Federal Court of Appeal | Cour d'appel fédérale

Date: 20241002

Docket: A-169-21

Citation: 2024 FCA 158

CORAM: **DE MONTIGNY C.J.**
BOIVIN J.A.
LEBLANC J.A.

BETWEEN:

DEMOCRACY WATCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN TELECOMMUNICATIONS ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on March 25, 2024.

Judgment delivered at Ottawa, Ontario, on October 2, 2024.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRING REASONS BY: BOIVIN J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] Democracy Watch (the "applicant") applied for judicial review of a report by the Conflict of Interest Ethics Commissioner (the "Commissioner"). The report concluded that Prime Minister Justin Trudeau (the "Prime Minister") did not contravene the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 (the "COIA") when he participated in two decisions involving WE Charity. Before addressing the merits of this application, this Court bifurcated the proceeding into two stages (*Democracy Watch v. Attorney General of Canada*, 2023 FCA 39 (*Democracy Watch 2023*)). This is stage 1 of the application, where the main issue is whether the applicant can bring the application for judicial review despite the partial privative clause in COIA section 66.

[2] This case is somewhat special because it highlights an ongoing debate in the Court's jurisprudence (*Democracy Watch 2023* at para. 5). The majority decision in *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 (*Best Buy*) holds that partial restrictions on judicial review for certain types of errors are contrary to the rule of law. In contrast, *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, rev'd in part 2023 SCC 17 (*Canadian Council for Refugees*) holds partial restrictions on judicial review can be valid and do not necessarily offend the rule of law. The Supreme Court's decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) and, more recently, *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8 (*Yatar*), do not definitively address the issue.

[3] For the reasons that follow, I am of the view that the Attorney General's motion to strike the application for judicial review should be granted. In my view, the majority reasons in *Best Buy* do not govern the decision in this case, because the available alternative political remedies combined with section 66 of the COIA effectively bar the intervention of this Court. That being said, I will nevertheless address the role and impact of privative clauses and the underlying debate that has been going on in this Court, since the parties have focussed much of their arguments on that question.

I. Facts

[4] On May 14, 2021, the Commissioner concluded that the Prime Minister was not in a conflict of interest when participating in two decisions involving WE Charity ("The Trudeau III Report"). The Commissioner released his report following an investigation that he had instigated under COIA section 44 following two requests from Members of Parliament on June 28, 2020 and July 3, 2020. The allegations were that the Prime Minister had contravened subsection 6(1) and sections 7 and 21 of the COIA. These provisions prohibit public office holders from making decisions that lead to a conflict of interest (s. 6) and from giving preferential treatment (s. 7), and require a public office holder to recuse themselves from any discussion where they have a conflict of interest (s. 21).

[5] On June 11, 2021, the applicant applied for judicial review of the Commissioner's decision, alleging two errors of law regarding the Commissioner's interpretation of subsection

6(1) and an error of fact regarding the Prime Minister's relationship with one of the founders of WE Charity.

[6] The Attorney General (the "respondent") moved to strike the application, arguing that the applicant lacked standing and that the application was based on grounds barred from judicial review by section 66 of COIA, which prevents an applicant from bringing an application for judicial review on questions of law and fact. Under COIA section 66, the Commissioner's decisions can only be reviewed on the grounds listed in paragraphs 18.1(4)(*a*), (*b*), or (*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "FCA"). Those grounds are, respectively, limited to issues of jurisdiction, procedural fairness, or acting or failing to act "by reason of fraud of perjured evidence."

[7] On December 5, 2022, this Court ruled that the applicant has public interest standing, but left the issue of whether the application was barred by section 66 of the COIA to the panel hearing the application (*Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208).

[8] The applicant then moved for disclosure of documents from the Commissioner. It is at that point that the Court ordered that the application proceed in two stages, on the basis that the disclosure request placed the Commissioner in an untenable position. Such was the case because it involved asking the Commissioner to disclose confidential documents in support of a ground that might ultimately be barred under section 66. If that section were to be interpreted as barring some or all of the grounds raised in the application, confidential material that should not have been disclosed would nevertheless have been disclosed. To solve that conundrum, the Court

decided it would hear and determine the legal issue of whether section 66 bars the application (stage 1). If the Court decides that it does not, it would then hear and determine the merits of the application (stage 2).

[9] By order of this Court dated May 4, 2023, the Canadian Telecommunications Association (the "CTA" or "intervener"), a trade organization that represents a number of companies across the telecommunications sector, was granted leave to intervene in stage 1 to make submissions on the prerequisite issue of the Court's subject-matter jurisdiction.

II. Issue

[10] The discrete issue to be decided in this application for judicial review can be stated as follows:

> Under the COIA, does the partial privative clause limiting judicial review only on questions of jurisdiction, procedural fairness, and fraud or perjured evidence prevent the judicial review of questions of law or questions of fact arising from the Commissioner's findings in the "Trudeau III Report"?

III. The legislative scheme

[11] The Commissioner is an independent Officer of Parliament appointed under subsection 81(1) of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (the "PCA") to administer the COIA. The Office of the Conflict of Interest and Ethics Commissioner was established under the *Federal Accountability Act*, S.C. 2006, c. 9 (the "FAA"), which amended the PCA and

established the COIA. The FAA received Royal Assent in December 2006 and came into force in July 2007.

[12] The COIA was implemented after several attempts to introduce conflict of interest and ethics legislation and codes in Parliament. The first recommendation for legislation regarding conflict of interest and ethics dates to a 1973 Green Paper tabled in the House of Commons on Members of Parliament and Conflict of Interest. Following the Green Paper, in 1974, Prime Minister Pierre E. Trudeau issued guidelines for Cabinet Ministers instead of legislation, and established the Office of Assistant Deputy Registrar within the Department of Consumer and Corporate Affairs, the first iteration of the Commissioner. The Office's role was to manage the new ethics guidelines for Cabinet Ministers and process Cabinet Ministers' disclosures of assets. Subsequent attempts to introduce legislation in 1978, 1983, 1988, 1989, 1991 and 1992 were unsuccessful and died on the order paper. In 1994, the Prime Minister appointed an Ethics Counsellor to replace the Assistant Deputy Registrar General ("Speech from the Throne", *House of Commons Debates*, 35-1, vol. 133, No. 2 (18 January 1994) at 009 (Hon. Gilbert Parent)) and administer an updated Code of Conduct. The Counsellor's role moved from a department to reporting directly to the Prime Minister. Additionally, unlike the current Commissioner, the Ethics Counsellor's role was primarily advisory, not investigatory.

[13] In 2004, the Office of the Ethics Commissioner replaced the Ethics Counsellor through an amendment to the PCA, providing additional legislative accountability mechanisms. A Commissioner was chosen to implement the COIA for simplicity and to minimize the risk of partisanship (House of Commons, Standing Committee on Procedure and House Affairs, *Code of*

Conduct, 37-2, No. 40 (13 June 2003) at para. 20 (*Code of Conduct Report*)). Additionally, it was believed that the person "who works with Members on a daily basis and provides confidential opinions on the interpretation of the Code should be the person to interpret that Code if a complaint is made" (*Code of Conduct Report* at para. 26). At the time, the Report acknowledged that the Commissioner would "not make final decisions; he or she makes recommendations to the House, which is the final arbiter." (*Code of Conduct Report* at para. 27). The intention was to keep the final decision with the House of Commons and ensure the House of Commons could "refuse to implement the recommendation" (*Code of Conduct Report* at para. 27). With the introduction of the FAA, the current Commissioner became responsible for administering ethics and conflict of interest issues at the federal level, with a statute defining powers and obligations. Now the Commissioner is appointed after consultation with the leader of every recognized party in the House of Commons and approval by resolution of that House (PCA, s. 81). The Commissioner administers the COIA for "public office holders", which means ministers, ministers of State, parliamentary secretaries, ministerial staff, ministerial advisors, and certain Government in Council appointees (COIA, s. 2(1)), and a conflict of interest code for Members of Parliament (PCA, ss. 85–87).

[14] Among the substantive prohibitions in the COIA, subsection 6(1) mandates that public office holders shall not engage in decision-making when they would be in a conflict of interest. Similarly, section 7 prohibits public office holders from giving preferential treatment to a person or organization. Equally of interest for the purposes of the underlying application for judicial review is section 21 of the COIA, which requires public office holders to recuse themselves from a matter in which they would be in a conflict of interest.

[15] The Commissioner encourages compliance with the COIA through various means, which include: (i) providing confidential advice to public office holders and the Prime Minister on how to comply with their obligations under the COIA; (ii) trying to reach agreement with public office holders on compliance measures, or otherwise ordering compliance measures; and (iii) overseeing the measures they take to meet their obligations (COIA at ss. 28–29, 32, 43). The Commissioner also receives confidential reports from all reporting public office holders within 60 days of their appointment, which address matters such as assets, liabilities, employment activities, businesses, and charitable activities (COIA, ss. 22(1), 22(2)). To encourage public office holders to comply with their reporting obligations in a timely way, the Commissioner is also empowered to issue limited administrative monetary penalties not exceeding $500 (COIA, s. 52). If such penalties are imposed, the Commissioner must make public the identity of the public officer holder, the violation, and the amount of the penalty (COIA, s. 62).

[16] The Commissioner may also examine alleged contraventions of the COIA, either on the request of a member of the House of Commons or the Senate, or on the Commissioner's own initiative. The Commissioner may decline to examine requests that are frivolous, vexatious, or made in bad faith and may also discontinue examinations (COIA, ss. 44–45). If it is determined that a public office holder contravened the COIA, the Commissioner provides the Prime Minister with a report, setting out the facts and his analysis and conclusions. That report is simultaneously provided to the public office holder who is the subject of the report, any member who requested the examination, and to the public (COIA, ss. 44–45). The Commissioner is not empowered to enforce recommendations or to impose legal consequences or sanctions in connection with a

report; ultimately, the decision on how to act upon the Commissioner's findings is left to the Prime Minister.

[17] The COIA includes a partial statutory restriction on judicial review. This provision reads as follows:

Orders and decisions final	**Ordonnances et décisions définitives**
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.	**66** Les ordonnances et décisions du commissaire sont définitives et ne peuvent être attaquées que conformément à la *Loi sur les Cours fédérales* pour les motifs énoncés aux alinéas 18.1(4)*a*), *b*) ou *e*) de cette loi.

[18] This provision is sometimes described as a partial privative clause. A full privative clause would simply provide that every decision is final and shall not be questioned or reviewed in any court. However, pursuant to section 66 (read in conjunction with subsection 18.1(4)), only questions of law or fact are not reviewable:

Grounds of review	**Motifs**
18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1(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	***a*)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

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

IV. The parties' positions

A. *The applicant*

[19] The applicant argues that the partial privative clause in COIA section 66 offends the rule of law, and makes three main arguments to support this position. First, the rule of law guarantees judicial oversight of administrative decision makers. Relying on Professor Paul Daly's analysis that *Vavilov* constitutionally entrenches reasonableness review, the applicant argues the legislative branch cannot constitutionally shield the executive from oversight by limiting judicial review. For the applicant, "if a full privative clause cannot oust the courts' authority to judicially review administrative decisions, there is no principled basis for a partial privative clause to do

so." (Applicant's memorandum of fact and law at para. 18). Further, the applicant argues that since a statutory appeal mechanism can only limit judicial review on questions covered by the appeal mechanism (and not others) then a provision limiting judicial review without a statutory appeal mechanism cannot stand.

[20] Second, the applicant argues the jurisprudence (both before and after *Vavilov*) already affirms that partial privative clauses do not prevent judicial review on questions prohibited by the clause. Here, the applicant relies on the pre-*Vavilov* case *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 (*PSAC*), where Justice Gleason rejected the argument that the privative clause prevented judicial review of errors of fact and law because there are numerous examples of the Court's review not adhering to the privative clause. *PSAC* and *Public Service Alliance of Canada v. Canadian Federal Pilots Association*, 2009 FCA 223 held that there is some overlap in the grounds set out in subsection 18.1(4) of the FCA. They also held that "jurisdiction" in paragraph 18.1(4)(*a*) includes unreasonable errors of law or fact, as such findings also went to the question of whether the decision-maker exceeded its jurisdiction. Further, since *Vavilov*, the majority decision in *Best Buy* confirms that judicial review is still available, even in the presence of a limited statutory right of appeal. Since the *Best Buy* majority confirms that the rule of law guarantees judicial review for any type of issue in an administrative decision, it means that all aspects of the decision are subject to judicial review. The applicant also argues that section 18.5 of the FCA constitutionally entrenches a right to judicial review on any issue. The applicant reads *Best Buy* as holding that "judicial review is available for any ground for which there is no statutory right of appeal" (Applicant's memorandum of fact and law at para. 35).

[21] Third, the applicant argues that the COIA is quasi-constitutional because it furthers the unwritten constitutional principles of democracy, constitutionalism, and the rule of law. Since there are no internal appeal mechanisms or alternative recourse other than judicial review, Parliament cannot shield the Commissioner from judicial oversight.

B. *The respondent*

[22] The respondent argues that section 66 prevents the applicant from judicially reviewing the Commissioner's report on questions of law and fact. The respondent's submissions focus on two main points. First, the privative clause is valid because the rule of law only requires some degree of judicial review. Relying on a number of Supreme Court decisions, the respondent submits that limits on judicial review can be justified by constitutional or legal policy considerations, such as when Parliament has reserved for itself the enforcement role. That being said, the respondent recognizes that the Supreme Court's decision in *Crevier v. Attorney General of Québec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 (*Crevier*) held a privative clause cannot completely bar judicial review on questions of jurisdiction. Since section 66 still permits judicial review or questions of jurisdiction, then the limitation on judicial review complies with the *Constitution Act, 1867*.

[23] Contrary to the applicant's submission, the respondent argues that *Best Buy* has limited applicability to the present case because it addresses judicial review in the presence of a statutory appeal mechanism, whereas the COIA does not contain a statutory appeal mechanism. *Best Buy* did not definitively hold that a partial privative clause could never be effective because it was concerned with concurrent appeals and judicial reviews. Further, the respondent argues that

PSAC does not apply because there are parliamentary accountability mechanisms in the COIA that are not available in the statute at issue in *PSAC*.

[24] The second focus of the respondent's argument is the very distinct role played by the Commissioner. In the respondent's view, the exclusion of paragraphs 18.1(4)(*c*) and (*d*) of the FCA in section 66 was deliberate, and reflects the unique role of this decision-maker and the dual supervisory roles of the judiciary and Parliament in a highly political context. The powers of the Commissioner, an officer of Parliament who is accountable to Parliament, are limited to overseeing public and parliamentary accountability, with no mechanisms to enforce the findings from investigation reports. Instead, the Commissioner provides his reports to the Prime Minister, who then decides how to give effect to the recommendations, and for the House to hold the government to account. In this highly political environment, Parliament's intention was to limit courts' involvement in these matters to prevent interference with political conduct or matters concerning an officer of Parliament that are most appropriately dealt with by Parliament.

C. *The intervener*

[25] The intervener is a trade organization representing telecommunication companies and equipment manufacturers across Canada. CTA's submissions focus on the availability of judicial review in the presence of a statutory appeal mechanism. Particularly, CTA makes three main submissions that generally support the applicant's position.

[26] First, CTA endorses the majority position in *Best Buy* because it supports pre-*Vavilov* cases that allowed judicial review on questions of fact or law in the face of a privative clause.

This finding is supported by sections 18.1 and 28 of the FCA, which create a freestanding right of judicial review, regardless of any privative clauses in the decision-maker's home statute. Judicial review is a core constitutional function of the courts created under sections 96 to 101 of the *Constitution Act, 1867*, and privative clauses that purport to oust any and all review are for that reason unconstitutional. The Court would abdicate its constitutional duty if it were to give effect to a statutory partial restriction that prohibits judicial review of one or more issues without providing adequate alternative remedies.

[27] CTA's second and third arguments raise new issues that need not be decided by the Court in the context of the current proceeding. It claims that section 18.5 of the FCA does not bar judicial review in all circumstances, but only where Parliament has expressly provided for true appeals in a statute. It also submits that, when read in context, subsection 31(1) of the *Broadcasting Act*, S.C. 1991, c. 11 and subsection 52(1) of the *Telecommunications Act*, S.C. 1993, c. 38 cannot be interpreted as shielding from review factually-suffused issues in Canadian Radio-television and Telecommunications Commission's decisions. These issues are not germane to the question to be decided in stage 1 of this application, first because the COIA does not provide for a statutory right of appeal, and second because there is no similarity between section 66 of the COIA and the provisions in the *Broadcasting Act* and in the *Telecommunications Act* the CTA relies on. Interveners cannot raise new issues that have not been put forward by the parties: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 at paras. 54-55, 58.

V. Analysis

A. *Does section 66 of the* Conflict of Interest Act *bar this application for judicial review?*

[28] Privative clauses have had a chequered history in Canadian jurisprudence. Ever since the rise of the administrative state, courts and legislatures have tried to find equilibrium in their relationships. The reconciliation between the cardinal values of legislative supremacy and the rule of law has led to some confusion, and at times even to some tension. Nowhere has this tension been better expressed than in *Dunsmuir v. New Brunswick*, 2008 SCC 9, where Justices Bastarache and Lebel starkly contrasted the rule of law and the democratic principle, and strove to reconcile the two by inviting courts to 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" (at para. 27).

[29] As a constitutional matter, Parliament and the legislatures undoubtedly have the power to delegate power to subordinate decision-makers, within the confines of the distribution of powers set out in sections 91 to 95 of the *Constitution Act, 1867*¸ and to the extent that the legislature does not abdicate its legislative role: see *Hodge v. The Queen*, [1883] 9 A.C. 117; In *re George Edwin Gray* (1918), 57 S.C.R. 150, 42 D.L.R. 1; *Reference as to the Validity of the Regulations in relation to chemicals*, [1943] S.C.R. 1, [1943] 1 D.L.R. 248; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. One of the constitutional constraints Parliament and the provincial legislatures must adhere to when delegating power to decision-makers is the Judicature section of the *Constitution Act, 1867*, and in particular sections 96 to 101 of that

constitutional document. These provisions, which seemingly relate to the appointment of superior court judges, their tenure and salary, have been interpreted as a safeguard of the core jurisdiction of these courts. This much was made clear by Chief Justice Laskin in *Crevier*, where he stated (at 237):

> …given that s. 96 is in the [*Constitution Act, 1867*] 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.

[30] Justices Bastarache and LeBel picked up on this interpretation of a "safeguard" in *Dunsmuir*. Before quoting from *Crevier*, they wrote (at para. 31):

> … 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 in *U.E.S. Local 298 v. Bibeault*, [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. …

[31] On this interpretation, what is constitutionally protected is not only the inherent jurisdiction of the superior courts, but maybe more importantly, the notion that these courts are the guardians of the rule of law. At its most basic, the rule of law ensures individuals are regulated by law and not the whim of government officials (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 55; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at paras. 58-59; *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at

paras. 50-51). And, in a constitutional democracy like ours, it means both that Parliament and the legislatures are constrained by the distribution of powers found in sections 91 to 95 of the *Constitution Act, 1867*, and that the executive branch must also act within the confines of their delegated authority. Indeed, it would make no sense for Parliament to delegate circumscribed decision-making powers to administrative and executive bodies if these same bodies could override the limits on their powers and act outside the range of their delegated authority. To that extent, judicial review by courts of superior jurisdiction becomes the essential companion to parliamentary sovereignty

[32] Two points need to be made before going any further. First, sections 96 to 101 bind Parliament as much as the legislatures. In other words, Parliament is no more able to transfer a Superior Court jurisdiction to a provincial court than a provincial legislature would be: *McEvoy v. Attorney General for New Brunswick et al.*, [1983] 1 S.C.R. 704, 148 D.L.R. (3d) 25. Second, it is beyond dispute that Parliament cannot completely oust judicial review in the Federal Courts. Despite the fact that these courts have been created by statute pursuant to section 101 of the *Constitution Act, 1867* and are not endowed with inherent jurisdiction like the section 96 courts, it is clear that Parliament's intention was to grant them (and codify) the judicial review function over federal decision-makers as courts of superior jurisdiction. An interpretation that would nullify that power and bring the clock back to the situation pre-1971, when judicial review of federal boards and tribunals was within the purview of provincial superior courts, would run against Parliament's intention (*Quebec North Shore Paper v. C.P. Ltd.* (1976), [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111 at 1065-66).

[33] With the rise of the administrative state and the proliferation of administrative and quasi-judicial bodies, however, Parliament and the legislatures have sought in different ways to limit the availability of judicial review for all sorts of reasons (for example expediency, judicial economy, finality of the administrative process). Since very early on, courts have been called upon to define more precisely what it is exactly that is constitutionally protected in terms of judicial review. Or, to look at it from the opposite angle, how far can legislatures oust judicial review of the decisions made by decision-makers of their own making?

[34] In the early days, which was later dubbed the "jurisdictional era", courts would only intervene when a decision-maker had exceeded its jurisdiction. If a decision was purportedly within the jurisdiction of an administrative board or agency, courts would refrain from reviewing it even if of the view that there was an error. This form of judicial deference, which reflected an attitude of reverence to parliamentary sovereignty, is evidenced in a number of cases that spans a period of more than 30 years (see, for example, *Labour Relations Board v. Traders' Service Ltd.*, [1958] S.C.R. 672, 15 D.L.R. (2d) 305; *Bakery and Confectionery Workers International Union of America, Local No. 468 v. White Lunch Ltd.*, [1966] S.C.R. 282, 56 D.L.R. (2d) 193; *Commission des relations ouvrières du Québec v. Burlington Mills Hosiery Co. of Canada*, [1964] S.C.R. 342, 45 D.L.R. (2d) 730; *Labour Relations Board of Saskatchewan v. The Queen et al.*, [1969] S.C.R. 898, 7 D.L.R. (3d) 1; see also, more generally, on that period: Paul Daly, "The Struggle for Deference in Canada" in Mark Elliott & Hanna Wilberg, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (London: Hart Publishing, 2015) 297 at 300-09; Mark P. Mancini, "Foxes, Henhouses, and the Constitutional Guarantee of Judicial Review: Re-Evaluating *Crevier*"

(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589547) (Forthcoming, Canadian Bar Review); Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: Cambridge University Press, 2018).

[35] During that period, the role played by privative clauses was tightly related to jurisdiction. If the administrative decision-maker's error was committed within the exercise of its jurisdiction conferred by statute, a privative clause would be effective to insulate it from review: see, as an illustration, *Farrell v. Workmen's Compensation Board*, [1962] S.C.R. 48, 31 D.L.R. (2d) 177 (*Farrell*). If, on the other hand, an error went to the jurisdiction of the decision-maker exercising delegated authority, courts were justified to intervene, even in the face of a seemingly tightly worded privative clause, to ensure executive actors did not exceed the power delegated to them by Parliament.

[36] The decisions of the Supreme Court in *Attorney General (Quebec) et al. v. Farrah*, [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161 (*Farrah*) and *Crevier* illustrate that trend. At issue in *Farrah* was the establishment of a Transport Tribunal, comprised of provincial judges, that was granted an exclusive appellate jurisdiction from any decision of the Transport Commission. The Tribunal's decisions were protected from the reviewing power of the Superior Court. Writing for the majority, Justice Pratte found that such a scheme was problematic because it encroached on the supervisory jurisdiction of superior courts, a power that is entrenched by section 96 of the *Constitution Act, 1867*. Relying on a number of cases (including *Farrell* and *Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, 27 D.L.R. (3d) 608), Justice Pratte wrote (at 655) that "while [privative clauses] are ineffective to oust the supervisory power of superior courts in

cases of want or excess of jurisdiction of inferior tribunals, they are nevertheless effective to preclude interference by the courts in cases of "illegalities" committed by such tribunals in the exercise of their jurisdiction and for which, barring a privative clause, *certiorari* would otherwise lie."

[37] *Crevier* similarly harks back to the notion of jurisdiction. Pursuant to the Québec *Professional Code* of the time, the Professions Tribunal, composed of judges of the Provincial Court, was granted the power to hear appeals of disciplinary decisions made by the various professional orders' Disciplinary Committees. Section 194 of the *Professional Code* prevented any recourse to the Superior Court of decisions made by the Professions Tribunal. Once again, the Supreme Court struck down that provision on the basis that a legislature cannot oust judicial review on questions of jurisdiction. Writing for the Court, Chief Justice Laskin wrote (at 236-237):

> 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. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the [*Constitution Act, 1867*] 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.

[38] Behind this facade of apparent simplicity, however, the distinction between jurisdictional and non-jurisdictional error became increasingly muddy over time. The Supreme Court of Canada contributed to make that distinction ever more uncertain in a number of cases, much like the House of Lords did in the wake of *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208. For a comprehensive and illuminating history of judicial review and the impact thereon of "ouster" clauses in England, see *R. (on the application of Privacy International) v. Investigatory Powers Tribunal and others*, [2019] UKSC 22, [2019] 4 All E.R. 1. In both countries, what started as a timid expansion of non-jurisdictional errors to cover egregious errors of law against which a privative clause would be of no effect gradually expanded, thereby allowing courts to review not only legal errors but also factual and evidentiary issues.

[39] It is in the landmark decision of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 (*New Brunswick Liquor*), that our highest Court started to move away from the preliminary question doctrine. Under this doctrine, a reviewing court would inquire into whether a tribunal erred in determining the scope of its jurisdiction. However, *New Brunswick Liquor* focused instead on a substantive review of the determinations made by the administrative body. This new approach, which was meant to be more respectful of administrative decision-making, has frequently been characterized as "the beginning of the modern era of Canadian administrative law" (*Dunsmuir* at para. 35). Instead of applying an all or nothing approach, whereby the focus was whether a tribunal had erred in determining the scope of its jurisdiction, courts adopted a more nuanced approach and started to

develop various standards of review through a “pragmatic and functional approach”, with a concomitant multi-level degree of deference.

[40] At issue in *New Brunswick Liquor* was the interpretation of a statutory provision which provided that “the employer shall not replace the striking employees or fill their position with any other employee”. The Public Service Labour Relations Board concluded that replacing striking employees with management personnel was not permissible, and rejected the employer’s argument that they could assign management personnel the duties otherwise performed by the striking employees because the intent of the section was to ensure that the jobs remained open for the employees after the strike was over. This decision was overturned by the Appeal Division of the Supreme Court of New Brunswick, which held that management was not prevented from performing the duties of striking employees.

[41] At the very beginning of his reasons, Justice Dickson, as he then was, writing for the Court, acknowledged that jurisdictional error will sometimes justify judicial intervention, but cautioned in the same breath that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (at 233). This is so not only because the question of what is or is not jurisdictional is often very difficult to determine, but also because in that case, a privative clause protected the decisions of the Board and reinforced the deference traditionally shown to specialized tribunals in the field of labour relations.

[42] That would have been sufficient to dispose of the appeal. But Justice Dickson went further and addressed the argument that the interpretation given by the Board to the provision barring employers to replace the striking employees was so patently unreasonable that it took the Board beyond the protection of the privative clause. After having stressed the ambiguity of that provision and its many possible interpretations, and having turned his mind to its purpose, Justice Dickson found it difficult to brand as "patently unreasonable" the interpretation arrived at by the Board. As he stated: "[a]t a minimum the Board's interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal" (at 242).

[43] That seminal decision was significant for at least two reasons. First, it clearly signaled that courts should adopt a deferential attitude towards specialized tribunals, and therefore resist the temptation to label an issue as jurisdictional "that which may be doubtfully so" (*New Brunswick Liquor* at 233). Second, it opened the door to a judicial review of intrajurisdictional errors of law, even in the face of privative clauses. For all intents and purposes, an error of law that rose to the level of patent unreasonableness would be assimilated to a jurisdictional error (*Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, 7 D.L.R. (4th) 1 at 184).

[44] Because there has never been a clear line of demarcation between an intrajurisdictional and extrajurisdictional error, however, the Supreme Court itself did not keep to its caution and steadily expanded the concept of jurisdictional error. Indeed, it characterized as jurisdictional an ever-broader category of questions of fact, capturing not only those cases where there is no evidence at all, but also cases where the evidence was incapable of supporting the decision-maker's findings of fact (see, for example, *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 at 669; *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).

[45] Of more significance for our purposes is the shift from a system based on jurisdictional error to an approach focused on variable intensity of review, expressed through different standards. It was not about completely shielding some decisions from review as an expression of deference for Parliament's choice to delegate decision-making authority to the executive branch writ large any more. Instead, this new approach (later referred to as the "pragmatic and functional approach") focused on such contextual factors as the presence or absence of a privative clause, the expertise of the administrative decision-maker as compared to that of a court with respect to the issue to be decided, the purpose of the statute conferring jurisdiction on the decision-maker and the reason for its existence, and the nature of the problem to be solved (see *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161 (*Bibeault 1988*); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 1222, 60 D.L.R. (4th) 193).

[46] This evolution, which took place over the course of 30 years and culminated with the landmark decision of *Dunsmuir*, marked a significant departure from the jurisdictional era and also signaled, most importantly for our purposes, a radically different approach to privative clauses. Instead of attempting to give effect to privative clauses by delineating as off-limit for judicial review an area of exclusive jurisdiction for administrative decision-makers, courts were sought to show deference for parliamentary sovereignty by reviewing a broader set of decisions

but according to different intensities of review. In this new paradigm, privative clauses were no longer the polar star of judicial review, but rather one indicia among others in determining how stringently judicial review should be exercised. As Justice Rothstein aptly put it in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*), "[r]ather than being viewed as the express manifestation of legislative intent regarding deference, the privative clause was now treated simply as one of several factors in the calibration of deference (standard of review)" (at para. 92).

[47] With the increasing complexity of the analytical process to determine which of the then three standards of review applied in a given situation, the Supreme Court felt the need to reconsider both the number and definitions of these standards. The Court prefaced its discussion with the acknowledgment that it had "moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provide[d] great flexibility but little real on-the-ground guidance, and offer[ed] too many standards of review" (*Dunsmuir* at para. 43). Hence, the need for a test that was neither formalistic nor artificial, and allowed for review when justice so required. As a result, the Court did away with the distinction between the patent unreasonableness standard and the reasonableness *simpliciter* standard introduced in *Canada (Director and Investigation and Research) and Southam Inc.*, [1997] 1 S.C.R. 748, and collapsed the standards of review into two: reasonableness and correctness. In doing so, it also endeavoured to simplify the application of the correctness and reasonableness standard. Most notably, it clarified that the presence of a privative clause no longer limited the scope of the Court's review to patent unreasonableness, but was merely a "strong indication" that the reasonableness standard applied. This view was premised on the

notion that the court's power to review the actions and decisions of administrative bodies is constitutionally protected.

[48] Expanding on their views as to the relationship between the rule of law, judicial review and legislative sovereignty, Justices Bastarache and LeBel wrote:

> [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.
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> [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.
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> [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] 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.
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> [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.
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> [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). 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] 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*:
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> > 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 [*Constitution Act, 1867*] 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]

[49] While one may query, as did Justice Rothstein in *Khosa*, whether the tension between the rule of law and legislative sovereignty stems from the delegation of decision-making authority to

administrative bodies *per se* or from the insertion of privative clauses to put their decisions beyond the reach of courts of superior jurisdiction, the above passage is nevertheless the most expansive and articulate rationale one will find in the jurisprudence of the Supreme Court for any constitutional protection of judicial review. It falls short, however, of providing the contours of that constitutional protection and delineating what are the core judicial review functions of section 96 courts and, where established, section 101 courts that legislatures or Parliament cannot interfere with. Are privative clauses to be read down only to preserve the judicial review power of courts of superior jurisdiction when an administrative body exceeds its jurisdiction, as the early case law seems to imply? Or are we to read more into it and infer a constitutional guarantee that would also protect reviewability on questions of law, on mixed questions of law and fact, and even on pure questions of fact?

[50] Unfortunately, the most recent comprehensive decision of the Supreme Court on judicial review does not provide much guidance on this thorny issue. In *Vavilov*, the Court set out to re-examine its approach to judicial review, while insisting that its revised framework continues to be guided by the principles articulated in *Dunsmuir*, namely "that judicial review functions to maintain the rule of law while giving effect to legislative intent" (at para. 2).

[51] One of the important clarifications brought about by *Vavilov* is that it did away with the contextual approach. No longer do courts have to look at context to determine which standard of review applies; reasonableness is presumptively the applicable standard whenever a court reviews administrative decisions, with two general exceptions. Under *Vavilov*, the presumption of reasonableness is rebutted when the legislature had indicated that a different standard should

apply (either by prescribing a specific standard or by providing for a statutory appeal mechanism), or when the rule of law requires that the standard of correctness be applied. Relying on *Dunsmuir*, *Crevier* and *Bibeault 1988*, the Court reiterated that legislatures cannot shield administrative decision-making entirely from curial scrutiny because of section 96 of the *Constitution Act, 1867* (*Vavilov* at para. 24).

[52] As a result of this current approach, privative clauses play no role in identifying the applicable standard of review. They merely inform the reasonableness analysis and are part of the context that will constrain what will be reasonable for a decision maker to decide in any given case. This is as far as the Court went with respect to the impact of privative clauses.

[53] There are, however, a few dicta in the reasons of the majority that are instructive. After having reiterated that "respect for legislative intent is the 'polar star' of judicial review" (at para. 33, quoting *CU.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 149) and having reaffirmed that the standard of review analysis "requires courts to give effect to the legislature's institutional design choices to delegate authority through statute" (at para. 36), the Court draws the conclusion that the choice of a legislature to opt for an appeal process to challenge an administrative decision should no longer be ignored. As such, the court hearing an appeal will apply the appellate standards of review (or the specific standards set out in the statute), and not the judicial review principles.

[54] The Court went on to add that a limited right of appeal will not preclude a court from considering other aspects of a decision in an application for judicial review (at para. 45). The Court elaborated further on that issue at paragraph 52:

> … 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.

[55] Even on a careful reading of *Vavilov*, there is little to be gained as to how reviewing courts should deal with privative clauses and, more particularly, as to whether such provisions can effectively oust judicial review and, if so, to what extent. The applicant himself recognizes as much in his memorandum. This uncertainty has indeed been confirmed in a most recent case handed down by the Supreme Court after the hearing of the case at bar.

[56] In *Yatar*, the Supreme Court had to deal with the scenario anticipated in *Vavilov*. Pursuant to the Ontario's *License Appeal Tribunal Act, 1999*, a litigant's right of appeal from a decision of the Licence Appeal Tribunal was restricted to questions of law. The appellant in this case therefore pursued an appeal on questions of law, and also sought judicial review on questions of fact and or mixed fact and law. Relying on its decision in *Vavilov*, the Supreme Court reiterated that a statutory right of appeal on certain questions does not bar judicial review

for other types of questions. While the court before which judicial review is sought retains the discretion to refuse to grant a remedy because it is not appropriate (if there are alternative remedies, for example), it cannot bar judicial review on the basis that a limited right of appeal evinced an intention to restrict recourse to the courts on other questions arising from an administrative decision.

[57] That decision is entirely consistent with paragraph 52 of *Vavilov*, quoted above, where the Supreme Court stated that the existence of a circumscribed right of appeal does not, on its own, preclude applications for judicial review. Most significantly, however, the Supreme Court took note of the recent jurisprudence of this Court dealing with the availability of judicial review where there is a privative clause: *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Best Buy*; *Democracy Watch 2023*; *Democracy Watch 2022*. It explicitly declined to rule on that issue, leaving it for another day and therefore acknowledging that this question is still unresolved.

[58] In the case at bar, the applicant and the intervener have forcefully argued that partial privative clauses do not bar judicial review, and urged upon this Court to apply the majority position in *Best Buy*. In contrast, the respondent is of the view that *Best Buy* is of limited applicability to solve the issue before us. As mentioned earlier, I am ultimately of the view that the context of this case brings it outside the confines of *Best Buy*. I nevertheless feel compelled to address briefly the conflicting lines of cases that have emerged in this Court on this issue, in response to the extensive arguments made by the parties on this issue.

[59] In *Best Buy*, the question for the Court was whether judicial review was available for questions of fact or mixed fact and law in the presence of a statutory appeal mechanism on questions of law. The statute in question, the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the "Customs Act") contained both an appeal provision (s. 68(1)) pursuant to which an appeal could be brought from Canadian International Trade Tribunal decisions that raise questions of law, and a privative clause (s. 67(3)) which limits judicial intervention to the terms set out in subsection 68(1). Writing for the majority, Justice Gleason found that the availability of limited appellate review does not foreclose the availability of judicial review, and that privative clauses do not bar access to judicial review for all factual issues. She came to that conclusion after a thorough and comprehensive historical review of the evolution of administrative law over the last several decades, and most particularly of *Dunsmuir* and *Vavilov*. She summarizes her overview of the case law in the following two paragraphs:

> [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.
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> [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.

[60] Justice Gleason found further comfort for her view in a blog post from Professor Daly ("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>) where he opined that reasonableness review is constitutionally entrenched (*Best Buy* at para. 118). She also stated that her approach is consistent with section 18.5 of the FCA, which provides that access to judicial review is barred to the extent a right of appeal otherwise exists in respect of an issue. Her reasoning on that point is based on an inference that she draws from the determination by the Supreme Court in *Vavilov* that the availability of limited appellate review (such as section 18.5) does not foreclose the availability of judicial review. Assuming that the Supreme Court was aware that several statutes which contain a limited right of appeal also contain a privative clause, she surmised that its failure to indicate that such a clause would bar access to judicial review was telling (*Best Buy* at para. 111). Finally, she relied on the Court's previous decision in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, where a privative clause identical to the privative clause in the Customs Act was held ineffective to bar judicial review (*Best Buy* at para. 124).

[61] Justice Near, in the minority, on the other hand, took a different view and would have enforced the partial privative clause found in subsection 68(1) of the Customs Act, such that the Court could only entertain appeal on questions of law and would not have entertained an application for judicial review on questions of fact or of mixed fact and law. This finding rests essentially on various *dicta* in *Vavilov* to the effect that Parliament's legislative intent and

institutional design choices must be respected. After also reviewing the jurisprudence of the Supreme Court, Justice Near bolstered his reasoning with his interpretation of *Crevier* in the following terms:

> [60] In my view, *Crevier* supports the position that Parliament may restrict judicial review to questions of law. A statutory provision having this effect, such as section 68 of the *Customs Act*, meets any threshold established in *Crevier*. To hold otherwise would be to eliminate any possibility that Parliament could, via statute, restrict the ambit of judicial review of administrative action. What purpose would the specific provisions of the *Customs Act*, and many other federal statutes that restrict review, serve if recourse to the Courts could always be had on all issues under the general provisions of section 18 and section 28 of the *Federal Courts Act*?

[62] The majority and minority opinions in *Best Buy* illustrate a divide as to the effect to be given to privative clauses in federal legislation in this Court, and crystallize a debate that has been raging in Canadian administrative law for many years. It is also the culmination of conflicting trends in this Court. While Justice Gleason could rely on *PSAC*, the minority referred to *Canadian Council for Refugees* in support of its position. Leave to appeal of the *Best Buy* decision was not sought before the Supreme Court.

[63] The *Best Buy* majority approach has been followed by this Court, in a cursory manner and without any further discussion, in *BCE Inc v. Québécor Média Inc.*, 2022 FCA 152 (at para. 58), *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93, leave to appeal to SCC refused, 40828 (21 March 2024), and in *Canada (Attorney General) v. Pier Imports (U.S.), Inc.*, 2023 FCA 209 (at paras. 29-30). I do not think, however, that such an important issue ought to be decided on that narrow basis. I note, moreover, that the long list of cases referred to by Justice Gleason in her *PSAC* reasons in

support of her view that alleged errors of law, fact or mixed fact and law have been reviewed despite the presence of a privative clause, do not address explicitly the impact of such a clause.

[64] One should not lose sight of the fact, moreover, that Justice Gleason's opinion in *Best Buy* is, strictly speaking, *obiter,* since the appellant in that case had not filed an application for judicial review. She made that clear in the opening paragraph of her reasons, as she stated that her conclusion does not affect the result in that appeal because even if judicial review was available, the sort of factual errors alleged by the applicants fell well short of the kind of error that might have led to review under paragraph 18.1(4)(*d*) (see paras. 71-72 and 129-130). The same is true of paragraph 102 of the *Canadian Council for Refugees*, upon which Justice Near relied in *Best Buy*. The Court in *Canadian Council for Refugees* was not tasked with determining the legal effect of any statutory limitation, let alone a privative clause, on judicial review. Instead, it was focused on whether the *Charter* claim was properly constituted, whether any *Charter* right was violated, and whether the impugned administrative conduct could be the object of a judicial review application.

[65] As a matter of statutory interpretation, I would offer the following thoughts. If, as instructed by the Supreme Court in *Vavilov*, legislative intent is to be taken as the "polar star" of judicial review, and if heed must be paid to statutory appeal mechanisms as clear signals with respect to the applicable standard of review, why should courts not pay equal respect to privative clauses ousting judicial review? As Justice Near rhetorically asked in his reasons, what would be left of legislative intent if courts were to systematically ignore the language of privative clauses

and review the decisions of administrative tribunals and other decision makers exercising delegated authority as if there were no such clauses?

[66] In the *Dunsmuir* period, of course, the answer would have been that privative clauses were to be taken into consideration as one contextual factors in the determination of the applicable standard of review. Following *Vavilov* and its interpretation by the majority in *Best Buy*, privative clauses are downgraded from an important factor in determining the applicable standard of review (as in *Dunsmuir*) to a mere contextual factor in determining the parameters of a reasonable decision. In light of the high degree of deference to which administrative decision makers are entitled when their decisions are subject to the reasonableness standard, it is not readily apparent what extra protection from judicial scrutiny a privative clause would confer. And yet, if legislative intent is to mean something, one would expect that a privative clause written in no uncertain terms would have a real impact and somehow curtail the exercise by courts to judicially review of administrative decisions. So far, the answer to that dilemma has been unsatisfactory and muted.

[67] There is no doubt that the rule of law is a cardinal principle of our constitution and should be adhered to. One needs to look no further for that proposition than the decision of the Supreme Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (at para. 71). But as much as the rule of law is a fundamental principle, the scope of judicial review should be no more than is proportionate and necessary for the maintaining of the rule of law. After all, parliamentary sovereignty (within the bound of the Constitution) is also a fundamental tenet of our democratic system of government. If courts were allowed to ignore legislative

provisions that they do not like and entitled to create a higher source of law through their own decisions, they too would act in violation of the rule of law.

[68] The issue, therefore, is whether Parliament itself has limited its authority to adopt a privative clause or, alternatively, to what extent (if any) the Constitution erects a firewall around the judicial review jurisdiction of the section 96 courts and, where established, section 101 courts. There is much disagreement on that issue, both in the case law and in academia, and I do not purport to provide a definitive answer within the limited confine of these reasons.

[69] As previously mentioned, Justice Gleason in *Best Buy* inferred from *Vavilov* that the availability of a limited right of appeal such as s. 18.5 of the FCA, even when coupled with a privative clause, would be insufficient to bar judicial review. In my respectful opinion, the Supreme Court would have been much more explicit if that is what they had intended. In my view, it seems equally plausible to argue that section 18.5 is an illustration that Parliament can bar judicial review in some instances, in that case by providing a right of appeal. We should be weary to read too much into *Vavilov* with respect to privative clause; this Court has cautioned in the past that "the Supreme Court does not change substantive law by implication, particularly when it has shown a cautious approach to change in the same context" (*Bristol-Myers Squibb Canada Co. v. Teva Canada Limited*, 2017 FCA 76 at para. 68). On that reasoning, therefore, I fail to see how it can be said that Parliament has clearly imposed upon itself a limit on its ability to exclude judicial review. The fact that judicial review is barred when there is an appeal cannot be read, *a contrario*, as preventing Parliament to exclude judicial review on other grounds.

[70] As for the Constitution, the answer is not as clear-cut. I think it is fair to say, as my colleague stated in *Canadian Council for Refugees* (at paras. 102-103), that the "complete barring of review by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary", and therefore that full privative clauses purporting to entirely immunize administrative decision-making should be read down. If that were all that is protected, the privative clause that immunizes the Ethics Commissioner's decisions from judicial review on questions of law or fact would be enforceable, to the extent that it is supported by a pressing and valid government objective, as it safeguards some degree of judicial oversight, namely on questions of jurisdiction, procedural fairness and fraud or perjured evidence. But is that enough?

[71] Counsel for the applicant and for the intervener submit that the partial privative clause in section 66 of the COIA does not bar judicial review of the alleged errors of law and fact. In support of that proposition, they rely heavily on the majority decision in *Best Buy* and on Professor Daly's article already referred from which Justice Gleason quoted at length in *Best Buy*. According to Professor Daly, "[r]easonableness review is within the core irreducible minimum of judicial review protected by s. 96 of the *Constitution Act, 1867*" ("Vavilov on the Road", (2022) 35 Can. J. Admin. L. & Prac. 1 at 20). According to that interpretation, a full or partial privative clause that purports to oust judicial review of one or more issues (including factual ones) without providing adequate alternative remedies would be going too far and should be read down by a reviewing court.

[72] In my view, that conclusion is too broad and does not flow either from the case law of the Supreme Court on judicial review nor from the most generous interpretation of *Vavilov*. Indeed, Professor Daly himself suggests an alternative (and, in my view, equally compelling) interpretation of *Vavilov* in the opening paragraph of the quoted portion of his blog cited by Justice Gleason in *Best Buy* (at para. 118):

> … 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.

[73] This is not only consistent with the various *dicta* of the Supreme Court with respect to the role of judicial review (most explicitly in *Crevier* and *Dunsmuir*) and with its insistence on respect for institutional design choices in *Vavilov.* It is also aligned with the underlying rationale for judicial review in a parliamentary democracy, which is that all exercises of delegated authority by the executive branch must find their source in the law and be respectful of the Constitution.

[74] Courts need not be the final arbiter of every dispute between the State and its subjects. As the Supreme Court stated in *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 66, "[t]he principle of the rule of law does not require that all decisions of a lower court or administrative tribunal necessarily be subject to microscopic judicial review". There are many

other ways to redress perceived injustices or mistakes. And as my colleague Justice Stratas mentioned in his interim order in this case, Parliament may have perfectly legitimate and valid reasons to restrict judicial review of administrative decisions, such as screening unmeritorious proceedings and minimizing the uncertainty and delay of the administrative process (*Democracy Watch 2022* at paras. 52-53).

[75] As long as courts have the ability to intervene in cases where an administrative decision-maker steps out of bounds and impermissibly oversteps its lawful authority, how can it be said that the rule of law is threatened by the insertion of a privative clause in a statute? I acknowledge that the delineation of jurisdictional errors is far from an easy task and has led to the abandonment of this notion for the purpose of determining the issues that must be reviewed on the correctness standard. That being said, courts must strive to infuse content to this concept, as it is the only principled way to harmonize the legislative choice to delegate some decisions to administrative decision-makers and insulate them from review, with the responsibility of the courts to police the boundaries of the delegation.

[76] The reasons given by Professor Daly to reject that approach are, in my respectful opinion, tenuous. First, he fixates on the following assertion in *Vavilov*: “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” (emphasis in original). Yet, it is always a perilous exercise to focus on a single sentence in a set of reasons of 197 paragraphs to extract a general principle. Moreover, Professor Daly ties that sentence to “the language of constitutional duty” in *Crevier* and *Dunsmuir*. But as we have seen, these two cases

merely stand for the proposition that superior courts must be able to enforce the jurisdictional limits of an inferior court or administrative tribunal. To go beyond that and suggest that reasonableness review cannot be ousted is, in my humble opinion, an impermissible and unwarranted stretch.

[77] The second reason given by Professor Daly in support of his view that *Vavilov* has implicitly entrenched reasonableness review is that the insistence of the majority on a culture of justification would make no sense in the absence of curial review of administrative decisions. I do not find that argument any more convincing than the first one. For one thing, not all decisions of administrative decision-makers are insulated from judicial review (partially or totally), and even when they are, courts would still be able to review their decisions when they are out of bounds. Moreover, the notion that justification in terms of fairness and rationality can only be required for judicial review purposes is very court-centric. I would have thought that the obligation put on decision makers to justify their decisions through cogent and persuasive reasons is first and foremost directed to the litigants affected by the decision, and more broadly to the public at large. Indeed, the very sentence of *Vavilov* relied upon by Professor Daly in that respect states that administrative decision-makers must demonstrate that their exercise of delegated public power "can be 'justified to citizens in terms of rationality and fairness'" (at para. 14 of *Vavilov*). Moreover, the rule of law does not necessarily require that an administrative decision be reviewable by courts. For instance, the review by Parliament of an officer of Parliament's decision, or the review by a second level administrative body of a first level administrative body's decision, would be consistent with the rule of law.

[78] I realize that the final word on that most complex and vexed question will ultimately have to come from the Supreme Court itself. In the meantime, courts (and not only this one) will struggle to decipher how best to reconcile legislative supremacy with the rule of law from the abundant jurisprudence on the subject, and will be left to guess what posture to take when confronted with 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] 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] 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

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