SCC File Number: 41576

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

DEMOCRACY WATCH

APPELLANT
(Applicant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CONSTITUTIONAL LAW INITIATIVE OF THE UNIVERSITY OF OTTAWA FACULTY OF LAW, CANADIAN COUNCIL FOR REFUGEES, CANADIAN TELECOMMUNICATIONS ASSOCIATION, CENTRE FOR FREE EXPRESSION, CITY OF SURREY, COMMUNITY & LEGAL AID SERVICES PROGRAM, ECOJUSTICE CANADA SOCIETY, OMBUDSMAN SASKATCHEWAN AND PUBLIC INTEREST DISCLOSURE COMMISSIONER

Interveners

APPELLANT'S CONDENSED BOOK

Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada* (SOR/2002-156)

CIRCLE BARRISTERS
250 Front St W, Suite 200
Toronto, ON M5V 2Y1

Sujit Choudhry (LSO #45011E)
Tel: 416-436-3679
Email: sujit.choudhry@circlebarristers.com

PAUL DALY LAW PC
910-180 York Street
Ottawa, ON K1N 1J6

Paul Daly (LSO # 62833A)
Tel: 343-987-0733
Email: paul.daly@uottawa.ca

Co-counsel for the Applicant,
Democracy Watch

ORIGINAL TO:

Supreme Court of Canada
Attention: Registry Branch, Room 156
301 Wellington Street
Ottawa, Ontario K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF CANADA
ATTN: Deputy Attorney General of Canada
Department of Justice Canada, Civil Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, Ontario, K1A 0H8

Zoe Oxaal
Sarah Drodge

Tel: 613-295-0765
Fax: 613-954-1920
Email: Zoe.Oxaal@justice.gc.ca,
Sarah.Drodge@justice.gc.ca

Counsel for the Respondent,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
ATTN: Deputy Attorney General of Canada
Department of Justice Canada, Civil Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, Ontario, K1A 0H8

Bernard Letarte

Telephone: (613) 946-2776
Fax: (613) 954-1920
Email:
SCCAgentCorrespondentCSC@justice.gc.ca

Agent for the Respondent,
Attorney General of Canada

ATTORNEY GENERAL OF ALBERTA
Alberta Justice and Solicitor General
Legal Services Division - Civil Litigation
639 5 Avenue SW, Suite 1710
Calgary, Alberta T2P 0M9

Melissa N. Burkett
Shaheer Meenai
Adam Ollenberger

Tel: 613- 662-3825
Fax: 613- 662-3824
Email: Melissa.Burkett@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

GOWLING WLG
160 Elgin St.
Suite 2600
Ottawa, ON
K1P 1C3

D. Lynne Watt

Tel: 613-786-8695
Fax: 613-788-3509
Email: Lynne.Watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Alberta

ATTORNEY GENERAL OF B.C.
Ministry of Justice of B.C.
1001 Douglas Street, 6th Floor
P.O. Box 9290 Stn Prov Govt
Victoria, BC V8W 9E2

Zachary Froese
Marina Goodwin

Tel: 250-952-7559
Fax: 250-356-9154
Email: zachary.froese@gov.bc.ca

Counsel for the Intervener,
Attorney General of British Columbia

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Tel: 613- 787-3562
Fax: 613- 230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener,
Attorney General of British Columbia

ATTORNEY GENERAL OF ONTARIO
Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9

Ryan Cookson
Matthew Chung

Tel: 416-389-2604
Email: ryan.cookson@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

JURISTES POWER LAW
50 O'Connor Street Suite 1313
Ottawa, Ontario K1P 6L2

Maxine Vincelette

Tel: 613-702-5560
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

Ottawa Agent for the Intervener,
Attorney General of Ontario

ATTORNEY GENERAL OF SASKATCHEWAN
Ministry of Justice Saskatchewan
Constitutional Law Branch
820-1874 Scarth St.
Regina, Saskatchewan S4P 4B3

Theodore J.C. Litowski
Laura Mazenc

Tel: 306-787-6642
Fax: 306-787-9111
Email: theodore.litowski@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

HASA AVOCATS INC.
4911 Sherbrooke Ouest
Wesmount, Quebec H3Z 1H2

Lawrence David, Gjergji Hasa
Said LeBer-Assiani

Tel: (343) 961-6186
Fax: (514) 849-7313
Email: l.david@havocats.ca

Counsel for the Intervener,
Association quebecoise des avocats et avocates en droit de l'immigration

DEWART GLEASON LLP
102-366 Adelaide Street West
Toronto, Ontario M5V 1R9

Sean Dewart, Tim Gleason
Amani Rauff

Tel: (416) 971-8000
Fax: (416) 971-8001
Email: sdewart@dgllp.ca, tgleason@dgllp.ca, arauff@dgllp.ca

Counsel for the Intervener,
Canadian Civil Liberties Association

GOWLING WLG
160 Elgin St Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: Lynne.Watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Saskatchewan

TORYS LLP
79 Wellington St. West
30th Floor, TD South Tower
Toronto, Ontario M5K 1N2

Andrew Bernstein
Jeremy Opolsky

Tel: (416) 865-7678
Fax: (416) 865-7380
Email: abernstein@torys.com

Counsel for the Intervener,
Canadian Constitutional Law Initiative of
the University of Ottawa Faculty of Law

JACKMAN & ASSOCIATES
598 St. Clair Avenue West, Unit 3
Toronto, Ontario M6C 1A6

Barbara Jackman, Hana Marku

Tel: (416) 653-9964
Fax: (416) 653-1036
Email: barb@bjackman.com

Counsel for the Intervener,
Canadian Council for Refugees

MCCARTHY TÉTRAULT LLP
66 Wellington Street West
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Steven Mason, Brandon Kain
James S.S. Holtom,
Audrey-Anne Delage
Tel: 416-362-1812
Fax: 416-868-0673
Email: smason@mccarthy.ca,
bkain@mccarthy.ca,
jholtom@mccarthy.ca,adelage@mccarthy.ca

Counsel for the Intervener,
Canadian Telecommunications Association

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400 Bay Adelaide Centre, Box 20 Toronto ON M5H 2T6

Abbas Kassam (LSO: 66326T)
Tel: (416) 865-5138
Daniella Murynka (LSO: 69309G)
Tel: (416) 865-4508
Mathias Memmel (LSO: 87329J)
Tel: (416) 865-4470

Fax: (416) 364-7813
Email: akassam@fasken.com, dmurynka@fasken.com, mmemmel@fasken.com

Lawyers for the Intervener, Centre for Free Expression

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5
Fax: (613) 230-6423

Sophie Arseneault (LSO: 67409U)

Tel: (613) 696-6904
Email: sarseneault@fasken.com

CITY OF SURREY
Legal Services Division
13450 – 104th Avenue
Surrey, British Columbia V3T 1V8

Philip C.M. Huynh
Allan Wu
Benjie Lee

Tel: (604) 591-4124
Fax: (604) 599-1613
Email: phuynh@surrey.ca, bglee@surrey.ca, allan.wu@surrey.ca

Counsel for the Intervener, City of Surrey

OLTHUIS VAN ERT
66 Lisgar St.
Ottawa, Ontario K2P 0C1

Dahlia Shuhaibar

Tel: (613) 501-5350
Fax: (613) 651-0304
Email: dshuhaibar@ovcounsel.com

Agent for the Intervener, City of Surrey

COMMUNITY & LEGAL AID SERVICES PROGRAM
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario M3J 1P3

Steven Yu, Subodh Bharati, Anum Malik
Tel: (416) 736-5029
Fax: (416) 736-5564

Email: syu@osgoode.yorku.ca

**Counsel for the Intervener,
Community & Legal Aid Services Program
(CLASP)**

ECOJUSTICE CANADA SOCIETY
1910 - 777 Bay Street, P.O. Box 106
Toronto, Ontario M5G 2C8

Ian Miron
Dyna Tuytel

Tel: (416) 368-7533 x 551
Fax: (416) 363-2746
imiron@ecojustice.ca, dtuytel@ecojustice.ca

**Counsel for the Intervener,
Ecojustice Canada Society**

OMBUDSMAN SASKATCHEWAN
500 - 2103 11th Avenue
Regina, SK S4P 3Z8

Sharon H. Pratchler, K.C.

Tel: (306) 787-6211
Fax: (306) 787-9090
Email: spratchler@ombudsman.sk.ca

Counsel for the Intervener, Ombudsman Saskatchewan and Public Interest Disclosure Commissioner ("Ombudsman Saskatchewan")

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Catherine Ouellet

Tel: (613) 786-0189
Fax: (613) 563-9869
Email: catherine.ouellet@gowlingwlg.com

Agent for Counsel for the Intervener, Ombudsman Saskatchewan and Public Interest Disclosure Commissioner ("Ombudsman Saskatchewan")

***Democracy Watch v. Attorney General of Canada*, SCC No. 41576**

APPELLANTS' CONDENSED BOOK

INDEX

TAB	ITEM	PAGE
1	Appellant's Outline of Oral Argument	1
The Commissioner's decision regarding Prime Minister Trudeau and the WE Charity		
2	*Trudeau III Report*, paras 215-270 (Analysis and Conclusion) (May 2021)	5
ISSUE 1: Parliament is not an adequate alternative forum		
The legal framework		
3	*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, para 42	16
4	*Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, para 65	19
The Federal Court of Appeal's decision		
5	*Democracy Watch v. Canada (Attorney General)*, 2024 FCA 158, paras 79-94	21
The Commissioner is a statutory decision-maker under the *COIA*		
6	*Conflict of Interest Act*, SC 2006, c 9, s 2 (extracts) [***COIA***]	28
7	Commissioner's Role and Mandate (25 March 2025) (website)	32
8	*Parliament of Canada Act*, RSC 1985, c P-1 (extracts)	35
9	*Federal Courts Act*, RSC 1985, c F-7 (extracts)	44
10	*McIver v. Alberta (Ethics Commissioner)*, 2018 ABQB 240 (extracts)	47
11	*Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCSC 123 (extracts)	52
The Commissioner's reports are reviewable decisions		
12	*Conflict of Interest Act*, SC 2006, c 9, s 2 (extracts)	62
13	*Morneau II Report*, paras 239-284 (Analysis and Conclusion) (May 2021)	67
14	*Lobbying Act*, RSC 1985, c 44 (4th Supp) (extract)	76
15	*Democracy Watch v. Canada (Attorney General)*, 2021 FC 613, para 43	80
16	*Democracy Watch v. Canada (Attorney General)*, 2023 FC 825, para 23	82
The Commissioner's annual report does not provide a political remedy		
17	*Auditor General Act*, RSC 1985, c A-17, s. 7(1) (in force in 1989)	84
18	*Auditor General v. Min. Energy, Mines and Resources*, [1989] 2 SCR 49, pp. 97-99	86

ISSUE 2: Section 66 of the *COIA* does not preclude reasonableness review		
Privative clauses must be interpreted narrowly		
19	*R (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2019] 4 All ER 1, paras 111, 163-164	90
20	*Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, paras 30-31	95
21	Paul Daly, "Some Features of Pre-Confederation Judicial Review in Canada", *Administrative Law Matters*, 23 August 2023	98
The supervisory jurisdiction is constitutionally entrenched		
22	*Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220, at 234, 238	102
23	*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725, para 35	106
24	*Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 SCR 291, para 51	109
25	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, paras 65-68	113
26	*Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, paras 76-117	118
27	*Northback Holdings Corporation v. Alberta Energy Regulator*, 2025 ABCA 186, paras 222-224	142
Judicial review of the decision is available under the *Federal Courts Act*		
28	*Federal Courts Act*, RSC 1985, c F-7, s.18.1(4)	145
29	*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, paras. 44, 48	148
30	*Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, paras 25, 28, 34	152
31	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, paras 108-110	158
32	Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85 Sask LR 89, 110-115	163
33	Paul Daly, "Patent Unreasonableness after *Vavilov*" (2021) 34 Can. J. Admin. L. & Prac. 167	171
If judicial review of the decision is precluded, s. 66 of the *COIA* is unconstitutional		
34	*Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, [1983] 1 SCR 147, 154	181
35	W.R. Lederman, "The Independence of the Judiciary: III" (1956), 34 CBR 1139, 1175-76	184
36	David Mullan, "The Uncertain Constitutional Position of Canada's Administrative Appeals Tribunals" (1981), 14 OLR 239, 266-69	187

TAB 1

APPELLANTS' OUTLINE OF ORAL ARGUMENT

ISSUE 1: Parliament is not an adequate alternative forum

1. The FCA implied that the Commissioner's actions under the *COIA* are beyond judicial review because the Commissioner is a creature of privilege. BUT when discharging responsibilities under the *COIA*, the Commissioner is a statutory decision-maker.
    a. The *COIA* applies to 3000 "public office holders", the overwhelming majority of whom are not MPs and fall outside the parliamentary privilege over MPs conduct.
    b. The *Parliament of Canada Act* confirms that when administering the *COIA*, the Commissioner is not a creature of parliamentary privilege.
    c. The *Federal Court Act* confirms that the Commissioner is not a creature of parliamentary privilege and is subject to judicial review under the *COIA*.
    d. *McIver* and *Democracy Watch (BC)* are distinguishable, because they concerned the privilege of provincial legislative assemblies to regulate members' conduct, which lies beyond judicial review.
2. The FCA held that the enforcement mechanism for the *COIA* is political, because the Commissioner cannot impose any consequences for breaching the *COIA*, which is left to the PM. But the Commissioner's reports are nonetheless reviewable decisions.
    a. Section 66 of the *COIA* confirms, and the AGC concedes, that the Commissioner's reports are subject to judicial review, for example, for procedural fairness.
    b. The Commissioner's reports are reviewable decisions because they have reputational consequences, apart from whatever steps the PM may take – just as the reports of the Lobbying Commissioner under the *Lobbying Act* are reviewable.
3. The FCA relied on *Auditor General* to hold that the Commissioner's annual report provide a political remedy to enforce the *COIA*. But *Auditor General* is distinguishable.
    a. The Auditor General's annual report under s. 7(1)(b) of the *Auditor General Act* is expressly remedial, whereas the Commissioner's annual report is not.
    b. *Auditor General* was a fundamentally different case. The Auditor General sought a judicial remedy as an Officer of Parliament against other political actors raising questions regarding the separation of powers The Appellant has brought suit as a public interest litigant to ensure the *COIA*, which imposes binding legal obligations on "public office holders", has been reasonably interpreted and applied.

ISSUE 2: Section 66 of the *COIA* does not preclude reasonableness review

1. The ability of the courts to develop the general principles of judicial review is a fundamental aspect of the Canadian constitutional order.
    a. There are two means of protecting this judicial role:
        i. Courts *interpret* privative clauses narrowly to preserve judicial review: this has been the common law *status quo* for centuries and was the understanding at the time of Confederation.
        ii. Judicial review has been *constitutionalized* through the judicature provisions of the *Constitution Act, 1867*: determining the limits of creatures of statute's jurisdiction is a core judicial function – the absence of judicial review would permit creatures of statute to determine the limits of their own powers, making them tantamount to s. 96 courts.
2. Reasonableness review of the Commissioner's alleged errors of law and fact is not precluded by s. 66 of the *COIA*.
    a. Subsection 18.1(4) of the *Federal Courts Act* contains a master principle – review for jurisdiction – and specifications of the principle.
    b. The master principle is broad enough to include the unreasonable errors of law and errors of fact alleged in the appellant's application for judicial review: therefore, judicial review is not precluded at all.
    c. The Federal Court of Appeal correctly addressed this issue in *PSAC 2019*:
        i. "Jurisdiction" in para. 18.1(4)(a) encompasses law and fact.
        ii. A partial privative clause is an indicator of enhanced deference, not the preclusion of judicial review.
        iii. This approach is entirely consistent with *Vavilov*, esp. paras. 108-110.
3. If reasonableness review is precluded, s. 66 of the *COIA* is unconstitutional.
    a. Parliament is bound by s. 96: *MacMillan Bloedel.*
    b. If s. 66 confers unreviewable authority on the Commissioner to determine the legal limits of his powers, it violates s. 96 of the *Constitution Act, 1867*.
    c. Parliament cannot confer exclusive review authority on the Federal Court of Appeal under s. 101 of the *Constitution Act, 1867* only to then remove the core authority to review errors of law and fact.

TAB 2

ANALYSIS AND CONCLUSION

Analysis

[215] In this examination, I must determine whether Mr. Trudeau, in his capacity as Prime Minister of Canada, contravened subsection 6(1) and sections 7 and 21 of the Act when he participated in the decision whether to award funding for WE's Social Entrepreneurship proposal and to select WE as the administrator of the CSSG.

Preferential treatment

[216] Beginning with the alleged contravention of section 7 of the Act, I must determine whether Mr. Trudeau, in the exercise of his official powers, duties or functions, gave preferential treatment to WE based on the identity of a person who represented WE.

[217] Section 7 reads as follows:

> **7.** No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.

[218] An alleged contravention of section 7 of the Act was also the focus of Commissioner Dawson's examination in the *Paradis Report* (March 2012). Because "preferential treatment" is not defined in the Act, she set out her understanding of the term based on the definition used in the 1984 Report of the Task Force on Conflict of Interest, co-chaired by the Honourable Michael Starr and the Honourable Mitchell Sharp, entitled *Ethical Conduct in the Public Sector.* In that report, "preferential treatment" is defined as "treatment more favourable than might be accorded to anyone else in similar circumstances."

[219] Commissioner Dawson concluded there was a "strong indication" that Mr. Paradis, then minister of Public Works and Government Services Canada, had provided preferential treatment to a company (Green Power Generation). He had done so by arranging meetings between departmental officials and the company's founder, Mr. Rahim Jaffer, despite having minimal knowledge of the proposal. Commissioner Dawson also found that Mr. Paradis was motivated "to help a former caucus colleague." The preferential treatment was therefore based on the identity of the representative of the organization.

[220] In the *Finley Report*, Commissioner Dawson also examined the application of section 7 in the context of a federal funding initiative. She concluded that Ms. Diane Finley, then Minister of Human Resources and Skills Development, had provided favourable treatment to a proponent by allowing them to provide additional information to supplement its original proposal and by seeking an external evaluation, a process that no other proponent was permitted to undergo. Ms. Finley also selected the winning proposal despite being aware that it had certain deficiencies. However, Commissioner Dawson found no evidence to establish that the preferential treatment was based on the identity of the

proponent's representative. Although Ms. Finley was found not to have contravened section 7 of the Act, the decision to award funding to the proponent was determined to have been improper within the meaning of subsection 6(1) because of the preferential treatment.

[221] As the *Finley Report* illustrates, section 7 does not capture situations where the interested party benefits from preferential treatment provided directly by a public office holder. The prohibition under section 7 covers instances where a person or organization receives preferential treatment *by virtue of the identity of its representative*.

[222] It is worth reiterating that the reasonable grounds to examine a possible contravention of section 7 consisted primarily of Mr. Marc Kielburger's recorded statement that a member of the Prime Minister's Office had reached out to him the day after Mr. Trudeau's public announcement on April 22 of a forthcoming student aid package. Mr. Kielburger provided me with a sworn statement that he had misspoken. This is supported by Mr. Trudeau's and Mr. Theis' version of the events and by the documentary evidence, which shows that the Prime Minister's Office was not involved in the discussions relating to the selection of the CSSG's administrator at that time.

[223] Following my review of the evidence gathered, I am satisfied that Mr. Trudeau did not give WE preferential treatment and that the decisions he made in the matter were not influenced by the identity of any of its representatives.

[224] Mr. Trudeau was briefed on the development of the student aid package on April 15 and 21, 2020. He believed, at that time, that the federal public service would be administering the program through the Canada Service Corps, even though a third party would be used to help disburse the funds. Based on my review of the documentary evidence, I accept Mr. Trudeau's position that he was not made aware of WE's involvement in the CSSG until the matter was to be tabled at Cabinet on May 8. At that time, Mr. Trudeau requested that the public service conduct an additional analysis to confirm that only WE could administer the CSSG, which delayed the approval process by two weeks.

[225] On May 15, 2020, Mr. Trudeau concurred with the Privy Council Office's recommendation to fund the CSSG and not award funding for WE's Social Entrepreneurship proposal. The latter decision, the only one Mr. Trudeau made in respect of WE's Social Entrepreneurship proposal, cannot be viewed as favourable to WE in any way. With respect to the CSSG, Mr. Trudeau's concurrence given on May 15, followed by his participation on May 22 in Cabinet's ratification of WE as the program's administrator, were indeed favourable to WE. However, these decisions did not constitute treatment that was more favourable than that which would have been given to another similarly recommended third party.

[226] I could find no evidence that Mr. Trudeau provided specific instruction to Cabinet or to his ministerial staff on how to proceed in respect of the student aid package. Mr. Trudeau was not personally involved in any discussion involving WE and his ministerial staff only began communicating with WE after they had been approached by ESDC to administer the CSSG.

[227] Furthermore, in all of these instances, Mr. Trudeau was not, in my view, motivated by the identity of any person representing WE, including the Kielburgers or any of his relatives.

[228] I saw no evidence that WE attempted to communicate with Mr. Trudeau directly in respect of either the Social Entrepreneurship proposal or the CSSG.

[229] Ms. Margaret Trudeau and Mr. Alexandre Trudeau also confirmed neither had communicated with Mr. Trudeau on any official matter, including the CSSG. Mr. Trudeau also confirmed not having spoken to his spouse on this initiative.

[230] The evidence shows that interactions involving WE in the matter under examination occurred primarily with members of Mr. Morneau's ministerial staff and with public servants. These individuals were responsible for shaping and developing the national service component of the student support measures. For this reason, I also examined whether Mr. Trudeau or a member of his ministerial staff intervened indirectly, through the public service, to provide WE with preferential treatment.

[231] Both Ms. Wernick and Ms. Kovacevic, the public servants responsible for the development of the CSSG, testified they were unaware of Mr. Trudeau's and his family's association with WE. They also both testified not having received instruction or direction from Mr. Trudeau or his office and nothing in the documentary evidence suggests otherwise.

[232] I believe that in the frenzy to distribute funds as expeditiously as possible to those affected by the COVID-19 pandemic, there were some departures from the ordinary process of policy development. Ms. Kovacevic noted that a draft copy of a briefing note, which had not been updated to reflect the progress of discussions between ESDC and WE, was circulated and used to brief Mr. Trudeau. The Social Entrepreneurship proposal remained annexed to the briefing note to the Prime Minister and earmarked funding remained in communications tools despite not having been approved by Mr. Morneau. For her part, Ms. Wernick testified that she would have presented more options had she been given time to conduct a proper and thorough analysis. These departures were caused by the extraordinary conditions at the time, not by Mr. Trudeau's involvement personally or through his ministerial office.

Mr. Trudeau's decision making in respect of the Social Entrepreneurship proposal and the CSSG

[233] Subsection 6(1) of the Act prohibits public office holders from making or participating in the making of a decision that would place them in a conflict of interest. It reads as follows:

> **6. (1)** No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

[234] Section 4 of the Act describes the circumstances under which a public office holder would be in a conflict of interest for the purposes of subsection 6(1) of the Act. Section 4 reads as follows:

> **4.** For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

[235] Section 21 of the Act requires public office holders to recuse themselves from certain situations. It reads as follows:

> **21.** A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

[236] With respect to the alleged contravention of subsection 6(1), I examined whether Mr. Trudeau, in his capacity as Prime Minister, participated in the making of a decision that provided an opportunity to further his own interests, or those of his relatives or friends, or to improperly further the private interests of another person.

[237] I am satisfied that there was no opportunity to further Mr. Trudeau's own interests. I examined Mr. Trudeau's participation in several WE Day events, for which he received no remuneration or advantage. I also examined his involvement in WE's prior requests for federal funding. In that regard, I note that Mr. Trudeau was also the Minister of Intergovernmental Affairs and Youth from his re-election in 2015 until July 2018. It would not have been unusual for him to have been kept apprised of WE's initiatives and for his office to be involved in those discussions at an official level. I found nothing that gave rise to concerns that Mr. Trudeau's interests were furthered by discussions surrounding the CSSG or any other file involving WE.

[238] In my view, there was no real connection between WE's role under the CSSG and the remunerated work of Mr. Trudeau's relatives. Nor was there evidence to suggest that any of them stood to benefit, even indirectly, from WE's Social Entrepreneurship proposal or the CSSG. The purpose of the CSSG was to assist students and youth who had been adversely affected by disruptions caused by the COVID-19 pandemic. Even if WE stood to gain financially from administering the CSSG, the argument that Mr. Trudeau's relatives, who were remunerated through WE for their speaking engagements, could ultimately benefit from the funds received by WE (to administer the CSSG) is too remote and speculative to merit further consideration.

[239] Mr. Trudeau's many appearances at WE Day events and the Kielburgers' many requests for federal funding led me to examine the possible existence of a personal relationship between the two parties. In the *Watson Report*, Commissioner Dawson examined a similar relationship between a public office holder and a proponent for federal funding in the context of a possible contravention of subsection 6(1) and section 21 of the Act. The examination concerned alleged decisions made by Mr. Colin Watson, a member of the Toronto Port Authority Board of Directors in relation to a proposal to acquire a new ferry. It was alleged that the proponent, Mr. Robert Deluce, was a friend of the Board member.

[240] Commissioner Dawson noted that the term "friend" is not defined in the Act. She added that the word could be applied to a "range of relationships from the closest of lifelong companions to neighbours, colleagues, acquaintances or business associates that one sees only occasionally and where there is little emotional attachment." In her view, the prohibition relating to decision making under subsection 6(1) was intended to apply to individuals "who have a close bond of friendship, a feeling of affection or a special kinship."

[241] I am also of the view that Mr. Trudeau and the Kielburgers are not friends within the meaning of the Act. Mr. Trudeau did not socialize with the Kielburgers outside of his public duties and his participation in WE Day events. This was also confirmed by the Kielburgers. There was no evidence that caused me to question Mr. Trudeau's position in that regard.

[242] To complete my analysis, I must therefore determine whether Mr. Trudeau exercised an official power, duty or function that provided an opportunity to improperly further the private interests of WE, as is required under section 4 of the Act.

[243] I examined two opportunities to further WE's private interests. The first centred around WE's Social Entrepreneurship proposal, which had been distributed to several ministers, their staff and departmental officials. The proposal was then reviewed by the Department of Finance and sent to the Privy Council Office for approval. Although the Privy Council Office ultimately recommended against funding the initiative, it nonetheless provided Mr. Trudeau with an opportunity to further WE's private interests because the final decision rested with him. The second opportunity related to the ratification by Cabinet of the CSSG and the selection of WE as the program's administrator.

[244] There is no doubt that WE's interests would have been furthered had the Government moved forward with the Social Entrepreneurship proposal or had WE administered the CSSG. In both cases, WE would have acquired a significant financial interest for its role. The acquisition of any financial interest by an individual or organization, regardless of whether it ultimately leads to an increase in the person's assets, is considered to be a private interest under the Act. As my predecessor stated in the *Trudeau Report* with respect to a federal grant awarded to the not-for-profit Global Centre for Pluralism, "[a]lthough government funding decisions are generally understood to be made to serve a public interest, this does not negate the fact that any government grant also specifically furthers the private interests of the recipient."

[245] For there to be a contravention of subsection 6(1), those private interests must have been furthered improperly. In the *Trudeau II Report*, I provided examples of improprieties from past examination reports. I explained that an impropriety under the Act occurs when a public office holder exercises an official power, duty or function that goes against the public interest, either by acting outside the scope of their jurisdiction or by acting contrary to a rule, a convention or an established process.

[246] Although I found no indication of preferential treatment of WE by Mr. Trudeau in my analysis of the matter under section 7 of the Act, it must be pointed out that preferential treatment, in the general sense, could also be viewed as an impropriety under subsection 6(1). Such was the case in the *Finley Report*.

[247] In my view, the creation and eventual ratification of the CSSG was not done improperly. The evidence laid bare the extraordinary working conditions that led to the development of this program. The public service was tasked, in early April 2020, to design a program that would distribute millions in federal funds to thousands of recipients in a matter of weeks. When a program of this magnitude is rolled out in such a short timeframe, as I indicated above, there are bound to be departures from normal practices. None of these departures was the result of Mr. Trudeau's instruction or direction on the matter.

[248] Nevertheless, the evidence gathered in this examination shows that Mr. Trudeau and members of his family had been closely involved in WE's affairs for several years. His mother and brother had both been paid to speak at WE-related events, while his spouse was an official ambassador and ally since 2018 and hosted her own WE-themed podcast. As recently as March 2020, Mr. Trudeau's spouse

and mother had participated in WE Day events and had been reimbursed for their travel and accommodation expenses. Photographs of Mr. Trudeau's spouse and mother were even used in an updated version of WE's proposal for the CSSG. All this in addition to the numerous occasions where Mr. Trudeau himself participated in WE's public gatherings and benefited from publicity and promotional materials generated, directly and indirectly, by WE.

[249] An isolated interaction, whether by Mr. Trudeau or by a single relative, would likely have been insufficient to call into question the exercise of his official powers, duties and functions in respect of WE. Simply participating in a WE-sponsored event, as so many Members of Parliament and public office holders have done, does not automatically require a recusal from decisions, discussions, debates or votes in respect of that organization.

[250] When viewed together, however, the many elements identified in the preceding paragraphs give rise to a strong appearance of conflict between the Trudeau family's relationship with WE and Mr. Trudeau's duty to make decisions that best serve the public interest. This appearance of conflict of interest is what prompted my examination of a possible contravention of subsection 6(1).

[251] Mr. Trudeau does not dispute the fact that his and his family's proximity to the WE organization created the appearance of conflict. However, Mr. Trudeau submits that an apparent conflict does not necessarily lead to a contravention of a substantive conflict of interest rule under the Act.

[252] The crux of the matter, therefore, is whether the appearance of a conflict is captured by the definition of conflict of interest under section 4 of the Act and, if so, whether it constitutes an impropriety under the Act.

[253] It is generally understood that conflicts of interest are divided into three categories: real, potential or apparent. In the *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*, Commissioner Parker was tasked with determining whether there was a "real or apparent conflict of interest defined by the Conflict of Interest and Post Employment Code for Public Office Holders." Without a proper definition of conflict of interest in the Code or in any other policy instrument that governed the conduct of public office holders, Commissioner Parker developed definitions of each term that have subsequently been adopted by trial and appellate courts in conflict-of-interest cases.

[254] According to Commissioner Parker, a real (or actual) conflict has three prerequisites:

- the existence of a private interest;
- that is known to the public office holder; and
- that has a connection or nexus with their public duties or responsibilities that is sufficient to influence the exercise of those duties or responsibilities.

[255] Commissioner Parker observed that a potential conflict of interest arises between the moment a public office holder realizes that they have a private interest in some matter and the moment they exercise an official power, duty or function that would place them in a real conflict of interest. It is the "momentary oasis of sober reflection that allows the public office holder an opportunity to respond to and resolve the problem in a manner that enhances public confidence in the integrity of government."

[256] A potential conflict exists as soon as a real conflict is foreseeable by the public office holder. They must take "all appropriate steps" to remove themselves from the potential conflict. Once the public office holder discharges their official duties or responsibilities without first removing the private interest, "the line is crossed and a situation of real conflict ensues."

[257] In attempting to elaborate a definition of "apparent conflict of interest," Commissioner Parker turned to the common law and the concept of reasonable apprehension of bias. That legal principle states that "justice must not only be done, but must also be seen to be done."[3] Relying on more recent jurisprudence, Commissioner Parker observed:

> It is enough that an informed person viewing the matter realistically and practically and having thought the matter through concludes that there is an appearance of conflict. That is what appearance means. […] "An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could have, that a conflict of interest exists."[4]

[258] The Post-Employment Code, which governed the conduct of public office holders during the period examined by the Parker Commission, stated that "Ministers must also take care to avoid placing, or appearing to place, themselves under an obligation to any person or organization which might profit from special consideration or favour on their part" [emphasis added]. In that regard, Commissioner Parker acknowledged it was not necessary for a real conflict to occur for an apparent conflict to be found.

[259] The *Conflict of Interest Code for Members of the House of Commons*, to which Mr. Trudeau and all other Members of Parliament must adhere in the exercise of their parliamentary duties, expressly provides for the types of conflicts to avoid. As one of its guiding principles, Members are expected to "fulfill their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests." Another principle requires Members to "perform their official duties and functions and arrange their private affairs in a manner that bears the closest public scrutiny, an obligation that may not be fully discharged by simply acting within the law."

[260] The Code of Values and Ethics, the policy instrument that governs the proper conduct of all federal public servants, is replete with references to apparent conflicts of interest. Public servants, like public office holders, hold a public trust. They must make decisions in the public interest, and must be seen to be fair and impartial and to act with integrity. The Supreme Court of Canada recognized the importance of "actual and apparent impartiality" of the public service in a leading judgment on the duty of loyalty by public servants.[5] In a separate decision, the Supreme Court of Canada also stressed the importance of preserving not only the integrity of government, but also the appearance of integrity.[6] In other words, public trust may be harmed just as easily by the appearance of impropriety as with the actual impropriety itself.

---

[3] *Sussex Justice Case*, [1924] 1 K.B. 256.

[4] Canada, Minister of Supply and Services, "Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens," (1987), at pp. 34-35.

[5] See: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455.

[6] See, for example: *R. v. Hinchey*, [1996] 3 S.C.R. 1128.

[261] Contrary to the instruments referenced above, subsection 6(1) of the Act does not expressly refer to apparent conflicts of interest. The reference to "conflict of interest" in this provision must be read together with section 4, which sets out an objective test to determine when a public office holder has placed themselves in a real conflict of interest. In my view, it does not leave room for a subjective determination of an appearance of conflict.

[262] Support for this conclusion is found in several sources. In 2006, in the context of the adoption of the *Federal Accountability Act*, proposed amendments to include the appearance standard in the *Conflict of Interest Act* were rejected by both Houses of Parliament. The reason provided for this rejection was that the standard would undermine the ability of public office holders to discharge their duties and substitute the Conflict of Interest and Ethics Commissioner for Parliament or the public as the final arbiter of an appearance of conflict by expanding the definition of "conflict of interest" under the *Conflict of Interest Act* to include "potential" and "apparent" conflicts of interest.[7]

[263] In the report produced following the Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney, chaired by the Honourable Jeffrey J. Oliphant (hereinafter, the "Oliphant Commission"), an entire section was devoted to the appearance of conflict in the context of recommendations made to the Government of Canada. Commissioner Oliphant noted specifically that section 6 of the Act is dependent on the definition of a conflict of interest under section 4. The definition, as Commissioner Oliphant observed, only encompasses real conflicts—"that is, the actual existence of an opportunity to further a private interest. It does not reach apparent conflicts—that is, circumstances where a reasonable observer would perceive a conflict situation to exist, *even if it does not*" [emphasis in original].

[264] Commissioner Oliphant recommended that section 4 of the Act be amended to include apparent conflicts of interest. An apparent conflict of interest, according to Commissioner Oliphant, is "understood to exist if there is a reasonable perception, which a reasonably well-informed person could properly have, that a public office holder's ability to exercise an official power or perform an official duty or function will be, or must have been, affected by his or her private interest or that of a relative or friend."

[265] In 2013, the question of apparent conflicts arose again in the context of the statutory five-year review of the Act. Following the recommendation made in the Oliphant Commission to include the appearance standard in the Act, the Standing Committee on Access to Information, Privacy and Ethics devoted particular attention to this question. Twenty-six witnesses appeared before the standing committee to testify on possible amendments to the Act, several of whom advocated for a clear legislative direction on the appearance of conflict.

[7] Canada, Parliament, *House of Commons Debates*, 39th Parl., 1st Sess., No. 082 (20 November 2006) at 1205 [Hon. John Baird].

[266] The Committee presented its report on the statutory review of the Act in 2014. It canvassed the observations made by several witnesses, including Commissioner Dawson, on the question of whether to broaden the scope of the Act to include apparent conflicts of interest. However, none of the 16 recommendations concerned the issue of apparent conflicts of interest.

[267] The British Columbia *Members' Conflicts of Interest Act* is the only Canadian piece of legislation that includes apparent conflicts expressly in its definition of a conflict of interest. Some of my provincial counterparts have expressed positions that apparent conflicts of interest do not fall under their bailiwick unless expressly provided by statute.[8] Most notably, in a report in respect of the conduct of former Premier of Ontario, the Honourable Michael Harris, the former Integrity Commissioner for Ontario, the Honourable Gregory T. Evans, Q.C., stated:

> Proof of a breach or complicity in a breach of the Member's Integrity Act must be based on facts rather than conjecture, suspicion, or affinity based on friendship, common interest or political affiliation. A person's reputation, irrespective of his station in life, is important and if it is to be impugned, there must be evidence to support that challenge.
>
> The perception standard of morality which some suggest should be the test applied to politicians would require that a legislator should not engage in conduct which would appear to be improper to a reasonable, non-partisan, fully informed person. The problem with such an "appearance standard" is that there are few, if any, reasonable, non-partisan, fully informed persons.
>
> One person's perception of another's conduct is a purely subjective assessment influenced by many factors including the interest of the individual making the assessment. It is not the proper criteria by which the conduct of a legislator should be measured.[9]

[268] Mr. Trudeau recognized the apparent conflict of interest, which in this case was based on his and his family's association with WE, before he participated in making the decisions to deny the organization's request to fund its Social Entrepreneurship program and to select WE to administer the CSSG. However, the appearance of conflict is not caught by the Act's substantive rules. Without an actual conflict of interest or a clear legislative prohibition against placing oneself in an apparent conflict, I cannot conclude that a contravention has occurred.

---

[8] See, for example: *Select Special Conflicts of Interest Act Review Committee: Final Report*, Legislative Assembly of Alberta, May 2006, pp. 37-39. See also: Standing Committee on Access to Information, Privacy and Ethics, 41st Parl., 1st Sess., No. 69, Appearance by the Honourable Paul D.K. Fraser (March 6, 2013).

[9] *Report of the Honourable Gregory T. Evans Re: the Honourable Michael D. Harris, Premier of Ontario* (May 16, 2001).

[269] Mr. Trudeau has acknowledged publicly that he should have recused himself because of the appearance of conflict. While it is always advisable to recuse oneself and inform the Commissioner promptly when facing an apparent conflict of interest, there is no requirement to do so under the Act. Section 21 provides that recusal is required in instances where the public office holder is in a potential conflict of interest.

Conclusion

[270] In light of the evidence gathered in this examination and for the reasons outlined above, I find that Mr. Trudeau did not contravene subsection 6(1), section 7 or section 21 of the Act.



Mario Dion
Conflict of Interest and Ethics Commissioner

May 13, 2021

TAB 3

(b) *Alternative Relief*

[40] One of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative. The leading case is *Harelkin*, in which a student alleged that a university committee made a decision that violated his procedural rights. There was a right of appeal to the university's senate, but instead of pursuing it, the student applied for judicial review. This Court held that the judge at first instance had erred in entertaining the judicial review application because he failed to exercise his discretion on relevant grounds: he did not consider whether the internal appeal process was an adequate alternative remedy that was capable of curing the denial of natural justice of which the student complained.

[41] The Court has applied similar reasoning in a number of cases to dismiss applications for judicial review. For example, in *Matsqui*, the Court upheld the decision of the Federal Court to decline to hear Canadian Pacific's application for judicial review because it could have pursued an appeal procedure established by the Matsqui Band. In *Canada (Auditor General)*, the Court refused judicial review to the Auditor General to challenge a denial of access to information because a political remedy — reporting to the House of Commons any refusals to comply with requests for information — was an adequate alternative remedy.

[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, at pp. 430-31; Brown and Evans, 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).

[43] 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 *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).

[44] This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:

> While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief. [Emphasis added; p. 447.]

[45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

TAB 4

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

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

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

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

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

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

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

TAB 5

privative clauses. Fortunately for our purposes, the decision in the case at bar does not turn on the resolution of that question. At the end of the day, the role a court is expected to play in enforcing a statute is a matter of statutory interpretation. When looked at in the context of the entire legislative scheme put in place by the COIA, section 66 should be given effect and Parliament's intention to restrain judicial review and create alternative parliamentary accountability mechanisms should be respected.

B. *Does the* Conflict of Interest Act *provide, as a matter of statutory interpretation, adequate alternative remedies to judicial review?*

[79] Like any statutory provision, section 66 of the COIA must be interpreted through accepted principles of statutory interpretation, including an assessment of the whole legislative scheme in its proper context. When viewed in its totality, it is very clear that the COIA reflects Parliament's intention to give both Parliament and the Court distinct supervisory roles in monitoring potential conflict of interests involving public office holders. In that context, it makes perfect sense to insulate from review by the Court the determinations made by the Commissioner within his jurisdiction.

[80] As previously mentioned (see above, paras. 13-16), the Commissioner is an independent Officer of Parliament, and the position he occupies is firmly within the legislative branch of government. He is tasked with the administration of the COIA for public office holders, and of the conflict of interest code for members of Parliament. Section 86 of the PCA makes it clear that he acts under the direction of the House of Commons when enforcing the code to its members.

[81] It is in this context that section 66 must be interpreted. Even if its wording is similar to that of subsection 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365 (the "FPSLREB Act") at issue in *PSAC*, the legislative intent behind this section is very different. It is very clear from subsections 44(7), 44(8), 45(3) and 45(4) of the COIA, which require the Commissioner to provide his reports to the Prime Minister, that it is for the Prime Minister to decide how to give effect to the Commissioner's determination, and for the House of Commons to hold the government to account. The sanction is meant to be political, not judicial.

This conclusion is reinforced by the fact that the report of the Commissioner is to be made available to the public, and that its conclusions are not determinative of the measures to be taken (s. 47 of COIA).

[82] This is not to say that the Court has no role to play in supervising the Commissioner and the use that the incumbent makes of its powers. While the Court is precluded from granting judicial remedies for alleged errors of fact and law within the Commissioner's jurisdiction, it can still be called upon when the Commissioner does not act within the confines of its jurisdiction, fails to observe a principle of natural justice or procedural fairness, acts or fails to act by reason of fraud or perjured evidence. This is perfectly consistent with the dual supervisory roles assigned to the Court and to Parliament, in a context that is highly political by nature and that has historically been the exclusive preserve of parliamentarians.

[83] It is also interesting to note that the Commissioner is required to submit annual reports on the administration of the COIA to the Standing Committee on Access to Information; the Committee may then determine whether anything flowing from the Commissioner's activities requires additional consideration. In December 2012, the House of Commons tasked the Committee to conduct a statutory review of the COIA. In its report dated February 2014 (Respondent's record at Tab 5), the Committee recommended amending section 66 to allow judicial review on errors of law. Yet, no significant changes were made following the report.

[84] Courts should be loath to perceive judicial remedies as the only effective recourse in every instance where an aggrieved party raises an alleged illegality. The decision of the Supreme Court in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604 provides a useful (and, in my view, compelling) example of a situation where courts were denied the possibility to intervene in a dispute because Parliament had provided an adequate alternative remedy.

[85] In fulfilling his mandate and performing an audit, the Auditor General had requested certain documentation from the Department of Energy, Mines and Resources and from senior officials of Petro-Canada. These requests were denied, and the Governor in Council declined to exercise its powers to assist the Auditor General by ordering Petro-Canada to provide the information. The Auditor General sought to obtain the information through the judicial process. The Supreme Court found, unanimously, that the Auditor General had no recourse to the courts in the event of the refusal by Parliament, responsible Ministers, and the Governor in Council to make available to him all of the documentation he may seek in the discharge of his responsibilities.

[86] The Court started with the premise that it is open to Parliament to signal its view as to the role the courts should play in interpreting, applying and enforcing its statutes, and that such a signal should be respected in the same way as when courts give effect to privative clauses that oust judicial review (at 91-92). Interpreting the Act as a whole, the Court determined that the reporting mechanism in subsection 7(1) of the *Auditor General Act*, R.S.C. 1985, c. A-17 (the "Auditor General Act") was the only remedy available to the Auditor General for claimed denials of entitlements to certain information from the government. Pursuant to that provision, the Auditor General had an obligation to report annually to the House of Commons on whether, in carrying on the work of his office, he received all the information he required. According to the Supreme Court, on a proper and holistic interpretation of the Act, this was the only remedy available to the Attorney General "not only because the text is conducive to such an interpretation but also because, in the circumstances, a political remedy of this nature is an adequate alternative remedy" (at 103).

[87] The Court expanded on the notion that a political remedy is not to be dismissed as ineffectual in the following paragraph (at 104):

> The adequacy of the s. 7(1)(*b*) remedy must not be underestimated. A report by the Auditor General to the House of Commons that the government of the day has refused to provide the information brings the matter to public attention. It is open to the Opposition in Parliament to make the issue part of the public debate. The Auditor General's complaint that the government has not been willing to provide all the information requested may, as a result, affect the public's assessment of the government's performance. Thus, the s. 7(1)(*b*) remedy has an important role to

> play in strengthening Parliament's control over the executive with respect to financial matters.

[88] In my view, the same can be said of the reporting mechanism found in the COIA. The statutory intention to have the courts defer to parliamentary remedies is, if anything, even clearer in the COIA than it was in the Auditor General case. While the Auditor General Act did not expressly exclude judicial remedies and the question of whether Parliament intended the court to defer to political remedies had to be inferred from the statute as a whole, section 66 of the COIA makes it even clearer that courts should not be drawn in disputes raising purely legal or factual issues within the jurisdiction of the Ethics Commissioner.

[89] Courts should always be sensitive to their proper role in a constitutional democracy like ours, where separation of powers goes hand in hand with the rule of law. Respect for the other branches of government must always be front and center when courts endeavour to play their role as judicial arbiters. As Justice McLachlin (as she then was) stated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 at 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.
>
> See also: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 33; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at para. 30, rev'd on a different point, 2016 SCC 29.

[90] This theme, albeit not in the context of determining whether section 66 of the COIA precludes judicial review raising prohibited grounds, has been picked up by this Court and in the Federal Court in previous cases involving Democracy Watch. In *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195, a panel of this Court found that Parliament has a supervisory role to play alongside the Court (at paras. 20-22). In *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290, the Federal Court similarly found that the combined effect of sections 47 and 66 of the

COIA demonstrate the limited role of the Court within an otherwise comprehensive regime of duties and remedies (at para. 116). The Court also held that these sections show that Parliament had reserved for itself what measures are to be taken as a result of the Commissioner's findings.

[91] Provincial courts have similarly adopted an attitude of restraint and respect to the legislature in matters of internal conduct, even in the absence of privative clauses (see, for example, *McIver v. Alberta (Ethics Commissioner)*, 2018 ABQB 240 at paras. 70-77; *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCSC 123 at paras. 35-37). In this last decision, the Supreme Court of British Columbia accepted the distinction between the Conflict of Interest Commissioner, an officer of the Legislature, and other administrative tribunals, and found that it was for the legislative assembly, not for the Commissioner, to exercise discipline authority over its members.

[92] Therefore, I am of the view, based on these considerations, that *Best Buy* and *PSAC* do not apply to this application for judicial review and ought to be distinguished. These cases arose in the context of decisions made by quasi-judicial or administrative tribunals, and not of findings by an Officer of Parliament. Moreover, the COIA provide for a dual parliamentary and judicial oversight, with an elaborate procedure to regulate ethical conduct through political consequences. In the context of such a scheme, where accountability is intended to lie primarily with the legislative branch, courts should clearly exercise judicial restraint and adhere to the limits prescribed by section 66 of the COIA in their judicial review function.

VI. Conclusion

[93] For all of the foregoing reasons, I would grant the Attorney General's motion to strike and dismiss the applicant's application for judicial review.

"Yves de Montigny"

Chief Justice

BOIVIN, LEBLANC JJ.A. (Concurring reasons)

[94] We both agree with the Chief Justice that the application for judicial review should be dismissed, essentially for the reasons set out in paragraphs 79 to 92, but we wish to add a consideration of our own.

[95] Panels of this Court have rendered a number of decisions determining the scope of judicial review when there is a privative clause (*Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 (*PSAC*) and *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 (*Best Buy*); see also *BCE Inc v. Québécor Média Inc.*, 2022 FCA 152 and *Canada (Attorney General) v. Pier Imports (U.S.), Inc.*, 2023 FCA 209).

[96] We are of the view that these decisions of our court are binding and ought to be followed pursuant to the rule of horizontal stare decisis (*R. v. Sullivan*, 2022 SCC 19). However, and given that these decisions, more specifically *PSAC* and *Best Buy*, have no bearing on this case, we consider paragraphs 58 to 78 as obiter and there is therefore no need to further opine on the matter.

[97] We would dispose of the application for judicial review as proposed by the Chief Justice.

"Richard Boivin"

J.A.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-169-21
STYLE OF CAUSE:	DEMOCRACY WATCH v. ATTOR NEY GENERAL OF CANADA AN

TAB 6

Commissioner means the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*. (*commissaire*)

common-law partner means a person who is cohabiting with a public office holder in a conjugal relationship, having so cohabited for a period of at least one year. (*conjoint de fait*)

common-law partnership means the relationship between two persons who are cohabiting in a conjugal relationship, having so cohabited for a period of at least one year. (*union de fait*)

dependent child means a child of a public office holder, or a child of the public office holder's spouse or common-law partner, who has not reached the age of 18 years or who has reached that age but is primarily dependent on the public office holder or public office holder's spouse or common-law partner for financial support. (*enfant à charge*)

former reporting public office holder means a former public office holder who, while in office, was a reporting public office holder. (*ex-titulaire de charge publique principal*)

gift or other advantage means

(a) an amount of money if there is no obligation to repay it; and

(b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value. (*cadeau ou autre avantage*)

ministerial adviser means a person, other than a public servant, who occupies a position in the office of a minister of the Crown or a minister of state and who provides policy, program or financial advice to that person on issues relating to his or her powers, duties and functions as a minister of the Crown or a minister of state, whether or not the advice is provided on a full-time or part-time basis and whether or not the person is entitled to any remuneration or other compensation for the advice. (*conseiller ministériel*)

ministerial staff means those persons, other than public servants, who work on behalf of a minister of the Crown or a minister of state. (*personnel ministériel*)

private interest does not include an interest in a decision or matter

(a) that is of general application;

(b) that affects a public office holder as one of a broad class of persons; or

(c) that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)

public office holder means

(a) a minister of the Crown, a minister of state or a parliamentary secretary;

(a.1) the Chief Electoral Officer;

(b) a member of ministerial staff;

(c) a ministerial adviser;

(d) a Governor in Council appointee, other than the following persons, namely,

(i) a lieutenant governor,

(ii) officers and staff of the Senate, House of Commons and Library of Parliament,

(iii) a person appointed or employed under the *Public Service Employment Act* who is a head of mission as defined in subsection 15(1) of the *Department of Foreign Affairs, Trade and Development Act*,

(iv) a judge who receives a salary under the *Judges Act*,

(v) a military judge within the meaning of subsection 2(1) of the *National Defence Act*,

(vi) a Deputy Commissioner of the Royal Canadian Mounted Police, and

(vii) a member of the National Security and Intelligence Committee of Parliamentarians;

(d.01) the Parliamentary Budget Officer;

(d.1) a ministerial appointee whose appointment is approved by the Governor in Council; and

(e) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(1) or 62.2(1). (*titulaire de charge publique*)

public sector entity means a department or agency of the Government of Canada, a Crown corporation established by or under an Act of Parliament or any other entity to which the Governor in Council may appoint a person, but does not include the Senate or the House of Commons. (*entité du secteur public*)

public servant has the meaning assigned by subsection 2(1) of the *Public Servants Disclosure Protection Act*, but includes officers and non-commissioned members of the Canadian Forces and employees of the Canadian Security Intelligence Service or the Communications Security Establishment. (*fonctionnaire*)

reporting public office holder means a public office holder who is

(a) a minister of the Crown, minister of state or parliamentary secretary;

(a.1) the Chief Electoral Officer;

(b) a member of ministerial staff who works on average 15 hours or more a week;

(c) a ministerial adviser;

(d) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;

(e) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and

functions on a full-time basis;

(e.1) the Parliamentary Budget Officer; or

(f) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(2) or 62.2(2). (*titulaire de charge publique principal*)

spouse does not include a person from whom a public office holder is separated if all support obligations and family property or patrimony have been dealt with by a separation agreement or a court order. (*époux*)

Family members

(2) The following are the members of a public office holder's family for the purposes of this Act:

(a) his or her spouse or common-law partner; and

(b) his or her dependent children and the dependent children of his or her spouse or common-law partner.

Relatives

(3) Persons who are related to a public office holder by birth, marriage, common-law partnership, adoption or affinity are the public office holder's relatives for the purposes of this Act unless the Commissioner determines, either generally or in relation to a particular public office holder, that it is not necessary for the purposes of this Act that a person or a class of persons be considered a relative of a public office holder.
2006, c. 9, s. 2 "2"; 2013, c. 18, s. 66, c. 33, s. 192, c. 40, s. 288; 2014, c. 12, s. 145; 2017, c. 15, s. 48, c. 20, s. 187.

Purpose

Purpose of the Act

3 The purpose of this Act is to

(a) establish clear conflict of interest and post-employment rules for public office holders;

(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;

(c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;

(d) encourage experienced and competent persons to seek and accept public office; and

(e) facilitate interchange between the private and public sector.

TAB 7

COMMISSIONER'S ROLE AND MANDATE

PDF Version
Get updated Adobe Acrobat Reader

The Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.

Parliament of Canada Act, s. 81(1)

The Conflict of Interest and Ethics Commissioner administers the Conflict of Interest Act for public office holders and the Conflict of Interest Code for Members of the House of Commons. These regimes seek to prevent conflicts between private interests and the public duties of appointed and elected officials. The Commissioner also gives confidential advice about conflict of interest and ethics issues to the Prime Minister.

The position of Conflict of Interest and Ethics Commissioner was created under the Federal Accountability Act. The Commissioner is an Officer of Parliament whose mandate is set out in the Parliament of Canada Act.

The Commissioner is completely independent of the government of the day and reports directly to Parliament, through the Speaker of the House of Commons. The Office of the Conflict of Interest and Ethics Commissioner, along with the Senate, the Office of the Senate Ethics Officer, the House of Commons and the Library of Parliament, is part of the parliamentary infrastructure. The Commissioner enjoys the privileges and immunities of the House of Commons and its Members when carrying out official duties and functions.

Canada's first Conflict of Interest and Ethics Commissioner was appointed in July 2007.

CONFLICT OF INTEREST ACT

The Conflict of Interest Act applies to almost 3,000 public office holders.

All public office holders must follow the Act's core set of conflict of interest and post-employment rules. For example, they cannot participate in decisions or votes in connection with their public office where they would be in a conflict of interest. They are not allowed to use insider information to advance private interests. And they must not accept gifts or other advantages that could reasonably be seen to have been given to influence them.

More than half of them are subject only to these general rules. This group is mostly made up of part-time members of federal boards, commissions and tribunals, and some part-time ministerial staff.

About 1,400 mostly full-time public office holders are considered reporting public office holders. They include ministers, parliamentary secretaries, ministerial staff, and all full-time Governor in Council appointees such as deputy ministers, heads of Crown corporations and members of federal boards.

Reporting public office holders are subject not only to the Act's general rules, but also to its reporting and public disclosure provisions, and prohibitions against outside activities and holding controlled assets. Ministers and parliamentary secretaries face extra requirements.

For more information, please see the separate fact sheet on the Conflict of Interest Act.

CONFLICT OF INTEREST CODE FOR MEMBERS OF THE HOUSE OF COMMONS

The Code, which is appended to the Standing Orders of the House of Commons, applies to all 343 elected Members of Parliament.

It prohibits Members from using their public office to further their private interests or those of their family, or from improperly furthering the private interests of another person or entity. This general rule is complemented by rules on avoiding conflict of interest, including restrictions on the gifts that Members can accept, processes for the confidential disclosure of private interests to the Commissioner, procedures for making Members' summary information public and an advisory role for the Commissioner.

Members must also tell the Commissioner about any sponsored travel they accept, for themselves and guests. Sponsored travel is any travel worth more than $200 that is not fully paid by the government, a political party, a recognized parliamentary association, or by the Members.

There is more information in the Overview of the Conflict of Interest Code for Members of the House of Commons.

ADMINISTRATION OF THE ACT AND THE CODE

The Office of the Conflict of Interest and Ethics Commissioner administers these regimes by:

- Giving confidential advice to public office holders and Members of the House of Commons on what they must do to to respect the Act and the Code.
- Reviewing confidential reports. Individuals covered by the Act and the Code must make a number of confidential disclosures relating to their assets, liabilities and outside activities. These disclosures help the Office determine relevant compliance measures and provide appropriate advice and guidance.
- Making information available. While disclosures remain confidential, the Office prepares summaries containing general information that are placed in a public registry.
- Investigating possible contraventions of the Act and the Code. Investigations are called "examinations" under the Act and "inquiries" under the Code.
- Reporting to Parliament. The Commissioner reports annually to Parliament through the Speaker of the House of Commons on the administration of the Act and the Code, and prepares an annual list of sponsored travel by Members of the House of Commons. The Commissioner reports on examinations under the Act to the Prime Minister and on inquiries under the Code to the House of Commons. All of these reports are made public.

TAB 8

Prohibition — accepting benefits from trusts relating to position

41.1 (1) No member of the House of Commons may, directly or indirectly, accept any benefit or income from a trust established by reason of his or her position as a member of the House of Commons.

Anti-avoidance

(2) No member of the House of Commons shall take any action that has as its purpose the circumvention of the prohibition referred to in subsection (1).

Offence and punishment

(3) Every member of the House of Commons who contravenes subsection (1) or (2) is guilty of an offence and liable on summary conviction to a fine of not less than $500 and not more than $2,000.

2006, c. 9, s. 99.

Obligation to disclose trusts

41.2 (1) Every member of the House of Commons shall disclose to the Conflict of Interest and Ethics Commissioner every trust known to the member from which he or she could, currently or in the future, either directly or indirectly, derive a benefit or income.

Manner of disclosure

(2) The disclosure must be made in accordance with the provisions governing the disclosure of private interests in the Conflict of Interest Code for Members of the House of Commons set out in the Standing Orders of the House of Commons.

Non-application of section 126 of the *Criminal Code*

(3) Section 126 of the *Criminal Code* does not apply in respect of a contravention of subsection (1).

2006, c. 9, s. 99.

Commissioner's orders

41.3 (1) If a trust disclosed by a member of the House of Commons was established by the member or by a person who is not a relative of the member, the Conflict of Interest and Ethics Commissioner shall

(a) if he or she is of the opinion that it is legally possible for the member to terminate the trust, order the member to terminate the trust and not to use any distribution of the assets on its termination for the purpose of financing a nomination contest, a leadership contest or an electoral campaign within the meaning of the *Canada Elections Act*; or

(b) if he or she is of the opinion that it is not legally possible for the member to terminate the trust, order the member not to derive any benefit or income from the

trust for the purpose of financing a nomination contest, a leadership contest or an electoral campaign within the meaning of the *Canada Elections Act*.

Commissioner's orders

(2) If a trust disclosed by a member was established by a relative of the member, the Conflict of Interest and Ethics Commissioner shall order the member not to derive any benefit or income from the trust, including any distribution of its assets on its termination, for the purpose of financing a nomination contest, a leadership contest or an electoral campaign within the meaning of the *Canada Elections Act*.

Exceptions

(3) Subsections (1) and (2) do not apply in respect of a trust that meets the requirements of subsection 27(4) of the *Conflict of Interest Act* or a trust that is governed by a registered retirement savings plan or a registered education savings plan.

Cessation of order

(4) No order made under this section has effect after the day on which the member to which the order relates ceases to be a member of the House of Commons and, for the purposes of this subsection, a person who was a member of the House of Commons immediately before the issue of a writ for the election of a new member in place of that person is deemed to continue to be a member of that House until the date of that election.

Compliance measures under *Conflict of Interest Act*

(5) If there is any inconsistency between an order made under this section and compliance measures required to be taken under the *Conflict of Interest Act*, the order prevails to the extent of the inconsistency.

Offence and punishment

(6) Every member of the House of Commons who contravenes an order made under this section is guilty of an offence and liable on summary conviction to a fine of not less than $500 and not more than $2,000.

Meaning of relative

(7) Persons who are related to a member of the House of Commons by birth, marriage, common-law partnership, adoption or affinity are the member's relatives for the purpose of this section unless the Conflict of Interest and Ethics Commissioner determines, either generally or in relation to a particular member, that it is not necessary for the purposes of this section that a person or class of persons be considered a relative of the member.

Meaning of *common law partnership*

(8) For the purpose of subsection (7), ***common law partnership*** means the relationship between two persons who are cohabiting in a conjugal relationship, having so cohabited for a period of at least one year.

2006, c. 9, s. 99.

Notification of Committee

41.4 (1) Any person, including the Conflict of Interest and Ethics Commissioner, who has reasonable grounds to believe that an offence has been committed under section 41.1 shall, in writing, notify the Committee of the House of Commons designated to consider such matters.

Opinion of Committee

(2) The Committee may issue its opinion with respect to the notification within 30 sitting days of the House of Commons after being notified.

2006, c. 9, s. 99.

Order to be provided to Committee

41.5 (1) The Conflict of Interest and Ethics Commissioner shall provide any order made under section 41.3 to a Committee of the House of Commons designated to consider whether a member has contravened an order of the Commissioner.

Issuance of opinion

(2) The Committee may issue its opinion with respect to the order within 30 sitting days of the House of Commons after being provided with the order.

2006, c. 9, s. 99.

DIVISION C

Speaker, Parliamentary Secretaries, Clerk and Other Personnel

Deputy Speaker

Speaker leaving the chair

42 Whenever the Speaker of the House of Commons, from illness or other cause, finds it necessary to leave the chair during any part of the sittings of the House on any day, the Speaker may call on the Chairman of Committees or, in the absence of that Chairman, on any member of the House to take the chair and act as Deputy Speaker during the remainder of that day unless the Speaker resumes the chair before the close of the sittings for that day.

R.S., c. S-13, s. 2.

Unavoidable absence

43 (1) Whenever the House of Commons is informed of the unavoidable absence of the Speaker thereof by the Clerk at the table, the Chairman of Committees, if present, shall

House of Commons and their members.
2015, c. 36, s. 98.

General

Statutory Instruments Act

79.59 For greater certainty, the designation referred to in the definition ***parliamentary precinct*** in section 79.51 is not a statutory instrument for the purposes of the *Statutory Instruments Act*.

2015, c. 36, s. 98.

Offence and Punishment

Prohibited use of expression "Parliament Hill"

80 (1) Notwithstanding anything contained in any Act of Parliament or regulation made thereunder, no person shall use the words "Parliament Hill" in combination

(a) to describe or designate a property, place, site or location in the National Capital Region described in the schedule to the *National Capital Act* other than the area of ground in the City of Ottawa bounded by Wellington Street, the Rideau Canal, the Ottawa River and Kent Street;

(b) to identify any goods, merchandise, wares or articles for commercial use or sale; or

(c) in association with a commercial establishment providing services.

Offence and punishment

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Construction

(3) This section shall not be construed as limiting in any way the powers, privileges, rights and immunities of both Houses of Parliament and of their members.

R.S., 1985, c. P-1, s. 80; 2001, c. 20, s. 13.

Conflict of Interest and Ethics Commissioner

Appointment

81 (1) The Governor in Council shall, by commission under the Great Seal, appoint a Conflict of Interest and Ethics Commissioner after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House.

Qualifications

(2) In order to be appointed under subsection (1), a person must be

(a) a former judge of a superior court in Canada or of any other court whose members are appointed under an Act of the legislature of a province;

(b) a former member of a federal or provincial board, commission or tribunal who, in the opinion of the Governor in Council, has demonstrated expertise in one or more of the following:

(i) conflicts of interest,

(ii) financial arrangements,

(iii) professional regulation and discipline, or

(iv) ethics; or

(c) a former Senate Ethics Officer or former Ethics Commissioner.

Reappointment

(3) The Commissioner is eligible to be reappointed for one or more terms of up to seven years each.

2006, c. 9, s. 28.

Tenure

82 (1) The Commissioner holds office during good behaviour for a term of seven years but may be removed for cause by the Governor in Council on address of the House of Commons.

Interim appointment

(2) In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.

2006, c. 9, s. 28.

Remuneration

83 (1) The Commissioner shall be paid the remuneration and expenses set by the Governor in Council.

Carrying out functions

(2) The Commissioner shall engage exclusively in the duties and functions of the Commissioner and may not hold any office under Her Majesty or engage in any other employment for reward.

2006, c. 9, s. 28.

Deputy head

84 (1) The Commissioner has the rank of a deputy head of a department of the Government of Canada and has the control and management of the office of the Commissioner.

Powers to contract

(2) The Commissioner may, in carrying out the work of the office of the Commissioner, enter into contracts, memoranda of understanding or other arrangements.

Staff

(3) The Commissioner may employ any officers and employees and may engage the services of any agents and mandataries, advisers and consultants that the Commissioner considers necessary for the proper conduct of the work of the office of the Commissioner.

Authorization

(4) The Commissioner may, subject to the conditions he or she sets, authorize any person to exercise any powers under subsection (2) or (3) on behalf of the Commissioner that he or she may determine.

Salaries

(5) The salaries of the officers and employees of the office of the Commissioner shall be fixed according to the scale provided by law.

Payment

(6) The salaries of the officers and employees of the office of the Commissioner, and any casual expenses connected with the office, shall be paid out of moneys provided by Parliament for that purpose.

Estimates to be prepared

(7) Prior to each fiscal year, the Commissioner shall cause to be prepared an estimate of the sums that will be required to pay the charges and expenses of the office of the Commissioner during the fiscal year.

Inclusion in government estimates

(8) The estimate referred to in subsection (7) shall be considered by the Speaker of the House of Commons and then transmitted to the President of the Treasury Board, who shall lay it before the House of Commons with the estimates of the Government for the fiscal year.

2006, c. 9, s. 28.

Mandate

85 The mandate of the Commissioner is to

(a) carry out the functions of the Commissioner referred to in sections 86 and 87; and

(b) provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general.

2006, c. 9, s. 28.

Functions: members of House of Commons

86 (1) The Commissioner shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House.

Privileges and immunities

(2) The duties and functions of the Commissioner under subsection (1) are carried out within the institution of the House of Commons. The Commissioner enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions.

General direction of committee

(3) The Commissioner shall carry out those duties and functions under the general direction of any committee of the House of Commons that may be designated or established by that House for that purpose.

Clarification — ethical principles, etc.

(4) For greater certainty, the general direction of the committee referred to in subsection (3) does not include the administration of the *Conflict of Interest Act* in respect of ministers of the Crown, ministers of state or parliamentary secretaries acting in their capacity as ministers of the Crown, ministers of state or parliamentary secretaries.

Clarification — powers, etc., of House of Commons

(5) For greater certainty, this section shall not be interpreted as limiting in any way the powers, privileges, rights and immunities of the House of Commons or its members.

2006, c. 9, s. 28.

No summons

86.1 (1) The Commissioner, or any person acting on behalf or under the direction of the Commissioner, is not a competent or compellable witness in respect of any matter coming to his or her knowledge as a result of exercising any powers or performing any duties or functions of the Commissioner under this Act.

Protection

(2) No criminal or civil proceedings lie against the Commissioner, or any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the exercise or purported exercise of any power, or the performance or purported performance of any duty or function, of the Commissioner under this Act.

Clarification

(3) The protection provided under subsections (1) and (2) does not limit any powers, privileges, rights and immunities that the Commissioner may otherwise enjoy.
2006, c. 9, s. 28.

Functions: public office holders

87 The Commissioner shall, in relation to public office holders, perform the duties and functions assigned to the Commissioner under the *Conflict of Interest Act*.

2006, c. 9, s. 28.

Use of personal information

88 (1) Personal information collected by the Commissioner shall not, without the consent of the individual to whom it relates, be used by the Commissioner except for the purpose for which the information was obtained or for a use consistent with that purpose.

Clarification

(2) The purpose for which information referred to in subsection (1) was obtained is determined by the section of this Act under which the Commissioner was acting when he or she obtained the information.

2006, c. 9, s. 28.

Delegation

89 The Commissioner may authorize any person to exercise or perform, subject to any restrictions or limitations that the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this Act or the *Conflict of Interest Act* except the power to delegate under this section.

2006, c. 9, s. 28.

Annual reports

90 (1) Within three months after the end of each fiscal year, the Commissioner shall submit

(a) a report on his or her activities under section 86 for that year to the Speaker of the House of Commons, who shall table the report in that House; and

(b) a report on his or her activities under section 87 for that year to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides.

Confidentiality

(2) The Commissioner may not include in the annual reports any information that he or she is required to keep confidential, including confidences of the Queen's Privy Council for Canada.

2006, c. 9, s. 28.

TAB 9

ship means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes

(a) a ship in the process of construction from the time that it is capable of floating, and

(b) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up. (*navire*)

Supreme Court [Repealed, 1990, c. 8, s. 1]

Trial Division [Repealed, 2002, c. 8, s. 15]

Senate and House of Commons

(2) For greater certainty, the expression *federal board, commission or other tribunal*, as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the *Parliament of Canada Act*, the Parliamentary Protective Service or the Parliamentary Budget Officer.

Deeming

(3) Despite subsection (2), the Parliamentary Budget Officer is deemed to be a federal board, commission or other tribunal for the purpose of subsection 18.3(1).

R.S., 1985, c. F-7, s. 2; 1990, c. 8, s. 1; 2001, c. 6, s. 115; 2002, c. 8, s. 15; 2004, c. 7, ss. 7, 38; 2006, c. 9, ss. 5, 38; 2015, c. 36, s. 124; 2017, c. 20, s. 159; 2022, c. 10, s. 364; 2022, c. 10, s. 371.

The Courts

Federal Court — Appeal Division continued

3 The division of the Federal Court of Canada called the Federal Court — Appeal Division is continued under the name "Federal Court of Appeal" in English and "Cour d'appel fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

R.S., 1985, c. F-7, s. 3; 1993, c. 34, s. 68(F); 2002, c. 8, s. 16.

Federal Court — Trial Division continued

4 The division of the Federal Court of Canada called the Federal Court — Trial Division is continued under the name "Federal Court" in English and "Cour fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

R.S., 1985, c. F-7, s. 4; 2002, c. 8, s. 16.

further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(a) [Repealed, 2012, c. 24, s. 86]

(b) the Review Tribunal continued by subsection 27(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the Canadian Energy Regulator established by the *Canadian Energy Regulator Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 186(1) of the *Canadian Energy Regulator Act*;

(g.1) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58.2 of that Act or relates to an appeal respecting a decision relating to further time to make a request under

(i) subsection 52(2) of that Act,

(ii) section 81 of the *Canada Pension Plan*,

(iii) section 27.1 of the *Old Age Security Act*,

TAB 10

Memorandum of Decision
of the
Honourable Madam Justice J.R. Ashcroft

I. Introduction

[1] A complaint was filed against Ric McIver, a Member of the Legislative Assembly of Alberta, related to comments he made in the Legislative Assembly during Question Period in November 2016. The Ethics Commissioner investigated and tabled a report to the Speaker. In the report, the Ethics Commissioner made findings and recommendations regarding Mr. McIver's breach of the *Conflicts of Interest Act*, RSA 2000, c C-23 [*CIA*]. The Legislative Assembly accepted the report and Mr. McIver was eventually sanctioned. He was ordered to pay $500 and apologize to the Legislative Assembly.

[2] Mr. McIver challenges the Ethics Commissioner's decision arguing that she exceeded her jurisdiction in interfering with his free speech. He submits the decision should be set aside.

II. Facts

[3] The facts are not in dispute. On November 22, 2016 the Government of Alberta unveiled a new rate ceiling for electricity prices. During Question Period, Mr. McIver asked the Premier, "why are you doing everything in your power to run these [power generation and distribution] companies, many of which are owned by taxpayers, out of business?"

[4] Christine McIver, Mr. McIver's wife, is the sole shareholder and director of Brighter Futures Energy Inc., an energy retailer.

[5] Heather Sweet, another member of the Legislative Assembly, filed a written complaint to the Ethics Commissioner alleging that Mr. McIver was therefore in a conflict of interest in asking his question, and violated section 3 of the *CIA*.

[6] Section 3 states:

> A Member breaches this Act if the Member uses the Member's office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to further a private interest of the Member, a person directly associated with the Member or the Member's minor child or to improperly further another person's private interest.

[7] The Ethics Commissioner investigated and prepared a report concluding that, "Mr. McIver was in breach of s. 3 of the *Conflicts of Interest Act* as he sought to influence the Crown's decision to implement (or prevent) certain policies, the unintended result of which, had he succeeded, would further the private interest of his direct associate." She recommended a penalty of a formal apology and a $500 fine.

[8] The report was tabled in the legislature and a motion was brought to concur with the report and require Mr. McIver to pay the fine and make the apology. Meanwhile, the opposition brought a point of order to halt this proceeding pending a judicial review of the Ethics Commissioner's decision, and a point of privilege on similar substantive grounds as the arguments advanced before me. These points were defeated. The Speaker ruled that the Ethics Commissioner and the Legislative Assembly were acting within their parliamentary privilege over discipline and internal affairs. The motion of concurrence was ultimately passed and Mr. McIver has since apologized and paid his fine.

Commissioner exceeded the scope of her jurisdiction and infringed on the Constitution. Mr. McIver argues that the Court must decide whether the Ethics Commissioner had authority to interfere with the free speech of a member of the Legislative Assembly in Question Period. He submits that, as the *CIA* does not expressly abrogate his parliamentary privilege to free expression in Question Period, the Ethics Commissioner exceeded her jurisdiction in infringing that privilege. As such, her decision should be subject to judicial review.

[18] The Speaker and the Ethics Commissioner fundamentally disagree with that approach, arguing that the administrative law paradigm is not appropriate. They submit that the Court must assess whether the actions of the Ethics Commissioner and the decision of the Legislative Assembly relate to an accepted category of parliamentary privilege—in this case, governing the conduct of members of the Legislative Assembly. If so, then parliamentary privilege applies to the decision and the Court has no jurisdiction to consider the issue or examine whether the Ethics Commissioner exceeded the scope of her authority. The Speaker and the Ethics Commissioner argue that any concerns about the Legislative Assembly's decision should be dealt with in the Legislative Assembly.

[19] As will become clear, I agree with the Speaker and the Ethics Commissioner that the issue must be approached from a parliamentary privilege perspective. If the actions of the Ethics Commissioner and the Assembly are found to fall within the scope of parliamentary privilege, then the issue is non justiciable.

C. Standard of Review

[20] Mr. McIver submits that the standard of review is correctness as the issue is constitutional. The Speaker and the Ethics Commissioner argue that a standard of review analysis not appropriate as the issue is not subject to judicial review by the courts. Again, as set out more fully below, I agree with the position of the Speaker and the Ethics Commissioner.

D. What is the decision under review? Who is the decision maker?

[21] Mr. McIver seeks to judicially review the Ethics Commissioner's decision to sanction him. He takes the position that the Ethics Commissioner is the decision maker. He points to sections 25(10) and (15) of the *CIA* as support for his submission that the Ethics Commissioner does not just issue recommendations; rather she renders decisions. Section 25(10) states that the Ethics Commissioner may refuse to investigate or cease an investigation if she is of the opinion that the request is frivolous, vexatious or not made in good faith or there are no or insufficient grounds to warrant an investigation or the continuance of an investigation.

[22] The Speaker and the Ethics Commissioner disagree, submitting the *CIA* clearly gives the Legislative Assembly full discretion to accept or not to accept the Ethics Commissioner's decisions:

- Section 25(12) indicates that the Ethics Commissioner "shall" report her findings to the Speaker if the complaint is made under section 24(1), (3) or (4). The investigation herein was initiated under section 24(1);
- Section 28(1) states that upon receiving a report from the Commissioner under 25(12) the Speaker "shall lay the report" before the Legislative Assembly;
- Section 28(3) states that if the Ethics Commissioner has found a breach and recommended a sanction, the Legislative Assembly shall debate and vote on the report; and,
- Section 29(1) states that the Legislative Assembly "may accept or reject the findings of the Ethics Commissioner or make its own findings" and impose the sanction recommended by the Ethics Commissioner or any other sanction it determines appropriate or impose no sanction at all.

[23] In addition to the above, other relevant portions of the *CIA* include:

- Section 25(1) which states that the Ethics Commissioner may conduct an investigation; and,
- Section 25(4) which states that the Ethics Commissioner may inform the Speaker of matters related to the investigation.

[24] A complete reading of the legislation is important in determining who is the actual decision maker. The "laying of the report" before the Speaker is mandatory under section 28(1). Even if the Ethics Commissioner refuses to investigate or ceases an investigation under section 25(10), she must, at the very least, inform the Speaker (s 25(11)). If the Ethics Commissioner is of the opinion that the request was frivolous or vexatious or was not made in good faith, then she may state that opinion in a report to the Speaker (s 25(15)). The Speaker must table any such report before the Legislative Assembly (s 25(16)).

[25] It is also clear, pursuant to section 29(1), that the Legislative Assembly may accept or reject the findings, and may, if it finds there has been a breach, impose the recommended sanction, its own sanction, or no sanction at all.

[26] In the matter at hand, the complaint was made under section 24(1). The Ethics Commissioner reported her findings to the Speaker. The Legislative Assembly ultimately accepted her findings and imposed a sanction. The actions of the Ethics Commissioner involved investigating and making recommendations regarding the complaint. However, the Legislative Assembly was the ultimate decision maker as to whether there was a breach and whether sanctions would be imposed.

[27] While Mr. McIver takes issue with the Ethics Commissioner's actions, it is really the Legislative Assembly that made the decision to sanction him and thus arguably infringe on his freedom of speech in Question Period.

E. What is parliamentary privilege and who may claim it?

[28] A helpful description of parliamentary privilege is set out in Maingot, *Parliamentary Privilege in Canada*, 2nd ed (Montreal: Published for the House of Commons by McGill-Queen's University Press, 1997) at 12:

> Parliamentary privilege is the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature... . Finally, it is the authority and power of each House of Parliament and of each legislative assembly to enforce that immunity...

[29] The Supreme Court of Canada in ***New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)***, 1993 CanLII 153 (SCC), [1993] 1 SCR 319 speaks to the constitutional nature of the privilege. McLachlin J (as she then was), writing for the majority, considered the historical perspective at p 387:

> In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional.

[30] La Forest J, in concurring reasons, stated at pp 367-368:

> ...When the British government granted a legislative assembly to a colony, the grant carried with it as an adjunct the power necessary for that body to carry out its functions, in particular the power to regulate its internal processes in the traditional manner developed over the years. This is really what we are talking about when we speak of parliamentary or legislative privileges in this country.

[65] A more recent confirmation that *Charter* rights cannot diminish the protection of parliamentary privilege is found in ***Singh***. The Quebec Court of Appeal found that a resolution by the Assembly to approve exclusion of individuals from the Assembly who were wearing kirpans, under a directive which excludes items such as knives and scissors, was subject to parliamentary privilege. The Court found that the action fell under the category of parliamentary privilege to "exclude strangers" and was beyond the supervision of the courts. While the Court acknowledged that the exclusion may be contrary to the *Charter* it stated at para 26 that, "... parliamentary privilege cannot be set aside."

H. Parliamentary Privilege applies even though the conduct was in Question Period

[66] Mr. McIver argues that the parliamentary privilege to regulate conduct does not apply in Question Period. He submits that Question Period is unique, that it is different from a debate or voting on legislation, and for this reason, it is not referenced in the *CIA*. He argues that the *CIA* would have to clearly specify that privilege applies and that the corresponding privilege of free speech was abrogated.

[67] The Speaker and the Ethics Commissioner argue that the parliamentary privilege to regulate conduct applies to Question Period; that there is nothing so special about Question Period that members' conduct should not be regulated. The Ethics Commissioner points to the preamble of the *CIA* as supporting the regulation of the conduct of members of the Legislative Assembly in Question Period:

> WHEREAS Members of the Legislative Assembly are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence and trust in the integrity of each Member, that maintains the Assembly's dignity and that justifies the respect in which society holds the Assembly and its Members;

[68] The Speaker argues that the primary duty of members is to serve in the Legislative Assembly. This duty is carried out almost exclusively through speech, as such, participation in Question Period is simply an aspect of those duties and there is no reason to distinguish Question Period from other forms of legislative debate.

[69] I find that members of the Legislative Assembly exercise their power and influence during Question Period in the same manner as they do in other forms of legislative debate: to gain political influence and to use that influence to sway decision making. Question Period is part of the legislative process and participation in it is an exercise of a member's duty. As such, I find that parliamentary privilege continues to apply.

I. An administrative law approach is not appropriate in assessing the conduct of the Ethics Commissioner

[70] There may be circumstances where a statutory delegate such as the Ethics Commissioner engages in activities or conduct that do not fall within a recognized category of parliamentary privilege.

[71] In the case before me, the Ethics Commissioner was exercising her function as a statutory delegate of the Legislative Assembly. In investigating an alleged conflict of interest of a member for statements made in Question Period, finding a breach and recommending sanctions, she was acting within the parliamentary privilege over the regulation of members and her actions are not subject to judicial review. Resolving issues where that privilege clashes with other parliamentary privileges, such as freedom of speech, is clearly a matter for the legislature. It is inappropriate for this Court to proceed with a judicial review under the auspices of an examination as to whether the Ethics Commissioner exceeded her jurisdiction, as it would result in an unacceptable infringement of parliamentary privilege.

TAB 11

CanLII

Democracy Watch v. British Columbia (Conflict of Interest Commissioner), 2017 BCSC 123 (CanLII)

Source:	Supreme Court of British Columbia
Date:	2017-01-25
File number:	S169841
Citation:	Democracy Watch v. British Columbia (Conflict of Interest Commissioner), 2017 BCSC 123 (CanLII), <https://canlii.ca/t/gx4bk>, retrieved on 2025-12-26

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCSC 123

Date: 20170125
Docket: S169841
Registry: Vancouver

Between:

Democracy Watch

Petitioner

And

British Columbia Conflict of Interest Commissioner

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Petitioner: J.B. Gratl

Counsel for the Respondent: J.J.L. Hunter, Q.C.

Place and Date of Trial/Hearing:	Vancouver, B.C. January 13, 2017
Place and Date of Judgment:	Vancouver, B.C. January 25, 2017

INTRODUCTION

[1] Democracy Watch has petitioned this Court for an order reviewing and setting aside the opinions of the Conflict of Interest Commissioner (the Commissioner) issued on May 4, 2016 and August 9, 2016 concerning certain Liberal Party of B.C. fundraising activities. Democracy Watch requests an order remitting "the issue" to a different decision-maker for reconsideration.

[2] In an introductory "overview" to the petition the "issue" is described as follows

> This is a judicial review by Democracy Watch of decisions made by the British Columbia Conflict of Interest Commissioner on May 4, 2016 and August 9, 2016. Conflict of Interest Commissioner Paul Fraser's decision unreasonably concluded that it was not a real or apparent conflict of interest pursuant to s.2 of the *Members' Conflict of Interest Act* ("the Act") for the Premier to receive $50,000 annual payments from the BC Liberal Party ("LPBC") while fundraising for the [LPBC] at exclusive informal events at which special access to the Premier was sold for high amounts (up to $20,000 per person). The Commissioner's decision also unreasonably concluded that donations made to attend the events and the annual salary drawn by the Premier from the [LPBC] were not a personal benefit for the Premier that are indirectly connected with the performance of her duties of office as prohibited under s.7 of the Act.

[3] In response to the application for judicial review, the Commissioner applies for an order dismissing the petition on the basis this Court lacks jurisdiction to entertain it. In particular it is asserted by the Commissioner that the challenged opinions are immunized from judicial review by a legislative privilege. The Commissioner also submits that Democracy Watch lacks standing to petition this Court in the present circumstance.

[4] These reasons address the jurisdictional issue only.

THE FACTUAL BACKGROUND

[5] On March 31, 2016 Mr. Duff Conacher, on the letterhead of Democracy Watch, wrote to the Commissioner as follows:

> I am writing because the media has revealed that the B.C. Liberals are holding fundraising events where the party leader or other Cabinet ministers are essentially selling access to themselves. The cost of tickets is very high, and in return the donor is invited to an exclusive, private event where they have access to the leader or minister.
>
> Subsection 7(1) of the B.C. *Members' Conflict of Interest Act* states:
>
> "7(1) A member must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of his or her duties of office."

> While the donations for these events go to a party or riding association, access to the politician is part of the ticket price for these exclusive events (which connects the donation to their position as a politician). The politician takes part in directing the spending of the money (as the party leader or senior party official or local politician for the riding association), and at least some of the donated money is spent on the politician's re-election campaign (directly or indirectly through the party's campaign). As a result, the politician is receiving at least part of a donation made because the politician attended an event - and therefore the politician is receiving an illegal gift.
>
> Democracy Watch is not claiming that all fundraising events are illegal --just high- priced, exclusive events where politicians sell access to themselves in return for a donation. Low-priced, large, public events at which no one gets special access to the politician are clearly legal under the conflict-of-interest laws because the donation is not made to gain access to the politician (and therefore is not connected directly or indirectly to their position).
>
> As a result, Democracy Watch requests that you:
>
> 1. Issue an immediate ruling that states that donations made for private, exclusive fundraising events at which special access is given to a politician are illegal gifts prohibited by subsection [7(1)] of the *Members' Conflict of Interest Act*,

[6] The statutory authority for a member of the public to lodge a complaint with the Commissioner is found in section 19(2) of the *Members Conflict of Interest Act*, R.S.B.C. 1996, c. 287 ["the *Act*" or the "present *Act*"] which reads:

> (2) A member of the public who has reasonable and probable grounds to believe that there has been a contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the alleged contravention.

[7] In April 2016 Mr. David Eby, in his capacity as a member of the Legislative Assembly, wrote to the Commissioner " Re: Complaint under section 19(1) of [the *Act*] concerning the Hon. Christy Clark" which subsection reads:

> (1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.

[8] Mr. Eby's letter describes a media "allegation" that "the Member for Westside – Kelowna, and Premier of British Columbia, Christy Clark" had recently attended a dinner where "10 guests paid $10,000 each to mingle with Ms. Clark" and at a fundraiser in Kelowna a "small group who paid $5,000 each got quality time with the Premier". Mr. Eby made extensive submissions; requested the Commissioner "investigate this matter immediately", and suggested the Commissioner "find the Premier has placed herself in a conflict of interest".

[9] On May 1, 2016, Sharon E. White, Q.C. president of the British Columbia Liberal party wrote to the Commissioner describing an annual "Leaders Allowance" paid to the Premier by the British Columbia Liberal party. Ms. White advised that in 2016 the allowance was $50,000. The

Commissioner copied Ms. White's letter to Mr. Eby who submitted to the Commissioner that in his view the allowance created a conflict of interest for the Premier.

[10] In a written "Opinion" of May 4, 2016, the Commissioner concluded that the Premier had not contravened the *Act* as asserted by either Democracy Watch or Mr. Eby. In an addendum to that opinion dated August 9, 2016 the Commissioner declined to reconsider his opinion.

THE COMMISSIONER'S SUBMISSIONS

[11] The burden of demonstrating that a legislative privilege precludes this Court from reviewing the Commissioner's opinions rests on the Commissioner. To discharge that burden he relies on the decision of the Court of Appeal in *Tafler v. British Columbia (Conflict of Interest Commissioner)* (1998), 1998 CanLII 6216 (BC CA), 49 B.C.L.R. (3d) 328, which the Commissioner submits is dispositive of the petition.

[12] The facts in *Tafler* were as follows. In 1995 a member of the public, who was not Mr. Tafler, and a member of the Legislative Assembly each complained that Premier Harcourt had contravened the provisions of s. 15(1) of the *Member's Conflict of Interest Act*, S.B.C. 1990, c. 54 ["the 1990 *Act*]. The Commissioner conducted hearings to which he denied Mr. Tafler access. Mr. Tafler sought judicial review of that decision. On the hearing of the judicial review application Mr. Justice Melvin, in reasons found at (1995), 1995 CanLII 1367 (BC SC), 5 B.C.L.R. (3d) 285, held that a legislative privilege prevented this Court from reviewing the Commissioner's decision denying Mr. Tafler access to the hearings.

[13] Mr. Tafler appealed from that decision, and Mr. Justice Lambert, with whom the other judges of the Court of Appeal agreed, began his reasons as follows:

> The principal issue in this appeal is whether the Conflict of Interest Commissioner, acting under the *Members' Conflict of Interest Act* [1990], on the complaint of a member of the public or of a member of the Legislative Assembly, is acting under legislative privilege such that the courts have no power of review in relation to the way the Commissioner carries out his tasks.

[14] In his reasons for dismissing the appeal Lambert J.A. set out the language of subsections 15(1) and (1.1) of the 1990 *Act* which is identical to the language of subsections 19(1) and (2) of the present *Act*. Lambert J.A. also referred to section 10(1) of the 1990 *Act*, which provided that "there shall be a commissioner who is an officer of the legislature". Likewise s. 14(1) of the present *Act* provides that "there must be appointed a commissioner who is an officer of the legislative assembly".

[15] Lambert J.A. referred to s. 16(1) of the 1990 *Act*, which enabled the Commissioner, on receiving a request under s. 15, to conduct an inquiry and to "report his or her opinion" to the speaker of the legislature. Under section 17(1) of the 1990 *Act* the Commissioner could "recommend in a report that is laid before the legislative assembly" that a member, who the

Commissioner found was in contravention of the 1990 *Act*, be subject to a penalty. Section 17(3) of the 1990 *Act* read:

> (3) The Assembly may order the imposition of the recommendation of the commissioner under subsection (1) or may reject the recommendation, but the Assembly shall not further inquire into the contravention nor shall the Assembly impose a punishment other than the one recommended by the commissioner. [Emphasis that of Lambert J.A.]

[16] Section 22 of the *Act* has language identical to that in section 17 of the 1990 *Act*.

[17] At para. 14 of the reasons in *Tafler* these words are found:

> I think it is noteworthy, first, that the Commissioner is an officer of the Assembly, (see sub-section 10(1)); second, that the Commissioner's obligation is to report his opinion to the Assembly, (see sub-section 16(3)), and thereafter if he considers it proper to do so, to make a recommendation with respect to discipline of the member, (see sub-section 17(1)), but not himself to reach any enforceable decision; third, that the actual decision on any question of conflict of interest is made by the Assembly itself; and, fourth, that no action of any kind lies against the Commissioner for anything he or she does under the Act, (see section 18). I would like to note in passing that neither counsel referred to section 18 of the Act in the course of their arguments, and we have been left to our own devices in interpreting that section. [Emphasis added.]

[18] The Commissioner on the present hearing did not rely on s. 23 of the present *Act* which is in the same terms as s. 18 in the 1990 *Act*.

[19] Mr. Justice Melvin, relying on the decision of the Supreme Court of Canada in *N.B. Broadcasting Co. v. Nova Scotia*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, had come to the following conclusion at para. 53 of his reasons:

> Here, as I mentioned, the Commissioner is acting for and on behalf of the Legislative Assembly in providing that body with information and opinion. The nature of the investigation relates to the functioning of the member of the Legislative Assembly. Control over members or a member, or sanction of a member, remains with the Legislative Assembly. In my opinion, information gathering which may assist the Assembly in dealing with its own members is a vital step in the decision of the legislature and is necessary to the proper functioning of the Assembly as Madam McLachlin J. referred to in ... the New Brunswick Broadcasting decision. Consequently, the manner in which it chooses to deal with its members in the context is one cloaked with privilege, the exercise of which is not reviewable.

[20] Lambert J.A. agreed with Melvin J. and added the following:

> … In my opinion, the privileges of the Legislative Assembly extend to the Commissioner who is expressly made an officer of the Assembly by sub-section 10(1) of the *Members' Conflict of Interest Act*. In my opinion, decisions made by the Commissioner in the carrying out of the Commissioner's powers under the *Act* are decisions made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts.

[21] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, Binnie J. for the Supreme Court of Canada, wrote of "parliamentary privilege" that it is:

> the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces . . . in order for these legislators to do their

legislative work. [Emphasis added.]

[22] At page 688 of *Vaid*, Binnie J. wrote:

> Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of the exercise of a privilege need not be shown to be necessary" (*New Brunswick Broadcasting*, at p. 343) [Emphasis that of Binnie J.]

[23] Justice Binnie observed that the "categories" of parliamentary privilege include the discipline of members, for which proposition he cited *Tafler*.

[24] The Commissioner points out that in the United Kingdom a similar privilege precludes the courts in that country from exercising a supervisory role over the U.K. parliamentary commissioner. In *Regina v. Parliamentary Commissioner for Standards, ex parte AL Fayed*, [1998] 1 W.L.R. 669 at 673 Lord Woolf M.R. wrote:

> … On the other hand, the focus of the Parliamentary Commissioner for standards is on the propriety of the workings and the activities of those engaged within Parliament. He is one of the means, by which the select committee set up by the House carries out its functions, which are accepted to be part of the proceedings of the House. This being the role of the Parliamentary Commissioner for Standards, it would be inappropriate for this court to use its supervisory powers to control what the Parliamentary Commissioner for Standards does in relation to an investigation of this sort. The responsibility for supervising the Parliamentary Commissioner for Standards is placed by Parliament, through its standing orders, on the Committee of Standards and Privileges of the House, and it is for that body to perform that role and not the courts.

THE PETITIONER'S POSITION AND THIS COURT'S JURISDICTION

[25] The petitioner's response to the submissions of the Commissioner is that *Tafler* is not authority which precludes this Court from reviewing the Commissioner's opinions because they were not directed to the conduct of the Premier as a member of the Legislature, but rather to her role as President of the Executive Council.

[26] To demonstrate the role in which it is submitted the Premier acted when in an alleged conflict of interest the petitioner refers to the constitutional basis for executive government in this province. Section 7 of the *Constitution Act*, R.S.B.C. 1996 c. 66 (the "*B.C. Constitution Act*") provides that "executive power" in the province continues, so far as un-altered by that *Act*, as it existed on February 14, 1871 subject to various sections of the *Constitution Act 1867*, 30 - 31 Victoria c. 3 (U.K.) and to an Imperial order in council. Section 9 of the of the *B.C. Constitution Act* provides for an Executive Council composed of those persons appointed by the Lieutenant Governor, including the Premier who is the Council's President. By contrast sections 17 and 18 of the *B.C. Constitution Act* enable the Lieutenant Governor to make laws in and for British

Columbia but only on the advice and consent of the Members of the Legislative Assembly who are elected in the manner provided in the *Elections Act*, R.S.B.C. 1996, c. 106.

[27] The petitioner then emphasizes s. 1 of the *Act*, which defines "member" to mean "a member of the legislative assembly or of the Executive Council, or both". The petitioner submits this definition reflects the distinction that must be drawn between the legislative branch of government and the executive.

[28] The petitioner accepts that members of the legislative branch of government enjoy a privilege which precludes judicial review of their conduct as members of the Legislature, but rejects the proposition that the conduct of the Premier in her role as President of the Executive Council is insulated from judicial review.

[29] The petitioner submits that the decision of the Premier to engage in the fundraising activities, of which it and Mr. Eby complain, was a decision made not as a member of the Legislature but as President of the Executive Council. The petitioner argues that it is fundamental to the rule of law that executive decisions of government must be subject to review by the courts to ensure they are made within lawful authority.

[30] The petitioner relies on the reasons of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Paragraphs 27 and 28 from those reasons read:

> [27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> [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.

[31] At para. 31 of *Dunsmuir* these words are found:

> [31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government.

[32] The petitioner's position on jurisdiction in essence is that there is an inviolable constitutional rule in Canada that decisions of the executive branch of government must be subject to judicial review and that the Commissioner's opinions must be seen as addressing a fundraising

decision made by the Premier not as a member of the elected Legislative Assembly but as a member of the Executive Council.

MY DECISION

[33] The petitioner's argument has a superficial plausibility but I cannot agree with it. The *Act* is directed to potential conflicts of interest by "members". The definition of member is intended to encompass both those who are elected members of the Legislative Assembly and those who are appointed to the Executive Council but who have not been elected to the Legislature. In our system of government a person may be appointed to the Executive Council (the Cabinet as it is commonly described), even though that person has not been elected to the Legislature. If a complaint is made that such a person is in a conflict of interest the Commissioner is authorized by the *Act*, to investigate and to give an opinion and perhaps a recommendation. I do not, however, read the definition of "member" to mean that the Commissioner is clothed with authority to investigate an executive decision by a member of the Executive Council and then report to the Legislature, and perhaps recommend a penalty to be imposed on that person.

[34] The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, provides a means for an aggrieved person to seek judicial review of the exercise of a statutory power of decision. That may include a decision of the Executive Council or one of its members. If the Legislature had intended that the *Act* also provide the Commissioner with the power to investigate, report to the Legislature and perhaps recommend a penalty to be imposed on a member of the Executive Council, for an executive decision, I would expect the Legislature to have said so expressly. It did not.

[35] Nor do I accept the petitioner's submission that *Dunsmuir* has application to the present matter. *Dunsmuir* dealt with judicial review of decisions made by administrative tribunals. An "officer of the Legislature" cannot be equated to an administrative tribunal.

[36] There is an abundance of high authority against the petitioner's position on jurisdiction. It is for the Legislature to consider the conduct of its officers, when they are performing their assigned role, not the courts.

[37] I will add that the Commissioner is authorized by the *Act* to do no more than conduct an inquiry; arrive at an opinion, and in the appropriate circumstance make a recommendation to the Legislative Assembly. It is then for the Legislature, not the Commissioner, if it chooses to do so to exercise discipline authority over its members. An opinion of the Commissioner has no legal consequence unless and until the Legislature acts on it.

[38] The petition is dismissed.

[39] The petitioner seeks an order "protecting the petitioner from adverse costs liability in the event that this petition is dismissed". The petitioner submits this is public interest litigation in which the usual rule ought to apply that no court costs award is made. The Commissioner submits

on the other hand that the governing authorities are so patently against the petitioner that the "discipline" of costs ought to prevail.

[40] The petitioner has made a novel argument with at least a modicum of plausibility. There will be no costs order.

"Mr. Justice Affleck"

TAB 12

No impact

42 For greater certainty, no exemption granted in respect of a person under section 38 and no waiver or reduction granted in respect of a person under section 39 affects any obligation or prohibition that applies to that person under the *Lobbying Act*.

2006, c. 9, ss. 2 "42", 35.

PART 4

Administration and Enforcement

Mandate and Powers of the Commissioner

Confidential advice

43 In addition to carrying out his or her other duties and functions under this Act, the Commissioner shall

(a) provide confidential advice to the Prime Minister, including on the request of the Prime Minister, with respect to the application of this Act to individual public office holders; and

(b) provide confidential advice to individual public office holders with respect to their obligations under this Act.

Request from parliamentarian

44 (1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.

Content of request

(2) The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.

Examination

(3) If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the circumstances of the case, may discontinue the examination.

Information from public

(4) In conducting an examination, the Commissioner may consider information from the public that is brought to his or her attention by a member of the Senate or House of Commons indicating that a public office holder or former public office holder has

contravened this Act. The member shall identify the alleged contravention and set out the reasonable grounds for believing a contravention has occurred.

Confidentiality

(5) If a member of the Senate or House of Commons receives information referred to in subsection (4), the member, while considering whether to bring that information to the attention of the Commissioner, shall not disclose that information to anyone. If the member brings that information to the attention of the Commissioner under that subsection, the member shall not disclose that information to anyone until the Commissioner has issued a report under this section in respect of the information.

Referral to Speaker

(6) Where the Commissioner is of the opinion that a member of the Senate or House of Commons has failed to comply with the confidentiality provision of subsection (5), the Commissioner may refer the matter, in confidence, to the Speaker of the Senate or House of Commons.

Report

(7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3).

Making report available

(8) The Commissioner shall, at the same time that the report is provided under subsection (7), provide a copy of it to the member who made the request — and the public office holder or former public office holder who is the subject of the request — and make the report available to the public.

Confidentiality

(9) The Commissioner may not include in the report any information that he or she is required to keep confidential.

Examination on own initiative

45 (1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

Discontinuance

(2) The Commissioner, having regard to all the circumstances of the case, may discontinue the examination.

Report

(3) Unless the examination is discontinued, the Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions.

Making report available

(4) The Commissioner shall, at the same time that the report is provided under subsection (3) to the Prime Minister, provide a copy of it to the public office holder or former public office holder who is the subject of the report and make the report available to the public.

Presentation of views

46 Before providing confidential advice under paragraph 43(a) or a report under section 44 or 45, the Commissioner shall provide the public office holder or former public office holder concerned with a reasonable opportunity to present his or her views.

Conclusion in report final

47 A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.

Powers

48 (1) For the purposes of paragraph 43(a) and sections 44 and 45, the Commissioner has the power to summon witnesses and require them

(a) to give evidence — orally or in writing — on oath or, if they are persons entitled to affirm in civil matters, on affirmation; and

(b) to produce any documents and things that the Commissioner considers necessary.

Enforcement

(2) The Commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence as a court of record in civil cases.

Powers exercised in private

(3) The powers referred to in subsections (1) and (2) shall be exercised in private.

Inadmissibility

(4) Information given by a person under this section is inadmissible against the person in a court or in any proceeding, other than in a prosecution of the person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made to the Commissioner.

Governor in Council designating public office holder

62.2 (1) The Governor in Council may, by order, designate any person or class of persons as public office holders for the purpose of paragraph (e) of the definition *public office holder* in subsection 2(1).

Governor in Council designating reporting public office holder

(2) The Governor in Council may, by order, designate any person who is a public office holder or any class of persons who are public office holders as reporting public office holders for the purpose of paragraph (f) of the definition *reporting public office holder* in subsection 2(1).

2013, c. 40, s. 289.

Section 126 of *Criminal Code*

63 Section 126 of the *Criminal Code* does not apply to or in respect of any contravention or alleged contravention of any provision of this Act.

Activities on behalf of constituents

64 (1) Subject to subsection 6(2) and sections 21 and 30, nothing in this Act prohibits a member of the Senate or the House of Commons who is a public office holder or former public office holder from engaging in those activities that he or she would normally carry out as a member of the Senate or the House of Commons.

Rights, etc. not affected

(2) Subject to subsection 6(2) and sections 21 and 30, nothing in this Act abrogates or derogates from any of the privileges, immunities and powers referred to in section 4 of the *Parliament of Canada Act*.

Limitation period

65 Proceedings under this Act may be taken at any time within but not later than five years after the day on which the Commissioner became aware of the subject-matter of the proceedings and, in any case, not later than ten years after the day on which the subject-matter of the proceeding arose.

Orders and decisions final

66 Every order and decision of the Commissioner is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

Review

67 (1) Within five years after this section comes into force, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated

TAB 13

ANALYSIS AND CONCLUSION

Analysis

Decision making and recusal – subsection 6(1) and section 21

[239] I must determine whether Mr. Morneau, in his former capacity as Minister of Finance, contravened subsection 6(1) and section 21 of the Act in relation to his participation in the decisions to recommend funding for WE's Social Entrepreneurship program and to select WE as the administrator of the CSSG.

[240] Subsection 6(1) of the Act prohibits public office holders from making a decision that would place them in a conflict of interest. It reads as follows:

> **6. (1)** No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

[241] Section 4 of the Act describes the circumstances under which a public office holder would be in a conflict of interest for the purposes of subsection 6(1) of the Act. Section 4 reads as follows:

> **4.** For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

[242] Section 21 of the Act requires public office holders to recuse themselves from certain situations. It reads as follows:

> **21.** A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

[243] With respect to the alleged contravention of subsection 6(1), I am satisfied that neither Mr. Morneau's interests, nor those of his relatives were directly furthered in the matter under review. Mr. Morneau and his family were keenly aware of WE's domestic and international operations, having witnessed both first-hand.

[244] The purpose of the CSSG was to assist students and youth who had been adversely affected by disruptions caused by the COVID-19 pandemic. Neither of Mr. Morneau's daughters, whose association with WE was established well before the pandemic struck, were involved in any way with the discussions or decisions surrounding the student support measures. His eldest daughter was asked to speak on several occasions at WE Day events to promote her book, while the youngest was employed in an entry-level position in an affiliate that had no role in the administration of the CSSG. In other words, the connection between WE's request for funding for its Social Entrepreneurship proposal or its role

with the CSSG and Mr. Morneau's daughters' association with WE is too remote to merit further consideration. Nor was there any evidence suggesting any type of connection between Ms. McCain's association with WE and Mr. Morneau's involvement in the matter under examination.

[245] Mr. Morneau provided me with thousands of pages of documentary evidence detailing the many official and personal communications between WE and his ministerial office since he became a public office holder. This caused me to devote particular attention to the relationship between Mr. Morneau and Mr. Craig Kielburger.

[246] Under the Act, the prohibition against furthering the private interests of a friend is evaluated against the same standard as that of a relative or of the public office holder themselves. It is not necessary to determine the degree of the public office holder's involvement in the decision or whether they were motivated by an improper purpose; the impropriety in such cases is inherent. However, in contrast to a public office holder's relationship with a "relative," which can be verified empirically and objectively, whether a person is a public office holder's "friend" is not as easily discernible.

[247] In the *Watson Report*, Commissioner Dawson examined a similar relationship between a public office holder and a proponent for federal funding in the context of a possible contravention of subsection 6(1) and section 21 of the Act. The examination concerned alleged decisions made by Mr. Colin Watson, a member of the Toronto Port Authority Board of Directors in relation to a proposal to acquire a new ferry. It was alleged that the proponent, Mr. Robert Deluce, was a friend of the Board member.

[248] Commissioner Dawson noted that the term "friend" is not defined in the Act. She added that the word could be applied to a "range of relationships from the closest of lifelong companions to neighbours, colleagues, acquaintances or business associates that one sees only occasionally and where there is little emotional attachment." In her view, the rules against furthering the private interest of a friend was intended to apply to individuals "who have a close bond of friendship, a feeling of affection or a special kinship." This suggests that the circle of friends captured by the Act includes those with whom the relationship is close enough to reasonably call into question the judgment of a public office holder's decision making.

[249] Both individuals belonged to the same social circle and were professional acquaintances. However, they both said they did not solicit each other's company and their families did not socialize together. Despite Mr. Watson's frequent references to Mr. Deluce as his "friend" or "pal," Commissioner Dawson found these to be statements that "likely resulted from a habit of Mr. Watson claiming friendship with a broad range of people with whom he had no particularly close bond."

[250] As the case above illustrates, this Office has traditionally favoured a narrow interpretation of the term "friend" to include only the public office holder's closest personal friends. Colleagues, associates or members of a broad social circle were generally excluded from its application. I believe it is necessary to broaden the scope of the term to capture relationships where personal and professional interactions become intertwined to such an extent that it becomes difficult to draw the line between the two. In such cases, the public office holder's judgment in the exercise of their official powers and duties can also reasonably be impaired.

[251] While the "close bond" descriptor outlined in the *Watson Report* is helpful, an assessment of friendship should also be measured against more objective indicators. In my determination of whether Mr. Morneau and Mr. Kielburger are friends within the meaning of the Act, I examined, among other factors, the duration of and motive for the relationship; the nature, frequency and exclusivity of interactions; the sharing of meals and gifts in a personal setting; and mutual displays of trust, respect, affection or admiration.

[252] Both Mr. Morneau and the Kielburgers wrote that they first met shortly after Mr. Morneau's appointment to public office, in late 2015 or early 2016. At first blush, the timing suggests the primary motivation of the relationship is one between a constituent and a Member of Parliament, which militates against a finding of friendship. However, I can neither discount the fact that the Morneau family's social values aligned strikingly with those of the Kielburgers, nor the effect this may have caused on the evolution of the relationship. Mr. Morneau and his family were particularly involved in development projects in Kenya, which coincided with WE's efforts there and predated his first contact with WE and its co-founders. Mr. Craig Kielburger also struck a relationship with Mr. Morneau's spouse, a noted philanthropist, and at least one of his children, who had written a book on the experiences of Kenyan schoolgirls. His youngest daughter was later hired by WE. The alignment of values and the multiple family touchpoints undoubtedly facilitated a possible friendship.

[253] The evidence makes clear that Mr. Morneau and Mr. Kielburger were more than passing professional acquaintances or simply members of the same broad social circle. Several email exchanges denote a particular kinship and affection between Mr. Kielburger and the Morneaus. Invitations to WE Day events were personally extended by Mr. Kielburger to the entire Morneau family. On more than one occasion, Mr. Kielburger wrote to Mr. Morneau about the friendship between the two families and praised his daughter's participation in WE Day events. They addressed each other by their first names, even in correspondence relating to professional activities. Mr. Kielburger shared personal news with Mr. Morneau and Ms. McCain (i.e., the arrival of his child) and spoke fondly of their family members. Mr. Morneau indicated he likely had given Mr. Kielburger a small gift to celebrate the birth of his son. Mr. Morneau also wanted to personally deliver news of funding approval to Mr. Kielburger. On at least one occasion, the families socialized together at the Morneau residence. All these indicators point towards a friendship.

[254] In response to questions by this Office, Mr. Kielburger wrote that he did not consider the Morneaus to be personal friends. He explained that the Morneaus were among a group of individuals during their two family service trips in 2017. However, Mr. Kielburger was in attendance during both trips and had shared a private meal with Mr. Morneau's spouse and daughter while in Kenya. Mr. Kielburger added that his interactions with Mr. Morneau were always in his professional capacity, including his participation in a Sunday brunch with his family at the Morneaus' home. However, the evidence shows that Mr. Kielburger sometimes communicated directly with Mr. Morneau using his personal email address. When Mr. Kielburger communicated with other ministers, they were all addressed by their title and last name and through official channels. The tone of those emails differed significantly from his communications with Mr. Morneau.

[255] Mr. Kielburger's assertion that he does not consider Mr. Morneau or Ms. McCain to be his friends stands in stark contrast to the numerous exchanges between him and members of Mr. Morneau's family. To an objective reader, these communications are more akin to messages between friends than ones between a constituent and their Member of Parliament. I believe Mr. Kielburger was sincere in his appreciation for the Morneau family's support and genuine in his displays of affection and respect at that time. I also believe that through these numerous interactions, Mr. Morneau and his family were made to feel as though they had become personal friends with Mr. Kielburger.

[256] Furthermore, this relationship appeared to be common knowledge among ministerial staff in Mr. Morneau's office, since they viewed Mr. Kielburger as being "important to Bill" and noting that "he has been really good to us." It also lends credence to Ms. Kovacevic's characterization of the relationship as one between "besties."

[257] Consequently, for the reasons outlined above, I find that Mr. Morneau and Mr. Craig Kielburger were friends within the meaning of the Act.

[258] There is no doubt that Mr. Kielburger's interests would have been furthered had WE administered the CSSG. WE was the lone administrator of the CSSG and would have acquired a significant financial interest for its role. As co-founders, the Kielburgers hold an important interest in WE's affairs and derive an annual salary from ME to WE. Their involvement in WE's day-to-day operations is so prevalent that the organization's interests are also those of its co-founders.

[259] The acquisition of any financial interest by an individual or organization, regardless of whether it ultimately leads to an increase in their assets, is a private interest under the Act. As my predecessor stated in the *Trudeau Report* with respect to a federal grant awarded to the not-for-profit Global Centre for Pluralism, "[a]lthough government funding decisions are generally understood to be made to serve a public interest, this does not negate the fact that any government grant also specifically furthers the private interests of the recipient."

[260] Mr. Morneau does not dispute the fact that his and his family's proximity to the WE organization created the appearance of a conflict of interest. As I noted in the *Trudeau III Report*, the appearance of conflict is not captured by the Act's definition or prohibitions. However, the nature of the interactions between the Morneaus and the Kielburgers differs significantly from the ones examined in the *Trudeau III Report*. The friendship between the two families and the close proximity between the Kielburgers' and WE's interests created a potential conflict of interest, which became real when Mr. Morneau was called upon to make a decision that would provide an opportunity to further WE's private interests. In other words, any decision made by Mr. Morneau that could further the private interests of WE would be made improperly since it would also further the interests of its co-founder, Mr. Kielburger.

[261] Public office holders must arrange their affairs so as to minimize the possibility of conflicts arising and, when in doubt, must take measures to resolve those conflicts in the public interest. This is consistent with the object and spirit of the Act (paragraph 3(b)). In particular, section 21 requires a public office holder to recuse themselves from any discussion, decision, debate or vote on any matter in respect of which they would be in a conflict of interest. A recusal is more than a simple abstention from

voting; it requires the public office holder to physically remove themselves from the location where the matter is being decided, lest their mere presence be seen to influence the decision of other public office holders.

[262] The Act also provides that reporting public office holders must disclose all recusals to the Commissioner. Reporting public office holders must provide sufficient detail to identify the conflict of interest that was avoided. The Act provides that a public declaration to that effect must be posted on the Office's public registry, unless doing so could reveal, directly or indirectly, a confidence of the Queen's Privy Council or other protected information.

[263] I am of the view that Mr. Morneau should have reasonably known, because of his relationship with Mr. Kielburger, that any involvement in a decision regarding WE could place him in a conflict of interest as defined by the Act. This should have sprung to Mr. Morneau's mind when he received the proposal for WE's Social Entrepreneurship program on April 10, 2020, as well as during his subsequent briefings on the progress of the student aid package, when WE's Social Entrepreneurship proposal was again raised and the organization was also mentioned as a possible partner in the administration of the national service program.

[264] On April 19, 2020, when Mr. Morneau was advised that it would be more likely than not that WE would play an important role in the student relief initiative, he should have recused himself from subsequent discussions in accordance with section 21 of the Act and disclosed his recusal to this Office.

[265] Even though no formal decision had yet been made on WE's specific role, Mr. Morneau knew that WE would have to be brought "into the fold" on the student relief package. Accordingly, Mr. Morneau's recommendation to set aside $900 million in funding for the CSSG on April 21 and his participation in Cabinet discussions on May 22, where he ultimately voted in favour of the creation of the CSSG and the selection of WE as its administrator, provided an opportunity to improperly further WE's private interests because of his friendship with Mr. Craig Kielburger. In so doing, Mr. Morneau placed himself in a conflict of interest.

Preferential treatment – section 7

[266] I must also determine whether Mr. Morneau, in the exercise of his official powers, duties or functions, gave preferential treatment to WE based on the identity of a person who represented WE.

[267] Section 7 reads as follows:

> **7.** No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.

[268] I canvassed prior examination reports from this Office for a working definition of preferential treatment since that term is not defined in the Act. This Office has adopted a definition of preferential treatment as "treatment more favourable than might be accorded to anyone else in similar circumstances." Section 7 of the Act covers specific instances of preferential treatment based on the identity of a representative of the person or organization that is the recipient of this treatment.

[269] In the *Paradis Report* (March 2012), which also focused on allegations of a possible contravention of section 7 of the Act, Commissioner Dawson concluded there was a "strong indication" that the Honourable Christian Paradis, then minister of Public Works and Government Services Canada, had provided preferential treatment to a company (Green Power Generation). He had done so by arranging meetings between departmental officials and the company's founder, Mr. Rahim Jaffer, despite having minimal knowledge of the proposal. Commissioner Dawson also found that Mr. Paradis was motivated "to help a former caucus colleague." The preferential treatment was therefore based on the identity of the representative of the organization.

[270] Some parallels to this examination may also be drawn with the *Paradis Report* (December 2013). It was alleged in that examination that Mr. Paradis, then Minister of Natural Resources and Regional Minister for the province of Quebec, had made representations to the Honourable Diane Finley, then Minister of Human Resources and Skills Development, on behalf of a constituent. Specifically, Mr. Paradis had allegedly attempted to influence Ms. Finley to have an employment centre moved from Rimouski to Thetford Mines, and into a building owned by a company whose principal shareholder was an associate of Mr. Paradis' family and also a personal friend.

[271] Commissioner Dawson found that even though Mr. Paradis was not involved in the ultimate decision, it was impossible to dissociate his ministerial role from his role as an ordinary Member of Parliament when Mr. Paradis raised a constituency matter with a federal institution or a Cabinet colleague. Any influence Mr. Paradis exercised stemmed from his capacity as a minister of the Crown.

[272] In the matter under examination, the documentary evidence provided to me by Mr. Morneau demonstrates that the Department of Finance—and Mr. Morneau's ministerial office in particular—played a central role in the development of the student support measures. The CSSG, in particular, was just one undertaking in a much larger portfolio of programs coordinated through the Department of Finance.

[273] I found no evidence that Mr. Morneau was directly involved in the development of the CSSG's delivery model, including ESDC's decision to propose WE as its administrator. In Mr. Morneau's extensive disclosure package to this Office, none of the communications with WE suggested, much less revealed, that Mr. Morneau had provided instruction or direction to anyone—including his Cabinet colleagues, members of his ministerial staff and public servants—associated with the Social Entrepreneurship proposal.

[274] Nevertheless, I am of the view that Mr. Morneau's ministerial office, with Mr. Morneau's tacit approval, afforded WE preferential treatment in its discussions leading to the eventual development of the CSSG and in continuing to promote and support WE's original Social Entrepreneurship program.

[275] ESDC initially proposed a modest expansion of the Canada Service Corps' capacity with WE's participation following early discussions between Ms. Wernick and Mr. Kielburger. Yet WE felt it necessary to relay this information to Mr. Morneau's ministerial office. As a result, Mr. Singh inquired whether it would be possible to further expand WE's original proposal to 20,000 volunteer placements. Mr. Singh received WE's reworked Youth Summer Service proposal on April 21 and forwarded it to the Prime Minister's Office and the Department of Finance without reviewing, analyzing, or sharing the proposal with Mr. Morneau.

[276] WE's original Social Entrepreneurship proposal was also included in Mr. Morneau's briefing package of April 21 rather than the amended Youth Summer Service proposal. Mr. Singh testified that its inclusion and the $12 million budgetary set-aside was not formally approved by Mr. Morneau and was left in Annex 4 inadvertently. Moreover, Mr. Singh testified that the reference to the Social Entrepreneurship proposal was in fact a reference to the mechanics of the proposal, and not to the program itself. I have difficulty reconciling Mr. Singh's explanation of these events with the documentary evidence, which suggests that he believed the new Youth Summer Service proposal could be used as the basis of the CSSG, and he continued to promote and advocate for the original proposal as it made its way to the Prime Minister's Office.

[277] ESDC officials became aware of the scope of the undertaking and the anticipated early May roll-out only after Mr. Trudeau's public announcement on April 22. It became clear to Ms. Wernick that existing federal programs could not deliver such an ambitious project in such a short period of time. Even before April 23, when Ms. Wernick was given the green light to begin "courting" WE, it had already reworked its original proposal to meet Mr. Singh's requests. Given the deadline imposed by the Department of Finance, ESDC was left with no alternative but to reach out to WE. And because of its revamped proposal, WE was positioned to be the lone candidate who could administer the program within the new parameters. It is therefore not surprising that this was the recommendation presented to Ms. Chagger's office on April 28.

[278] The degree of involvement of Mr. Morneau's ministerial office in files relating to WE is not unique to the matter under examination. The documentary evidence shows several other instances where Mr. Morneau and members of his ministerial staff provided assistance to representatives of WE that, in my view, fell outside the scope of normal and proper use of ministerial resources. This treatment ranged from facilitating introductions with federal and provincial counterparts in the context of funding initiatives or on matters that fell outside his mandate to directly intervening with other orders of government on behalf of a constituent. This treatment continued up to and including the period under review.

[279] Mr. Morneau explained that, like many constituent organizations in his riding, WE reached out to his staff for guidance and support to seek appropriate sources of funding from all levels of government. Mr. Morneau added that, as with many projects, his ministerial office would assess and engage to provide assistance where possible, without his instruction.

[280] Although WE is an established charitable organization whose projects aspire to serve a greater good, the organization and its representatives must still be treated like any other constituent stakeholder. It must make requests for assistance using the appropriate channels and must be redirected to the relevant authorities without preferential treatment particularly when, as in this case, personal and professional relationships were blurred.

[281] It has long been understood that it would be improper for a minister or a parliamentary secretary to conflate their ministerial duties with their parliamentary duties. This Office has issued compliance orders and produced examination reports against ministers or parliamentary secretaries who had, for instance, acted improperly by writing letters of support to an administrative tribunal (the *Gill Report*) or who were admonished simply for using their ministerial titles when assisting constituents, even though no other contravention was found (the *Clement Report*).

[282] As Commissioner Dawson wrote in the *Clement Report*: "ministers, as Members, have duties towards their constituents. However, in carrying out these duties, ministers should exercise some caution. When representing constituents, they should not use their positions as ministers to provide greater assistance to their constituents than to other Canadians in relation to their own department or larger portfolio."

[283] Following my examination of the documentary evidence, I am of the view Mr. Morneau afforded WE preferential treatment by permitting members of his ministerial staff to disproportionately assist a constituent. This unfettered access to the Office of the Minister of Finance was based, in my view, on the relationship between Mr. Morneau and Mr. Craig Kielburger, whom I found to be friends within the meaning of the Act. This treatment also constitutes, in my view, an impropriety under subsection 6(1) of the Act.

Conclusion

[284] Accordingly, I find that Mr. Morneau has contravened subsection 6(1), section 7 and section 21 of the Act.



Mario Dion
Conflict of Interest and Ethics Commissioner

May 13, 2021

TAB 14

(2) Section 126 of the *Criminal Code* does not apply in respect of a contravention of subsection (1).

1995, c. 12, s. 5; 2003, c. 10, s. 9.

Investigations

Investigation

10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.

Exception

(1.1) The Commissioner may refuse to conduct or may cease an investigation with respect to any matter if he or she is of the opinion that

(a) the matter is one that could more appropriately be dealt with according to a procedure provided for under another Act of Parliament;

(b) the matter is not sufficiently important;

(c) dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose; or

(d) there is any other valid reason for not dealing with the matter.

Powers of investigation

(2) For the purpose of conducting the investigation, the Commissioner may

(a) in the same manner and to the same extent as a superior court of record,

(i) summon and enforce the attendance of persons before the Commissioner and compel them to give oral or written evidence on oath, and

(ii) compel persons to produce any documents or other things that the Commissioner considers relevant for the investigation;

and

(b) administer oaths and receive and accept information, whether or not it would be admissible as evidence in a court of law.

Investigation in private

(3) The investigation shall be conducted in private.

Evidence in other proceedings

(4) Evidence given by a person in the investigation and evidence of the existence of the investigation are inadmissible against the person in a court or in any other proceeding,

other than in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made to the Commissioner.

Opportunity to present views

(5) Before finding that a person has breached the Code, the Commissioner shall give the person a reasonable opportunity to present their views to the Commissioner.

Confidentiality

(6) The Commissioner, and every person acting on behalf of or under the direction of the Commissioner, may not disclose any information that comes to their knowledge in the performance of their duties and functions under this section, unless

(a) the disclosure is, in the opinion of the Commissioner, necessary for the purpose of conducting an investigation under this section or establishing the grounds for any findings or conclusions contained in a report under section 10.5;

(b) the information is disclosed in a report under section 10.5 or in the course of a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made to the Commissioner; or

(c) the Commissioner believes on reasonable grounds that the disclosure is necessary for the purpose of advising a peace officer having jurisdiction to investigate an alleged offence under this or any other Act of Parliament or of the legislature of a province.

Advice to peace officers

(7) If, during an investigation under this section, the Commissioner believes on reasonable grounds that a person has committed an offence under this or any other Act of Parliament or of the legislature of a province, the Commissioner shall advise a peace officer having jurisdiction to investigate the alleged offence and immediately suspend the Commissioner's investigation.

Suspension of investigation

(8) The Commissioner shall immediately suspend an investigation under this section if he or she discovers that the subject-matter of the investigation is also the subject-matter of an investigation to determine whether an offence under this or any other Act of Parliament or of the legislature of a province has been committed or that a charge has been laid with respect to that subject-matter.

Investigation continued

(9) The Commissioner may not continue an investigation under this section until any investigation or charge regarding the same subject-matter has been finally disposed of.
1995, c. 12, s. 5; 2003, c. 10, s. 10; 2004, c. 7, ss. 23, 39; 2006, c. 9, ss. 77, 81.

Report on investigation

10.5 (1) After conducting an investigation, the Commissioner shall prepare a report of the investigation, including the findings, conclusions and reasons for the Commissioner's

conclusions, and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Contents of report

(2) The report may contain details of any payment received, disbursement made or expense incurred by an individual who is required to file a return under subsection 5(1) or by an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1), in respect of any matter referred to in any of subparagraphs 5(1)(a)(i) to (vi) or 7(1)(a)(i) to (v), as the case may be, or of any payment made by the client of an individual who is required to file a return under subsection 5(1) in respect of any matter referred to in any of subparagraphs 5(1)(a)(i) to (vi), any communication referred to in paragraph 5(1)(a) or any meeting referred to in paragraph 5(1)(b), if the Commissioner considers publication of the details to be in the public interest.

1995, c. 12, s. 5; 2003, c. 10, s. 11; 2004, c. 7, ss. 23, 39; 2006, c. 9, s. 78.

10.6 [Repealed, 2006, c. 9, s. 78]

Reports to Parliament

Annual report

11 The Commissioner shall, within three months after the end of each fiscal year, prepare a report with regard to the administration of this Act during that fiscal year and submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

R.S., 1985, c. 44 (4th Supp.), s. 11; 1995, c. 12, s. 6; 2004, c. 7, s. 24; 2006, c. 9, s. 78.

Special reports

11.1 (1) The Commissioner may, at any time, prepare a special report concerning any matter within the scope of the powers, duties and functions of the Commissioner if, in the opinion of the Commissioner, the matter is of such urgency or importance that a report on it should not be deferred until the next annual report.

Tabling of special report

(2) The Commissioner shall submit the special report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

2006, c. 9, s. 78.

TAB 15

[17] Counsel for the respondents submits that the applicant fails on the first and third branches of the public interest standing test. The application allegedly does not raise a justiciable issue, insofar as it concerns Parliament's own means of holding the government to account. Relying on *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49 and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, the respondents argue that the Court should not overstep the bounds of its constitutional role when deciding whether to grant public interest standing. Moreover, the respondents claim that the present application is not a reasonable and effective way to raise the issue, as it relates to a non-adversarial process between the Commissioner and public office holders to reach agreement on compliance measures, thereby not resulting in a "decision" or "order". Equally relevant is the fact that section 44 of the *Act* provides another review mechanism, allowing parliamentarians who have reasonable grounds to believe a public office holder has contravened the *Act* to request that the Commissioner examine the matter.

[18] There is no doubt in my mind that the issues raised by the applicant are serious. Specifically, the question raised in regard to the reasonableness of the Commissioner's interpretation of section 29 of the *Act* constitutes an important question that is far from frivolous. The same is true of the question of whether or not the establishment of a conflict screen circumvents the requirement, pursuant to section 25, to report each recusal arising due to a conflict of interest. These issues are also clearly justiciable, for the purpose of assessing public interest standing, as they concern the correct interpretation to be given to provisions of the *Act*. The Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not stray beyond its proper legislative mandate. This is clearly and eminently a judicial function.

[Emphasis added]

[43] It seems to me these comments also speak to the justiciability of the decision in the case at bar: there is the question of who is and who is not staff of the Minister, a question concerning the correct interpretation of provisions of the *Lobbying Act*, RSC 1985, c 44 (4th Supp) [*Lobbying Act*]. Again, it seems more likely that the Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not unreasonably constrain her legislative mandate. As Justice de Montigny said, so too here: "[t]his is clearly and eminently a judicial function." The Lobbying Commissioner herself has called for review; that review would likely be aided by judicial input.

TAB 16

[20] The Commissioner found no evidence that Mr. Bergen or Ms. O'Born ever attempted to lobby Ms. Freeland herself. Further, the Commissioner found that neither Mr. Lametti in his capacity as Parliamentary Secretary, nor any member of his staff were "staff" of Ms. Freeland's office for the purpose of Rule 9.

[21] With respect to Rule 6, the Commissioner found that the evidence did not support a finding that either Mr. Bergen or Ms. O'Born placed Ms. Freeland in a real or apparent conflict of interest.

III. Issues and Standard of Review

[22] There are two issues raised by this application:

A. Did the Commissioner err in her interpretation and application of Rule 9 of the Code? and

B. Did the Commissioner err in her interpretation and application of Rule 6 of the Code?

[23] The Respondent also initially raised the issue of whether the Court had jurisdiction to hear this application. However, by the time of the hearing, it had conceded that in view of the finding of this Court in *Democracy Watch v Canada (Attorney General)*, 2021 FC 613, the Applicant had public interest standing and could seek judicial review of the Reports, which were made pursuant to section 10.5 of the Act. I agree that no issue of jurisdiction remains and that the present matter is distinguishable from the findings of the Court in *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133, which dealt with a refusal to investigate a public request.

[24] The parties assert, and I agree, that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at para 25; *Portnov v Canada (Attorney General)*, 2021 FCA 171 at paras 26-27.

[25] In conducting reasonableness review, the Court must determine whether the decision under review is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada*

TAB 17

Report to House of Commons

7. (1) The Auditor General shall report annually to the House of Commons

(*a*) on the work of his office; and

(*b*) on whether, in carrying on the work of his office, he received all the information and explanations he required.

Rapport à la Chambre des communes

7. (1) Le vérificateur général prépare à l'intention de la Chambre des communes un rapport annuel dans lequel :

a) il fournit des renseignements sur les activités de son bureau;

b) il indique s'il a reçu, dans l'exercice de ces activités, tous les renseignements et éclaircissements réclamés.

Idem

(2) Each report of the Auditor General under subsection (1) shall call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons, including any cases in which he has observed that

(*a*) accounts have not been faithfully and properly maintained or public money has not been fully accounted for or paid, where so required by law, into the Consolidated Revenue Fund;

(*b*) essential records have not been maintained or the rules and procedures applied have been insufficient to safeguard and control public property, to secure an effective check on the assessment, collection and proper allocation of the revenue and to ensure that expenditures have been made only as authorized;

(*c*) money has been expended other than for purposes for which it was appropriated by Parliament;

(*d*) money has been expended without due regard to economy or efficiency; or

(*e*) satisfactory procedures have not been established to measure and report the effectiveness of programs, where such procedures could appropriately and reasonably be implemented.

Idem

(2) Dans le rapport mentionné au paragraphe (1), le vérificateur général signale tout sujet qui, à son avis, est important et doit être porté à l'attention de la Chambre des communes, notamment les cas où il a constaté que :

a) les comptes n'ont pas été tenus d'une manière fidèle et régulière ou des deniers publics n'ont pas fait l'objet d'un compte rendu complet ou n'ont pas été versés au Trésor lorsque cela est légalement requis;

b) les registres essentiels n'ont pas été tenus ou les règles et procédures utilisées ont été insuffisantes pour sauvegarder et contrôler les biens publics, assurer un contrôle efficace des cotisations, du recouvrement et de la répartition régulière du revenu et assurer que les dépenses effectuées ont été autorisées;

c) des sommes d'argent ont été dépensées à d'autres fins que celles auxquelles le Parlement les avait affectées;

d) des sommes d'argent ont été dépensées sans égard à l'économie ou à l'efficience;

e) des procédures satisfaisantes n'ont pas été établies pour mesurer et faire rapport sur l'efficacité des programmes dans les cas où elles peuvent convenablement et raisonnablement être mises en œuvre.

Submission of report to Speaker and tabling in the House of Commons

(3) Each annual report by the Auditor General to the House of Commons shall be submitted to the Speaker of the House of Commons on or before December 31 in the year to which the report relates and the Speaker of the House of Commons shall lay each such report before the House of Commons forthwith after receipt thereof by him or, if that House is not then sitting, on the first day next thereafter that the House of Commons is sitting. 1976-77, c. 34, s. 7.

Soumission du rapport au président et dépôt devant la Chambre des communes

(3) Le rapport annuel du vérificateur général à la Chambre des communes est soumis au président de la Chambre des communes au plus tard le 31 décembre de l'année à laquelle il se rapporte; ce dernier doit le déposer devant la Chambre des communes immédiatement ou, si elle ne siège pas, le premier jour de séance ultérieur. 1976-77, ch. 34, art. 7.

Special report

8. (1) The Auditor General may make a special report to the House of Commons on any matter of pressing importance or urgency that,

Rapport spécial

8. (1) Le vérificateur général peut adresser un rapport spécial à la Chambre des communes sur toute affaire d'une importance ou d'une

TAB 18

desirability of a sphere of "substantial internal autonomy" for universities.

Does s. 7(1)(*b*) mean that the Auditor General has no judicial review remedy for any entitlements that he may have under s. 13(1)? Is the reporting remedy contained therein an adequate and, therefore, exclusive remedy? Before interpreting the import of s. 7(1)(*b*), three preliminary observations are necessary. First, the alternative remedial forum, the House of Commons, is a purely political forum in contrast to the administrative bodies in *Terrasses Zarolega* and *Harelkin*, *supra*. Part of the question of adequacy in those cases resided in the fact that these bodies resembled the judiciary to some extent in terms of their capacities and nature. In the present case, the Court is called upon to decide whether the political remedy in s. 7(1)(*b*) is an adequate remedy for s. 13(1) entitlements, assuming a s. 13(1) entitlement. An inquiry into adequacy in this context very obviously connotes notions of justiciability. The second and related observation is that the Auditor General has brought suit not *qua* ordinary citizen but in his capacity as the servant of Parliament. While in normal course (that is, in a suit by a citizen) a political remedy would not meet the adequacy test, different considerations are introduced when suit is brought by a political servant, in his or her official capacity. This must particularly be the case when the remedial political forum is also the political master of that political servant. Thirdly, it is significant that the Auditor General seeks a remedy against other political actors, namely Ministers of the Crown and Crown servants (Deputy Ministers). This directly raises issues related to the

loi ou la *common law*. Juger de ce qui est approprié ou ne l'est pas comportera souvent l'examen normatif de la justiciabilité évoqué précédemment dans le contexte des arrêts *Temple v. Bulmer*, *British Railways Board v. Pickin* et *Operation Dismantle*, précités. Le juge Beetz semble s'être engagé dans une appréciation de ce type lorsqu'il a examiné, dans *Harelkin*, précité, l'avantage que présenterait une sphère d'«autonomie interne appréciable» pour les universités.

L'alinéa 7(1)*b*) signifie-t-il que le vérificateur général ne peut recourir au contrôle judiciaire pour faire valoir les droits qu'il peut avoir en vertu du par. 13(1)? Le rapport qui y est visé constitue-t-il un recours approprié et, par conséquent, exclusif? Avant d'interpréter l'al. 7(1)*b*), trois observations préliminaires s'imposent. En premier lieu, la tribune pouvant être saisie du recours, soit la Chambre des communes, est une tribune purement politique, par opposition aux organismes administratifs en cause dans *Terrasses Zarolega* et *Harelkin*, précités. Un des éléments du caractère approprié du recours dans ces affaires résidait dans le fait que ces organismes, de par leurs pouvoirs et leur nature, ressemblaient dans une certaine mesure au judiciaire. En l'espèce, on demande à la Cour de décider si le recours politique visé à l'al. 7(1)*b*) est un recours approprié pour les droits conférés par le par. 13(1), en présumant que de tels droits existent. Dans ce contexte, un examen du caractère approprié du recours renvoie, de façon très évidente, aux notions de justiciabilité. En second lieu et de façon connexe, soulignons que c'est à titre de préposé du Parlement et non en sa qualité de citoyen ordinaire que le vérificateur général a intenté sa poursuite. Alors qu'en temps normal (c'est-à-dire dans une poursuite intentée par un citoyen), un recours politique ne satisferait pas au critère de l'adéquation, des considérations d'un autre ordre entrent en jeu lorsque la poursuite est intentée par un préposé politique, en sa qualité officielle. Ceci est d'autant plus vrai lorsque la tribune politique susceptible d'être saisie du recours est également le maître politique du préposé politique en question. En troisième lieu, il est significatif que le vérificateur général cherche à exercer un recours contre d'autres acteurs politiques, savoir des ministres et des préposés de la

constitutional balance of powers in the Westminster, and our, system of government.

The following analysis proceeds in two stages. I will first seek to discern from the terms of the *Auditor General Act* what Parliament itself may be taken to have intended on the question of whether s. 7(1)(*b*) is an exclusive remedy. This will be an attempt to determine, as far as possible, the enacting Parliament's view of the justiciability of the s. 13(1) claim. I will then inquire into the adequacy of s. 7(1)(*b*) as a remedy and, therefore, the appropriateness of finding s. 13(1) to be nonjusticiable.

It was suggested above that the clarity of the linkage between a statutory right and a statutory remedy is relevant to determining Parliament's view of the appropriateness of the remedy. Even more fundamentally, a prior question is whether a provision is in fact a remedy at all, let alone an adequate one. Section 7(1)(*b*) admittedly is not cast in explicitly remedial terms. For ease of reference, I will again set out the section:

> **7.** (1) The Auditor General shall report annually to the House of Commons
>
> . . .
>
> (*b*) on whether, in carrying on the work of his office, he received all the information and explanations he required.

The section refers to a duty to report of the Auditor General, but can, in my view, simultaneously be characterized as a reporting remedy.

The reference to "information and explanations" in s. 7(1)(*b*) is almost exactly paralleled by s. 13(1) which refers to "information" and then "information, reports and explanations"; further, s. 14(2) and (3) refer again to "information and explanations". Section 13(1) sets out an entitlement of access to information while s. 7(1)(*b*)

Couronne (les sous-ministres). Ainsi sont directement soulevées des questions reliées à l'équilibre constitutionnel des pouvoirs dans le système gouvernemental de Westminster et, partant, dans le nôtre.

L'analyse qui suit comporte deux étapes. Je chercherai d'abord, à partir du texte de la *Loi sur le vérificateur général*, à découvrir l'intention du Parlement quant à l'exclusivité du recours visé à l'al. 7(1)*b*). Il s'agira ainsi de déterminer, dans la mesure possible, sa conception de la justiciabilité des demandes fondées sur le par. 13(1). J'examinerai ensuite la question de savoir si l'al. 7(1)*b*) constitue une voie de recours appropriée et s'il convient, le cas échéant, de conclure à la non-justiciabilité des demandes présentées en vertu du par. 13(1).

On a allégué précédemment que l'évidence du lien entre un droit et un recours conférés par la loi était un facteur utile pour discerner l'intention du Parlement quant au caractère approprié de ce recours. Mais plus fondamentalement encore, se pose au préalable la question de savoir si une disposition constitue bel et bien un recours, avant même de parler d'adéquation. Les termes de l'al. 7(1)*b*), il est vrai, ne visent pas explicitement un recours. Pour faciliter l'analyse, je cite à nouveau cet alinéa:

> **7.** (1) Le vérificateur général prépare à l'intention de la Chambre des communes un rapport annuel dans lequel
>
> . . .
>
> *b*) il indique s'il a reçu dans l'exercice de ces activités, tous les renseignements et éclaircissements réclamés.

Cet alinéa impose au vérificateur général l'obligation de faire un rapport mais on peut simultanément, à mon avis, considérer qu'il lui offre ainsi un recours sous forme de rapport.

La mention de «renseignements et éclaircissements» à l'al. 7(1)*b*) fait presque exactement pendant aux termes «renseignement» et, plus loin, «renseignements, rapports et explications» figurant au par. 13(1). Il est également question de «renseignements et éclaircissements» aux par. 14(2) et (3). Le paragraphe 13(1) établit un droit d'accès à

envisages that access might not be given and obligates the Auditor General to report such an eventuality. There must be some purpose for conveying such information to the House of Commons and one must assume that Parliament intended the House of Commons to exercise its judgment as to whether to seek the information its servant had not been able to secure on its behalf.

Support for the view that s. 7(1)(*b*) embodies a reporting remedy can be found in the French text of s. 7(1)(*b*). The English text reads "... whether ... he received all the information and explanations he required" (emphasis added); the French version reads "... s'il a reçu [...] tous les renseignements et éclaircissements réclamés» (emphasis added). The French text clearly conveys the idea of the Auditor General having been denied information which he actively claimed or demanded and also serves to suggest that the word "required" in s. 7(1)(*b*) is not to be understood in the passive sense of "needed" but rather in the active sense in which it is used in s. 13(1) in the phrase "he is also entitled to require and receive ...". Thus, there is a linkage between s. 13(1) and s. 7(1)(*b*). Section 13(1) contains the entitlement while s. 7(1)(*b*) is the corresponding remedy. I do not think it accurate to conceive of s. 13(1) as itself a remedy, except in the attenuated sense of the statutory authority for the Auditor General's requests for information according to his own view of his entitlements. Once a dispute arises as to these s. 13(1) entitlements, the issue arises as to whether the courts should exercise inherent powers of judicial review to enforce that right or whether they should interpret the s. 7(1)(*b*) remedy as ousting that review—precisely the issue under discussion.

It is also worthwhile noting that not only s. 7(1)(*b*) and the paramountcy clause of s. 13(1) but also s. 7(2)(*d*) was added in 1977 when the Auditor General's rights and duties were consolidated into the *Auditor General Act*, for the first time: see Hugessen J., at pp. 433-37. It is not unreasonable to take this into account as being, at the very least, consistent with Parliament having

l'information tandis que l'al. 7(1)*b*) prévoit l'éventualité où cet accès serait refusé et oblige le vérificateur général à en faire rapport. La communication de ce refus à la Chambre des communes vise assurément certaines fins et l'on doit présumer que le Parlement entendait que la Chambre des communes exerce son jugement quant à savoir s'il lui fallait solliciter les renseignements que son préposé n'avait pu obtenir en son nom.

La version française de l'al. 7(1)*b*) renforce l'argument voulant que le rapport qui y est visé constitue un recours. Le texte anglais dit: «... whether ... he received all the information and explanations he required" (je souligne), et la version française: «... s'il a reçu [...] tous les renseignements et éclaircissements réclamés» (je souligne). Le texte français traduit clairement l'idée que le vérificateur général s'est vu refuser des renseignements qu'il a activement demandés ou réclamés; il tend à démontrer également que le mot anglais «required» dans cet alinéa ne doit pas être pris au sens passif de «needed» (nécessaires) mais plutôt au sens actif dans lequel il est utilisé au par. 13(1) dans l'expression «he is also entitled to require and receive ...» («il peut exiger»). Il y a donc un lien entre le par. 13(1) et l'al. 7(1)*b*): le par. 13(1) confère un droit et l'al. 7(1)*b*) crée le recours correspondant. Je ne crois pas qu'il soit exact de concevoir le par. 13(1) comme un recours en soi, sauf dans le sens atténué du pouvoir que la loi confère au vérificateur général de demander les renseignements auxquels il estime lui-même avoir droit. Lorsqu'un différend survient au sujet d'un droit visé au par. 13(1), il faut se demander si les tribunaux devraient exercer leur pouvoir inhérent de contrôle judiciaire pour faire respecter ce droit ou s'ils devraient interpréter le recours visé à l'al. 7(1)*b*) comme l'exclusion de ce contrôle—précisément la question soumise à notre examen.

Il convient également de souligner que non seulement l'al. 7(1)*b*) et la disposition attributive de prépondérance qu'est le par. 13(1), mais également l'al. 7(2)*d*) ont été ajoutés en 1977 lorsque les droits et les fonctions du vérificateur général ont été réunis, pour la première fois, dans la *Loi sur le vérificateur général*: voir l'opinion du juge Hugessen, aux pp. 433 à 437. Il n'est pas déraison-

TAB 19

R (on the application of Privacy International) v Investigatory Powers Tribunal

[2019] UKSC 22

SUPREME COURT

LADY HALE P, LORD REED DP, LORD KERR, LORD WILSON, LORD CARNWATH, LORD LLOYD-JONES JJSC AND LORD SUMPTION

3, 4 DECEMBER 2018, 15 MAY 2019

Investigatory powers – Investigatory Powers Tribunal – Exercise of tribunal's jurisdiction – Statute providing decisions of tribunal '… shall not be subject to appeal or be liable to be questioned in any court' – Whether decision of tribunal amenable to judicial review – Regulation of Investigatory Powers Act 2000, s 67(8).

The Investigatory Powers Tribunal ('IPT') was a special tribunal established under the Regulation of Investigatory Powers Act 2000 with jurisdiction to examine, among other things, the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters ('the intelligence services'). Section 67(8)[a] of the 2000 Act provided: 'Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.' The claimant, Privacy International, sought judicial review of a decision of the IPT relating to the proper construction and scope of s 5 of the Intelligence Services Act 1994, which empowered the Secretary of State to issue a warrant 'authorising the taking of such action as is specified in the warrant in respect of any property so specified' if he considered, among other things, that such action was necessary for the purpose of assisting the intelligence services in carrying out their functions, and its alleged use by the intelligence services to authorise computer network exploitation. The Divisional Court, however, at a preliminary issue hearing, found that s 67(8) prohibited judicial review of the IPT decision. The Court of Appeal dismissed the appeal and Privacy International appealed further to the Supreme Court. The issues for the court were: (i) whether s 67(8) 'ousts' the supervisory jurisdiction of the High Court to quash a judgment of the IPT for error of law; and (ii) whether, and, if so, in accordance with what principles, Parliament might by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction.

Held – The appeal would be allowed (Lord Reed DP, Lord Wilson and Lord Sumption dissenting). The judicial review jurisdiction of the High Court was not excluded by s 67(8) of the 2000 Act. On established authority, a determination vitiated by any error of law, jurisdictional or not, was to be treated as no determination at all. The reference to such a determination was

a Section 67, so far as material, is set out at [1], [8], [9], below.

[**108**] Does the specific reference to 'decisions as to whether they have jurisdiction' make any difference? It would be odd if it did. As has been seen the relevant decision in this case raised a short point of law, turning principally on the reading of the word 'specified' in s 5. On no ordinary view could it be regarded as a decision 'as to whether [the IPT] had jurisdiction', nor even as a decision 'as to jurisdiction' under the apparently broader language of the 1985 Act. Although the arguments before us have proceeded on the basis that the change of wording made no material difference, the present wording seems designed if anything to emphasise that the exclusion is directed specifically at decisions about jurisdiction made by the IPT itself.

[**109**] If, however, those words are read in the language of *Anisminic* there is no problem. The exclusion applies only to a legally valid decision relating to jurisdiction. In the parenthesis, as in the remainder of the subsection, a decision which is vitiated by error of law, whether 'as to jurisdiction' or otherwise, is no decision at all. While of course respect is due to the contrary view expressed obiter by Lord Brown in the *A* case (para [19] above), the point was not in issue and there was no argument on it.

[**110**] This does not necessarily mean that the words in parenthesis are otiose. As Ms Rose points out, at the time of the 1985 Act, the potential significance of the distinction between issues of fact and law, in the context of jurisdiction, had been highlighted by the House of Lords in *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74. Closer to home the decision of the IPT itself in *C v Police* (see para [7] above) is an example of the kind of decision as to jurisdiction which might well involve issues of fact to which the exclusion could be said to apply without engaging the presumption against ouster.

[**111**] However, whether that is a likely interpretation of Parliament's intentions, or indeed whether or not the parenthesis is redundant, is in my view beside the point. Judicial review can only be excluded by 'the most clear and explicit words' (*Cart* [2010] 1 All ER 908, [2011] QB 120 (para [31])). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind. (If so, as Lord Wilson observes, they would have gained support from the distinguished author of the notes to the 1985 Current Law Statutes.) But one is entitled to ask why they did not use more explicit wording. With *O'Reilly v Mackman* in mind, the natural focus of attention would have been, not on potential challenges to the tribunal's own decisions 'as to' jurisdiction, but on jurisdictional or legal challenges to its substantive decisions generally. A more explicit formula might perhaps have anticipated the extreme wording of the bill presented in 2003 (para [101] above), excluding challenges to any determination or 'purported' determination as 'a nullity by reason of lack of jurisdiction, error of law, or any other matter'. The reason for not adopting that course may simply be that, as in 2003, it might not have been expected to survive Parliamentary scrutiny.

[**112**] So far as concerns the features of the IPT regime on which the Court of Appeal relied, I agree generally with Ms Rose's responses (paras [24]–[25] above). I am unimpressed by arguments based on the security issues involved in many (though not all) of the IPT's cases. As this case shows, the tribunal itself is able to organise its procedures to ensure that a material point of law can be considered separately without threatening any security interests. The

"All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory *implication*."

[32] I need not multiply citations. A conspicuous case is the seminal authority of *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147 which abolished (for most purposes) the distinction between errors of law within and without jurisdiction, ushering in the modern constitutional rule that any error of law by a public decision-maker is beyond his jurisdiction. Older instances include *Cardiffe Bridge Case* (1700) 1 Salk 146, 91 ER 135, *R v Berkley* (1754) 1 Keny 80 at 101, 96 ER 923 at 931, *R v Cheltenham Comrs* (1841) 1 QB 467, 113 ER 1211, and *Ex p Bradlaugh* (1878) 3 QBD 509. More recent instances include *R v Secretary of State for the Home Dept, ex p Fayed* [1997] 1 All ER 228 at 235–237, [1998] 1 WLR 763 at 771–773. Against this background it cannot be supposed that judicial review may be ousted by an implication, far less one contained in a formula which amounts in effect to a deeming provision. But that is the sum of the defendants' case.'

[**162**] It has been suggested, on the basis of *Racal*, that while s 67(8) does not exclude judicial review on other grounds such as a lack of subject-matter jurisdiction or want of natural justice, that section excludes the jurisdiction of the High Court to entertain a challenge to the Tribunal's decisions on the merits i e it excludes judicial review on grounds which would be tantamount to an appeal on the merits. It seems to me, however, that this places more weight on *Racal* than that authority can bear. It provides an insecure foundation because, as is demonstrated by the later decisions referred to above, at the date of *Racal* the legal principles in play were still evolving. As a result, it is not appropriate to allow the reasoning of Lord Diplock in *Racal* to influence the issue of interpretation in the present case.

[**163**] Turning to the issue of interpretation of s 67(8), I accept that the role of the IPT is judicial. As a result, there is no presumption in favour of restricting its field or of restricting its power to decide issues of law. However, if the jurisdiction of the High Court can be excluded at all, it requires the most clear and explicit words. As Lord Reid observed in *Anisminic* ([1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 170):

'It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.'

[**164**] Subject to one point, the wording of s 67(8) closely resembles that of s 4(4) of the Foreign Compensation Act 1950 which was the subject of *Anisminic*:

'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.'

There, the House of Lords held that 'determination' in s 4(4) did not include everything which purported to be a determination, but which was not in fact a determination because the Commission had misconstrued the statutory provision defining its jurisdiction. Reference has been made above to the way

in which the law subsequently developed so as to remove the distinction between jurisdictional and non-jurisdictional errors of law. By 1985, when s 7(8) of the Interception of Communications Act 1985 was enacted, it would have been entirely clear from the judgment of Lord Diplock in *O'Reilly v Mackman* that a determination founded on an error of law, whether it would previously have been characterised as jurisdictional or not, was not to be regarded as a determination at all. Having regard to this ground-breaking development at common law, if it had been the intention of Parliament to exclude the jurisdiction of the High Court in respect of such decisions, it could be expected to have employed language which excluded jurisdiction not only in respect of 'determinations, awards, orders and other decisions of the Tribunal' but also in respect of purported determinations, awards and other decisions. It is a striking feature of s 67(8) and its predecessor that it failed to do so.

[**165**] The one point of distinction between s 4(4) of the Foreign Compensation Act 1950, on the one hand, and s 67(8) on the other, is the inclusion in the latter of the words in parenthesis '(including decisions as to whether they have jurisdiction)'. To my mind, however, these words are not apt to extend the exclusion of the jurisdiction of the High Court to what purport to be decisions but in law are not to be so regarded. While it is now established that a decision based on an error of law is not to be regarded as a decision for this purpose, this notion does not easily fit within the description of a decision as to whether it has jurisdiction. If the IPT takes a decision which is founded on an error of law, it is not in any real sense taking a decision as to whether it has jurisdiction. If the intention was to exclude the jurisdiction of the High Court from purported decisions founded on an error of law, it was necessary to say so in clear terms. Clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill 2003, to which Lord Carnwath refers at para [101] of his judgment, is a more recent example of an attempt to achieve the required degree of clarity if such a provision is to be effective. That provision, which was not enacted, can at least be said to have squarely confronted what it sought to achieve as required by the principle of legality. To my mind, s 67(8) does not satisfy this requirement.

[**166**] It may be that the explanation of the words in parenthesis is, as submitted by Ms Dinah Rose QC on behalf of the appellant, that they were intended to refer to determinations of precedent fact, a matter which was highly topical in 1985 following the decision of the House of Lords in *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74. On this basis the words in parenthesis in s 67(8) could be considered to have the effect that decisions of the IPT on issues of precedent fact going to its jurisdiction, but not issues of law, would be beyond the scope of review. However, it is not necessary to come to a concluded view on this point. For present purposes it is sufficient that the words employed in s 67(8) do not make provision with sufficient clarity for the exclusion of the review jurisdiction of the High Court in respect of errors of law.

[**167**] In coming to this conclusion, I have taken full account of the various features of the statutory scheme to which Sir James Eadie QC has drawn attention in support of the respondents' case. He is correct in his submission that there is here a special allocation of judicial responsibility to the IPT in the national security context (s 67(3)(a)). Similarly, the IPT's rules and procedures create a 'bespoke' system particularly well suited to the adjudication of controversial issues in the context of national security and directed to protecting the public interest. Furthermore, there can be no doubt as to the

TAB 20

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190301

Dockets: A-235-17
A-236-17

Citation: 2019 FCA 41

2019 FCA 41 (CanLII)

CORAM: **NADON J.A.**
GAUTHIER J.A.
GLEASON J.A.

Docket: A-235-17

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

and

FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD

Intervener

Docket: A-236-17

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

2019 FCA 41 (CanLII)

[30] Finally, contrary to what the Board says, its interpretation runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch: see *Dunsmuir* at paras. 27-29; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13, 421 D.L.R. (4th) 381. Given recent pronouncements by the Supreme Court of Canada, the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited, if such issues may still even be said to exist at all. Although the category of true questions of jurisdiction was recognized in *Dunsmuir* at para. 59 as attracting correctness review, the Supreme Court has repeatedly emphasized its narrow and exceptional nature: see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 26; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 at para. 32. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41, 36 Admin L.R. (6th) 1, the Supreme Court cast doubt on the category's future:

> 41. The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

[31] As the Board acknowledges, the recognition that there are few, if any, questions of jurisdiction could result in its decisions being largely unreviewable. This cannot be.

TAB 21



Fodden Award for Best Canadian Law Blog



COMMENTS

Some Features of Pre-Confederation Judicial Review in Canada

Paul Daly | August 23, 2023

The supervisory jurisdiction is a core function of Canada's superior courts. It cannot be exercised by another body, nor can access to the supervisory jurisdiction be precluded, as this superintending and reforming power has a solid constitutional foundation in s. 96 of the *Constitution Act, 1867*. (The sweep of these propositions will be in issue in a case to be heard in the Supreme Court of Canada in November: *Yatar v. TD Insurance Meloche Monnex*. I will be appearing for the intervener Canadian Telecommunications Association.) Cases involving the scope of s. 96 require a close focus on the powers exercised by the courts in 1867, when the Constitution of Canada was drafted and adopted.

I had thought that judicial review in 1867 would be closely tethered to the notion of "jurisdiction", as this came (in the 20th century at least) to be the organizing principle of the prerogative writ of certiorari, itself the principal means used by the superior courts to control so-called inferior tribunals. "Jurisdiction" certainly features in the certiorari cases available in electronic databases. A good example is provided by *Hespeler v. Shaw* (1858), 16 U.C.Q.B. 104. H had been convicted of working on a Sunday (the Lord's Day…) in contravention of a statute making it unlawful for "any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, to do or exercise any worldly labour, business, or work of their respective ordinary callings upon a Sunday"; there was an exception for the conveying of travellers, or her Majesty's mail, selling drugs and medicines, and such other works of necessity, and also works of charity. Robinson CJ gave a clear exposition of the classic law of jurisdictional error:

> If, for instance, the justices had convicted a tinsmith, or a shoemaker, of working at his ordinary calling on the Lord's day, and the conviction had been affirmed on appeal after a trial by a jury, we should not have allowed a certiorari in order to have it determined here whether the jury had before them sufficient evidence of the offence. But if, on the other hand, a driver of a stage-coach had been convicted of working at his calling, by conveying her Majesty's mail, which the statute expressly allows to be done on a Sunday; or if a clergyman had been convicted for preaching on a Sunday, or the sexton for ringing the bell, or a doctor for visiting a patient, which would all be works within their ordinary calling; such a conviction, though confirmed upon appeal, might be removed into a superior court by certiorari, in order to obtain the opinion of that court whether any such case as we have mentioned was within the statute (at para. 6).

Certiorari was not available to question the jury's findings of fact, or the sufficiency of evidence (see also, *e.g. Re Miller* (1857), 15 U.C.Q.B. 244), but H was entitled to apply to the superior court to have the conviction quashed for excess of jurisdiction even though he had already exercised a right of appeal to the quarter sessions (at para. 6; see also *R. v. York Justices* (1827), 1 N.B.R. 108). Here, the conviction was quashed for, in essence, failing to state any

offence within the statute: "It does not state that it was his own hay that the defendant was raking and hauling: it does not state that he was working as a labourer for others: it does not call him a farmer, nor state such facts as shew that he was a farmer following his ordinary calling in getting in his own crops" (at para. 8). It is fair to observe that the boundaries of law, jurisdiction, fact and evidence proved themselves somewhat nebulous, as the defect was as much one of the absence of facts and evidence on salient points as a misinterpretation of the law:

> If a farmer so acting would come within the statute as following his ordinary calling of a farmer, yet the conviction does not state such a case in terms, *nor state facts from which we can infer it*; but it is indispensable that some offence should be charged in the terms of the statute (at para. 9, emphasis added. See by contrast *R. v. Stewart* (1866), 25 U.C.Q.B. 327 where it was held not to be necessary to provide further particulars explaining whether the "distress" in question related to unpaid rent or penalties).

Another nice example is *R. v. York Justices* (1827), 1 N.B.R. 108, where an assessment against a parish for the construction and maintenance of a poor house in the county of York was quashed: only parishes with paupers in the house were liable to be assessed and the Justices therefore had no jurisdiction to assess a parish with no paupers in the house. This clearly involved close consideration of factual matters. Similarly, in *Ex Parte Weade* (1856), 8 N.B.R. 307, Carter CJ relied heavily on affidavit evidence (and the absence of affidavit evidence in support of a competing position) to conclude that the Commissioners of Highways had exceeded their jurisdiction by failing to record the totality of a road they had laid out (which had implications for the damages assessed as a result of the road).

However, jurisdictional error was not the only target of the supervisory jurisdiction. Consider this authoritative statement of the scope of certiorari from *Boston v. Lelievre*, 1864 CarswellQue 4, a case in Quebec's Court of Queen's Bench:

> In principle, certiorari lies to all Courts where the Superior tribunal can administer the same justice as the Court below, and also, though the cause cannot be determined in the higher tribunal, yet this writ may be granted if the inferior tribunal have no jurisdiction over the matter, *or do not proceed therein according to the provisions of law*; hence, through the jurisdiction of the Superior Court is not taken away except as above, its power is limited to judicial proceedings, and therefore the certiorari does not go to try the merits of the question, but to see whether a limited jurisdiction *has exceeded its bounds and has not acted in conformity with the law* (at para. 15, per Badgely J, emphasis added).

Inferior tribunals have only "limited jurisdiction", which it is the role of the superior courts to confine them to. An inferior tribunal must respect its "bounds" and act "in conformity with the law"; it might have "no jurisdiction" at all over a matter or commit a reviewable error by failing to "proceeding therein according to the provisions of law". For example, in *R. v. St John (City)* (1856), 8 N.B.R. 361, an assessment levied on property holders to pay for a sewer was quashed because of a failure to give statutorily-required notice.

Fundamentally, certiorari functioned so as to ensure the lawfulness of inferior tribunal decision-making. Courts presumed, moreover, that legislatures did not intend to restrict access to certiorari (see *e.g. Ex Parte McNeil* (1857), 8 N.B.R. 493). For example, finality clauses (stating that a particular decision was "final") were strictly construed: "even where a statute declares that the decision of the Justices shall be final, and that no other Court whatever shall intermeddle therewith; the effect of that is only to make the Justices' decision final as to matters of fact, and the jurisdiction of the Court of Queen's Bench by certiorari is not taken away" (*R. v. York Justices* (1827), 1 N.B.R. 108). And, as noted, this nominal finality on matters of fact, did not exclude the possibility of certiorari being used to quash a decision where a reviewable error had been established: it was, in effect, a warning to reviewing courts not to reweigh the evidence.

You will notice, however, that the superior court's jurisdiction was "limited to judicial proceedings", for in the nineteenth century — and well into the twentieth — certiorari was only available in respect of "judicial decisions". That limitation is now extinct. The scope of judicial review has evolved over time, with the prerogative writs being displaced by general principles of reasonableness and fairness: the means may have changed but the ultimate end of ensuring lawfulness remains the same.

As now, there were accepted bases on which the courts could exercise their discretion to refuse a remedy. In *Ex parte Gerow* (1859), 9 N.B.R. 269, for example, a ratepayer had delayed in challenging an assessment and, having sold his property in the meantime, certiorari should not issue:

> this application should have been made in Hilary term; and that having allowed his property to be sold, and a term to elapse without taking any proceedings, the applicant was now too late, though if the application had been made in proper time, the assessment would have been set aside. That where there had been so much delay, the certiorari ought not to be granted, unless the law imperatively required it.

But in *Ex Parte McNeil* (1857), 8 N.B.R. 493, Parker J declined to exercise this discretion on the basis that the amount in issue was insignificant: "such relief should not be denied in a case like the present, which, though trifling in its amount, involves a serious question as to the rights of real property and the construction of acts of Assembly". Note, similarly, that in *Hespeler* the fact that H had already appealed his conviction was no barrier to seeking certiorari: the ability to quash unlawful decisions was a fundamental feature of superior court jurisdiction, not lightly to be refused.

In short, then, pre-Confederation certiorari practice aimed to ensure that inferior tribunals remained within the bounds of legality, looked askance at legislative attempts to limit judicial review and developed principled grounds for exercising discretion to refuse a remedy.

This content has been updated on August 23, 2023 at 10:16.

Publications

BOOKS
A Culture of Justification: Vavilov and the Future of Administrative Law

Speaking Engagements

ACADEMIC PAPERS
Defending Understanding Administrative Law in the Common Law World

2023

BOOKS
Researching Public Law in Common Law Systems

2023

REVIEWS AND OTHERS
Future Directions in Standard of Review in Canadian Administrative Law: Substantive Review and Procedural Fairness

2023

March 28 2022 | Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong

ACADEMIC PAPERS
Invoking the Emergencies Act: Critical Reflections

March 29 2023 | Centre for Public Law, University of Ottawa, Interdisciplinary Perspectives on the Public Order Emergency Commission (Rouleau Commission) Report

ACADEMIC PAPERS
"Comparative Reflections on State-Owned Enterprises"

March 21, 2023 | School of Law, National University of Mongolia, Fourth Annual Conference on Constitutional and Administrative Law

Media

PRESS
HBC's legal challenge may hinge on evidence behind lockdown provisions, experts say

Financial Post | December 11, 2020

PRESS
Nominations for Canadian Lawyer's Top 25 Most Influential List 2020

Canadian Lawyer | May 20, 2020

RADIO / PODCAST
CBC All in a Day, "Supreme Court rulings try to clarify administrative law"

CBC Radio | December 30, 2019

Blog

COMMENTS
Remoulding Administrative Law: An Essay For Gerard Hogan (Part I)

Paul Daly | January 5, 2026

COMMENTS
Agency Independence in Canada: Structure, Adjudication, and the Limits of Autonomy

Paul Daly | December 29, 2025

COMMENTS
Reform of Non-Court Adjudicative Bodies and Appeals to Courts, LRC CP 70 – 2025

Paul Daly | December 22, 2025

© 2016 Paul Daly • Credits

powered by forcerouge on OpenUM.ca,
a L.R. Wilson Chair project

TAB 22

Pierre Crevier *Appellant*;

and

The Attorney General of the Province of Quebec and Harmel Aubry *Respondents*;

and

Pierre Crevier *Appellant*;

and

The Attorney General of the Province of Quebec and Robert Cofsky *Respondents*;

and

The Attorney General for the Province of Alberta *Intervener*.

1981: February 10, 11; 1981: October 20.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Professions Tribunal — Writs of evocation — Privative clauses — Express general exclusion of the supervisory authority of the Superior Court in respect of jurisdiction and law — Power to determine limits of jurisdiction without appeal or review — Whether a s. 96 court created — British North America Act, art. 96 — Professional Code, R.S.Q. 1977, c. C-26, arts. 162, 163, 164, 169, 175, 193, 194, 195 — Code of Civil Procedure, arts. 33, 846.

The appellant obtained two writs of evocation from a judge of the Superior Court of Quebec from two decisions of the Professions Tribunal quashing a decision of a Discipline Committee of a professional corporation on the ground that that body had acted beyond its authority. The Superior Court held that the wide powers conferred upon the Professions Tribunal—powers encompassing review of law or fact and jurisdiction—offended s. 96 of the *B.N.A. Act* because the question whether a body has exceeded its jurisdiction fell within the superintending and reforming power belonging solely to a superior court whose members are appointed by the Governor General in Council. That decision was reversed by a majority of the Quebec Court of Appeal. Hence the appeal to this Court.

Pierre Crevier *Appelant*;

et

Le procureur général de la province de Québec et Harmel Aubry *Intimés*;

et

Pierre Crevier *Appelant*;

et

Le procureur général de la province de Québec et Robert Cofsky *Intimés*;

et

Le procureur général de la province de l'Alberta *Intervenant*.

1981: 10, 11 février; 1981: 20 octobre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Tribunal des professions — Brefs d'évocation — Clauses privatives — Exclusion expresse et générale du pouvoir de surveillance de la Cour supérieure à l'égard des questions de droit et de compétence — Pouvoir de définir les limites de sa propre compétence sans appel ni révision équivaut à créer une cour visée par l'art. 96 de l'A.A.N.B. — Acte de l'Amérique du Nord britannique, art. 96 — Code des professions, L.R.Q. 1977, chap. C-26, art. 162, 163, 164, 169, 175, 193, 194, 195 — Code de procédure civile, art. 33, 846.

L'appelant a obtenu deux brefs d'évocation d'un juge de la Cour supérieure du Québec à l'encontre de deux décisions du Tribunal des professions qui a infirmé une décision du comité de discipline d'une corporation professionnelle au motif que cet organisme avait excédé sa compétence. La Cour supérieure a statué que les pouvoirs étendus accordés au Tribunal des professions (pouvoirs englobant la révision de questions de droit, de fait ou de compétence) étaient de nature à contrevenir à l'art. 96 de l'*A.A.N.B.* car la question de savoir si un organisme a excédé sa juridiction relève du pouvoir de surveillance et de contrôle lequel seul est réservé à une cour supérieure dont la nomination des membres relève du gouverneur général en conseil. La Cour d'appel, à la majorité, a infirmé ce jugement, d'où le pourvoi devant cette Cour.

1981 CanLII 30 (SCC)

1981 and as yet unreported[8]. There, Dickson J., speaking for a unanimous Court, said this in considering *Tomko* in the course of his reasons [at p. 735]:

It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in *Tomko*. What must be considered is the 'context' in which this power is exercised. *Tomko* leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96 courts. It will all depend on the context of the exercise of the power. It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East; Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating 'like a s. 96 court'.

I emphasize the concluding sentence of this passage.

The second issue arising from the reasons of the Quebec Court of Appeal concerns the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any review of its decisions. Is it enough to deflect s. 96 if the privative clause is construed to preserve superior court supervision over questions of jurisdiction, and if (as in this case) such a construction is not open because of the wording of the privative clause, is the clause constitutionally valid? In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court. As Judson J. noted in *Farrell v. Workmen's Compen-*

[8] Now published at [1981] 1 S.C.R. 714.

encore inédit[8]. Dans cette affaire, le juge Dickson, qui a rédigé les motifs de l'arrêt unanime de la Cour, examine l'arrêt *Tomko* [à la p. 735]:

Il ne suffit plus simplement d'examiner le pouvoir ou la fonction précise d'un tribunal et de se demander si ce pouvoir ou cette fonction a déjà été exercé par un tribunal visé à l'art. 96. Ce serait examiner le pouvoir ou la fonction «dans l'abstrait», contrairement au raisonnement de l'arrêt *Tomko*. C'est le contexte dans lequel le pouvoir s'exerce qu'il faut considérer. L'arrêt *Tomko* nous mène au résultat suivant: les tribunaux administratifs peuvent exercer les pouvoirs et la compétence que les tribunaux visés à l'art. 96 ont déjà exercés. Tout dépendra du contexte dans lequel le pouvoir est exercé. Les «pouvoirs judiciaires» attaqués peuvent être simplement complémentaires ou accessoires aux fonctions administratives générales attribuées au tribunal (les arrêts *John East* et *Tomko*), ou ils peuvent être nécessairement inséparables de la réalisation des objectifs plus larges de la législature (l'arrêt *Mississauga*). Dans ce cas, l'attribution d'un pouvoir judiciaire à des organismes provinciaux est valide. La loi ne sera invalide que si la seule fonction ou la fonction principale du tribunal est de juger (l'arrêt *Farrah*) et qu'on puisse dire que le tribunal fonctionne «comme une cour visée à l'art. 96».

Je mets l'accent sur la dernière phrase de ce passage.

La deuxième question porte sur l'effet, à l'égard de l'art. 96, d'une disposition législative privative qui prétend soustraire à toute révision les décisions d'un tribunal créé par une province et qui a pour fonction d'adjuger. Est-il suffisant pour écarter l'art. 96 que la disposition privative soit interprétée de façon à sauvegarder le pouvoir de surveillance de la Cour supérieure sur les questions de compétence et si (comme en l'espèce) cette interprétation n'est pas possible à cause du texte de la disposition privative, la disposition est-elle constitutionnelle? A mon avis, chaque fois que le législateur provincial prétend soustraire l'un des tribunaux créé par la loi à toute révision judiciaire de sa fonction d'adjuger, et que la soustraction englobe la compétence, la loi provinciale doit être déclarée inconstitutionnelle parce qu'elle a comme conséquence de faire de ce tribunal une cour au sens de l'art. 96.

[8] Maintenant publié à [1981] 1 R.C.S. 714.

1981 CanLII 30 (SCC)

issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

The third issue that emerges from the reasons of the Court of Appeal relates to the impact of the *Farrah* case. There, as here, the provincial Legislature established a statutory tribunal of appeal. The relevant statute, the Quebec *Transport Act*, confided to the Transport Tribunal, under s. 58(*a*) of the *Transport Act*, "jurisdiction, to the exclusion of any other court, to hear and dispose of in appeal, on any question of law, any decision of the [Quebec Transport] Commission which terminates a matter". This authority was reinforced by the privative provisions of ss. 24 and 72 which, respectively, precluded recourse under arts. 834 to 850 of the *Code of Civil Procedure* as against the Commission and as against the Transport Tribunal. The effect of the foregoing provisions, taken together, was to transfer the supervisory jurisdiction of the Quebec Superior Court, as it existed at Confederation and afterwards, to the Transport Tribunal, and this was beyond provincial competence. It was a supporting consideration that s. 58(*a*) put the Transport Tribunal in place of the Quebec Court of Appeal to which there was previously a right of appeal on questions of law and of jurisdiction.

In short, what the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a s. 96 court. The present case is no different in principle, even though in ss. 162 and 175 of the *Professional Code*, dealing with the appellate authority of the Professions Tribunal, there is no mention of the word "law" or the word "jurisdiction". When regard is had to the privative terms of ss. 194 and 195, added to the fact that by s. 175 the Profes-

tes en dernier ressort de l'*Acte de l'Amérique du Nord britannique* et de son art. 96. Les mêmes considérations ne s'appliquent cependant pas aux questions de compétence qui ne sont pas très éloignées des questions de constitutionnalité. Il ne peut être accordé à un tribunal créé par une loi provinciale, à cause de l'art. 96, de définir les limites de sa propre compétence sans appel ni révision.

La troisième question que soulèvent les motifs de la Cour d'appel a trait à la portée de l'arrêt *Farrah*. Dans cette affaire-là, comme en l'espèce, le législateur provincial a institué un tribunal d'appel. La loi en cause, la *Loi des transports* du Québec, attribuait au tribunal des transports, en vertu de son al. 58*a*) «juridiction pour connaître et disposer, exclusivement à tout autre tribunal, en appel, sur toute question de droit, de toute décision de la Commission [des transports du Québec] qui termine une affaire». Ce pouvoir était renforcé par les dispositions privatives des art. 24 et 72 qui écartaient les recours prévus aux art. 834 à 850 du *Code de procédure civile* à l'encontre de la Commission et du tribunal des transports respectivement. Les dispositions précédentes, considérées ensemble, avaient pour effet de transférer au tribunal des transports le pouvoir de surveillance de la Cour supérieure du Québec qui existait au moment de la Confédération et depuis lors, ce qui excédait la compétence provinciale. Un des facteurs de la décision a été que l'al. 58*a*) substituait le tribunal des transports à la Cour d'appel du Québec auprès de laquelle il y avait antérieurement un droit d'appel sur des questions de droit et de compétence.

En bref, l'arrêt *Farrah* a établi qu'attribuer à un tribunal créé par une loi provinciale la compétence d'appel sur des questions de droit sans restriction et renforcer cette compétence d'appel par la suppression de tout pouvoir de surveillance de la Cour supérieure du Québec équivaut à créer une cour visée par l'art. 96. L'affaire en l'espèce n'est pas différente en principe, même si l'on ne trouve pas dans les art. 162 et 175 du *Code des professions*, lesquels traitent de la compétence d'appel du Tribunal des professions, le mot «droit» ni le mot «compétence». Si je considère les dispositions privatives des art. 194 et 195, et que j'ajoute le fait

1981 CanLII 381 (SCC)

TAB 23

J.P. *Appellant*

v.

MacMillan Bloedel Limited *Respondent*

and

The Attorney General of British Columbia *Respondent*

and

The Attorney General of Canada *Intervener*

INDEXED AS: MACMILLAN BLOEDEL LTD. *v.* SIMPSON

File No.: 24171.

1995: June 12; 1995: December 14.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Courts — Transfer of superior court powers to inferior tribunal — Youth courts granted exclusive jurisdiction to try youths for ex facie contempt of superior courts — Whether exclusive grant of jurisdiction constitutional — Constitution Act, 1867, s. 96 — Young Offenders Act, R.S.C., 1985, c. Y-1, s. 47(2).

The appellant, a young person, contravened an injunction of the British Columbia Supreme Court prohibiting protest activities interfering with the respondent's logging operations in the Clayoquot Sound area of Vancouver Island. He was charged with contempt of court and, at trial, made an application to be tried in youth court pursuant to s. 47(2) of the *Young Offenders Act*. This section states that exclusive jurisdiction over *ex facie* contempt of court committed by a young person is transferred to the youth court. The application was dismissed and the appellant was later convicted and sentenced to 45 days' imprisonment and a fine. He appealed his conviction on the ground that the British

J.P. *Appelant*

c.

MacMillan Bloedel Limited *Intimée*

et

Le procureur général de la Colombie-Britannique *Intimé*

et

Le procureur général du Canada *Intervenant*

RÉPERTORIÉ: MACMILLAN BLOEDEL LTD. *c.* SIMPSON

N° du greffe: 24171.

1995: 12 juin; 1995: 14 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Tribunaux — Transfert de pouvoirs d'une cour supérieure à un tribunal inférieur — Attribution aux tribunaux pour adolescents de la compétence exclusive pour juger des adolescents pour outrage commis en dehors des audiences d'une cour supérieure — L'attribution de compétence exclusive est-elle constitutionnelle? — Loi constitutionnelle de 1867, art. 96 — Loi sur les jeunes contrevenants, L.R.C. (1985), ch. Y-1, art. 47(2).

L'appelant, un adolescent, a contrevenu à une injonction de la Cour suprême de la Colombie-Britannique interdisant la tenue de manifestations d'opposition gênant les opérations forestières de l'intimée dans la région de Clayoquot Sound, sur l'île de Vancouver. Il a été accusé d'outrage au tribunal et, à son procès, il a demandé à être jugé devant un tribunal pour adolescents, conformément au par. 47(2) de la *Loi sur les jeunes contrevenants*. Cette disposition précise que la compétence exclusive en matière d'outrage commis par un adolescent en dehors des audiences d'un tribunal est transférée au tribunal pour adolescents. La demande a été rejetée et l'appelant a, par la suite, été déclaré

1995 CanLII 57 (SCC)

General of Quebec, [1981] 2 S.C.R. 220, the Court considered whether the provincial legislature could grant the power to make final decisions on questions of jurisdiction to an appeal tribunal under Quebec's *Professional Code*. Writing for the Court, Laskin C.J. stated (at pp. 236-37):

> It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. . . . [G]iven that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. [Emphasis added.]

This decision establishes, therefore, that powers which are 'hallmarks of superior courts' cannot be removed from those courts.

36 In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, the Court considered whether the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, ousted the jurisdiction of provincial superior courts to consider the constitutional validity of federal statutes. Estey J., writing for the Court, described the superior courts as follows (at pp. 326-27):

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction . . . .

Crevier c. Procureur général du Québec, [1981] 2 R.C.S. 220, notre Cour a examiné si une législature provinciale pouvait accorder à un tribunal d'appel, constitué en vertu du *Code des professions* du Québec, le pouvoir de rendre des décisions finales sur des questions de compétence. Le juge en chef Laskin affirme, au nom de notre Cour (aux pp. 236 et 237):

> C'est la première fois, il est vrai, que cette Cour déclare sans équivoque qu'un tribunal créé par une loi provinciale ne peut être constitutionnellement à l'abri du contrôle de ses décisions sur des questions de compétence. À mon avis, cette limitation, qui découle de l'art. 96, repose sur le même fondement que la limitation reconnue du pouvoir des tribunaux créés par des lois provinciales de rendre des décisions sans appel sur des questions constitutionnelles. Il peut y avoir des divergences de vues sur ce que sont des questions de compétence, mais, dans mon vocabulaire, elles dépassent les erreurs de droit, dont elles diffèrent, que celles-ci tiennent à l'interprétation des lois, à des questions de preuve ou à d'autres questions. [. . .] [C]omme l'art. 96 fait partie de l'*Acte de l'Amérique du Nord britannique* et que ce serait le tourner en dérision que de l'interpréter comme un pouvoir de nomination simple et sans portée, je ne puis trouver de marque plus distinctive d'une cour supérieure que l'attribution à un tribunal provincial du pouvoir de délimiter sa compétence sans appel ni autre révision. [Je souligne.]

En conséquence, cet arrêt établit qu'un pouvoir qui constitue une «marque [. . .] distinctive d'une cour supérieure» ne peut être retiré à ce tribunal.

Dans l'arrêt *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, notre Cour a examiné si la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e suppl.), ch. 10, écartait la compétence des cours supérieures provinciales pour examiner la constitutionnalité des lois fédérales. Le juge Estey, s'exprimant au nom de notre Cour, donne la description suivante des cours supérieures (aux pp. 326 et 327):

> Les cours supérieures des provinces ont toujours occupé une position de premier plan à l'intérieur du régime constitutionnel de ce pays. Ces cours de compétence générale sont les descendantes des cours royales de justice. [. . .] [E]lles franchissent, pour ainsi dire, la ligne de partage des compétences fédérale et provinciale.

1995 CanLII 57 (SCC)

TAB 24

IN THE MATTER OF a Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure*, CQLR, c. C-25.01, which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec

Conférence des juges de la Cour du Québec *Appellant*

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Conseil de la magistrature du Québec,
Canadian Association of Provincial Court Judges,
Organisme d'autoréglementation du courtage immobilier du Québec,
Canadian Council of Chief Judges,
Trial Lawyers Association of British Columbia and
Canadian Superior Courts Judges Association *Interveners*

- and -

Attorney General of Quebec *Appellant*

v.

Chief Justice, Senior Associate Chief Justice and Associate Chief Justice of the Superior Court of Quebec *Respondents*

DANS L'AFFAIRE D'UN renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du *Code de procédure civile*, RLRQ, c. C-25.01, qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec et sur la compétence d'appel attribuée à la Cour du Québec

Conférence des juges de la Cour du Québec *Appelante*

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

et

Procureur général du Canada,
procureur général de l'Ontario,
procureur général du Québec,
procureur général de la Colombie-Britannique,
procureur général de l'Alberta,
Conseil de la magistrature du Québec,
Association canadienne des juges des cours provinciales,
Organisme d'autoréglementation du courtage immobilier du Québec,
Canadian Council of Chief Judges,
Trial Lawyers Association of British Columbia et Association canadienne des juges des cours supérieures *Intervenants*

- et -

Procureur général du Québec *Appelant*

c.

Juge en chef, juge en chef associée et juge en chef adjointe de la Cour supérieure du Québec *Intimés*

2021 SCC 27 (CanLII)

Saskatchewan, [1977] 2 S.C.R. 576, at p. 590; D. P. Jones, "A Constitutionally Guaranteed Role for the Courts" (1979), 57 *Can. Bar Rev*. 669, at p. 675). Moreover, the superior courts' existence and status enjoy constitutional protection against legislative interference (*Reference re Residential Tenancies Act (N.S.)*, at paras. 72-73; *Trial Lawyers*, at para. 30). As a result, the superior courts need not rely on statutorily conferred powers to fully exercise their judicial functions.

[50] While it is true that this Court, in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference re Remuneration of Judges (1997)*"), recognized the independence of provincial court judges and reaffirmed the important role played by provincial courts in maintaining the rule of law, the fact remains that the superior courts are the *primary* guardians of the rule of law. Subject to constitutional guarantees of judicial independence, legislatures may abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution, whereas superior courts are constitutionally protected from such legislative interference.

[51] Only the superior courts have inherent powers that flow from their very nature, and the particular purpose of those powers is to enable the superior courts to ensure the maintenance of the rule of law in our legal system (*Reference re Residential Tenancies Act (N.S.)*, at para. 56, per Lamer C.J., concurring; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 61; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 19 and 26). As will be seen below, these fundamental powers are constitutionally protected and therefore cannot be removed from them or unduly fettered. For example, the superior courts have the power to control their own process and enforce their orders. They also have the power to review exercises of public power for legality and to ensure that citizens are protected from arbitrary government action (*Crevier*; *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048,

citoyens (voir *Amax Potash Ltd. c. Gouvernement de la Saskatchewan*, [1977] 2 R.C.S. 576, p. 590; D. P. Jones, « A Constitutionally Guaranteed Role for the Courts » (1979), 57 *R. du B. can.* 669, p. 675). De plus, l'existence et le statut des cours supérieures sont garantis par la Constitution à l'encontre des ingérences législatives (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72-73; *Trial Lawyers*, par. 30). Ainsi, les cours supérieures ne dépendent pas des pouvoirs qui leur sont conférés par le législateur pour s'acquitter pleinement de leurs fonctions judiciaires.

[50] S'il est vrai que notre Cour, dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif à la rémunération des juges (1997)* »), a reconnu l'indépendance des juges des cours provinciales et confirmé le rôle important de ces cours dans le maintien de la primauté du droit, il n'en demeure pas moins que ce sont les cours supérieures qui sont les *premières* gardiennes de la primauté du droit. Sous réserve des garanties constitutionnelles d'indépendance judiciaire, les législatures peuvent abolir les cours de nomination provinciale ou sérieusement entraver leurs pouvoirs sans que la Constitution n'y fasse obstacle, tandis que les cours supérieures sont protégées par la Constitution contre ce type d'ingérence législative.

[51] Seules les cours supérieures disposent de pouvoirs inhérents découlant de leur nature même et ayant spécialement pour objectif de leur permettre d'assurer la primauté du droit au sein de notre système juridique (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 56, le juge en chef Lamer, concordant; *R. c. Ahmad*, 2011 CSC 6, [2011] 1 R.C.S. 110, par. 61; *Ontario c. Criminal Lawyers' Association of Ontario*, 2013 CSC 43, [2013] 3 R.C.S. 3, par. 19 et 26). Comme nous le verrons, ces pouvoirs fondamentaux bénéficient d'une protection constitutionnelle et ils ne peuvent donc leur être retirés ou être indûment entravés. Par exemple, les cours supérieures ont le pouvoir de contrôler leur propre procédure et de mettre à exécution leurs ordonnances. Elles ont également le pouvoir de réviser l'exercice des pouvoirs publics afin de s'assurer que cet exercice soit conforme à la loi et que les citoyens

2021 SCC 27 (CanLII)

at p. 1090; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 31; *Vavilov*, at para. 24). Finally, the superior courts have residual jurisdiction as courts of original general jurisdiction, meaning they may — without statutory authorization — hear any matter that has not been assigned to a statutory court. As we will explain, this provides superior courts with a comprehensive view of the law, allowing them to preserve the coherence of the judicial system and set its overall directions (R. Pepin, "Les parlements peuvent-ils vider les cours supérieures de leur juridiction? Ont-elles des pouvoirs 'inhérents', 'inaliénables'? Réflexions sur la décision *MacMillan Bloedel Ltd. c. Simpson*" (1997), 22 *Queen's L.J.* 487, at pp. 512-13; Huppé, at pp. 12-14).

soient protégés contre l'arbitraire de l'État (*Crevier*; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 31; *Vavilov*, par. 24). Enfin, les cours supérieures sont pourvues d'une compétence résiduelle à titre de tribunal de droit commun leur permettant d'entendre toute affaire non confiée à un tribunal statutaire sans avoir besoin d'une habilitation législative. Comme nous l'expliquerons, ceci confère aux cours supérieures une perspective globale sur le droit à partir de laquelle elles peuvent préserver la cohérence du système judiciaire et en définir les grandes orientations (R. Pepin, « Les parlements peuvent-ils vider les cours supérieures de leur juridiction? Ont-elles des pouvoirs "inhérents", "inaliénables"? Réflexions sur la décision *MacMillan Bloedel Ltd. c. Simpson* » (1997), 22 *Queen's L.J.* 487, p. 512-513; Huppé, p. 12-14).

[52] Although the provincial courts also play an important part in safeguarding the rule of law, none of their powers receive the same protection. Their role as guardians of the rule of law therefore rests on a less stable foundation. This led Lamer C.J. to remark that no statutory court can be "as crucial to the rule of law" as the superior courts (*MacMillan Bloedel*, at para. 37; see also *Reference re Residential Tenancies Act (N.S.)*, at para. 72; *Trial Lawyers*, at para. 39).

[52] Même si les cours provinciales participent aussi d'une manière importante à la sauvegarde de la primauté du droit, aucun de leurs pouvoirs ne bénéficie d'une telle protection. Leur rôle de gardiennes de la primauté du droit repose donc sur des fondations moins solides. Ceci a fait dire au juge en chef Lamer qu'aucune cour statutaire « n'est aussi importante pour le maintien de la primauté du droit » que ne le sont les cours supérieures (*MacMillan Bloedel*, par. 37; voir aussi *Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 72; *Trial Lawyers*, par. 39).

(3) Concept Common to the Section 96 Tests: Prohibition Against Creating Parallel Courts That Undermine the Role of the Superior Courts

(3) Une notion commune aux tests découlant de l'art. 96 : l'interdiction de créer des cours parallèles qui affaiblissent le rôle des cours supérieures

[53] To ensure s. 96 can play its role to the fullest extent and achieve its purpose, this Court has developed various tests over the years. The most recent are the three-step *Residential Tenancies* test and the core jurisdiction test. The Court has often reiterated that s. 96 must be able to evolve in accordance with the living tree doctrine (*Reference re Residential Tenancies Act (N.S.)*, at para. 27, per Lamer C.J., concurring; see Hogg, at pp. 15-51 to 15-57). The jurisprudence on s. 96 must thus not

[53] Pour que l'art. 96 puisse jouer pleinement son rôle et atteindre son objet, notre Cour a développé toute une variété de tests au fil des années, les plus récents étant le test en trois volets du *Renvoi sur la location résidentielle* ainsi que celui de la compétence fondamentale. Notre Cour a réitéré à de nombreuses reprises que l'art. 96 doit être en mesure d'évoluer conformément à la théorie de l'arbre vivant (*Renvoi relatif à la Residential Tenancies Act (N.-É.)*, par. 27, le juge en chef Lamer, concordant;

2021 SCC 27 (CanLII)

TAB 25

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Alexander Vavilov *Intimé*

et

Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
Conseil canadien pour les réfugiés,
Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement,
Commission des valeurs mobilières de l'Ontario,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario),
Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut),
Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse,
Appeals Commission for Alberta Workers' Compensation,
Tribunal d'appel des accidents au travail (Nouveau-Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Conseil des tribunaux administratifs canadiens,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Congrès du travail du Canada,
Association nationale des organismes de réglementation de la pharmacie,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,

2019 SCC 65 (CanLII)

true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

du droit ne saurait tolérer des ordonnances et des procédures qui entraînent un véritable conflit opérationnel entre deux organismes administratifs, de sorte qu'une partie se retrouve aux prises avec deux décisions contradictoires : voir *British Columbia Telephone Co.*, par. 80, motifs concordants de la juge McLachlin (plus tard juge en chef). Les membres du public doivent savoir à qui s'adresser en vue de régler un litige. À l'instar des questions de droit générales d'importance capitale pour le système juridique dans son ensemble, l'application de la norme de la décision correcte s'impose dans ces cas par souci de prévisibilité, de certitude et de caractère définitif du processus décisionnel en droit administratif.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*,

D. *Un mot sur les questions de compétence*

[65] Nous sommes d'avis de mettre fin à la reconnaissance des questions de compétence comme une catégorie distincte devant faire l'objet d'un contrôle selon la norme de la décision correcte. Selon la majorité dans l'arrêt *Dunsmuir*, il ne faisait « aucun doute » (par. 50) que les questions liées à la compétence (ou les questions touchant véritablement à la compétence) devaient être examinées selon la norme de la décision correcte. Une véritable question de compétence se posait « lorsque le tribunal administratif [devait] déterminer expressément si les pouvoirs dont le législateur l'a investi l'autoris[ai]ent à trancher une question » : voir *Dunsmuir*, par. 59; *Québec (Procureure générale) c. Guérin*, 2017 CSC 42, [2017] 2 R.C.S. 3, par. 32. Or, depuis l'arrêt *Dunsmuir*, des opinions des juges majoritaires de la Cour ont mis en doute la pertinence de cette catégorie, ont peiné à en définir la portée et ont affirmé « douter sérieusement que la question appartienne à une catégorie distincte de questions de droit » : *McLean*, par. 25, renvoyant à *Alberta Teachers*, par. 34; *Edmonton East*, par. 26; *Guérin*, par. 32-36; *CCDP*, par. 31-41.

[66] Comme l'a fait remarquer le juge Gascon dans l'arrêt *CCDP*, la « compétence » en droit administratif est, de par sa nature même, un concept « aux contours flous » : par. 38. Il en est ainsi, parce que, en théorie, toute contestation d'une décision administrative peut être qualifiée de question qui « touche à la compétence », en ce sens qu'elle sème un doute à

2019 SCC 65 (CanLII)

at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

savoir si le décideur était habilité à agir comme il l'a fait : voir *CCDP*, par. 38; *Alberta Teachers*, par. 34; voir également *City of Arlington, Texas c. Federal Communications Commission*, 569 U.S. 290 (2013), p. 299. Si notre Cour indique dans sa jurisprudence que seule une catégorie beaucoup plus circonscrite de questions touchant « véritablement » à la compétence appelle la norme de la décision correcte, elle fait aussi remarquer qu'il n'existe aucune « balise claire » qui permet de distinguer ces questions de celles touchant à l'interprétation de sa loi habilitante par un décideur administratif : voir *CCDP*, par. 38. Malgré les opinions divergentes sur la possibilité de délimiter la catégorie des questions touchant « véritablement » à la compétence, on s'entend généralement pour dire qu'il est « souvent difficile de distinguer l'exercice d'un pouvoir délégué qui soulève des questions touchant véritablement à la compétence de l'exercice du pouvoir qui fait intervenir l'application ordinaire d'une loi habilitante » : *CCDP*, par. 111, motifs concordants du juge Brown. Cette tension ressort peut-être le plus dans les cas où le législateur a délégué un large pouvoir à un organe administratif qui permet à celui-ci de concevoir des règlements dans la poursuite des objectifs de sa loi habilitante : voir, p. ex., *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360; *West Fraser Mills Ltd. c. Colombie-Britannique (Workers' Compensation Appeal Tribunal)*, 2018 CSC 22, [2018] 1 R.C.S. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill

[67] Tout en soulignant cette difficulté inhérente — ainsi que l'effet néfaste de l'incertitude juridique qui en découle sur les justiciables — les juges majoritaires dans l'arrêt *CCDP* ont néanmoins laissé en suspens la question de savoir si la catégorie des questions touchant véritablement à la compétence était toujours nécessaire. Après avoir entendu les observations présentées à cet égard et saisi l'occasion de nous pencher sur ce point, nous sommes aujourd'hui en mesure de conclure qu'il n'est pas nécessaire de maintenir cette catégorie au sein des questions appelant la norme de la décision correcte. Les arguments à l'appui du maintien de cette catégorie — notamment la préoccupation relative au pouvoir du décideur, titulaire de pouvoirs délégués, de déterminer l'étendue de sa propre compétence — peuvent faire l'objet d'un examen adéquat au moyen du cadre d'analyse, exposé plus loin, qui doit servir

2019 SCC 65 (CanLII)

their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to

à effectuer un contrôle selon la norme de la décision raisonnable. Le contrôle judiciaire selon cette norme est à la fois rigoureux et adapté au contexte. En l'appliquant adéquatement, les cours de justice sont en mesure d'accomplir leur devoir constitutionnel de veiller à ce que les organismes administratifs agissent dans les limites des pouvoirs qui leur sont conférés sans qu'il soit nécessaire de procéder à un examen préliminaire pour établir si une interprétation particulière soulève une question touchant « véritablement » et « étroitement » à la compétence et sans avoir à recourir à la norme de la décision correcte.

[68] La norme de la décision raisonnable ne permet pas aux décideurs administratifs d'interpréter leur loi habilitante à leur gré et ne les autorise donc pas à élargir la portée de leurs pouvoirs au-delà de ce que souhaitait le législateur. Elle vient plutôt confirmer que le régime législatif applicable servira toujours à circonscrire les actes ainsi que les pouvoirs des décideurs administratifs. Même dans les cas où l'interprétation que le décideur donne de ses pouvoirs fait l'objet d'un contrôle selon la norme de la décision raisonnable, un texte législatif formulé en termes précis ou étroits aura forcément pour effet de restreindre les interprétations *raisonnables* que le décideur peut retenir — en les limitant peut-être à une seule. À l'inverse, lorsque le législateur confère au décideur de vastes pouvoirs au moyen d'un texte législatif rédigé en termes généraux, et ne prévoit aucun droit d'appel devant une cour de justice, il y a lieu de donner effet à son intention d'accorder une plus grande latitude au décideur sur l'interprétation de sa loi habilitante. Sans pour autant chercher à importer en bloc la jurisprudence américaine sur ce point, nous estimons pertinents les propos suivants formulés par la Cour suprême des États-Unis dans l'arrêt *Arlington*, p. 307 :

> [TRADUCTION] Il faut éviter le syndrome du « loup dans la bergerie » non pas en créant une catégorie arbitraire et indéfinissable de décisions d'organismes à l'égard desquelles il n'y a pas lieu de faire preuve de déférence, mais en prenant au sérieux et en appliquant rigoureusement, dans tous les cas, les restrictions prévues par la loi relativement aux pouvoirs conférés à un organisme. Si [le législateur] trace une ligne de démarcation claire, l'organisme ne peut aller au-delà de celle-ci; si [le législateur] trace une ligne de démarcation ambiguë, l'organisme ne

2019 SCC 65 (CanLII)

TAB 26

Federal Court of Appeal | Cour d'appel fédérale

Date: 20210805

Docket: A-348-19

Citation: 2021 FCA 161

2021 FCA 161 (CanLII)

CORAM: **NEAR J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

BEST BUY CANADA LTD.

Respondent

Heard by online video conference hosted by the Registry on January 19, 2021.

Judgment delivered at Ottawa, Ontario, on August 5, 2021.

REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRING REASONS BY:	GLEASON J.A.
CONCURRED IN BY:	LEBLANC J.A.

opposed to deciding on the bounds of a permissible appeal. In addition, there were important differences in the statutory context in *Emerson Milling* and *Bell Canada*. Finally, my colleague's approach sits uncomfortably with how cases of this nature have been considered by this Court and the Supreme Court of Canada since *Dunsmuir*. I explore each of these points more fully below.

2021 FCA 161 (CanLII)

I. The Impact of the Supreme Court's Decision in Vavilov

[76] Turning first to the *dicta* in *Vavilov*, to put that case in context, it is useful to commence with a brief overview of how administrative law has developed over the last several decades, with particular focus on the availability of review for factual errors and the curial treatment of privative clauses. For it is only by understanding this context that one can appreciate the import of the decision in *Vavilov*.

A. Historical Overview

[77] Historically, review for factual errors made by administrative decision-makers was not available unless they fit into the category of jurisdictional error. However, legal errors made by administrative decision-makers were reviewable if they appeared on the face of the record. See Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2021, release 1), ch. 1 at 1-11 to 1-14.

[78] With the growth of the administrative state, legislatures inserted privative clauses into many statutes in an attempt to shield the decisions of administrative decision makers from curial review. In the years following adoption of provisions like subsection 67(3) of the *Customs Act*, Canadian courts, including the Supreme Court of Canada, determined that privative clauses could not shield patently unreasonable administrative decisions from review because this would violate the rule of law, which could not allow such fundamentally flawed administrative decisions to stand. In order to provide a basis for judicial intervention, under the administrative law framework then in force, patently unreasonable decisions were characterized as instances where an administrative decision maker exceeded its jurisdiction.

[79] Patently unreasonable decisions included those tainted *both* by patently unreasonable legal determinations *and* by patently unreasonable factual determinations. Legal determinations were patently unreasonable if they offered an interpretation that could not be rationally supported by the relevant legislation (see, e.g. *C.U.P.E v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, at 237). In the context of collective agreement provisions, a patently unreasonable interpretation was characterized as one the provisions could not reasonably bear (see e.g. *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 341). Factual determinations were characterized as being patently unreasonable where the evidence, viewed reasonably, was incapable of supporting the administrative decision-maker's findings of fact (see, e.g. *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389 [*Lester*] at 687).

2021 FCA 161 (CanLII)

[80] As concerns factual determinations, the starting point for the discussion of these principles in the Supreme Court's jurisprudence of the era is the decision in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6, one of the seminal cases enshrining the principle of deference in Canadian administrative law. There, the Supreme Court considered the ambit of review of determinations made by the Saskatchewan Labour Relations Board, whose decisions were protected by a strongly-worded privative clause. It stated as follows at 388-389:

> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.
>
> **A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include** acting in bad faith, **basing the decision on extraneous matters, failing to take relevant factors into account**, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts: *Anisminic, Ltd. v. Foreign Compensation Commission et al.; Noranda Mines Ltd. v. The Queen et al., supra; Farrell et al. v. Workmen's Compensation Board, supra; R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.*
>
> [Footnotes omitted and emphasis added.]

2021 FCA 161 (CanLII)

[81] The Supreme Court's reference to "basing a decision on extraneous matters" and "failing to take relevant factors into account" can be read as encompassing factual matters.

[82] The possibility of seriously erroneous factual determinations constituting patently unreasonable error was confirmed by the Supreme Court of Canada in its subsequent decision in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, 14 D.L.R. (4th) 289. There, the Supreme Court was faced with judicial review of a decision of a labour arbitrator, whose decision was protected by a privative clause. In concurring reasons, two judges who wrote separately for the Court, confirmed that a narrow range of factual errors were subject to review for being patently unreasonable.

[83] Justice Lamer, who wrote for two members of the Court, stated at 492-495:

> **In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of *which* errors of law result in the loss of jurisdiction.** […] this Court has tended since *Nipawin, supra,* and C.U.P.E., *supra,* to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, **only unreasonable errors of law can affect jurisdiction.**
>
> […]
>
> **In looking for an error which might affect jurisdiction, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact.** In addition to the difficulty of classification, **the distinction collides with that given by the courts to unreasonable errors of fact. An unreasonable error of fact has been categorized as an error of law**. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. **What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has**

2021 FCA 161 (CanLII)

> **the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.**
>
> […]
>
> **In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.** I hasten to add that **the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subject to review, only unreasonable errors of fact are, but no others.**

[84] Justice Beetz, who wrote for the remaining members of the Court, noted at 480-481:

> Whatever the arbitrator's jurisdiction, strictly speaking, **an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice would divest him of his jurisdiction and be a basis for judicial review by evocation, regardless of any privative clause.**
>
> **I cannot say that the arbitrator's award constituted such an abuse.**
>
> [...] I am far from certain that I would have decided as the arbitrator did, but I also cannot say that the less severe penalty which is imposed instead of the ultimate penalty is, in view of all the circumstances, **clearly abusive, flagrantly unjust, absurd, contrary to common sense, and lacking any basis in the evidence as a whole.**
>
> [emphasis added]

[85] The notion that certain types of serious factual errors will support intervention even in the face of a privative clause was again endorsed by the Supreme Court of Canada in *Lester*, where the Court again reviewed a decision of a labour board, whose decisions were protected by a privative clause. While holding that the board's decision was patently unreasonable because there was no evidence to support that a successorship had occurred under a rational interpretation of the relevant provisions in the legislation, Justice McLachlin (as she then was) described the

2021 FCA 161 (CanLII)

sort of factual error that might allow intervention under the patently unreasonable standard is the following way at 687:

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. **Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere**.
>
> [emphasis added]

[86] In *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, 144 D.L.R. (4th) 385, the Supreme Court again addressed the issue in the context of review of a decision of a labour arbitrator, that was protected by a privative clause. In overturning the arbitrator's conclusion on the issue of just cause, Justice Cory, writing for the majority of the Court stated at paras. 41- 45 and 47- 48:

> 41 A number of decisions of this Court have considered the circumstances which will give rise to a finding that a decision of an administrative body is patently unreasonable. The test has been articulated somewhat differently for findings of fact and findings of law.
>
> 42 Where a tribunal is interpreting a legislative provision, the test is:
>
> . . . was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?
>
> See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, at p. 237.
>
> 43 A slight variation of this test applies to arbitrators interpreting a collective agreement. In those circumstances, a court will not intervene "so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear":*Bradco, supra*, at p. 341.

2021 FCA 161 (CanLII)

44 **It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient.** As Estey J., dissenting in part, noted in *Douglas Aircraft Co. of Canada v. McConnell*, 1979 CanLII 51 (SCC), [1980] 1 S.C.R. 245, at p. 277:

> . . . **a decision without any evidence whatever in support is reviewable as being arbitrary**; but on the other hand, **insufficiency of evidence in the sense of appellate review is not jurisdictional,** and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.

45 **When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact**": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, 1990 CanLII 22 (SCC), [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

[...]

47 **In order to decide whether a decision of an administrative tribunal is patently unreasonable, a court may examine the record to determine the basis for the challenged findings of fact or law made by the tribunal**. As Gonthier J., writing for the majority in *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1370, observed "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis." In *Lester*, supra, this Court conducted a review of the record to determine if there was any evidence which could reasonably support a particular factual finding made by a labour relations board.

48 Therefore, **in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence that formed the basis for the inference**. I would stress that this is not to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that **even if a court disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can only substitute its opinion for**

2021 FCA 161 (CanLII)

> **that of the tribunal where the evidence viewed reasonably is incapable of supporting the tribunal's findings.**
>
> [emphasis added]

[87] It was against this backdrop that the provisions in the *Federal Courts Act* providing for judicial review of federally-regulated decision-makers were enacted. To a certain extent, they provided for review on a somewhat broader basis than that which was historically available at common law.

[88] Currently enshrined in sections 18, 18.1-18.5 and 28 of the *Federal Courts Act*, these provisions allow for judicial review by the Federal Court of Appeal (for the tribunals named in subsection 28(1) of the *Federal Courts Act*), or by the Federal Court (for all other federally-regulated administrative decision-makers), except where a statutory right of appeal is provided. Subsection 18.5 of the *Federal Courts Act*, which is of central importance to the issues before us, provides that access to judicial review is foreclosed *only* to the extent a right of appeal is present. It states:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la

2021 FCA 161 (CanLII)

or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[89] Grounds for review are listed in subsection 18.1(4) of the *Federal Courts Act*, which provides:

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**(4)** Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	**a)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	**b)** n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	**c)** a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	**d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	**e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

2021 FCA 161 (CanLII)

(f) acted in any other way that was contrary to law.	**f)** a agi de toute autre façon contraire à la loi.

[90] With the growth in number and expertise of administrative decision-makers and the increasing complexity of questions remitted to them, the Supreme Court of Canada determined that, at least in certain instances, legal determinations made in the absence of a privative clause should be afforded deference. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 DLR (4th) 1 [*Southam*], building on its earlier decision in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [*Pezim*], the Supreme Court developed a third standard of review somewhere between correctness and patent unreasonableness, which has been termed reasonableness *simpliciter*. Such standard required that a decision withstand a somewhat probing examination. The Supreme Court held that the difference between a merely unreasonable and a patently unreasonable decision was in the immediacy or obviousness of the defect. If the defect was apparent on the face of the decision-maker's reasons, then the decision was patently unreasonable. Conversely, if it took some significant searching or testing to find the defect, then the decision was unreasonable but not patently unreasonable.

[91] In *Southam*, the new reasonableness *simpliciter* standard of review was applied to all aspects of a decision of the Competition Tribunal, including its determinations of mixed fact and law. The relevant legislation provided for a right of appeal to this Court on issues of law and, with leave, on issues of fact.

2021 FCA 161 (CanLII)

[92] Perhaps not surprisingly, the determination of which of three standards of review might apply and discernment of their respective content proved increasingly complex and much litigation was devoted to the point.

[93] The Supreme Court of Canada developed the so-call “pragmatic and functional” analysis to assist in this discernment. As developed particularly in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 1222, 60 D.L.R. (4th) 193, this analysis required a reviewing court to consider several contextual factors to ascertain the applicable standard of review. These principally were: the presence or absence of a privative clause in the legislation creating the decision-maker; the expertise of the administrative decision-maker as compared to that of a court in respect of the point(s) in issue; the purpose of the statute conferring jurisdiction on the decision maker and of the provision(s) in issue; and the nature of the problem solved in the decision under review.

[94] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court confirmed that the foregoing analysis applied to each of the determinations made by an administrative decision-maker. In result, different standards of review could, and frequently did, apply to different parts of a decision.

[95] The increasing complexity of the requisite analysis and its concomitant impact on predictability and cost in judicial review matters gave rise to significant criticism, causing the

2021 FCA 161 (CanLII)

Supreme Court of Canada to largely jettison and re-work the entire framework for judicial review in *Dunsmuir*.

[96] In *Dunsmuir*, the Supreme Court collapsed two of the three previous standards of review of patent unreasonableness and reasonableness *simpliciter* into a single deferential standard of review called reasonableness. Thus, post-*Dunsmuir*, there were and are but two standards of review: correctness and reasonableness.

[97] The Supreme Court held in *Dunsmuir* that the reasonableness standard was presumptively applicable in most cases, but held that the presumption could be rebutted where the question fell into one of four defined categories or where the contextual factors enumerated in *Pushpanathan* might require selection of the correctness standard. The four categories for application of correctness set out by the Court in *Dunsmuir* were: (1) constitutional questions; (2) questions relating to the jurisdictional boundaries between two or more competing administrative decision-makers; (3) questions of central importance to the legal system as a whole; and (4) what the majority termed "true questions of jurisdiction or vires", which were said to encompass jurisdiction "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (at para. 59).

[98] The single framework for review under the deferential reasonableness standard was defined in *Dunsmuir* as being concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with assessment of whether a

2021 FCA 161 (CanLII)

decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and applicable law.

[99] Notably, under *Dunsmuir*, the presence of a privative clause in a decision-maker's constituent statute no longer limits the scope of the Court's review to patent unreasonableness. Indeed, in *Dunsmuir*, the decision of the adjudicator under review was protected by a strongly-worded privative clause in s. 101(1) of the New Brunswick *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, which provided that "Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court". The presence of this provision in the adjudicator's constituent statute played no role in the Supreme Court's analysis of whether the decision was reasonable. Instead, the Court applied its newly-formulated approach to reasonableness and overturned the adjudicator's statutory interpretation.

[100] In reaching its decision, the Supreme Court made two points of particular relevance for the present appeal. First, it noted that the sort of review it had fashioned under the newly-formulated reasonableness standard was required by rule of law principles and that judicial review is constitutionally guaranteed in Canada. At paragraphs, 27-31 Bastarache and Lebel, JJ., writing for the majority, stated as follows:

> [27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while

2021 FCA 161 (CanLII)

exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[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.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in

2021 FCA 161 (CanLII)

> this respect (*Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:
>
> > Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]
>
> See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[101] Second, it was clear that the newly-formulated reasonableness standard applies to *both* legal and factual determinations made by an administrative decision-maker. Indeed, this is inherent in the formulation of the standard itself, which requires that a reasonable decision be defensible in light of *both* the applicable facts and law.

[102] Subsequent to the decision in *Dunsmuir*, courts, including this one and the Supreme Court of Canada, applied the newly-formulated reasonableness standard in judicial review of administrative decisions, including those where the decision was shielded by a privative clause (see, e.g. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp*

2021 FCA 161 (CanLII)

& Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458; *Igloo Vikski*; *PSAC* and the various cases listed in the appendix to that decision).

[103] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*], which was decided the year after *Dunsmuir*, the Supreme Court of Canada confirmed that the *Dunsmuir* formulation of reasonableness applies under the *Federal Courts Act* and that questions of law are subject to reasonableness review, despite the wording of paragraph 18.1(4)(*c*), which contemplates review for errors of law. The majority held that the paragraph merely listed the grounds of review as opposed to the standard of review to be applied to errors of law. As for questions of fact, however, both the majority and the minority held that paragraph 18.1(4)(*d*) of the *Federal Courts Act* sets out both the grounds of review and the parameters of what reasonableness requires for review of factual errors. The majority noted that it was "[…] clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*" (at para. 46). Justice Rothstein, writing in dissent, concurred on this point.

[104] It is noteworthy that the decision of the Immigration Appeal Division that was the subject of review in *Khosa* was protected by a privative clause, albeit the clause was less broadly worded than the one in section 67 of the *Customs Act*. Subsection 162(1) of the *Immigration and Refugee Protection Act* provided that the Immigration Appeal Division had "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction".

2021 FCA 161 (CanLII)

[105] One further development of the case law of the Supreme Court of Canada in the wake of *Dunsmuir*, decided prior to *Vavilov*, merits mention, namely the decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 [*Edmonton East*]. There, the Supreme Court confirmed that the *Dunsmuir* reasonableness analysis applied to statutory appeals in addition to judicial review applications.

[106] With this background in mind, it is now possible to turn to examine the decision of the Supreme Court of Canada in *Vavilov*.

B. The Decision of the Supreme Court of Canada in *Vavilov*

[107] In *Vavilov*, the Supreme Court set out a revised framework applicable to judicial review in Canada, but, in so doing, confirmed that the "revised framework will continue to be guided by the principles underlying judicial review […] articulated in *Dunsmuir* [...]: that judicial review functions to maintain the rule of law while giving effect to legislative intent" (at para. 2). The Court also, with three exceptions, maintained the previous framework enshrined in *Dunsmuir*. More specifically, it confirmed that reasonableness is a single standard, that takes it colour from context, and that reasonableness is concerned both with the existence of justification, transparency and intelligibility within the decision-making process and with assessment of whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and applicable law. In *Vavilov*, the Court gave more definition to this

2021 FCA 161 (CanLII)

formulation of the reasonableness standard, but did not overturn the fundamental approach set out in *Dunsmuir*.

[108] In terms of the three changes to the previous framework wrought by *Vavilov*, the Supreme Court determined that the contextual factors from *Pushpanathan* (which, it will be recalled, included the presence of a privative clause) henceforth play no role in selection of the standard of review. Second, it abolished the category of so-called "true questions of jurisdiction", which were previously held in *Dunsmuir* to give rise to correctness review. Following *Vavilov*, such questions are now instead subject to reasonableness review, just like most issues in a judicial review application. Thus, currently, unless a statute specifically sets out the applicable standard of review, reasonableness will be applied in judicial review of all questions except constitutional questions, questions relating to the jurisdictional boundaries between two or more competing administrative decision-makers and questions of central importance to the legal system as a whole.

[109] The third change to the previous framework for conduct of judicial review wrought by *Vavilov* concerns the approach to statutory appeals. The Court held that, absent statutory language to the contrary, statutory appeals henceforth will be subject to appellate as opposed to judicial review principles, thereby overturning its earlier holdings on the point, including in *Edmonton East*, *Pezim* and *Southam*. The standards from *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 are accordingly now applicable to statutory appeals from administrative decisions. Thus, in a statutory appeal, errors of law are now subject to review under the correctness standard whereas, where an appeal is provided for factual issues, errors of fact or of

2021 FCA 161 (CanLII)

mixed fact and law from which a legal issue cannot be extricated are subject to review for palpable and overriding error.

[110] In so deciding, the majority of the Supreme Court held at paragraph 45 of *Vavilov*, that "The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of the court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding". The majority reconfirmed this point at paragraph 52, where it noted:

> [...] 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. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.
>
> [emphasis added]

[111] Thus, the Supreme Court determined that, as a matter of principle, the availability of limited appellate review does not foreclose the availability of judicial review. Indeed, such holding mirrors what subsection 18.5 of the *Federal Courts Act* already provides. This holding is important in the present case. While Supreme Court did not specifically address the issue now before us in *Vavilov*, it must have been aware that several statutes, like the *Customs Act*, which

2021 FCA 161 (CanLII)

contain a limited right of appeal, also contain a privative clause. Thus, its failure to indicate that such a clause would bar access to judicial review is telling.

[112] Moreover, nowhere in *Vavilov* does the Supreme Court endorse the notion that privative clauses may bar access to judicial review or to review for particular sorts of issues. A complete bar on the availably of judicial review for any type of issue would offend the rule of law as the Supreme Court noted in *Dunsmuir*, a holding that was specifically endorsed in *Vavilov* at para. 24. Further, the Court in *Dunsmuir* and *Vavilov* did not overturn the previous decades-old case law determining that what were previously characterized as patently unreasonable factual errors, formerly called jurisdictional, remain reviewable, albeit now under the reasonableness standard.

[113] To the contrary, the Supreme Court specifically contemplates in *Vavilov* that factual issues may give rise to unreasonable decisions. In providing further guidance as to the conduct of reasonableness review and the characteristics of a reasonable decision, the Supreme Court in *Vavilov* elucidated that there are two types of flaws that may render a decision unreasonable: either a failure of rationality in the reasoning process, where reasons are given, or the untenable nature of the decision in light of the legal and factual constraints that bear on it (at para. 101).

[114] Factual issues may give rise to an unreasonable decision under either type of flaw. The majority indicated in respect of a failure of rationality in the reasoning process, quoting from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 and *Southam* at paragraph 102 of its reasons in *Vavilov*, that a reviewing court "must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence

2021 FCA 161 (CanLII)

before it to the conclusion at which it arrived". Clearly, this contemplates a decision-maker's treatment of factual issues.

[115] The Court likewise contemplated that failure to reasonably address factual issues might lead to an untenable result. The majority commented on this point as follows at paragraph 126:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

[116] Thus, under the reasonableness standard of review delineated in *Vavilov*, factual determinations can be the subject of review. In light of this, I do not believe that one can read the *dicta* in the case as endorsing the notion that privative clauses are to be henceforth read as barring access to judicial review for all factual issues. This is particularly so in light of the limited role afforded to privative clauses by the Supreme Court over the last several decades and the recognition by that Court that the rule of law requires review for factual errors, the most serious of which were formerly called jurisdictional. Such errors now come within the ambit of unreasonable errors.

2021 FCA 161 (CanLII)

[117] This does not mean that privative clauses have been rendered meaningless. Rather, they are part of the relevant statutory framework – an important contextual factor in determining the parameters of a reasonable decision according to *Vavilov* and the case law of this Court – and such clauses highlight the deferential nature of reasonableness review for decisions falling within the ambit of the clauses. I do not believe there is any other way to reconcile the collapsing of the patent unreasonableness and reasonableness standards of review into a single standard of reasonableness other than to recognize that review is available under the reasonableness standard for what were formerly characterized as patently unreasonable errors, which include serious factual errors, even in the face of a privative clause.

[118] This view is shared by Professor Paul Daly, who has written extensively on administrative law matters. In a blog post entitled "Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review" (17 November 2020), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/#_ftn31>, he explained the following:

> Let me put the difficulty in stark terms. There is nothing, on the face of *Vavilov*, to prevent a legislature from eliminating reasonableness review. As the majority puts it, "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law." But the "rule of law" here means only that limited class of cases in which correctness review applies to allow the courts to furnish a final, definitive answer to a question in the interests of uniformity. As long as the courts are able to review constitutional questions, questions of central importance to the legal system or questions of overlapping jurisdiction for correctness, nothing seems to stand in the way of legislation to eliminate reasonableness review.
>
> This is not merely a theoretical difficulty. There are a couple of ways in which reasonableness review could be eliminated, directly or indirectly. In Alberta, s.

2021 FCA 161 (CanLII)

TAB 27

In the Court of Appeal of Alberta

Citation: Northback Holdings Corporation v Alberta Energy Regulator, 2025 ABCA 186

Date: 20250527
Docket: 2301-0319AC;
2301-0320AC;
2401-0005AC
Registry: Calgary

2025 ABCA 186 (CanLII)

Between:

Docket: 2301-0319AC

Northback Holdings Corporation (formerly operating as Benga Mining Limited)

Appellant
(Applicant)

- and -

Alberta Energy Regulator and the Joint Review Panel for the Grassy Mountain Coal Project acting in its capacity as the Alberta Energy Regulator

Respondents
(Respondents)

- and -

Municipal District of Ranchland No. 66 and the Minister of Justice of Alberta

Intervenors

And Between:

Docket: 2301-0320AC

Stoney Nakoda Nations

Appellant
(Applicant)

- and –

Alberta Energy Regulator and the Joint Review Panel for the Grassy Mountain Coal Project acting in its capacity as the Alberta Energy Regulator

Respondents
(Respondents)

- and –

to plead that questions of fact – weighing of evidence, its interpretation and so on – are questions of law, but without saying so. This reconstruction would provide incentives to characterize questions of fact as questions of law by artful pleading, once again adding a layer of complexity and incoherence.

[222] The precarious certainty benefits are connected with another problem. Many administrative tribunals exercise powers that can visit severe consequences on those affected. Those effects are largely unrelated to the law/fact distinction. A legally faultless decision may have profound repercussions due to errors in the treatment of evidence or fact finding. On the proposed reconstruction, such decisions would not be subject to review when there is a full privative clause. At the extreme, arbitrary or careless decisions affecting important interests would be free from judicial oversight as long as the arbitrariness or carelessness "only" relates to the interpretation or weighing of evidence, the finding of facts, or the application of the law to the facts.

[223] The First Nations argued this point in the appeals: Factum at para 52. Their judicial review applications assert that the AER decision breached its constitutional duties related to, or based on, their aboriginal and treaty rights. The importance of those rights is reflected in their constitutional status under s 35. The First Nations allege breaches of those constitutional duties not because the AER misunderstood the applicable legal tests (for infringement, what the duty of honour requires or when the duty to consult is triggered), but because of errors in evaluating the evidence or in applying the law to the evidence.

[224] The First Nations' point is this: Unless the constitutional guarantee includes curial review for errors of fact or mixed fact and law, the AER's (alleged) breaches of the First Nations' s 35 rights in this case are shielded from review.

v. Conclusion on constitutional minimum

[225] I conclude that the constitutional minimum under s 96 is not limited to review on questions of law. For the practical and doctrinal reasons discussed above, it must include review on questions of fact and mixed fact and law.

[226] Some authors and judges have reached the same conclusion from a different starting point. They argue that the constitutional minimum includes judicial review on the reasonableness standard.[22] Reasonableness review itself is entrenched: *Best Buy* at paras 116-18; Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85:1 Sask L Rev 89 at 113-14. Northback advanced the same argument on appeal: Reply Factum at para 10.

[227] This reconstruction differs from the approach in these reasons by identifying the minimum in terms of a standard of review rather than a class of issues (jurisdiction/law/fact). Nevertheless, it converges on the conclusion that the minimum includes review on questions of fact or mixed

[22] This argument was criticized by de Montigny CJ in *Democracy Watch* at paras 70-77.

2025 ABCA 186 (CanLII)

TAB 28

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to December 2, 2025

Last amended on June 20, 2024

À jour au 2 décembre 2025

Dernière modification le 20 juin 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order

qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

TAB 29

Minister of Citizenship and Immigration *Appellant*

v.

Sukhvir Singh Khosa *Respondent*

and

Immigration and Refugee Board *Intervener*

Indexed as: Canada (Citizenship and Immigration) *v.* Khosa

Neutral citation: 2009 SCC 12.

File No.: 31952.

2008: March 20; 2009: March 6.

Present: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Immigration Appeal Division denying special relief on "humanitarian and compassionate grounds" from removal order — Standard of review applicable to Immigration Appeal Division decision — Whether common law of judicial review displaced by s. 18.1 of Federal Courts Act, R.S.C. 1985, c. F-7 — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 67(1)(c).

K, a citizen of India, immigrated to Canada with his family in 1996, at the age of 14. In 2002, he was found guilty of criminal negligence causing death and received a conditional sentence of two years less a day. A valid removal order was issued to return him to India.

K appealed the order, but the majority of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board, after considering the *Ribic* factors and the evidence, denied "special relief" on humanitarian and compassionate grounds pursuant

* Bastarache J. took no part in the judgment.

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Sukhvir Singh Khosa *Intimé*

et

Commission de l'immigration et du statut de réfugié *Intervenante*

Répertorié : Canada (Citoyenneté et Immigration) *c.* Khosa

Référence neutre : 2009 CSC 12.

N° du greffe : 31952.

2008 : 20 mars; 2009 : 6 mars.

Présents : La juge en chef McLachlin et les juges Bastarache*, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Refus de la Section d'appel de l'immigration de prendre des mesures spéciales pour des « motifs d'ordre humanitaires » relativement à une mesure de renvoi — Norme de contrôle applicable à la décision de la Section d'appel de l'immigration — L'article 18.1 de la Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, écarte-t-il la common law en matière de contrôle judiciaire? — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27, art. 67(1)c).

K, un citoyen de l'Inde, a immigré au Canada avec sa famille en 1996, à l'âge de 14 ans. En 2002, il a été déclaré coupable de négligence criminelle causant la mort et condamné à une peine d'emprisonnement avec sursis de deux ans moins un jour. Une mesure de renvoi valide a été prise contre lui pour l'obliger à retourner en Inde.

K a interjeté appel de la mesure de renvoi, mais la Section d'appel de l'immigration (« SAI ») de la Commission de l'immigration et du statut de réfugié a décidé à la majorité, compte tenu des facteurs énumérés dans *Ribic* et après examen de la preuve, de ne pas

* Le juge Bastarache n'a pas participé au jugement.

2009 SCC 12 (CanLII)

No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). This is confirmed by s. 18.1(5). It may have been thought that the Federal Court, being a statutory court, required a specific grant of power to "make an order validating the decision" (s. 18.1(5)) where appropriate.

[44] Judicial intervention is authorized where a federal board, commission or other tribunal

> (*c*) *erred in law in making a decision or an order, whether or not the error appears on the face of the record*;

Errors of law are generally governed by a correctness standard. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 37, for example, held that the general questions of international law and criminal law at issue in that case had to be decided on a standard of correctness. *Dunsmuir* (at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision-maker is reasonable, there is no error of law justifying intervention. Accordingly, para. (*c*) provides a *ground* of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute. This nuance does not appear on the face of para. (*c*), but it is the common law principle on which the discretion provided in s. 18.1(4) is to be exercised. Once again, the open textured language of the *Federal Courts Act* is supplemented by the common law.

[45] Judicial intervention is further authorized where a federal board, commission or other tribunal

Aucune norme de contrôle n'est précisée. Par contre, suivant *Dunsmuir*, les questions de procédure (sous réserve d'une dérogation législative valide) doivent être examinées par un tribunal judiciaire selon la norme de la décision correcte. En pareil cas, la prise de mesures est régie par les principes de common law, qui prévoient notamment l'abstention d'accorder réparation si l'erreur procédurale est un vice de forme et n'entraîne aucun dommage important ni déni de justice (*Pal*, par. 9). C'est ce que confirme le par. 18.1(5). On a pu croire que la Cour fédérale, du fait qu'elle tire son origine d'une loi, devait bénéficier d'une attribution de pouvoir spécifique pour « valider la décision » (par. 18.1(5)) le cas échéant.

[44] L'intervention judiciaire est autorisée si l'office fédéral

> *c*) *a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier*;

Les erreurs de droit sont généralement assujetties à la norme de la décision correcte. Dans *Mugesera c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 40, [2005] 2 R.C.S. 100, par. 37, par exemple, la Cour a statué que les questions générales de droit international et de droit pénal soulevées dans cette affaire devaient être tranchées suivant la norme de la décision correcte. Selon l'arrêt *Dunsmuir* (au par. 54), un décideur spécialisé ne commet pas d'erreur de droit justifiant une intervention si son interprétation de sa loi constitutive ou d'une loi étroitement liée est raisonnable. L'alinéa *c*) prévoit donc un *motif* d'intervention, mais la common law empêchera les juges d'intervenir dans certains cas, lorsqu'un organisme administratif spécialisé interprète sa loi constitutive ou une loi intimement liée à celle-ci. Cette nuance n'apparaît pas à la simple lecture de l'al. *c*), mais c'est le principe de common law qui doit guider l'exercice du pouvoir discrétionnaire conféré au par. 18.1(4). Encore une fois, le libellé général de la *Loi sur les Cours fédérales* est complété par la common law.

[45] L'intervention judiciaire est de plus autorisée si l'office fédéral

2009 SCC 12 (CanLII)

The common law would not allow a statutory decision-maker to rely on fraudulent or perjured testimony. The court would be expected to exercise its discretion in favour of the applicant under para. (*e*) as well.

[48] Section 18.1(4)(*f*) permits judicial intervention if the federal board, commission or other tribunal

(*f*) *acted in any other way that was contrary to law.*

A reference to "contrary to law" necessarily includes "law" outside the *Federal Courts Act* including general principles of administrative law. Paragraph (*f*) shows, if further demonstration were necessary, that s. 18.1(4) is not intended to operate as a self-contained code, but is intended by Parliament to be interpreted and applied against the backdrop of the common law, including those elements most recently expounded in *Dunsmuir*.

[49] In *Federal Courts Practice 2009* (2008), B. J. Saunders et al. state, at pp. 112-13:

Grounds for Review

Section 18.1(4) sets out the grounds which an applicant must establish to succeed on an application for judicial review. The grounds are broadly stated and reflect, generally, the grounds upon which judicial review could be obtained under the prerogative and extraordinary remedies listed in section 18(1).

Section 18.1(4)(f) ensures that the Court will not be hindered in developing new grounds for review. [Emphasis added.]

[50] I readily accept, of course, that the legislature can by clear and explicit language oust the common law in this as in other matters. Many provinces and territories have enacted judicial review legislation which not only provide guidance to the courts but have the added benefit of making the law more understandable and accessible to interested members of the public. The diversity of such laws makes generalization difficult. In some jurisdictions (as in

La common law ne permettrait pas à un organisme décisionnel établi par la loi de se fonder sur un témoignage faux ou frauduleux. On s'attendrait à ce que la cour exerce aussi son pouvoir discrétionnaire en faveur du demandeur en application de l'alinéa *e*).

[48] L'alinéa 18.1(4)*f*) permet l'intervention judiciaire si l'office fédéral

f) *a agi de toute autre façon contraire à la loi.*

La portée des mots « contraire à la loi » s'étend nécessairement à la « loi » qui n'est pas incluse dans la *Loi sur les Cours fédérales*, et notamment aux principes généraux de droit administratif. L'alinéa *f*) démontre, à supposer que cela soit encore nécessaire, que le législateur ne voulait pas que le par. 18.1(4) soit considéré comme un code indépendant, mais plutôt interprété et appliqué dans le contexte de la common law, et notamment des éléments mentionnés tout récemment par la Cour dans *Dunsmuir*.

[49] Dans *Federal Courts Practice 2009* (2008), B. J. Saunders et autres affirment, aux p. 112-113 :

[TRADUCTION] **Motifs de contrôle**

Le paragraphe 18.1(4) énumère les motifs dont le demandeur doit faire la preuve pour que sa demande de contrôle judiciaire soit accueillie. Les motifs sont exprimés en termes généraux et correspondent, de façon générale, aux motifs permettant d'obtenir réparation en exerçant les recours de prérogative et les recours extraordinaires mentionnés au par. 18(1).

L'alinéa 18.1(4)f) garantit à la Cour la liberté nécessaire à l'élaboration de nouveaux motifs de contrôle. [Je souligne.]

[50] Je reconnais évidemment d'emblée que le législateur peut, en utilisant des termes clairs et explicites, exclure l'application de la common law dans ce domaine comme dans d'autres. Plusieurs provinces et territoires ont édicté en matière de contrôle judiciaire des dispositions législatives qui, non seulement guident les tribunaux judiciaires, mais comportent aussi l'avantage additionnel de rendre la loi plus compréhensible et accessible pour

2009 SCC 12 (CanLII)

TAB 30

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190301

Dockets: A-235-17
A-236-17

Citation: 2019 FCA 41

2019 FCA 41 (CanLII)

CORAM: **NADON J.A.**
GAUTHIER J.A.
GLEASON J.A.

Docket: A-235-17

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

and

FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD

Intervener

Docket: A-236-17

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

[24] Second, as this Court held in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 18, the term "jurisdiction", when used in a provision like paragraph 18.1(4)(*a*) of the *Federal Courts Act*, must be understood in its appropriate historical context. This is in accordance with the principles of statutory interpretation, which require a court to have regard to the appropriate context when interpreting legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 221 N.R. 241; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.

[25] In 1990, when Parliament adopted subsection 18.1 of the *Federal Courts Act*, errors of jurisdiction in Canadian administrative law were understood to include errors of law, in circumstances where the Board was required to offer a correct interpretation, and patently unreasonable legal interpretations, as was noted in *P.S.A.C. v. C.F.P.A.*; see also *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at pp. 1003-1004, 102 N.R. 1. Such errors were also understood to include findings of fact that would be caught by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, as was noted in *C.U.P.W. v. Healy*. Thus, properly read in context, "jurisdictional errors" for purposes of setting forth a ground (as opposed to a standard) of review within the meaning of subsection 18.1(4) of the *Federal Courts Act* include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(4)(*d*) of that Act.

[26] Third, contrary to what the Board asserts, the decisions of the Supreme Court of Canada in *Dunsmuir* and *Khosa* cannot be understood to narrow the range of Board decisions that may be judicially reviewed. Rather, they hold that a common standard of review framework is to be

2019 FCA 41 (CanLII)

applied to all federal administrative decision-makers and that, unless one of the exceptions discussed in *Dunsmuir* obtains, the applicable standard of review is reasonableness. This is evident both from the reasons of the majority in *Khosa*, at paragraphs 43 to 51 and from the reasons of Rothstein J. at paragraph 111 in the same case, where he discussed the import of the privative clause found in section 22 of the *Canada Labour Code*. He there wrote as follows:

> Section 22(1) expressly provides for review on questions of jurisdiction, procedural fairness, fraud or perjured evidence, but excludes review for errors of law or fact through express reference to s. 18.1(4) of the [*Federal Courts Act*]. Where the privative clause applies, i.e. with respect to s. 18.1(4)(*c*), (*d*), or (*f*), the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies. There is no role for the *Dunsmuir* standard of review analysis where s. 22(1) expressly provides for review on questions of jurisdiction, natural justice and fraud. Correctness review applies in these cases.

[27] While the majority in *Khosa* disagreed that the *Dunsmuir* analysis applied only to paragraphs 18.1(4)(*c*) to (*f*) of the *Federal Courts Act*, they did not disagree that issues falling within the purview of paragraphs 18.1(4)(*c*) to (*f*) are subject to the *Dunsmuir* analysis. Thus, when read in their appropriate context, subsection 34(1) of the *FPSLREBA* and subsection 18.1(4) of the *Federal Courts Act* do not preclude review in the instant cases.

[28] Fourth, the cases on which the Board relies enumerated in paragraph 14 of these Reasons do not constitute a binding ruling on this issue. Rather, to the extent these cases may contain passages that might support the Board's interpretation, the Court's comments are made only in passing and do not settle the issue. The relevant authorities, which do settle the issue, are *P.S.A.C. v. C.F.P.A.* and *C.U.P.W. v. Healy*, which, as already noted, directly contradict the Board's arguments. Also relevant are the multitude of cases where this Court has reviewed under

2019 FCA 41 (CanLII)

the reasonableness standard decisions like those challenged in this application. Thus, the case law relied upon by the Board is not determinative.

[29] Fifth, contrary to what the Board asserts, its interpretation would not lead to greater expedition. Under the Board's approach, this Court would be required to decide as a preliminary issue what paragraph in subsection 18.1(4) of the *Federal Courts Act* applies to each argument advanced in an application for judicial review and to determine the Court's jurisdiction based on the characterization of issue. This sort of formalistic preliminary question-type analysis harkens back to the now abolished division in judicial review matters that limited review under the former section 28 (as opposed to section 18) of the *Federal Courts Act* to decisions made on a judicial or quasi-judicial basis: see *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at p. 197, 58 N.R. 1 (*per* Wilson J.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at pp. 895-902, 100 N.R. 241. This requirement led to convoluted, costly and lengthy debates about the character of a decision under review that did little to advance the substance of litigation, and these requirements were consequently abolished in the 1990 amendments to the *Federal Courts Act*: see *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 8. To adopt the Board's approach would reintroduce similar debates and delays in the judicial review process, which are antithetical to the sound labour relations that the *FPSLRA* is designed to foster. Thus, the Board's interpretation would in fact end up undermining the purpose of the Act.

2019 FCA 41 (CanLII)

[32] In *Dunsmuir*, the Supreme Court of Canada underscored that judicial review must be available as a constitutional imperative and cannot be ousted by a privative clause. At paragraph 31, Bastarache and LeBel JJ., writing for the majority, stated:

> 31. The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127).

[33] Thus, for all the foregoing reasons, contrary to what the Board asserts, its decisions in the instant cases are amenable to review by this Court.

[34] This conclusion, however, does not mean that subsection 34(1) of the *FPSLREBA* is without impact. To the contrary, it has a vital impact, namely, to indicate that the applicable standard of review is reasonableness and to underscore the considerable deference to be accorded to the Board in respect of decisions of this nature: see *Dunsmuir* at para. 52. This Court and the Supreme Court of Canada have often commented that subsection 34(1) of the *FPSLREBA*'s predecessors have precisely this impact. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at p. 962, 150 N.R. 161, the Supreme Court underlined that the privative clause is a reason "why the decisions of the Board made within its jurisdiction should be treated with deference by the court". Put into modern terms, the Board's decisions are to be reviewed on a reasonableness standard due in part to its being protected by this strict privative clause: *Exeter v. Canada (Attorney General)*, 2014 FCA 251, 465 N.R. 346; *Boshra* at para. 44; *McConnell* at para. 14.

2019 FCA 41 (CanLII)

TAB 31

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Alexander Vavilov *Intimé*

et

Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
Conseil canadien pour les réfugiés,
Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement,
Commission des valeurs mobilières de l'Ontario,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario),
Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut),
Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse,
Appeals Commission for Alberta Workers' Compensation,
Tribunal d'appel des accidents au travail (Nouveau-Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Conseil des tribunaux administratifs canadiens,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Congrès du travail du Canada,
Association nationale des organismes de réglementation de la pharmacie,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,

2019 SCC 65 (CanLII)

are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as

et, enfin, de l'impact potentiel de la décision sur l'individu qui en fait l'objet. Ces éléments ne doivent pas servir de liste de vérification pour l'exercice du contrôle selon la norme de la décision raisonnable et leur importance peut varier selon le contexte. L'objectif est simplement d'insister sur certains éléments du contexte pouvant amener la cour de révision à perdre confiance dans le résultat obtenu.

[107] Il est possible que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Ces éléments interagissent forcément entre eux : par exemple, une sanction raisonnable infligée pour inconduite professionnelle dans un cas donné doit être justifiée *à la fois* au regard des sanctions prescrites par les dispositions législatives applicables et de la nature de l'inconduite en cause.

a) *Le régime législatif applicable*

[108] Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. Le fait que les décideurs administratifs participent, avec les cours de justice, à l'élaboration du contenu précis des régimes administratifs qu'ils administrent, ne devrait pas être interprété comme une licence accordée aux décideurs administratifs pour ignorer ou réécrire les lois adoptées par le Parlement et les législatures provinciales. Ainsi, bien qu'un organisme administratif puisse disposer d'un vaste pouvoir discrétionnaire lorsqu'il s'agit de prendre une décision en particulier, cette décision doit en fin de compte être conforme « à la raison d'être et à la portée du régime législatif sous lequel elle a été adoptée » : *Catalyst*, par. 15 et 25-28; voir aussi *Green*, par. 44. En effet, comme le faisait remarquer le juge Rand dans l'arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140, [TRADUCTION] « il n'y a rien de tel qu'une "discrétion" absolue et sans entraves », et tout exercice d'un pouvoir discrétionnaire doit être conforme aux fins pour lesquelles il a été accordé : voir aussi *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 CSC 14, [2010] 1 R.C.S. 427, par. 32-33; *Nor-Man Regional Health Authority*,

2019 SCC 65 (CanLII)

the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly

par. 6. De même, la décision doit tenir compte de toute contrainte plus spécifique clairement imposée par le régime législatif applicable, telle que les définitions, les formules ou les principes prévus par la loi qui prescrivent l'exercice d'un pouvoir discrétionnaire : voir *Montréal (Ville)*, par. 33 et 40-41; *Canada (Procureur général) c. Almon Equipment Limited*, 2010 CAF 193, [2011] 4 R.C.F. 203, par. 38-40. Le régime législatif oriente également les approches acceptables en matière de prise de décisions : par exemple, lorsque le décideur dispose d'un vaste pouvoir discrétionnaire, il serait déraisonnable de sa part d'entraver un tel pouvoir discrétionnaire : voir *Delta Air Lines*, par. 18.

[109] Comme nous l'avons déjà mentionné, l'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. Il est ainsi inutile de conserver une catégorie de questions touchant « véritablement » à la compétence assujetties au contrôle selon la norme de la décision correcte. Si, en règle générale, il y a lieu de faire preuve de déférence envers l'interprétation que donne le décideur du pouvoir que lui confère la loi, ce dernier doit néanmoins justifier convenablement son interprétation. Le contrôle selon la norme de la décision raisonnable ne permet pas au décideur administratif de s'arroger des pouvoirs que le législateur n'a jamais voulu lui conférer. De la même manière, un organisme administratif ne saurait exercer un pouvoir qui ne lui a pas été délégué. Contrairement aux préoccupations exprimées par nos collègues (par. 285), cette démarche ne fait pas resurgir la notion d'« erreur de compétence » dans le contrôle judiciaire; elle ne fait que relever l'une des contraintes évidentes et nécessaires qui s'imposent aux décideurs administratifs.

[110] La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur. Si le législateur souhaite circonscrire avec précision le pouvoir d'un décideur administratif de façon ciblée, il peut se servir de termes précis et restrictifs et définir en détail les pouvoirs conférés, limitant ainsi strictement

2019 SCC 65 (CanLII)

constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

les interprétations que le décideur peut donner de la disposition habilitante. À l'inverse, dans les cas où le législateur choisit d'utiliser des termes généraux, non limitatifs ou nettement qualitatifs — par exemple, l'expression « dans l'intérêt public » — il envisage manifestement que le décideur jouisse d'une souplesse accrue dans l'interprétation d'un tel libellé. D'autres formulations se retrouveront entre ces deux extrêmes. Bref, selon le libellé des dispositions législatives habilitantes, certaines questions touchant à la portée du pouvoir d'un décideur peuvent se prêter à plusieurs interprétations, alors que d'autres questions ne sauraient commander qu'une seule interprétation. Ce qui importe, c'est de déterminer si, aux yeux de la cour de révision, le décideur a justifié convenablement son interprétation de la loi à la lumière du contexte. Évidemment, il sera impossible au décideur administratif de justifier une décision qui excède les limites fixées par les dispositions législatives qu'il interprète.

(b) *Other Statutory or Common Law*

b) *Les autres règles législatives ou de common law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding

[111] Il coule de source que le droit — tant la loi que la common law — limitera l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier : voir *Dunsmuir*, par. 47 et 74. Par exemple, le décideur administratif qui interprète la portée de son pouvoir de réglementation dans le but de l'exercer ne peut retenir une interprétation incompatible avec les principes de common law applicables en ce qui concerne la nature des pouvoirs législatifs : voir *Katz Group Canada Inc. c. Ontario (Santé et Soins de longue durée)*, 2013 CSC 64, [2013] 3 R.C.S. 810, par. 45-48. Un organisme chargé par la loi d'évaluer un taux d'imposition applicable conformément à un régime fiscal existant en particulier ne peut non plus faire fi de ce régime ni baser ses calculs sur un système « fictif » qu'il a créé arbitrairement : *Montréal (Ville)*, par. 40. Lorsqu'une relation est régie par le droit privé, il serait déraisonnable de la part du décideur de faire abstraction de ce fait lorsqu'il se prononce sur les droits des parties dans le cadre de cette relation : *Dunsmuir*, par. 74. De la même manière, lorsque la loi habilitante prévoit l'application d'une norme bien connue en droit et dans la jurisprudence, une décision

2019 SCC 65 (CanLII)

TAB 32

SASKATCHEWAN LAW REVIEW

Unresolved Issues after *Vavilov*

Paul Daly*

I. INTRODUCTION

In granting leave to appeal in a trilogy of cases in 2018, the Supreme Court of Canada departed from its practice of never giving reasons to explain its leave decisions.[1] The Court explained that it was necessary to reconsider the framework for judicial review set out a decade earlier in *Dunsmuir v New Brunswick*.[2] Having been battered for several years by critiques from the bench, bar, and academy,[3] the Court—finally and publicly—signalled its intent to comprehensively revisit its administrative law jurisprudence.[4] The resulting decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[5] was the *big bang* of Canadian administrative law: from now on, every issue must be analyzed with *Vavilov* as the starting point, with prior jurisprudence playing a supporting role, applying only to the extent that it can fit within the *Vavilov* framework.[6]

---

* B.C.L. (Cork), LL.M. (Pennsylvania; Cork), Ph.D. (Cambridge), Associate Professor and University Research Chair in Administrative Law & Governance, Faculty of Law, University of Ottawa. The following paper has been adapted from the Hugh H. Ketcheson Q.C. Memorial Lecture delivered on November 19, 2020 in Regina, Saskatchewan. I have lightly revised the text of the lecture to take account of helpful comments by the anonymous reviewers, and to highlight some particularly important developments in the case law.

1 *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132, [2018] 3 FCR 75 [*Vavilov* FCA], leave to appeal to SCC granted, 37748 (10 May 2018); *National Football League, et al v Attorney General of Canada*, leave to appeal to SCC granted, 37897 (10 May 2018); *Bell Canada, et al v Attorney General of Canada*, leave to appeal to SCC granted, 37896 (10 May 2018).

2 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

3 See especially Paul Daly & Léonid Sirota, *Canadian Journal of Administration Law & Practice Special Issue: A Decade of Dunsmuir/Les 10 ans de Dunsmuir* (Toronto: Thomson Reuters, 2018).

4 See Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 112–14 [Daly, "The *Vavilov* Framework"].

5 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*].

6 See *ibid* at para 143, where the Court provides the following:

> A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case…As for cases that dictated how to conduct reasonableness review, they will often continue to

the parties.[153] Where the *Charter* is in play, the burden of justification will be a heavy one, with administrative decision makers required to demonstrate that they gave serious consideration to the relevant *Charter* implications, justifying the balance struck in light of the effect on the individual and the availability of alternative means of achieving the same objective.[154]

In sum, I have long thought that *Doré* was a misstep in the Canadian law of judicial review of administrative action. However, a post-*Vavilov* correction is not at all inevitable. Those who wish to see the back of *Doré* will have to attack it directly, and hope their attacks resonate with a majority of the Court.

VI. THE CONSTITUTIONAL FOUNDATIONS OF *VAVILOV*[155]

In *Dunsmuir*, Justices Bastarache and LeBel framed their rearticulation of the standard of review analysis by reference to the constitutional foundations of judicial review.[156] In their view, the law of "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle."[157] On the one hand, the rule of law imposes on courts a "constitutional duty to ensure that public authorities do not overreach their lawful powers."[158] On the other hand, judicial review has "an important constitutional function in maintaining legislative supremacy."[159] In fashioning the law of judicial review the courts must avoid "undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures."[160] However, undue interference could never mean abstinence, as "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits."[161]

By contrast, *Vavilov* is pitched at the level of practice, not constitutional theory. The Court was most concerned by criticism from the judiciary, the academy, litigants, and civil society organizations,

---

153 *Vavilov*, *supra* note 5 at paras 126–28, 133–35.

154 See e.g. *Loyola*, *supra* note 123; *Trinity Western*, *supra* note 123.

155 The following section owes a great deal to David Mullan, who prompted this idea: David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 Adv Q 423 (Mullan has also discussed the point further with me). See also Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response" (3 January 2020), online (blog): *ABlawg* <ablawg.ca> [perma.cc/5DJD-NJCK].

156 *Dunsmuir*, *supra* note 2 at para 27.

157 *Ibid*.

158 *Ibid* at para 29.

159 *Ibid* at para 30.

160 *Ibid* at para 27.

161 *Ibid* at para 31.

with these critiques going "to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence."[162] The majority's efforts were designed to respond to these critiques. The constitutional foundations of judicial review did not warrant a mention; the Constitution barely figured. The constitutional basis of *Vavilov* is obscure.

This opacity is problematic. At least since *Crevier v A.G. (Québec) et al.*,[163] the constitutional basis of judicial review in Canadian administrative law has been taken to be the judicature provisions of the *Constitution Act, 1867*,[164] in particular s. 96. A great oak has sprouted from this acorn. Section 96 simply provides that the federal government shall appoint superior court judges.[165] Nevertheless, judicial exegesis, first by the Privy Council, and subsequently by the Supreme Court of Canada, means its branches cast an imposing shade over encroachments on the supervisory powers of the superior courts. Most importantly, as Chief Justice Laskin explained in *Crevier*, "[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review."[166] Ensuring that administrative decision makers stay within their jurisdiction is, then, a core task of the superior courts; judicial review is how they discharge that task. As Justice Cromwell observed in his concurring reasons in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[167] "this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard."[168]

The difficulty presented by *Vavilov* is that in the course of the majority's simplification exercise, it whittled the remaining correctness categories down to almost nothing, and eliminated jurisdictional error as a distinct correctness category altogether. The narrow rule-of-law basis for correctness review means that the starting point of reasonableness review will typically also be the end point as far as selecting the standard of review is concerned. There is no category of "jurisdictional" error that allows a reviewing court to police, on a correctness basis,[169] what Laskin C.J.C. described as the "limits" of an administrative decision maker's jurisdiction.[170]

---

162 *Vavilov*, *supra* note 5 at para 9.
163 [1981] 2 SCR 220, 1981 CanLII 30 [*Crevier* cited to SCR].
164 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
165 *Ibid*, s 96.
166 *Crevier*, *supra* note 163 at 238.
167 2011 SCC 61, [2011] 3 SCR 654.
168 *Ibid* at para 103.
169 *Vavilov*, *supra* note 5 at paras 65–67.
170 *Crevier*, *supra* note 163 at 238.

The difficulty thereby presented can be appreciated by reference to Justice Gleason's analysis in *Canada (Attorney General) v Public Service Alliance of Canada*.[171] At issue here was s. 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*.[172] Pursuant to this provision, the grounds of review of the Board are limited to jurisdictional error, breach of natural justice, and bad faith.[173] The legislation specifically excludes the grounds of review of legal error, factual error, or acting contrary to law.[174] Gleason J.A. refused to accept that the exclusion was effective. Giving effect to the exclusion "runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch,"[175] because "the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited, if such issues may still even be said to exist at all."[176] Post-*Vavilov*, jurisdictional issues indeed may no longer "exist at all."[177] As Gleason J.A. explained, the result would be that decisions of the Board would be "largely unreviewable," but given the constitutional basis of judicial review in Canadian law, "[t]his cannot be."[178] Rather, the exclusion of several grounds of review indicated that decisions of the Board should be reviewed deferentially.[179]

Let me put the difficulty in stark terms. There is nothing, on the face of *Vavilov*, to prevent a legislature from eliminating reasonableness review. As the majority put it, "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law."[180] But the "rule of law" here means only that limited class of cases in which correctness review applies to allow the courts to furnish a final, definitive answer to a question in the interests of uniformity.[181] As long as the courts are able to review constitutional questions, questions of central importance to the legal system, or questions of overlapping jurisdiction for correctness,[182] nothing seems to stand in the way of legislation to eliminate reasonableness review.

---

171 2019 FCA 41, 432 DLR (4th) 170 [*Public Service Alliance*].
172 SC 2013, c 40, s 365 [*Federal Public Sector Act*].
173 *Ibid*, s 34(1) (section 34(1) of the *Federal Public Sector Act* is based on the grounds of review found in the *Federal Courts Act*, RSC 1985, c F-7, ss 18.1(4)(a), (b), (e) [*Federal Courts Act*]).
174 *Ibid* (additional grounds of appeal listed in the *Federal Courts Act*, *supra* note 173, are not included in the *Federal Public Sector Act*, *supra* note 172).
175 *Public Service Alliance*, *supra* note 171 at para 30.
176 *Ibid*.
177 *Ibid*.
178 *Ibid* at para 31.
179 *Ibid* at para 34.
180 *Vavilov*, *supra* note 5 at para 35.
181 *Ibid* at para 53.
182 *Ibid*.

This is not merely a theoretical difficulty. There are a couple of ways in which reasonableness review could be eliminated, directly or indirectly. In Alberta, s. 539 of the *Municipal Government Act*[183] provides the following: "No bylaw or resolution may be challenged on the ground that it is unreasonable." Meanwhile, in various provincial and territorial statutes,[184] most famously in British Columbia,[185] patent unreasonableness has been prescribed as the standard of review of some types of administrative action. Indirectly, reasonableness review could be ousted by providing for a limited right of appeal. For example, the Federal Court of Appeal has interpreted various provisions relating to statutory appeals on issues of "law or jurisdiction" as excluding the consideration of factual matters.[186] Where an appellate court whose jurisdiction is circumscribed in this way refuses to grant leave or finds that a matter raised by a party is outside the scope of the appeal clause, reasonableness review is unavailable. This would be a simple solution and would provide significant clarity. Here, however, I would invoke a saying often attributed to Albert Einstein: "[E]verything should be made as simple as possible, but no simpler."[187]

Appearances, moreover, may be deceptive. On the face of it, *Vavilov* would permit legislative ouster of reasonableness review, but only on the face of it. Indeed, *Hamlet* springs to mind: "God has given you one face, and you make yourself another."[188]

First, in the same paragraph that eliminated jurisdictional error as a category of correctness review one finds the following assertion: "A proper application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their lawful authority."[189] The language of constitutional duty is the language of *Crevier* and *Dunsmuir*. It suggests that reasonableness review *cannot*, in fact, be ousted, for its elimination may prevent courts from doing their constitutional duty.

Second, although the point is not expressed in constitutional terms, the majority was very clear that it was directing administrative decision makers to henceforth "adopt a culture of justification and demonstrate that their exercise of delegated public power can be

---

183 RSA 2000, c M-26.

184 See e.g. *Environmental Assessment Act*, RSO 1990, c E.18, s 23.1; *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, s 163.3(39); *Health Professions Act*, SY 2003, c 24, s 29.

185 *Administrative Tribunals Act*, SBC 2004, c 45, ss 58–59.

186 See e.g. *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.

187 Albert Einstein, (last visited 23 January 2022), online: *Forbes Quotes* <www.forbes.com/quotes/193> [perma.cc/53TB-BCGV].

188 William Shakespeare, *Hamlet*, ed by Jonathan Bate & Eric Rasmussen (New York: Random House, 2008) at 64.

189 *Vavilov*, *supra* note 5 at para 67 [emphasis added].

'justified to citizens in terms of rationality and fairness.'"[190] If reasonableness review has been eliminated, administrative decision makers need never demonstrate that their exercise of public power can be justified in terms of rationality and fairness. This would knock the legs from under a central pillar of the architecture of *Vavilov*.

The result, I submit, is that *Vavilov* establishes a core constitutional minimum of reasonableness review. With respect, the insistence that correctness review—and only correctness review—must be constitutionally entrenched is, and has been, misplaced. Julius Grey put the point with admirable clarity in the mid-1980s:

> What *Crevier* does entrench is *some* degree of review. The courts will not interfere at the same moment on all issues or against all tribunals. However, they now clearly possess a constitutional right to step in when the bounds of tolerance are exceeded by any decision-maker. Clearly, the precise location of the bounds of tolerance is left to the court and that is quite consistent with the general trends in modern administrative law.[191]

In short, the "bounds of tolerance" are supplied in *Vavilov* by reasonableness review. Inasmuch as constitutional questions, questions of central importance to the legal system, and questions of overlapping jurisdiction have a "constitutional dimension,"[192] correctness review is also constitutionally entrenched.

Indeed, this description of the constitutional foundations of *Vavilov* provides an explanation for an otherwise mysterious passage in the majority reasons. Having established institutional design as a key, grounding concept in the selection of the standard of review, the majority considered limited rights of appeal (such as those restricted to questions of law or jurisdiction) and observed the following: "[T]he 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."[193] If respect for institutional design choices is so important, why can unappealable aspects of decisions nonetheless be judicially reviewed?

---

190 *Ibid* at para 14, quoting the Honourable Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171 at 174 [emphasis omitted].

191 Julius Grey, "Sections 96 to 100: A Defense" (1985) 1 Administrative LJ 3 at 11.

192 *Bank of Montreal v Li*, 2020 FCA 22 at para 28, 443 DLR (4th) 688. See also *Vavilov*, *supra* note 5 at paras 55–64.

193 *Vavilov*, *supra* note 5 at para 52.

The answer is that reasonableness review is constitutionally entrenched. A limitation of a right of appeal cannot, constitutionally, effect the elimination of reasonableness review of aspects of a decision.

How, then, should courts address direct and indirect limitations on reasonableness review post-*Vavilov*? Consider first direct limitations, that is, those imposed by eliminating grounds of review or specifying a deferential ground of review. Here, the legislative language can be taken as an indication that the decision maker should benefit from a wider margin of appreciation. As was the case with privative clauses prior to *Vavilov*, they would not be enforced to the letter, but their spirit would be respected. *Vavilovian* reasonableness review is capacious enough to accommodate this solution. In *Vavilov*, the majority recognized that "the language chosen by the legislature in describing the limits and contours of the decision maker's authority" may differ from case to case, sometimes allowing "greater flexibility," and sometimes "tightly constraining the decision maker's ability to interpret the provision."[194] Where a ground of review has been eliminated, or patent unreasonableness specified as the standard of review, these statutory provisions can be taken as "language chosen by the legislature" to give "greater flexibility" to the decision maker.[195] In this way, reasonableness review is preserved, and the constitutionally entrenched core minimum of judicial review safeguarded.[196] This approach is a fairly simple solution, which takes advantage of the thick conception of reasonableness review set out in *Vavilov* and provides crystalline clarity about the scope of judicial review.

The second question, that of indirect limitations, is slightly more complex. Where an appeal is limited to questions of law or jurisdiction, it is arguable that any issue relating to the "constitutional duty" to ensure that administrative decision makers remain within the boundaries of their authority will fall within the appeal clause. Historically, this was certainly the case, as such clauses respected the constitutional boundaries set out in *Crevier*. However, the core

194 *Ibid* at para 110.

195 *Ibid*.

196 Equally, one could do as the Ontario courts have done (so far) and simply assimilate patent unreasonableness to reasonableness: *Intercounty Tennis Association v Human Rights Tribunal of Ontario*, 2020 ONSC 1632 at paras 30–38, 446 DLR (4th) 585; *Ontario v Association of Ontario Midwives*, 2020 ONSC 2839 at para 88, 82 Admin LR (6th) 241. I do not think this is a viable strategy in British Columbia, however, where patent unreasonableness has long been considered to have content that is distinct from the Court's reasonableness standard: see e.g. *Speckling v British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para 33, 46 BCLR (4th) 77; *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 28, [2018] 1 SCR 635. See also Daly, "One Year of *Vavilov*", *supra* note 26 at 30–33.

TAB 33

34 Can. J. Admin. L. & Prac. 167

Canadian Journal of Administrative Law & Practice
June, 2021

Article

Patent Unreasonableness after *Vavilov*

Paul Daly [a1]

Copyright © 2021 by Thomson Reuters Canada Limited; Paul Daly

Much ink has already been spilled about the implications of the Supreme Court of Canada's reformulation of administrative law in Canada (Minister of Citizenship and Immigration) v. Vavilov. [1] *One issue, which has "largely been overlooked in the literature" [2] but will require detailed attention in the near future is the status of the patent unreasonableness standard of review, enshrined in law in several provincial statutes, most notably British Columbia's* Administrative Tribunals Act. [3] *In this note, I consider how patent unreasonableness might interact with reasonableness review as articulated in* Vavilov. *In summary, while legislated standards of review must be respected, the content of the patent unreasonableness standard can be calibrated by reference to Vavilovian reasonableness review. In short, in British Columbia and elsewhere in Canada, the simplest and most straightforward approach to take post-*Vavilov *is to give decision-makers to whose decisions patent unreasonableness applies a wider margin of appreciation in the exercise of their functions*.

Les répercussions de la reformulation du droit administratif par la Cour suprême du Canada dans l'arrêt Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov *ont déjà fait couler beaucoup d'encre. [4] Une question largement ignorée dans la doctrine, [5] mais qui nécessitera qu'on s'y intéresse attentivement dans un avenir proche, est ce qu'il advient de la norme de contrôle de la décision manifestement déraisonnable, enchâssée dans plusieurs lois provinciales, et plus particulièrement en Colombie-Britannique dans l'*Administrative Tribunals Act. [6] *Dans le présent article, nous étudions de quelle façon l'examen du caractère raisonnable tel que défini dans l'arrêt Vavilov est susceptible d'interagir avec la norme du caractère manifestement déraisonnable. En résumé, puisque les normes de contrôle établies par la voie législative doivent être respectées, on peut déterminer le* ***168** *contenu de la norme du caractère manifestement déraisonnable en se référant à la norme du caractère raisonnable élaborée dans Vavilov. En définitive, en Colombie-Britannique et ailleurs au Canada, la méthode la plus simple à comprendre et à appliquer à la suite de l'arrêt Vavilov est de reconnaitre aux décideurs dont les décisions sont assujetties à la norme du caractère manifestement déraisonnable une plus grande marge d'appréciation dans l'exercice de leurs fonctions*.

1. GUIDANCE FROM THE SUPREME COURT

In *Vavilov*, the majority stated that courts must "respect clear statutory language that prescribes the applicable standard of review". [7] The emphasis on a *standard* of review was no accident. In *Khosa v. Canada (Citizenship and Immigration)*, [8] the Supreme Court considered the interaction of the common law of judicial review and the *Federal Courts Act*. [9] Section 18.1(4) of the *Act* sets out a codified scheme of grounds of review, for instance that a decision-maker "acted without jurisdiction", "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner" or "erred in law in making a decision or an order". But s. 18.1(4) does not set out any *standard* of review. The language of s. 18.1(4) is "open textured" and has to be "supplemented by the common law". [10] For example, the reference to error of law in s. 18.1(4) "provides a *ground* of intervention" but not a standard such that where deference is appropriate, "the common law will stay the hand of the judge(s) ...". [11] By contrast, where, as in the *Criminal Code* provisions relating to Review Board decisions, a right of

appeal is restricted by legislation to a consideration of the reasonableness of a decision, the standard will straightforwardly be reasonableness. [12]

The only limitation on a legislature's ability to prescribe a standard of review is the rule of law. As the majority in *Vavilov* stated, "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law". [13] It has been suggested that giving effect to a legislative designation of patent unreasonableness as the standard of review would violate this edict. [14] But the conception of the rule of ***169** law relied upon in *Vavilov* is very thin, requiring only that judges have "the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary". [15] Prescribing patent unreasonableness (or even reasonableness) as the standard of review in such situations would be inconsistent with the rule of law. But legislating a deferential standard of review, even a very deferential standard of review, is not inconsistent with the rule of law, as defined in *Vavilov*. [16] Moreover, as discussed further below, *Vavilov* envisages that reasonableness review will be less demanding in situations where an administrative decision-maker has been empowered in broad terms by the legislature; given that reasonableness review may provide significant "flexibility" to administrative decision-makers in some circumstances, it is difficult to accept that the suggestion that prescribing a deferential standard of review is beyond the limits of legislative competence.

2. PATENT UNREASONABLENESS IN BRITISH COLUMBIA

The most well-known legislated standard of review is British Columbia's *Administrative Tribunals Act*. [17] Sections 58(2)(a) and 59(3) apply a standard of review of "patent unreasonableness" to certain administrative decisions: determinations of law protected by a privative clause and discretionary decisions, respectively. At the time of the enactment of the *Act*, there were three standards of review: correctness, reasonableness simpliciter and patent unreasonableness. In enacting a standard of patent unreasonableness, the legislature can be taken to have intended a high degree of deference to be shown to administrative tribunals covered by this standard (essentially, those protected by a privative clause).

The standard is defined identically in ss. 58(3) and 59(4) as follows:

> a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> ***170** (d) fails to take statutory requirements into account.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(a) The Pre-*Vavilov* Position

An alert reader of *Khosa* will note that these provisions simply specify *grounds* of review; indeed, they parrot the classic grounds of judicial review for abuse of discretion. They do not--regardless of what the legislature wished to accomplish and of how deferentially these grounds had been applied in practice-- specify a *standard* of review. And as Binnie J. explained in *Khosa*, there is a significant difference between identifying the sorts of error which *may* lead an administrative decision-maker to take an unlawful decision and identifying *when* judicial intervention is justified. *Khosa* holds that judicial intervention is justified only when, say, a failure to take statutory requirements into account renders a decision unreasonable as a whole. *Vavilov's* discussion of the governing statutory scheme compels a similar conclusion.

In *British Columbia (Workers' Compensation Board) v. Figliola*, [18] the Supreme Court failed to appreciate this difficulty, simply noting uncritically that, "based on the directions found in s. 59(3) of the *ATA*, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness". [19] On the facts, a majority of the Court held that the decision in the instant case was unreasonable because "the Tribunal based its decision to proceed ... on predominantly irrelevant factors and ignored its true [statutory] mandate ..." [20] The Supreme Court subsequently stated that patent unreasonableness requires the "utmost deference" to a decision-maker's interpretation of its parent statute and its decisions. [21] And, in *Vavilov*, the majority stated "legislated standards of review should be given effect", [22] referring to several of its decisions from British Columbia.

Despite these difficulties, the British Columbia courts have unquestioningly (and, by all accounts, happily) applied patent unreasonableness in a highly deferential manner, without reference to the definition of patent unreasonableness provided in the *Act*. [23] In *Speckling v. British Columbia* ***171** *(Workers' Compensation Board)*, the Court of Appeal endorsed six principles as defining the content of patent unreasonableness. In particular, to be patently unreasonable, a decision must be "openly, clearly, evidently unreasonable"; [24] the standard must be applied "to the result not to the reasons leading to the result" and "a decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not". [25]

However, subsequent to the enactment of the *Administrative Tribunals Act*, the Supreme Court of Canada eliminated the patent unreasonableness standard of review. [26] This required the British Columbia courts to respond to arguments that the law in British Columbia should evolve to take account of evolution in the common law. The British Columbia Court of Appeal heard argument on the point on several occasions and held that there had been "no change" in the meaning of patent unreasonableness on account of the Supreme Court of Canada's elimination of patent unreasonableness. [27]

*172 (b) The Implications of *Vavilov*

Vavilov has reopened a debate which seemed to have been closed, because *Vavilovian* reasonableness review has four distinct features which were not present in the pre-*Vavilov* understanding of reasonableness. *Vavilov* teaches that an administrative decision must be "justified in relation to the constellation of law and facts that are relevant to the decision". [28] ***First***, the decision must be ***justified*** in light of the legal and factual constraints on the decision-maker. As the Federal Court explained in *Ortiz v. Canada (Citizenship and Immigration)*, whereas previously reviewing courts began with the outcome and then looked back at the reasons, *Vavilov* instructs them "to start with the reasons, and assess whether they justify the outcome". [29] ***Second***, the decision must be the product of the ***demonstrated expertise*** of the decision-maker. Prior to *Vavilov*, decision-makers benefited from a thoroughgoing presumption of expertise. [30] ***Third***, the decision must be ***responsive*** to the central points raised before the decision-maker who must, indeed, grapple with key arguments and evidence. ***Fourth***, there is now a strong requirement of **contemporaneity.** Reviewing courts are, consistent with the majority reasons in *Vavilov*, to refrain from bolstering defective administrative decisions with post-hoc reasoning supplied by the decision-maker.

In *College of New Caledonia v. Faculty Association of the College of New Caledonia*, [31] the petitioner argued that the articulation of "robust" reasonableness review in *Vavilov* should inform the application of patent unreasonableness in British

WESTLAW EDGE CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Columbia. Francis J was unimpressed and, stating that *"Vavilov* has not changed the law with respect to the meaning of patent unreasonableness", went on to uphold the decision. [32] But in *Guevara v. Louie*, Sewell J took the opposite view, drawing inspiration from *Vavilov* in defining the content of patent unreasonableness: "In [*Vavilov*], the Court emphasized that it is the duty of a reviewing court to determine whether the decision maker's reasons meaningfully account for the central issue and concerns raised by the parties. While these comments were made in the context of a review on a reasonableness standard, it is my view that they also apply to a review of reasons on the standard of patent unreasonableness". [33] And in *Team Transport Services Ltd. v. Unifor*, Gomery J took *Vavilov* to require a reasons-first approach to judicial review. [34]

***173** What future, then, for patent unreasonableness in British Columbia (assuming that it is, as the British Columbia courts and the Supreme Court have construed it, a highly deferential standard)?

To begin with, it is necessary to ask whether "patent unreasonableness" was set in aspic in 2004. Was the standard set by reference to Supreme Court jurisprudence to evolve or stay still? Is patent unreasonableness a living tree, or an ice sculpture? I think it must be a living tree, for two reasons. For one thing, the patent unreasonableness standard was notoriously difficult to define, as LeBel, J. pointed out in devastating concurring reasons in *Toronto (City) v C.U.P.E., Local 79*. To take just one of the many points eloquently made there by LeBel J, to say that a decision is patently unreasonable if it is "openly, clearly, evidently unreasonable" is tautological. [35] To suggest that a standard which no one understood in 2004 should forever have the meaning that it had in 2004 is, at least, unrealistic and probably, well, tautologous. For another thing, when common law terms of art are set out in a statute, it is natural for courts "to look to the common law for clarification". [36] As Binnie J. put it in *Khosa*, patent unreasonableness was "intended to be understood in the context of the common law jurisprudence" and to evolve accordingly: "the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law". [37]

Accordingly, evolutions in the general principles of administrative law are relevant to determining the meaning of the patent unreasonableness standard. However, this prompts a further question: *how* are subsequent developments in the common law of judicial review *relevant*? There are two possibilities.

> • One is that patent unreasonableness ***changes in lockstep*** with changes to the reasonableness standard. This seems inappropriate. Even if the legislature did not set patent unreasonableness in aspic in 2004 (inasmuch as one can set the inchoate in aspic), when a common law standard is codified in this way, "it is stated in a fixed statutory form while its substance remains the same" [38] and the substance of patent unreasonableness could not be equated with the substance of reasonableness--it is its antithesis. As the British Columbia Court of Appeal observed of Binnie J's comments, in *Khosa*, they "did not signify that the standard of patent unreasonableness would evolve along with changes in the standard of reasonableness at common law post-*Dunsmuir"*. [39]

> ***174** • Another possibility is that patent unreasonableness should be ***informed by subsequent developments*** in the common law of judicial review. Other standards of review can be used as a foil to determine the content of patent unreasonableness. Patent unreasonableness is *not* reasonableness: that much is clear about its "substance" at the time of enactment. Therefore, patent unreasonableness can be defined by reference to the components of the reasonableness standard that *it does not share*. In this regard, I am reminded of the old joke about what on earth it means to be Irish: it means not being English.

WESTLAW EDGE CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

In terms of the common law *informing* patent unreasonableness, the following options are available. One possibility is to use the key differences between pre-*Vavilov* and post-*Vavilov* reasonableness review--justification, demonstrated expertise, responsiveness and contemporaneity--to define the content of patent unreasonableness. In essence, a reviewing court should look only to whether a decision lies in the range of possible, acceptable outcomes (not whether the reasons justify the outcome), a reviewing court should presume that the decision-maker brought its expertise to bear on the matter before it, a reviewing court should not require responsiveness to key arguments or pieces of evidence, and a reviewing court can freely look to the record to find reasons which *could* have been given in support of a decision in determining whether it falls within the range of possible, acceptable outcomes. This would make for a meaningful difference between patent unreasonableness in British Columbia and *Vavilov's* reasonableness standard, respecting legislative intent but also ensuring that the patent unreasonableness standard evolves. It also respects one of the key features of the existing British Columbia definition of patent unreasonableness, that judicial review should be outcome-focused, not reasons-focused. However, in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, Groberman JA doubted this proposition, based on a comprehensive review of the case law. [40] There is thus high authority *against* this option.

An alternative option would be simply to say that where the patent unreasonableness standard applies, it forms part of the "governing statutory scheme" and operates so as to give the decision-maker "greater flexibility" [41] in discharging its statutory mandate. Although it does not track the important differences between pre- and post-*Vavilov* reasonableness review, the alternative has the merit of simplicity. It also allows for *some* evolution in patent unreasonableness, *informed* by changes in the common law of reasonableness review. Furthermore, this option would be harmonious with the pre-*Vavilov* understandings of patent unreasonableness in British Columbia. The strong language from *Speckling*, for example, about the need to demonstrate clear irrationality to justify intervention on the patent unreasonableness standard, ***175** could be understood as an injunction to judges to give as much flexibility as possible to administrative decision-makers when applying the patent unreasonableness standard.

3. PATENT UNREASONABLENESS ELSEWHERE IN CANADA

(a) Ontario

In Ontario, the reference to patent unreasonableness in the *Human Rights Code*, [42] continues to be taken to require the application of the reasonableness standard. Counsel for the Human Rights Tribunal of Ontario has taken the position that, post-*Vavilov*, the courts must give effect to the legislature's choice of standard of review. But counsel has been uniformly rebuffed by the Divisional Court. [43] The point was fully argued before the Court of Appeal in *Longueépée v. University of Waterloo*. [44] But Strathy CJO considered that it would be "unwise and unnecessary" to resolve it, because the Tribunal decision at issue could not be sustained on either the reasonableness standard or the patent unreasonableness standard. [45]

Accordingly, the status of patent unreasonableness in the Ontario *Human Rights Code* remains a live issue. The British Columbia options laid out in the preceding section could certainly be actioned in Ontario. But there may be an important nuance. The Ontario statute makes reference to a common law concept (patent unreasonableness) which has been assimilated by the courts to another common law concept (reasonableness). Unlike in British Columbia, the legislature and the courts have not attempted to specify the content of patent unreasonableness but rather signalled a willingness to rely on judicial development of patent unreasonableness (while it is true that the British Columbia legislature did not specify a standard for patently unreasonable interpretations of law, it nonetheless expended significant effort on specifying the meaning of the patent unreasonableness standard). Ontario judges have considered since *Dunsmuir* that the goals of patent unreasonableness can be achieved through the application of the reasonableness standard. In this instance, it might be said that the assimilation of patent unreasonableness to ***176** reasonableness does no violence to legislative intent. This is the view the Divisional Court has taken.

Equally, however, patent unreasonableness might be given content by using reasonableness review as a reference point, as I have suggested for British Columbia. The same two options would be on the table: either patent unreasonableness does *not* have the key features of *Vavilovian* reasonableness review; or the statutory reference to patent unreasonableness should be treated

WESTLAW EDGE CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

as part of the statutory scheme, giving "greater flexibility" than would otherwise be the case to the Human Rights Tribunal of Ontario. The advantage of the former option is that it would give real teeth to the patent unreasonableness standard. The advantage of the latter option is that it would not represent a sharp break with the earlier Ontario jurisprudence, as the content of the patent unreasonableness standard would continue to be calibrated by reference to the common law of reasonableness review.

(b) Alberta

In Alberta, s. 539 of the *Municipal Government Act* provides: "No bylaw or resolution may be challenged on the ground that it is unreasonable". [46] In *Ponoka Right to Farm Society v. Ponoka (County)*, [47] Neilson J followed the analysis in *Koebisch v. Rocky View County* [48] to the conclusion that s. 539 represented a legislative direction to apply the patent unreasonableness standard. [49] Having eliminated reasonableness review, with correctness review being inappropriate, patent unreasonableness was the only standard left standing.

Historically, s. 539 can be explained on the basis that it attempted to oust reasonableness review as articulated in cases such as *Kruse v. Johnson*. [50] As my colleague John Mark Keyes explains, s. 539 is "a measure to counteract the strict review of municipal bylaws before the more recent reforms to municipal legislation at the beginning of the 21 st century". [51] Once s. 539 is understood in context, it does not appear to be a clear legislative command to apply the patent unreasonableness standard. Once more, the benefit of the "greater flexibility" solution seems obvious: rather than reviving patent unreasonableness, reviewing courts in Alberta could simply take s. 539 as forming part of the applicable governing statutory scheme and indicating that municipalities have a wider margin of appreciation when making decisions to which s. 539 applies.

*177 4. CONCLUSION

Canadian courts of appeal have yet to weigh in on the continued vitality or otherwise of the patent unreasonableness standard post-*Vavilov*. Plainly, however, it is a live issue, especially in British Columbia and in Ontario and Alberta in respect of human rights law and municipal law respectively. Make no mistake: this is a difficult issue. Patent unreasonableness was a notoriously opaque standard of review. For precisely this reason it was eliminated by the Supreme Court of Canada in *Dunsmuir*. Simply saying that 'the legislature can specify the standard of review and it has specified patent unreasonableness' is insufficient. Some meaning must be given to a standard whose defining characteristic has been its standardless quality.

In this piece I have laid out the options available to the courts of appeal. Either patent unreasonableness is defined by opposition to *Vavilovian* reasonableness review, or it is informed by it.

The general difficulty with the first option is that it would represent a relatively sharp break with the past. In Ontario, patent unreasonableness has long been assimilated to reasonableness as far as the Human Rights Tribunal is concerned. In British Columbia, there is recent authority with which the first option would be difficult to square. Furthermore, consider the importance accorded in *Vavilov* to reasons for administrative decisions. The majority stated that their goal was to require administrative decision-makers to "adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness.'" [52] This sits uneasily with a patent unreasonableness standard pursuant to which *Vavilov's* demands for justification, demonstrated expertise, responsiveness and contemporaneity would go unheeded.

My preference, then, is for the second option. Where patent unreasonableness is set as the standard of review, reviewing courts should take this to be part of the governing statutory scheme. Administrative decision-makers to which the patent unreasonableness standard applies would benefit from a wider margin of appreciation than those to which it does not apply. Furthermore, the old jurisprudence on patent unreasonableness need not be discarded: the injunctions to reviewing courts not to intervene for patent unreasonableness unless a decision is clearly irrational or bordering on the absurd function as useful reminders to judges that they should tread lightly and think carefully before holding a decision to be patently unreasonable. [53]

Most of all, the second option has the benefit of simplicity, as it would provide a pan-Canadian solution to the problem of giving meaning to patent unreasonableness. The second option is a one-size-fits-all solution which would *178 be easy for litigants,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

lawyers and legislators alike to understand. As such, it is of a piece with the Supreme Court of Canada's desire, expressed in *Vavilov*, to achieve clarity and simplicity in Canadian administrative law. [54]

Footnotes

a1 Dr. Daly holds the University Research Chair in Administrative Law & Governance at the University of Ottawa. With thanks to Kseniya Kudischeva and Mary Murray for research assistance and to Frank A Falzon, QC and Elena Miller for discussion.

1 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (S.C.C.) [*Vavilov*].

2 Connor Bildfell, "Reasonableness as a Constitutional Floor: Is the Standard of Patent Unreasonableness Inconsistent with the Rule of Law?" (2020) 33 Can J Admin L & Prac 229, at p. 230 [Bildfell].

3 S.B.C. 2004, c. 45.

4 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884 (S.C.C.) [*Vavilov*].

5 Connor Bildfell, << Reasonableness as a Constitutional Floor: Is the Standard of Patent Unreasonableness Inconsistent with the Rule of Law? >> (2020) 33 Can J Admin L & Prac 229, à la page 230.

6 S.B.C. 2004, c. 45.

7 *Vavilov, supra*, note 1, at para. 34.

8 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435 (S.C.C.) at para. 19 [*Khosa*].

9 R.S.C. 1985, c. F-7.

10 *Khosa, supra*, note 8, at para. 44.

11 *Ibid.* [emphasis in original]. See also *Bergman v. Innisfree (Village)*, 2020 ABQB 661 at para. 114.

12 See e.g. *Ahmadzai (Re)*, 2020 ONCA 169, 2020 CarswellOnt 3058 (Ont. C.A.) at para. 12; *Nguyen (Re), Re*, 2020 ONCA 247, 2020 CarswellOnt 4821 (Ont. C.A.) at para. 28; *R. v. Ferzli*, 2020 ABCA 272, 2020 CarswellAlta 1318 (Alta. C.A.) at para. 20 (appeals from a Criminal Code Review Board to the Court of Appeal).

13 *Vavilov, supra,* note 1, at para. 35.

14 See generally, Bildfell, *supra,* note 2.

15 *Vavilov, supra*, note 1, at para. 53.

16 It is possible that it would be inconsistent with more expansive conceptions of the rule of law (*Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 2019 CarswellNat 513, 2019 CarswellNat 14747 (F.C.A.) at paras. 30-32) or create a constitutional problem, to the extent that robust reasonableness review is constitutionally entrenched: see *e.g.* David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 Advocates' Quarterly 423.

17 *Supra,* note 3. I am indebted to Frank Falzon QC for discussion of the position in British Columbia.

18 2011 SCC 52, 2011 CarswellBC 2702, 2011 CarswellBC 2703 (S.C.C.) [*Figliola*]. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 2010 CarswellBC 2867, 2010 CarswellBC 2868 (S.C.C.).

19 *Figliola, ibid*, at para. 20.

WESTLAW EDGE CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

20 *Ibid.*, at para. 54. The concurring judges, led by Cromwell J, were slightly more deferential, but also accepted that the patent unreasonableness standard applied. See *ibid.*, at para. 97.

21 *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, 2018 CarswellBC 1234, 2018 CarswellBC 1235 (S.C.C.) at para. 29.

22 *Vavilov, supra*, note 1, at para. 34.

23 Indeed, it is arguable that the statutory definition and common-law definition of patent unreasonableness have been merged: see *C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406, 2019 CarswellBC 3397 (B.C. C.A.) at paras. 45, 76-81. Note that the statutory definition of patent unreasonableness does not apply to the British Columbia Labour Relations Board: *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 115.1. This may be because the Board feared that the definition would be applied non-deferentially. For an example of non-deferential application of the patent unreasonableness standard, see *Moore v. College of Physicians and Surgeons of British Columbia*, 2013 BCSC 2081, 2013 CarswellBC 3479 (B.C. S.C.) at para. 112-113, aff'g 2014 BCCA 466, 2014 CarswellBC 3627 (B.C. C.A.).), leave to appeal refused *British Columbia (Health Professions Review Board) v. Moore*, 2015 CarswellBC 1529, 2015 CarswellBC 1530 (S.C.C.). As it is, the "common-law definition" of patent unreasonableness applies to the Board, not the statutory definition: see *Casavant v. British Columbia (Labour Relations Board)*, 2020 BCCA 159, 2020 CarswellBC 1380 (B.C. C.A.) at para. 24, leave to appeal refused *BC Government and Service Employees' Union (BCGEU) v. Bryce J. Casavant*, 2021 CarswellBC 120, 2021 CarswellBC 121 (S.C.C.). See further *BCNU v. HSABC*, 2017 BCSC 343, 2017 CarswellBC 563 (B.C. S.C.) at para. 29; *Langston v. Teamsters, Local 155*, 2010 BCSC 534, 2010 CarswellBC 949 (B.C. S.C.) at para. 26; and *C.O.P.E., Local 378 v. BC Hydro*, 2006 BCSC 1145, 2006 CarswellBC 1868 (B.C. S.C.) at para. 29. Many thanks to Elena Miller for discussion.

24 Or, if it makes any difference, "clearly irrational" (*Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73, 2018 CarswellBC 424 (B.C. C.A.) at para. 37) or bordering on the absurd (*West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, 2018 CarswellBC 1234, 2018 CarswellBC 1235 (S.C.C.) at para. 28). See also *Unifor, Local 2301 v. Rio Tinto Alcan (Kitimat Works)*, 2016 BCSC 455, 2016 CarswellBC 694 (B.C. S.C.) at para. 6.

25 *Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80, 2005 CarswellBC 293 (B.C. C.A.) at para. 33. The other three "principles" do not, in my view, have any analytical force.

26 *Dunsmuir v. New Brunswick,* 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125 (S.C.C.) [*Dunsmuir*].

27 *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000,* 2014 BCCA 496, 2014 CarswellBC 3796 (B.C. C.A.) at para. 48, leave to appeal refused 2015 CarswellBC 3129, 2015 CarswellBC 3130 (S.C.C.) [*Pacific Newspaper*]. See also *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCCA 527, 2011 CarswellBC 3531 (B.C. C.A.).

28 *Vavilov*, supra, note 1, at para. 105.

29 2020 FC 188, 2020 CarswellNat 1219, 2020 CarswellNat 208 (F.C.) at para. 22.

30 *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, [2016] 2 S.C.R. 293 (S.C.C.).

31 2020 BCSC 384, 2020 CarswellBC 657 (B.C. S.C.).

32 *Ibid.*, at para. 33.

33 *Guevara v. Louie*, 2020 BCSC 380, 2020 CarswellBC 648 (B.C. S.C.) at para. 48.

34 *Team Transport Services Ltd. v. Unifor*, 2020 BCSC 91, 2020 CarswellBC 178 (B.C. S.C.) at para. 19.

35 *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329 (S.C.C.) at paras. 104-105.

WESTLAW EDGE CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

36 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 436 [*Sullivan*].

37 *Khosa, supra*, note 8, at para. 19.

38 *Sullivan, supra,* note 36, at 436.

39 *Pacific Newspaper, supra*, note 27, at para. 46.

40 *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, 2018 CarswellBC 2752 (B.C. C.A.) at para. 74.

41 *Vavilov, supra*, note 1, at para. 110.

42 R.S.O. 1990, c. H-19, s. 45.8. See also *Environmental Assessment Act*, R.S.O. 1990, c. E.18, s. 23.1; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 163.3(39), though I was not able to find any jurisprudence applying these provisions.

43 *Intercounty Tennis Association v. Human Rights Tribunal of Ontario*, 2020 ONSC 1632, 2020 CarswellOnt 4742 (Ont. Div. Ct.) at para. 30-38; *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839, 2020 CarswellOnt 9033 (Ont. Div. Ct.) at para. 88; *Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150, 2020 CarswellOnt 14557 (Ont. Div. Ct.) at para. 16.

44 2020 ONCA 830, 2020 CarswellOnt 18852 (Ont. C.A.), additional reasons 2021 CarswellOnt 869 (Ont. C.A.).

45 *Ibid.*, at para. 56.

46 R.S.A. 2000, c. M-26.

47 2020 ABQB 273, 2020 CarswellAlta 733 (Alta. Q.B.) [*Ponoka Right to Farm Society*].

48 2019 ABQB 508, 2019 CarswellAlta 1966 (Alta. Q.B.).

49 *Ponoka Right to Farm Society, supra*, note, 47, at para. 13.

50 [1898] 2 QB 1.

51 "Judicial Review of Delegated Legislation: the Long and Winding Road to *Vavilov"*, *Ottawa Faculty of Law Working Paper No. 2020-14*, 18 June 2020, available online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630636>, at 6 n 40.

52 *Ibid.*, at para. 14, citing the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171 at 174 [emphasis deleted].

53 See further Paul Daly, "The Language of Administrative Law" (2016) 94 Canadian Bar Review 519.

54 See further Paul Daly, "Unresolved Issues after *Vavilov"*, Hugh M Ketcheson QC Memorial Lecture, 19 November 2020: https://papers.ssrn.com/sol3/papers.cfm?ab-stract_id=3732962.

34 CJALP 167

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 34

The Canada Labour Relations Board and the Attorney General of Canada *Appellants*;

and

Paul L'Anglais Inc. and J.P.L. Productions Inc. *Respondents*;

and

The Canadian Union of Public Employees, the Attorney General of Quebec and Télé-Métropole Inc. *Mis en cause*;

and

The Attorney General for New Brunswick and the Attorney General for Alberta *Interveners.*

The Canadian Union of Public Employees *Appellant*;

and

Paul L'Anglais Inc. and J.P.L. Productions Inc. *Respondents*;

and

The Canada Labour Relations Board, the Attorney General of Canada, the Attorney General of Quebec and Télé-Métropole Inc. *Mis en cause*;

and

The Attorney General for New Brunswick and the Attorney General for Alberta *Interveners.*

File No.: 16384.

1982: October 25, 26; 1983: February 8.

Present: Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Courts — Jurisdiction — Superior Court — Superintending and reforming power — Federal agency — Decision of Canada Labour Relations Board — Decision regarding constitutional division of powers — Motion in evocation — Whether s. 18 of Federal Court

Le Conseil canadien des relations du travail et le procureur général du Canada *Appelants*;

et

Paul L'Anglais Inc. et J.P.L. Productions Inc. *Intimées*;

et

Le Syndicat canadien de la fonction publique, le procureur général du Québec et Télé-Métropole Inc. *Mis en cause*;

et

Le procureur général du Nouveau-Brunswick et le procureur général de l'Alberta *Intervenants.*

Le Syndicat canadien de la fonction publique *Appelant*;

et

Paul L'Anglais Inc. et J.P.L. Productions Inc. *Intimées*;

et

Le Conseil canadien des relations du travail, le procureur général du Canada, le procureur général du Québec et Télé-Métropole Inc. *Mis en cause*;

et

Le procureur général du Nouveau-Brunswick et le procureur général de l'Alberta *Intervenants.*

N° du greffe: 16384.

1982: 25, 26 octobre; 1983: 8 février.

Présents: Les juges Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Tribunaux — Compétence — Cour supérieure — Pouvoir de surveillance et de contrôle — Organisme fédéral — Décision du Conseil canadien des relations du travail — Décision portant sur le partage constitutionnel des compétences — Requête en évocation —

1983 CanLII 121 (SCC)

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

It is well established that the effect of s. 18 was to transfer all superintending and reforming power over federal agencies from the superior courts to the Federal Court: *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, at p. 233; *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453, at p. 470.

That is not at issue. Respondents are not disputing that this section validly removed federal agencies, in their administration of the laws of Canada, from the superintending and reforming power of the superior courts. What respondents are saying is that this section cannot divest the superior courts of the power to find a statute of Canada unconstitutional, or rather, as is the case here, to find a statute of Canada inapplicable when the effect of that statute is to bring within the scope of federal authority a matter which the Constitution reserves exclusively for the provinces.

The constitutionality of s. 18 was not raised. However, respondents argued, this section, which confers exclusive jurisdiction on the Federal Court, cannot be applied to set aside the superintending and reforming power of the Superior Court when the Board, in finding that respondent undertakings are federal undertakings, confers on itself a jurisdiction which belongs exclusively to the provinces.

It is this finding of the Board which is challenged by respondents: in their submission, this is not a finding applying a statute of Canada, but one which relates to the constitutional division of powers.

a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

Il est bien établi que par l'effet de cet art. 18 toute la compétence de surveillance et de contrôle des organismes fédéraux est transférée des cours supérieures à la Cour fédérale. *Commonwealth de Puerto Rico c. Hernandez*, [1975] 1 R.C.S. 228, à la p. 233; *Howarth c. Commission nationale des libérations conditionnelles*, [1976] 1 R.C.S. 453, à la p. 470.

Cela n'est pas en cause. Les intimées ne contestent pas que cet article a validement soustrait à la surveillance et au contrôle des cours supérieures les organismes fédéraux dans leur administration des lois du Canada. Ce que les intimées contestent c'est que cet article puisse retirer aux cours supérieures le pouvoir de prononcer l'inconstitutionnalité d'une loi du Canada ou plutôt, comme c'est le cas en l'espèce, l'inapplicabilité d'une loi du Canada lorsque celle-ci a pour effet de faire entrer dans le champ de compétence fédérale un sujet que la Constitution réserve exclusivement aux provinces.

La constitutionnalité de l'art. 18 n'est pas soulevée. Cependant, disent les intimées, cet article qui attribue à la Cour fédérale une compétence exclusive, ne peut s'appliquer pour écarter le pouvoir de surveillance et de contrôle de la Cour supérieure lorsque le Conseil, en déterminant que les entreprises intimées sont des entreprises fédérales, s'arroge une compétence qui relève exclusivement des provinces.

C'est cette détermination du Conseil que les intimées attaquent et selon elles il ne s'agit pas là d'une détermination faite en application d'une loi du Canada, mais d'une détermination qui porte sur le partage constitutionnel des pouvoirs.

1983 CanLII 121 (SCC)

TAB 35

THE INDEPENDENCE OF THE JUDICIARY*

W. R. LEDERMAN
Halifax

III. *Status of Superior Court Judges in Colonial North America*

(*a*) *Before the American Revolution*

The seventeenth and eighteenth centuries saw extensive settlement and development of the American colonies under British auspices. It was at the beginning of the eighteenth century, when principles of colonial government were already rather well defined, that the Act of Settlement in England provided that judges' commissions should be made *quamdiu se bene gesserint* and their salaries ascertained and established. Looking back, one rather expects to find that this statutory guarantee would have taken effect contemporaneously in overseas territories as well as in Britain. British settlers were deemed to take with them to colonies acquired by settlement most of the common law of England and so much of the total body of English statute law as was applicable in the early days of the colony concerned to conditions in the New World. In addition, there was always the over-riding legislative supremacy of the Imperial Parliament. That body could at any time legislate for the colonies by statutes made applicable to them expressly or by necessary intendment.[106]

Why would not one or the other of these principles of Imperial constitutional law transport the seventh paragraph of the third section of the Act of Settlement to the New World? Certainly the first two sections of the statute were expressly applicable in all British territories, determining as they did (and still do) the succession to the throne. The fourth and last section looks applicable overseas by necessary intendment, and the same comment seems appropriate concerning at least some of the paragraphs of the third section other than the one about the judges. Finally, the

*The first two parts of this article appeared in the issue of the Review for August-September 1956, pages 769-809.

[106] See J. E. Read, The Early Provincial Constitutions (1948), 26 Can. Bar Rev. 621.

over-rides the provincial administration of justice power in section 92(14), which otherwise would be almost unlimited. But there is no need to over-ride sections 99 and 100 in favour of section 101 because, in so far as section 101 contemplates the establishment of superior courts, sections 99 and 100 are not inconsistent, in fact quite the contrary. They prescribe certain of the essential characteristics that superior courts must exhibit to be superior courts. There is no need to stand them off. Likewise one can say that a binding implication arises from sections 97 and 98 that judges of federal superior courts must be selected from the legal profession.

In other words, my reasoning is that the "notwithstanding" clause in section 101 performs the same office there that it does earlier in the opening words of section 91, that is, it supports specific categories of federal power against any verbally inconsistent category of provincial power and, having done that, is *functus officio*. Hence my view that the term "superior court" in sections 99 and 100 includes any federal superior courts constituted under section 101. If this is correct, then the judges of federal superior courts are in the same position respecting salary, tenure, retirement and removal as judges of the provincial superior courts, and for the same constitutional reasons.

(ii) *Guaranteed jurisdiction for federal superior courts?* When one realizes that the guaranteed jurisdiction of the provincial superior courts rests upon a wider basis of necessary implication than the "mere" federal appointing power in section 96, as explained earlier, then it follows that the same wider basis of implication is equally relevant to the federal superior courts and should confer on them a similarly guaranteed jurisdiction. This would mean that laws within section 91 of the B.N.A. Act appropriate only for superior-court administration on the test of the *John East* case must be assigned by the federal Parliament for administration to a superior court. This necessity could be satisfied by resort to a provincial superior court or to a federal superior court, but it would have to be to one or the other. If sections 97, 98, 99 and 100 of the B. N. A. Act apply to the federal superior courts as suggested earlier, then the basis for the implication is as obvious as for the provincial courts in the field of provincial laws. Even if these sections do not apply, the fact that section 101 contemplates federal superior courts might be said to mean also that some guaranteed substantial jurisdiction is contemplated within the scope of section 91. This approach casts some doubt, as Professor Laskin suggests

TAB 36

THE UNCERTAIN CONSTITUTIONAL POSITION OF CANADA'S ADMINISTRATIVE APPEAL TRIBUNALS

*David J. Mullan**

I. INTRODUCTION

Now that the Law Society of Upper Canada permits lawyers to advertise their practices as limited to certain areas of specialty, there are rumours of one practitioner restricting herself to cases "involving section 96 of the Constitution Act". While this story is almost certainly apocryphal, the continuing flow of constitutional litigation concerned with this provision suggests that it might be a lucrative way of making a living, providing one secured the relevant briefs. Indeed, the stimulus to litigation provided by the recent spate of successful invocations of the section as a basis for striking down legislation may ensure that there are

* Faculty of Law, Queen's University. The Supreme Court decision discussed in the comment was delivered while I was teaching Public Law in the Fall of 1981. Much of what follows emerged during class discussion with students in that course and I am indebted to them. I am also grateful for the incisive comments of my three colleagues, Professors John Claydon, Noel Lyon and Toni Pickard.

Nevertheless, this does not necessarily speak to the more general issue of the availability of access to the superior courts.[107] Rather, it can be interpreted as simply being concerned with the continued availability of particular remedies. In other words, it supports measures such as the Ontario[108] and British Columbia[109] Judical Review Procedure Acts and section 28 of the Federal Court Act[110] by which new judicial review remedies were created in place of the historic prerogative writs and other common law methods of judicial review. Change is alright, provided access to superior courts is preserved in some direct form.[111] Thus, on this interpretation, in *Pringle v. Fraser* it was important that the statute allowed appeals albeit by leave on questions of law and jurisdiction to the Supreme Court of Canada.[112] Appeal had taken the place of review but the major grounds of judicial review (law and jurisdiction) were still there.

Laskin C.J.C. in fact gives some credence to this interpretation by his statements at Edmonton in 1975:

> I'm bound to say from the way I read our cases — and that may not be the way you read our cases — that it was not so much that the Immigration Appeal Board was given exclusive jurisdiction respecting orders of deportation, as that a complete code of procedure has been established under immigration legislation, giving reviewing power to the board, to the Federal Court and ultimately to the Supreme Court of Canada (we said), to the exclusion of provincial courts.[113]

In sum, the argument is that the authorities do not in fact preclude the possibility of contending that the judicature provisions of the Constitution Act create a guaranteed core of jurisdiction for sections 96 to 100 courts immune from federal as well as provincial abrogation. If this argument is accepted it also seems to me that judicial review of administrative action for jurisdictional error is one of those categories of

---

[107] Note, however, Hogg's use of *Pringle*, *supra* note 41, at 727-28. *See also* Arthurs, *supra* note 44, at 332.

[108] R.S.O. 1980, c. 224.

[109] R.S.B.C. 1979, c. 209.

[110] S.C. 1970-71-72, c. 1. For a discussion of whether the fact that Federal Court judges retire at 70 rather than 75 as provided in s. 99 of the Constitution Act for s. 96 court judges raises a constitutional problem, *see* Hogg, *supra* note 41, at 728, n. 42 and Schwartz, *supra* note 41, at 139, n. 75.

[111] I use "direct" in contradistinction to "collateral". *See supra* note 40.

[112] Immigration Appeal Board Act, S.C. 1966-67, c. 90, s. 23. The fact that leave was required does not seem to me to be of importance. First, historically, the obtaining of relief by way of *certiorari* was itself a two stage process, with the first stage being the rough equivalent of a leave-granting stage. Secondly, the availability of an opportunity to argue that leave should be granted is arguably in itself a sufficient guarantee of access to the courts for review purposes. *See*, however, Schwartz, *supra* note 41, at 139, n. 73.

[113] *Supra* note 44, at 136. Note, however, that in his subsequent Australian Legal Conference paper, he appeared somewhat less sympathetic to the Lederman view of judicial review being guaranteed even against federal interference, describing it as having been rejected in R. v. Canada Lab. Rel. Bd., 44 D.L.R. (2d) 446 (Man. Q.B. 1964): *supra* note 44, at 456.

judicial function coming within the guaranteed core of substantive jurisdiction.

The judgments of the Supreme Court of Canada in *Farrah* in fact leave no doubt as to the place and importance of judicial review of administrative action by the superior courts in pre-Confederation Canada.[114] Moreover, as Laskin C.J.C. suggests in *Crevier*, the task of judicial review for jurisdictional error is not far removed in importance from judicial scrutiny of statutes for constitutionality.[115] That task is one of deciding whether a statutory authority has strayed beyond the mandate delegated to it by Parliament. To quote Lederman in a more recent article:

> [I]t would be strange indeed if the elected members of the federal parliament could be reviewed by the superior courts to keep them within the limits of the B.N.A. Act, but the appointed members of the federal Labour Relations Board could not be reviewed by the same superior courts to keep them within the limits of a valid federal statute.[116]

It is also important that review for jurisdictional error, whether viewed as guaranteed provincially or both federally and provincially, does not itself act as a brake on legislative experimentation with new structures for resolving old, new, or changing substantive problems. Rather, it serves in a reserve capacity ensuring that, whatever experimentation the various legislatures conduct, the actors in a particular statutory scheme keep within the legislative limits set for them. As such, judicial review for jurisdictional error as part of a guaranteed core of superior court authority has a higher claim for recognition than, for example, any argument that would suggest that tort liability for personal injuries resulting from negligence could not be abolished and replaced by a New Zealand-style Accident Compensation Scheme.[117] Certainly, it speaks to the preservation of existing institutions, namely the courts, but only in a special or reserve capacity and one which does not threaten the ability of legislatures to change institutions and methods of dealing with intransigent, social engineering problems of our society. It does not even totally preclude experimentation with methods of judicial review; it simply specifies the qualifications, tenure and mode of appointment of those who should perform the task. A federally appointed specialist court is

---

[114] *See* in particular the judgment of Pratte J., *supra* note 2, at 649-52, 86 D.L.R. (3d) at 173-76.

[115] After referring to the effectiveness of privative clauses restricting judicial review for "mere" or intrajurisdictional errors of law, he goes on to say: "The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality." *Supra* note 3, at 559, 127 D.L.R. (3d) at 14.

[116] *The Supreme Court and the Canadian Judicial System*, *supra* note 41, at 223-24.

[117] In 1972, by the Accident Compensation Act, the New Zealand Parliament abolished the action in tort for personal injuries and replaced it with a categorized system of compensation for all personal injuries with associated administrative and adjudicative structures.

still possible as are different procedures for judicial review, provided the requirements sections 96 to 100 are met.

In fact, if the core function idea operates as a limitation on the federal Parliament in the manner indicated up to this point, the authority of *Crevier* should be sufficient to include judicial review of administrative action for jurisdictional error within that core. The restraints on the provincial legislatures and the federal Parliament would be equated. In other words, the argument brings with it not only a guarantee of judicial review jurisdiction for a sections 96 to 100 court but also all the other limitations on interference with the jurisdiction of such courts including regrettably the uncertain limitations on the creation of administrative tribunals suggested by *Crevier*. There are, however, other possibilities which do not transfer all the section 96 precedents into the federal sphere.

Provided one accepts the notion that the Canadian Constitution enshrines a separation of powers doctrine with guaranteed roles for the legislative, executive and judicial branches of government, there is an independent argument that can be made against privative clauses which attempt to restrict review for jurisdictional error. This is suggested by Lyon in his 1976 article, *The Central Fallacy of Canadian Constitutional Law*.[118] His point is that such privative clauses constitute an impermissible delegation of legislative power in that conferring the ability to define the scope of one's authority or jurisdiction amounts to the creation of a mini-legislature.[119] Lyon admits[120] that the prospects for such an argument are weakened by the 1970 judgment of the Supreme Court in the *Breathalyzer Reference*[121] sustaining the selective proclamation of federal breathalyzer legislation. Nevertheless, in the context of a thorough-going analysis of the basis of the Canadian Constitution and a consideration of the applicability of the *Liyanage* decision,[122] it is possible that the Supreme Court could change its position on this issue and recognize limitations on the delegation of legislative power.

Another possibility is that judicial review of administrative action simply stands on a special footing because of its near equivalence to constitutional review and that its availability in the face of both federal and provincial privative legislation can thereby be defended, not-

---

[118] 22 McGILL L.J. 40 (1976).

[119] *Id.* at 42-50 particularly. Lyon does not advance his argument in these precise terms. Rather, he makes the more general assertion that there is a separation of legislative and executive functions in the Constitution Act which prevents the delegation of legislative power to the executive branch. Interestingly, H. WADE in CONSTITUTIONAL FUNDAMENTALS, *supra* note 45, at 66, also makes a similar argument in relation to the United Kingdom when he talks of "super" privative clauses as an abuse of parliamentary power involving the delegation of potentially dictatorial authority.

[120] In fact, this fundamental issue was not addressed in the case: *supra* note 118, at 42.

[121] Reference *re* Criminal Law Amendment Act, 1968-69, [1970] S.C.R. 777, 10 D.L.R. (3d) 699.

[122] *Supra* note 88. *See* Lyon, *supra* note 118, at 44-50.

withstanding that the judicature provisions generally do not apply to restrict the federal Parliament. Putting it slightly differently, section 101 allows the federal Parliament to create adjudicative bodies in any manner it pleases but that this does not authorize the precluding of judicial review of these or other federal jurisdictions by a superior court. Judicial review is thereby read as transcending section 101, but this does not apply to other jurisdictions guaranteed to section 96 courts from provincial interference; over these section 101 would still prevail. However, apart from Laskin C.J.C.'s aside in *Crevier* about the relationship between constitutional review and regular jurisdictional review, it is difficult to find support for such an argument.

VI. Summary

In short, the problem with *Crevier* is not that it decides that superior court judicial review is immune from provincial abolition. Indeed, one could argue that the logic of Laskin C.J.C.'s argument points to a guarantee against federal interference as well. Rather, the concern is focussed on the great uncertainty that the case has left with respect to intermediate administrative appeal tribunals. It appears to be quite contrary to the exigencies of our present society to potentially deny to the provinces in the name of section 96 the authority to establish administrative agencies of the type that are characterized at the federal level by the Tax Review Board and the Immigration Appeal Board. No principle of federalism would seem to demand that the authority to create and staff such bodies should be the federal Parliament's alone. The federal interest in such matters arising by virtue of section 96 and any overriding or guaranteed judicial role enshrined by the Constitution Act is amply preserved by the continued existence of judicial review for jurisdictional error.