SCC confirms: You have a constitutional right to judicial review on all issues

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In *Democracy Watch v. Canada (Attorney General)*, the Supreme Court of Canada confirmed that the Constitution guarantees the availability of a legality review for **all** aspects of an administrative decision. Privative clauses purporting to oust the courts from this supervisory role are unconstitutional.

The Supreme Court held that general political oversight of the Conflict of Interest and Ethics Commissioner (the Commissioner) by Parliament does not provide an adequate alternative remedy for judicial review of the Commissioner's decisions. The Supreme Court declared a partial privative clause purporting to preclude judicial review of the Commissioner's decisions on questions of fact and law to be unconstitutional.

Key takeaways

- **Judicial review is available for all aspects of an administrative decision**: Legality review of both questions of fact and law is part of the superior courts' core supervisory jurisdiction protected by sections 96 to 101 of the *Constitution Act, 1867*. The Court declined to endorse the view that reasonableness review under *Vavilov* is the constitutionally guaranteed minimum.
- **Partial privative clauses are unconstitutional**: Legislatures cannot constitutionally oust the courts' core supervisory jurisdiction through privative clauses, even partial ones. Privative clauses that cannot be read as constitutionally compliant should be struck down.
- **An adequate alternative remedy must provide for a legality review and a commensurate remedy**: While a court has discretion to decline to consider the merits of a judicial review application based on an "adequate alternative remedy", the alternative forum must provide for a legality review of the impugned decision and offer a remedy commensurate with that which would have been available on judicial review.
- **General political oversight is not an adequate alternative to judicial review**: Though Parliament has a general oversight role over the Commissioner, this political oversight did not provide the remedy available on judicial review to Democracy Watch, namely, consideration of the legality of the Commissioner's report.

Background

The Commissioner issued a report on May 14, 2021, finding that then-Prime Minister Justin Trudeau had not contravened the *Conflict of Interest Act*, S.C. 2006, c. 9 (the COIA), in relation to two WE Charity funding decisions. Democracy Watch applied to the Federal Court of Appeal for judicial review of the Commissioner's report, alleging errors of fact and law. The Attorney General of Canada brought a motion to strike Democracy Watch's application, in part on the basis that the privative clause in s. 66 of the COIA prohibits judicial review of the Commissioner's decision on questions of fact and law, limiting review to questions of jurisdiction alone.

A full panel of the Federal Court of Appeal allowed the Attorney General's motion on the basis that Democracy Watch had adequate alternative remedies available to it, namely, political oversight by the Standing Committee on Access to Information, Privacy and Ethics, which receives annual reports from the Commissioner on the administration of the COIA. Relying on *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, in which the Supreme Court held that the Auditor General had an adequate remedy to address grievances with the Governor in Council's decisions under the *Auditor General Act* through a Parliamentary reporting mechanism, the Federal Court of Appeal determined that Parliament's political oversight of the Commissioner under the COIA provided an alternative remedy in this case. In a minority opinion, Chief Justice de Montigny also would have found that the privative clause in s. 66 barred judicial review, though the majority did not agree that the privative clause was enforceable.

Supreme Court of Canada decision

The Supreme Court allowed Democracy Watch's appeal. In a unanimous decision written by Chief Justice Wagner, the Supreme Court held that there was no adequate alternative remedy available to Democracy Watch, and that the Constitution requires legality review of all aspects of administrative decisions, including on questions of fact and law. Section 66 of the COIA, which purported to oust review on certain issues, was therefore unconstitutional and declared to be of no force and effect to the extent it bars judicial review on questions of fact and law.

A political process to enforce the COIA is not an adequate alternative remedy

The Supreme Court held that the Federal Court of Appeal erred by treating political oversight by Parliament through the Commissioner's annual reporting obligation as an adequate alternative remedy. While the courts have discretion to decline to hear the merits of an application for judicial review where there is an adequate alternative remedy, an alternative forum is only adequate if it provides for a legality review of the administrative decision, and if a commensurate remedy can be ordered.

The Supreme Court distinguished *Auditor General*, in which the Auditor General himself sought judicial review but had access to an alternative political remedy, from the situation of Democracy Watch, which brought an application for judicial review based on public interest standing and has no other recourse under the COIA. Parliament's

political oversight does not provide Democracy Watch with any right to a legality review of the Commissioner's report. Additionally, s. 47 of the COIA provides that the Commissioner's conclusions in the challenged report are final and may not be altered by anyone. As such, the Supreme Court of Canada observed it was "hard to see" what political remedy Parliament could offer Democracy Watch. The only way for Democracy Watch to obtain legality review of the Commissioner's report was through the courts.

The Constitution guarantees legality review on questions of fact and law

The Supreme Court also affirmed that the Constitution guarantees legality review of all aspects of an administrative decision, including questions of fact and law. Pursuant to the judicature provisions in ss. 96–101 of the *Constitution Act, 1867*, the courts play a constitutional supervisory role over the administrative state, through judicial review of exercises of public power. This role is fundamental to the rule of law, which requires that all legal powers be exercised in accordance with their limits. The Supreme Court's emphasis on the importance of judicial review to the rule of law follows its prior decisions which reiterated the constitutional nature of the right to seek judicial review, including *Yatar v. TD Insurance Meloche Monnex*.

Though in *Crevier v. Attorney General of Québec*, the Supreme Court had observed that a privative clause cannot shield an administrative decision from judicial review on questions of jurisdiction, the Supreme Court found that this does not mean that judicial review on questions of fact and law can be so shielded. Rather, the Court concluded that Crevier must be understood in its proper historical context—including the courts' evolving understanding of what constitutes a "jurisdictional question", and the changes in the applicable standard of review. *Crevier* never intended to permit privative clauses to shield unreasonable findings of fact or law from judicial review.

However, the Court declined to endorse the view from certain parties and interveners that the reasonableness review as defined in *Vavilov* is the constitutionally guaranteed minimum seeing as the common law standards of review can be and have been modified over time, leaving that issue for another day.

Accordingly, legislation that purports to oust the courts' supervisory role is unconstitutional. The Supreme Court held that s. 66 of the COIA, which purports to oust judicial review on questions of fact and law, could not be read in a constitutionally compliant manner, and therefore declared it to be of no force and effect.

The Court's decision in *Democracy Watch* will be relevant in the upcoming appeal in *Canadian National Railway Company v. Alberta Pacific Forest Industries Inc.* (42092), set to be argued in November, addressing the constitutionality of s. 18.5 of the *Federal Courts Act*, which ousts the Federal Courts' jurisdiction to hear a judicial review application where the matter may be appealed to the Governor in Council. BLG is counsel for CN in the appeal.

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