SCC File Number: 41576

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

BETWEEN:

DEMOCRACY WATCH

APPELLANT
(Applicant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN TELECOMMUNICATIONS ASSOCIATION

Interveners

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Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. *Vavilov* placed the "culture of justification" at the centre of Canadian administrative law, by requiring those exercising public power to justify their decisions to citizens in terms of rationality and fairness before courts exercising the power of judicial review.[1] *Vavilov* is emerging as a global model for substantive review in administrative law across the common law world.[2] But according to the court below, it is inapplicable to decisions made by an official wielding statutory authority under one of the central pieces of legislation in Canadian public administration. This decision is incorrect, and this Court should overrule it.

2. Since 2006, the *Conflict of Interest Act* (**"*COIA*"**) has applied to approximately 3,000 of the most senior federal public office holders.[3] The *COIA*'s aim is to uphold ethical probity. The officials to whom the *COIA* applies include not only the Prime Minister, but also Cabinet ministers, their staff, and Cabinet appointees (deputy ministers, associate and assistant deputy ministers, and the heads of hundreds of federal government institutions) who wield the most significant decision-making powers in the federal executive. It is a profoundly important piece of legislation.

3. This case should be about the proper scope, interpretation and application by the Conflict of Interest and Ethics Commissioner (**"Commissioner"**) – who is responsible for the administration and enforcement of the *COIA* – of two central provisions in the *COIA*. Subsection 6(1) prohibits a public officer – in this case, the Prime Minister – from participating in a decision that would place them in a conflict of interest. Section 4 defines what a conflict of interest is. But this case is actually about the legally prior question of whether the Commissioner must justify his decisions in a court of law in the manner demanded by the culture of justification.

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [***Vavilov***], at para. 14.

[2] *ABT17 v. Minister for Immigration and Border Protection*, [2020] HCA 34, at para. 127 (High Court of Australia); *Movement for Quality Government in Israel v. The Knesset*, HCJ 5658/23 (Supreme Court of Israel), at para. 154; *New Health New Zealand Ltd v. Minister for Covid-19 Response*, [2023] NZHC 2647, at para. 97 (High Court of New Zealand); *QXNS v. Minister for Immigration, Citizenship and Multicultural Affairs*, [2024] FCA 1369, at para. 51 (Federal Court of Australia).

[3] *Conflict of Interest Act*, SC 2006, c 9, s 2 [***COIA***].

4. Even though the Commissioner wields statutory authority in relation to the *COIA*, the Federal Court of Appeal (**"FCA"**)_unanimously determined that his interpretations of s. 4 and ss. 6(1) are beyond the scope of judicial review.[4] To reach this startling conclusion, the FCA reasoned that enforcement of the *COIA* is entirely a matter for the political process. This decision upends the separation of powers and offends the rule of law by permitting the Commissioner to determine the legal limits of his own powers, because of the theoretical possibility of political oversight. Judicial review according to the dictates of *Vavilov* is excluded entirely. When the conduct at issue is that of the Prime Minister, judicial abstinence combined with political self-interest also licences executive self-dealing, which defeats the very purpose of the *COIA*.

5. The Attorney General of Canada will likely argue that the partial privative clause contained in s. 66 of the *COIA* ousts the power of the court to judicial review the Commissioner's decision on questions of law and fact. The Court must reject this argument. Over four decades ago, this Court held that judicial review is constitutionally entrenched in Canada. This appeal furnishes the opportunity for this Court to explain that this entrenchment extends to judicial review based on *Vavilov*. For centuries, the common law courts have jealously guarded their core function of ensuring lawful public administration against legislative and executive intrusion. This Court should not let its guard down now. It can never be acceptable for Parliament to insulate decision-making from judicial review on the basis of reasonableness.

6. Properly read, s. 66 of the *COIA* does not preclude judicial review at all. If it did, it would be unconstitutional, since it would empower the Commissioner to determine the limits of his own jurisdiction. That power lies exclusively with the courts and is constitutionally entrenched by s. 96 of the *Constitution Act, 1867*.[5] Parliament is bound by s. 96. Accordingly, it cannot exercise its legislative power under s. 101 of the *Constitution Act, 1867* to designate the Federal Court and FCA as superior courts, with exclusive supervisory authority over federal administrative decision-makers, only to then hamstring them in the exercise of that supervisory authority. The culture of justification must always apply to creatures of statute brought into being by federal or provincial

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[4] *Democracy Watch v. Canada (Attorney General)*, 2024 FCA 158 [**FCA Reasons**], at paras. 72-92 and 94, Appellant's Record [**AR**], Part I, Tabs 3 (English) and 4 (Français).

[5] *Constitution Act, 1867,* 30 & 31 Vict, c 3, ss. 96 and 101. *Loi constitutionelle de 1867*, 30 & 31 Victoria, ch. 3 (R.-U.), articles 96 et 101.

legislation. No Canadian legislature can immunize exercises of executive power from review for reasonableness.

B. Statement of Facts

i. Procedural History

a. WE Charity, Prime Minister Trudeau and the Trudeau family

7. The origins of this appeal lie in the early months of the COVID-19 pandemic. As part of its response to youth unemployment created by the economic crisis caused by the shutdown of the global economy, the federal government created the Canada Student Service Grant'(**"CSSG"**) to provide employment for post-secondary students. Civil servants in Employment and Social Development Canada (**"ESDC"**) and the Department of Finance, encouraged by political staffers, designed the CSSG. They recommended that an external third-party provider – the WE Charity – should administer the programme. ESDC submitted a proposed design and implementation plan to Cabinet.[6]

8. At that point, the Prime Minister's Office became aware of the CSSG plan. The involvement of the WE Charity gave rise to concern because of its longstanding and deep relationship with Prime Minister Trudeau and his family. Mr. Trudeau had participated in eight separate events for the WE Charity after becoming a MP, including after he became Prime Minister. His first speech as Prime Minister was at a WE Charity event. As the Commissioner later found, Mr. Trudeau had "benefited from publicity and promotional materials generated, directly and indirectly, by WE".[7] His spouse had appeared at eight events, had been paid for one, was an honorary ambassador for the WE Charity, and hosted a podcast related to the WE Charity. The WE Charity had paid Mr. Trudeau's mother and brother to participate in dozens of activities.[8]

9. Given the close ties between the Trudeau family and the WE Charity, Prime Minister Trudeau and his Chief of Staff pulled the CSSG off the Cabinet agenda and asked the public service to conduct further analysis. ESDC officials advised that only the WE Charity would be capable of implementing the plan in the proposed timeframe. The item was placed back on the Cabinet's

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[6] Conflict of Interest and Ethics Commissioner, *Trudeau III Report* (May 13, 2021) [**Commissioner's Report**], pp. 1-2.
[7] Commissioner's Report, at para. 248.
[8] Commissioner's Report, at paras. 20-29.

agenda. On May 22, 2020, Cabinet approved the plan. On June 22, 2020, Mr. Trudeau approved the contribution agreement with the WE Charity.[9]

b. The *Conflict of Interest Act* complaints against Prime Minister Trudeau

10. A political controversy soon erupted. Two MPs – Mr. Michael Barrett (Leeds–Grenville–Thousand Islands and Rideau Lakes) and Mr. Charlie Angus (Timmins–James Bay) – filed requests with the Commissioner to examine Prime Minister Trudeau's involvement in the approval of the CSSG. Their requests set out the provisions they alleged Prime Minister Trudeau had contravened: ss. 6(1) (Mr. Barrett) and s. 7 (Messrs. Angus and Barrett). Only ss. 6(1), and the closely related provision, s. 4, are relevant to this appeal.

11. Subsection 6(1) provides:

No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.	Il est interdit à tout titulaire de charge publique de prendre une décision ou de participer à la prise d'une décision dans l'exercice de sa charge s'il sait ou devrait raisonnablement savoir que, en prenant cette décision, il pourrait se trouver en situation de conflit d'intérêts.

12. Subsection 6(1) incorporates the definition of conflict of interest set out in s. 4:

For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.	Pour l'application de la présente loi, un titulaire de charge publique se trouve en situation de conflit d'intérêts lorsqu'il exerce un pouvoir officiel ou une fonction officielle qui lui fournit la possibilité de favoriser son intérêt personnel ou celui d'un parent ou d'un ami ou de favoriser de façon irrégulière celui de toute autre personne.

13. The complaints alleged that Mr. Trudeau was in a conflict of interest, since he had exercised an official power, duty or function, when he knew or reasonably should have known that the exercise provided an opportunity to further his private interests or those of his relatives (his spouse, mother and brother) or friends (the founders of the WE Charity) and/or to improperly further their

[9] Commissioner's Report, at paras. 178-205.

interests. It follows that under s. 21 of the *COIA*, he should have recused himself from "any discussion, decision, debate or vote" about the CSSG, including in Cabinet.

c. The Commissioner's decision

14. The Commissioner must investigate alleged breaches of the *COIA* at the instance of MPs unless the allegation is frivolous, vexatious or made in bad faith. The Commissioner investigated and produced a detailed report. He delivered his report to the Prime Minister – not because the Prime Minister was the target of the complaint, but because he is required to deliver all reports to the Prime Minister.

15. The Commissioner found that Mr. Trudeau had not breached the *COIA*. While making this determination, the Commissioner interpreted and applied s. 4 and ss. 6(1) of the *COIA*. There were three branches to the Commissioner's analysis.

16. *First*, the Commissioner determined that Mr. Trudeau and the founders of the WE Charity were not "friends". A previous Commissioner had interpreted friends to be individuals "who have a close bond of friendship, a feeling of affection or a special kinship".[10] The Commissioner went on to conclude:

> … Mr. Trudeau and the Kielburgers are not friends within the meaning of the Act. Mr. Trudeau did not socialize with the Kielburgers outside of his public duties and his participation in WE Day events.[11]

17. *Second*, the Commissioner found that being in an **apparent** conflict of interest – as Mr. Trudeau was – is not a breach of the *COIA*. As a matter of fact, the Commissioner found that there was an apparent conflict of interest. As he put it, "many elements" of the close relationship between the Trudeau family and WE "give rise to a strong appearance of conflict between the Trudeau family's relationship with WE and Mr. Trudeau's duty to make decisions that best serve the public interest".[12] Indeed, the Commissioner noted that "Mr. Trudeau does not dispute the fact that his and his family's proximity to the WE organization created the appearance of conflict" and "Mr. Trudeau recognized the apparent conflict of interest, which in this case was based on his and his family's association with WE, before he participated in making the decisions to deny the

[10] Commissioner's Report, at para. 240.
[11] Commissioner's Report, at para. 241.
[12] Commissioner's Report, at para. 250.

organization's request to fund its Social Entrepreneurship program and to select WE to administer the CSSG."[13]

18. However, the Commissioner decided that an appearance of a conflict of interest is not a breach of s. 6(1) of the *COIA*, for three reasons: (a) sections 4 and 6(1) do not refer expressly to apparent conflicts, whereas the *Conflict of Interest Code for Members of the House of Commons*, and the *Code of Values and Ethics* (which applies all federal public servants), both do;[14] (b) Parliament twice considered and rejected proposals to amend the *COIA* to extend its reach to apparent conflicts of interest; [15] and (c) provincial legislation (in British Columbia) makes express reference to apparent conflicts of interest.[16]

19. Even though Prime Minister Trudeau publicly acknowledged that he should have recused himself from the decision-making process,[17] the Commissioner found that the "substantive rules" of the *COIA* do not prohibit apparent conflicts.[18]

20. *Third*, s. 4 and ss. 6(1) establish two separate tests for whether an office holder is in a conflict of interest when exercising an official power, duty or function – when the office holder knows or reasonably should have known that the exercise provides an opportunity either (i) to further the office holder's private interest or those of the office holder's relatives or friends; **or** (ii) to improperly further another person's or entity's private interests.

21. The Commissioner conflated the two tests and then concluded that the proposal by public servants to give the grant to WE Charity had not been developed or proposed improperly and that, solely because the *COIA* does not prohibit apparent conflicts of interest, Mr. Trudeau had not acted "improperly".[19] The Commissioner did not fully consider the legal meaning and scope of the restriction on actions by office holders that the word "improperly" in s. 4 establishes, despite its broad meaning, its clear reference to a standard of behaviour distinct from the scope of the prohibitions in other sections of the *COIA*, and jurisprudence concerning its meaning.

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[13] Commissioner's Report, at paras. 251, 268.
[14] Commissioner's Report, at paras. 259-261.
[15] Commissioner's Report, at paras. 262-266.
[16] Commissioner's Report, at para. 267.
[17] Commissioner's Report, at para. 269
[18] Commissioner's Report, at para. 268.
[19] Commissioner's Report, at paras. 245-269.

22. The Commissioner also did not opine on whether the evidence establishing a close relationship between Mr. Trudeau, his family and the WE Charity generated a "real" conflict of interest under the *COIA*.

d. Democracy Watch's application for judicial review

23. Democracy Watch sought judicial review in the FCA of the Commissioner's decision, alleging errors of law, an error of fact and a breach of natural justice.[20]

24. The theory of the case is summarized in the Notice of Application for Judicial Review (**"Notice"**):

> The Commissioner's Decision, based on two errors of law, an error of fact, and a violation of a rule of natural justice, set a precedent that allows public office holders, when in a conflict of interest, to approve handing the public's money to their friends and their organizations. The Decision was thereby unlawful as it failed to comply with the main purposes and clear provisions of the *Conflict of Interest Act* that prevent and prohibit public office holders from taking part in decisions when in any conflict of interest or when doing so would be improper in any way.[21]

1. Error of law

25. The Notice identifies two errors of law in the Commissioner's interpretation of s. 4 and ss. 6(1) of the *COIA*:

a. Section 4 and ss. 6(1) should be interpreted to encompass apparent conflicts of interest and other "improper" furthering of private interests,[22] especially because Annex B of Prime Minister Trudeau's *Open and Accountable Government* code, which applied to him and all Cabinet ministers and staff, provided at the relevant time that the Prime Minister should avoid apparent conflicts of interest, which thereby clearly makes it "improper" for an office holder to further another person or entity's interest when in an apparent conflict of interest.[23]

b. Sections 4 and 6(1) must be read harmoniously with the statement of purpose in s. 3 of the *COIA*, which does not distinguish between "real" and "apparent" conflicts of interest.[24]

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[20] *Federal Courts Act*, RSC 1985, c F-7, para. 28(1)(b.1) (Commissioner's decisions within the jurisdiction of the Federal Court of Appeal).
[21] Notice of Application, at para. 29, AR, Part II, Tab 1.
[22] Notice of Application, at paras. 8-15, AR, Part II, Tab 1.
[23] Notice of Application, at para. 11, AR, Part II, Tab 1.
[24] Notice of Application, at paras. 16-19, AR, Part II, Tab 1.

26. In addition, the Commissioner erred in applying his own interpretation of ss. 4 and 6(1) to the facts as he had found them and should have concluded that Prime Minister Trudeau was in a "real conflict of interest" in any event.[25]

2. Error of fact

27. The Notice pleads that the Commissioner "ignored clear evidence" of the friendship between Prime Minister Trudeau and one of the founders of the WE Charity.[26] There was also ample evidence of Mr. Trudeau's family ties to the WE Charity, such that under any reasonable definition of "friend" Mr. Trudeau would be caught by ss. 4 and 6(1).

3. Reasonable apprehension of bias

28. The Notice also pleads a reasonable apprehension of bias due to the circumstances of the appointment of the Commissioner. The Appellant later abandoned this argument due to an intervening decision of the FCA and it is no longer at issue.[27]

4. The partial privative clause

29. The Notice pleads that the FCA had jurisdiction to grant its application for judicial review, on issues relating to lawfulness and natural justice that were not excluded by the partial privative clause in s. 66 of the *COIA*, which purports to exclude judicial review of errors of law and fact.[28]

30. In substance, Democracy Watch asserted that judicial review for unreasonableness remains available even in the face of the partial privative clause in s. 66.

5. Relief sought

31. Democracy Watch originally sought orders:

a. quashing (*certiorari*) the part of the Commissioner's Decision that found the Prime Minister did not violate s. 6(1) of the *COIA*; and

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[25] Notice of Application, at para. 20, AR, Part II, Tab 1.
[26] Notice of Application, at para. 21, AR, Part II, Tab 1.
[27] *Democracy Watch v. Canada (Attorney General)*, 2021 FCA 133; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208, at para. 16, AR, Part I, Tab 1. See Motion Record of the Responding Party/Applicant on Respondent's Motion to Strike, at para. 10, AR, Part II, Tab 2.
[28] Notice of Application, at para. 30, AR, Part II, Tab 1.

b. remitting the matter back to an independent, impartial decision-maker in accordance with the Court's reasons.

32. If this matter is remitted back to the FCA for a determination on the merits, Democracy Watch will continue to seek *certiorari* and an order directing the Commissioner to redetermine the complaints in accordance with the court's reasons.

e. Democracy Watch's application for judicial review survives Canada's motion to strike

33. The Attorney General of Canada (**"AGC"**) brought a motion to strike Democracy Watch's application for judicial review. The AGC asserted three bases on which the application was doomed to failure: lack of standing; the partial privative clause; and *res judicata*.

34. The motions judge (Stratas JA) dismissed the motion to strike.[29]

35. On standing, Stratas JA held that Democracy Watch satisfied the test for public interest standing. There was a serious justiciable issue, Democracy Watch had a genuine interest in having it resolved, and its application was a reasonable and effective means of bringing the matter before the courts.[30] Moreover, there was a serious risk that the Commissioner's decision would be immunized from judicial review if Democracy Watch did not have standing:

> I am also concerned that if the applicant is not given public interest standing, the Commissioner's decision will be immunized from any review. The potential for immunization of public decision-making is a weighty factor under the test for public interest standing: unless the applicant is given standing, immunization of the Commissioner's decision from any review, at least by courts, is a real possibility.[31]

36. On the partial privative clause issue, Stratas JA noted that the scope of judicial review in the face of statutory language purporting to oust or limit judicial review is uncertain. The answer was neither plain nor obvious and, as such, "[t]he motion should be left for the hearing panel that will decide the application on its merits".[32]

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[29] *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208, AR, Part I, Tab 1.
[30] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.
[31] 2022 FCA 208, at para. 9 (internal citations omitted), AR, Part I, Tab 1.
[32] 2022 FCA 208, at para. 23, AR, Part I, Tab 1.

37. On *res judicata*, Stratas JA held that in view of the uncertainty on the privative clause issue, it was best not to determine whether *res judicata* formed the basis for a motion to strike.[33]

f. The Federal Court of Appeal splits the proceedings

38. Under the *Federal Courts Rules*, an applicant for judicial review may request material not in the applicant's possession from the tribunal targeted by the application – the Certified Tribunal Record (**"CTR"**).[34] The tribunal must provide the CTR within 20 days.[35] The tribunal may object to providing a CTR.[36]

39. The Commissioner objected to Democracy Watch's request for the CTR.[37] The motions judge (Stratas JA) addressed the objection by splitting the proceedings into two stages:

> At Stage 1, the courts will first determine whether the partial privative clause in s. 66 of the *COIA* precludes Democracy Watch's application for judicial review. If the partial privative clause is effective to preclude judicial review of alleged errors of law and fact, then it would not be necessary to address the Commissioner's objection to disclosure.
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> At Stage 2, if this Court concludes the partial privative clause does not preclude judicial review, the Commissioner's objection to disclosure, and the grounds of this proceeding concerning the reasonableness of the Commission's decision, will be addressed by the FCA. Stage 2 is currently stayed, by order of the FCA, pending disposition of this appeal.[38]

g. The Federal Court of Appeal declines to decide the application for judicial review

40. At Stage 1, the FCA dismissed Democracy Watch's application for judicial review, on the basis that political oversight can be an adequate alternative remedy to judicial review.[39] De Montigny CJ delivered the court's reasons on this point. He noted that the Commissioner is "an independent Officer of Parliament, and the position he occupies is firmly within the legislative

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[33] 2022 FCA 208, at para. 59, AR, Part I, Tab 1.
[34] *Federal Courts Rules*, SOR/98-106, Rule 317.
[35] SOR/98-106, Rule 318.
[36] SOR/98-106, Rule 318(2).
[37] Notice of Motion of the Applicant, AR, Part II, Tab 4. Applicant's Written Representations on the Motion, AR, Part II, Tab 5. Applicant's Reply on the Motion, AR, Part II, Tab 6.
[38] *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39, AR, Part I, Tab 2.
[39] FCA Reasons, at paras. 72-92 and 94, AR, Part I, Tabs 3 (English) and 4 (Français).

branch of government".[40] In addition, he found that the statutory scheme suggests that Parliament intended political oversight of the Commissioner to be a central feature:

> 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.[41]

41. De Montigny CJ further explained that "Courts should be loath to perceive judicial remedies as the only effective recourse in every instance where an aggrieved party raises an alleged illegality".[42] Ultimately, "courts should not be drawn in disputes raising purely legal or factual issues within the jurisdiction of the Commissioner".[43]

42. The FCA, however, divided over the effect of the partial privative clause in s. 66. De Montigny CJ held that the partial privative clause excluded judicial review for errors of law and errors of fact and doomed the application to failure. He reasoned that Parliament could preclude reasonableness review of executive action in its entirety:

> 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.[44]

43. The concurring judges disagreed, relying on decisions of previous panels of the FCA on the constitutional core minimum of judicial review and the constitutionality of restrictions on judicial review.[45]

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[40] FCA Reasons, at para. 80, AR, Part I, Tabs 3 (English) and 4 (Français).
[41] FCA Reasons, at para. 81, AR, Part I, Tabs 3 (English) and 4 (Français).
[42] FCA Reasons, at para. 84, citing *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 [***Auditor General***], AR, Part I, Tabs 3 (English) and 4 (Français).
[43] FCA Reasons, at paras. 88. See also FCA Reasons, at para. 91, AR, Part I, Tabs 3 (English) and 4 (Français).
[44] FCA Reasons, at para. 73, AR, Part I, Tabs 3 (English) and 4 (Français).
[45] FCA Reasons, at para. 96, AR, Part I, Tabs 3 (English) and 4 (Français).

ii. The Statutory Scheme

a. *Parliament of Canada Act*

44. The Commissioner is a statutory office created by the *Parliament of Canada Act* (**"*PCA*"**). The legislated "mandate" of the Commissioner is to carry out statutory functions and, in addition, to "provide confidential policy advice and support to the Prime Minister in respect of conflict of interest and ethical issues in general".[46] Under the *PCA*, the Commissioner has two functions – that is, he wears two hats. Only one of these is relevant for present purposes.

45. First, the Commissioner "shall perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House".[47] In this role, the Commissioner's chief responsibility is the enforcement of the *Conflict of Interest Code for Members of the House of Commons* (**"*MP Code*"**) which is Appendix I to the *Standing Orders of the House of Commons*. Indeed, s. 86(2) specifically provides that these functions are carried out "within the institution of the House of Commons" and that the Commissioner "enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions". This is not a statutory power. Furthermore, s. 86(3) provides that those duties and functions are to be carried out "under the general direction of any committee of the House of Commons that may be designated or established by that House for that purpose" – that is, the Commissioner is subject to Parliamentary oversight. None of these duties and functions are at issue in this appeal.

46. Second, pursuant to s. 87 of the *PCA*, the Commissioner shall "perform the duties and functions assigned" under the *COIA*.[48] Section 87 does not refer to these statutory duties and functions being "within" Parliament or carrying any "privilege and immunities". This is a statutory power. Moreover, as explained further below, the Commissioner is not subject to Parliamentary oversight when administering and enforcing the *COIA*. This appeal is about whether the exercise of this statutory power is subject to judicial review.

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[46] *Parliament of Canada Act*, RSC 1985, c P-1 [***PCA***], s. 85.
[47] *PCA*, ss. 86(1) to 86(3).
[48] *PCA*, s. 87.

b. *Conflict of Interest Act*

47. The purpose of the *COIA* is succinctly and accurately stated in s. 3:

The purpose of this Act is to (a) establish clear conflict of interest and post-employment rules for public office holders; (b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise; (c) provide the Conflict of Interest and Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred; (d) encourage experienced and competent persons to seek and accept public office; and (e) facilitate interchange between the private and public sector.	La présente loi a pour objet : a) d'établir à l'intention des titulaires de charge publique des règles de conduite claires au sujet des conflits d'intérêts et de l'après-mandat; b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public; c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi; d) d'encourager les personnes qui possèdent l'expérience et les compétences requises à solliciter et à accepter une charge publique; e) de faciliter les échanges entre les secteurs privé et public.

48. The central concept of the *COIA* is a "conflict of interest", which is defined in s. 4 (already quoted), and permeates the *COIA*. That concept is the anchor for a series of prohibitions (in addition to ss. 6(1) already quoted) and requirements designed to ensure ethical probity from public office holders. For example, among other provisions in the *COIA*: s. 5 requires arranging one's private affairs to avoid conflicts; s. 8 prohibits using insider information, and s. 9 prohibits trying to influence decisions, to further one's private interests or the interests of relatives or friends (or to improperly further anyone's or any entity's interests); s. 16 prohibits soliciting funds if it would

cause a conflict of interest; and s. 21 (already referred to) requires recusal from decision-making processes when in a conflict of interest.[49]

49. The *COIA* envisages two discrete enforcement mechanisms. First, there are compliance measures under Part 2, including duties of disclosing assets and liabilities and divestment of assets, all to be overseen by the Commissioner.

50. Second, there is the power of "examination" (i.e. investigation) and enforcement by the Commissioner under Part 4, which is at issue in this case. Subsection 44(1) – the trigger for the investigation of Prime Minister Trudeau – permits any parliamentarian "who has reasonable grounds to believe" that the *COIA* was violated to request that the Commissioner "examine the matter". The Commissioner has the discretion to discontinue the examination if they determine that the request was made in bad faith or is frivolous; otherwise, the Commissioner "shall examine the matter described in the request" (s. 44(3)). The Commissioner has significant investigative powers, including "the same power to enforce the attendance of witnesses and to compel them to give evidence as a court of record in civil cases" (s. 48(2)).[50]

51. The Commissioner must provide their investigative report to the parliamentarian who made the request and to the Prime Minister, and must also make it publicly available:

44 (7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3). (8) The Commissioner shall, at the same time that the report is provided under subsection (7), provide a copy of it to the member who made the request — and the public office holder or former public office holder who is the subject	**44** (7) Le commissaire remet au premier ministre un rapport énonçant les faits, son analyse de la question et ses conclusions, même s'il juge la demande futile, vexatoire ou entachée de mauvaise foi, ou s'il a mis fin à l'étude en vertu du paragraphe (3). (8) En même temps qu'il remet le rapport, le commissaire en fournit un double à l'auteur de la demande et à l'intéressé, et le rend accessible au public.

[49] *COIA*, ss. 3, 4, 5, 6(1), 7, 8, 9, 16 and 21.
[50] *COIA*, ss. 44 (1), (3) (7) and (8) and 48(2).

of the request — and make the report available to the public.	

52. Under s. 47, the Commissioner's conclusions on any breaches of the *COIA* are final and may not be altered by anyone. However, the conclusions are not determinative of the measures to be taken in response to any violations of the Act:

A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.	Est inattaquable la conclusion tirée par le commissaire, dans le rapport prévu aux articles 44 ou 45, sur la question de savoir si le titulaire ou l'ex-titulaire de charge publique a contrevenu ou non à la présente loi. Elle n'est toutefois pas décisive lorsqu'il s'agit de déterminer les mesures à prendre pour donner suite au rapport.

53. Lastly, s. 66 contains a partial privative clause:

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.	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.

54. The purported effect of that partial privative clause can be visualized through a strikethrough version of s. 18.1(4) of the *Federal Courts Act*, which renders parts of it applicable to the Commissioner's decisions:[51]

The Federal Court may grant [an application for judicial review] if it is satisfied that the federal board, commission or other tribunal (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or	(4) Les mesures [de contrôle judiciaire] prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas : a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer; b) n'a pas observé un principe de justice naturelle ou d'équité

[51] *Federal Courts Act*, RSC 1985, c F-7 [***Federal Courts Act***].

other procedure that it was required by law to observe; ~~(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;~~ ~~(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;~~ (e) acted, or failed to act, by reason of fraud or perjured evidence; or ~~(f) acted in any other way that was contrary to law.~~	procédurale ou toute autre procédure qu'il était légalement tenu de respecter; ~~c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;~~ ~~d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;~~ e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages; ~~f) a agi de toute autre façon contraire à la loi.~~

55. Under section 18 of the *Federal Courts Act*, Parliament has transferred all supervisory jurisdiction from the provincial superior courts to the federal courts: "It is well established that the effect of s. 18 was to transfer all superintending and reforming power over federal agencies from the superior courts to the Federal Court".[52] Those courts now have exclusive original jurisdiction to grant judicial review remedies against federal administrative decision-makers, including the Commissioner.[53] Thus, only the FCA could grant the remedies against the Commissioner sought here and not a provincial superior court.

PART II: QUESTIONS IN ISSUE

56. There are three questions in issue:

a. Is the possibility of political oversight an adequate alternative remedy to judicial review?

b. Does the partial privative clause in s. 66 of the *COIA* preclude the application for judicial review?

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[52] *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, [1983] 1 SCR 147, at p. 154, citing *Commonwealth of Puerto Rico v. Hernandez*, 1973 CanLII 184 (SCC), [1975] 1 SCR 228 [***Hernandez***], at p. 233; *Howarth v. National Parole Board*, [1976] 1 SCR 453, at p. 470. See also *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (CanLII), at paras. 42, 45, 47, 51-52; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII), at para. 106.

[53] *Federal Courts Act*, s. 2 (definition of "federal board, commission or other tribunal"), ss. 18(1) and para. 28(1)(b.1) (FCA has judicial review jurisdiction over Commissioner).

c. If the answer to question (2) is "yes", is s. 66 of the *COIA* of no force and effect because it is inconsistent with the Constitution of Canada?

PART III: STATEMENT OF ARGUMENT

A. Issue 1: The Possibility of Political Oversight is Not an Adequate Alternative Remedy to Judicial Review

i. Judicial review is always available for statutory decision-makers

57. The FCA erred by concluding that, under the *PCA* and *COIA*, Parliament established an alternative political remedy for the review of the Commissioner's decisions concerning whether an office holder violated the *COIA* that pre-empts judicial review.[54]

58. When conducting an investigation under the *COIA* into a complaint, and issuing reports on the results of that investigation, the Commissioner is administering and enforcing a statutory scheme. The Commissioner is no different than any other administrative decision-maker, even though the Commissioner delivers the report to the Prime Minister and can take no further action on it. The basic principle of administrative law applies to the Commissioner's reports: "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority".[55]

59. As *Yatar* explained, in considering whether to exercise its discretion to decline to consider an application for judicial review, the starting point is that there is "a right to seek judicial review".[56] In assessing whether there is an adequate alternative remedy, the court must:

> ensure that those whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.[57]

60. On its facts, *Yatar* rejected the proposition that internal reconsideration of a decision by an administrative decision-maker could be an adequate alternative remedy, because the

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[54] FCA Reasons, paras. 81 and 92, AR, Part I, Tabs 3 (English) and 4 (Français).
[55] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 [***Dunsmuir***], at para. 28.
[56] *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8 (CanLII) [***Yatar***], at para. 49.
[57] *Yatar*, at para. 65.

reconsideration decision itself was the subject of the judicial review.[58] The same is true here: the right to judicial review should not be limited by the possibility of external review by the Prime Minister. This is particularly true when the investigation into his compliance with the *COIA* was itself the subject of the judicial review. The Appellant develops this argument further below.

61. The Appellant observes that *Yatar* is consistent with the approach of the UK Supreme Court. Faced with a situation in which an appellate court had refused judicial review on the basis that the claimant could have brought an action in private law against the regulator, Lords Sales and Stephens reasserted constitutional fundamentals. They noted that an appeal would be an adequate alternative remedy to judicial review, but – as with the *COIA* – no appeal had been provided for. They also remarked that the possibility of review by a non-judicial body (the Ombudsman) was not an adequate alternative remedy:

> The general position is that the opportunity to complain to an ombudsman does not affect the right of an individual to bring a judicial review claim against a public authority… The role of an ombudsman is intended by Parliament to supplement control of public authorities by the courts through judicial review, not to replace it.[59]

62. The same principles apply here. It would be an unwarranted logical leap to infer from the fact that the Commissioner provides his report to the Prime Minister that Parliament intended to replace, as opposed to supplement, judicial review, with political oversight. The Commissioner's report must be delivered somewhere. The delivery destination does not change its essential character as a set of legal analysis and conclusions based on findings of fact that, taken together, are determinative of whether the *COIA* has been breached. Moreover, the fact that the *COIA* vests responsibility with the Prime Minister, and not the Commissioner himself, to take any measures in response to his report, does not create an alternative political remedy to judicial review. Rather, as explained below, it simply creates a division of labour regarding the enforcement of the *COIA*.

63. Indeed, taken to its logical limit, the FCA's argument could be applied to *any* administrative decision, because the political process can always, in theory, lead to the reconsideration of an administrative decision.[60] This would be the end of judicial review.

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[58] *Yatar*, at para. 63.
[59] *Re McAleenon*, [2024] UKSC 31, at para. 63.
[60] *Woodward Estate v. Minister of Finance*, [1973] SCR 120; *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46.

ii. The federal courts have judicially reviewed decisions of officers of Parliament when exercising statutory powers

64. The FCA's decision is inconsistent with decisions of that court and the Federal Court which have subjected the decisions of officers of Parliament – including the Commissioner – to judicial review when exercising statutory powers.

65. In 2018, the FCA considered an application for judicial review of a decision of the Commissioner concerning whether a public office holder violated the *COIA*.[61] That case raised, as this appeal does, the issue of whether the Commissioner reasonably interpreted provisions in the *COIA*. The FCA confirmed that the Commissioner's decisions were subject to judicial review, because the Commissioner was exercising ordinary statutory powers. As the FCA explained, the application raised issues that were "clearly justiciable… as they concern the correct interpretation to be given to provisions of the Act" and that:

> The Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not stray beyond its proper legislative mandate. This is clearly and eminently a judicial function.[62]

66. The FCA's decision in this proceeding also conflicts with decisions of the Federal Court in two applications for judicial review of decisions of the Commissioner of Lobbying – also an Officer of Parliament, like the Commissioner – concerning whether lobbyists violated federal lobbying rules.

67. The first decision cited the FCA's 2018 decision on the Commissioner and granted the applicant public interest standing in part because the issues were justiciable.[63] The second decision held that that the Attorney General had conceded that the Commissioner of Lobbying's decisions concerning whether lobbyists violated federal lobbying rules are subject to judicial review (and then reviewed two of that commissioner's decisions).[64]

68. In both cases, the Federal Court reviewed the Commissioner of Lobbying's decisions even though that Commissioner's decisions concerning whether a lobbyist has violated the rules are

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[61] *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194.
[62] 2018 FCA 194, at paras. 17-18.
[63] *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613, at paras. 42-46, 58-60.
[64] *Democracy Watch v. Canada (Attorney General)*, 2023 FC 825, at para. 23.

tabled in Parliament under subsection 10.5(1) of the *Lobbying Act*.[65] The Federal Court did not conclude that this requirement created "alternative political remedies". And properly so: the delivery mechanism does not alter the essential character of a report by the Commissioner of Lobbying, which is based on legal analysis and findings of fact. The same logic applies to the Commissioner's decisions – the essential character of his report is that it contains findings of law and fact, and its transmission to the Prime Minister does not immunize it from judicial review.

iii. The Federal Court of Appeal misunderstood the statutory scheme

69. The FCA's conclusion was also based on a misunderstanding of the statutory scheme and relevant precedent.

a. Conflation of Commissioner's roles enforcing the *COIA* and *MP Code*

70. The FCA's fundamental mistake was to conclude that, because the Commissioner is an officer of Parliament, all of his activities fall under parliamentary privilege and within the legislative branch, and therefore are not subject to judicial review.

71. More specifically, the FCA conflated the Commissioner's positions and roles as enforcer of the *COIA* and enforcer of the *Conflict of Interest and Ethics Code for Members of the House of Commons* (**"*MP Code*"**).[66] Based on the conflation of the Commissioner's positions and roles as enforcer of the *COIA* and the *MP Code*, the FCA erred when it concluded that the position of Commissioner "is firmly within the legislative branch of government."[67] But while the Commissioner's position when enforcing the *MP Code* is within the legislative branch of government, when administering and enforcing the *COIA*, the Commissioner is outside the legislative branch as a creature of statute exercising statutory powers, like any administrative decision-maker.

72. Subsection 86(1) of the *PCA* provides that the duties and functions of the Commissioner are to be assigned by the House of Commons for governing the conduct of members of the House when carrying out their duties and functions as MPs. In that capacity, the Commissioner

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[65] *Lobbying Act*, RSC, 1985, c 44 (4th Supp.), ss. 10.5(1).
[66] *Conflict of Interest and Ethics Code for Members of the House of Commons*, Appendix 1 to the *Standing Orders of the House of Commons* (consolidated version as of September 18, 2023) [***MP Code***].
[67] FCA Reasons, at para. 80, AR, Part I, Tabs 3 (English) and 4 (Français).

administers the *MP Code*. Since the *MP Code* is Appendix 1 to the *Standing Orders of the House of Commons*, the Commissioner's authority to administer the *MP Code* is arguably an exercise of parliamentary privilege. When wearing this hat, the Commissioner is within the legislative branch of government. Indeed, subsection 86(2) specifically provides that these functions are carried out "within the institution of the House of Commons" and that the Commissioner "enjoys the privileges and immunities of the House of Commons and its members when carrying out those duties and functions".[68]

73. This conclusion that the Commissioner is operating with the House of Commons when administering the *MP Code* is reinforced by ss. 86(3), which provides that when the Commissioner exercises their duties and functions under ss. 86(1) – including in enforcing the *MP Code* – they do so "under the general direction of any committee of the House of Commons that may be designated or established by that House for that purpose".[69] The committee charged with this task is the Standing Committee on Access to Information, Ethics and Privacy.[70]

74. In contrast, when enforcing the *COIA*, the Commissioner exercises statutory powers, under Part 4 to the *COIA* (ss. 43 to 62), and s. 87 of the *PCA* (which the FCA does not discuss in its decision). Nor is the Commissioner in any way under the control of Parliament when determining whether an office holder has violated the *COIA*. On the contrary, ss. 86(4) – which the FCA does not mention – expressly provides that the remit of the House committee overseeing the Commissioner's enforcement of the *MP Code* does **not** extend to Commissioner's role under the *COIA* in relation to MPs who are public office holders:

> the general direction of the committee referred to in subsection (3) does not include the administration of the *Conflict of Interest Act* in respect of ministers of the Crown, ministers of state or parliamentary secretaries acting in their capacity as ministers of the Crown, ministers of state or parliamentary secretaries.[71]

75. Indeed, under ss. 44(7) and 45(4) of the *COIA*, the Commissioner, after investigating whether a public office holder has violated the *COIA*, submits the report to the Prime Minister and

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[68] *PCA*, ss. 86(1) and (2).
[69] *PCA*, ss. 86(1) and (3).
[70] *Standing Orders of the House of Commons*, Standing Order 108(3)(h)(iii).
[71] *COIA*, ss. 43 to 62. *PCA*, ss. 86(4) and s. 87.

the public office holder, and not to Parliament – as one would expect if the Commissioner were acting as part of the legislative branch.[72]

76. The FCA mistakenly relied on the fact that the Commissioner was required "to submit annual reports on the administration of the *COIA* to the Standing Committee on Access to Information", and its view that "the Committee may then determine whether anything flowing from the Commissioner's activities requires additional consideration",[73] to support the conclusion that the Commissioner was subject to Parliamentary oversight in administering the *COIA*. But the FCA misunderstood the audience and purpose of the Commissioner's annual reports. Paragraph 90(1)(b) of the *PCA* requires the Commissioner to submit an annual report on the administration of the *COIA* to the Speaker of the House – not the Standing Committee on Access to Information, Privacy and Ethics.[74] That report concerns only the Commissioner's spending of public funds in the same way every federal government institution is accountable to Parliament for its expenditures.

b. The Commissioner's different roles in penalties/sanctions under the *MP Code* and the *COIA*

77. The FCA also conflated the Commissioner's roles under the *MP Code* and *COIA* in relation to sanctions and penalties, apparently as further support for the conclusion that the Commissioner's role under the *COIA* falls within the legislative branch and is not subject to judicial review.

78. The *MP Code* explicitly empowers the Commissioner to "recommend that no sanction be imposed" or to "recommend appropriate sanctions" concerning whether an MP violated the *MP Code*.[75] The FCA stated that under the *COIA*, the Commissioner's decisions also address sanctions, through "recommendations" to the Prime Minister regarding violations of the *COIA*.[76]

79. But this is not true. Under the *COIA*, the Commissioner, after investigating whether an officer holder violated the *COIA*, issues a report "setting out the facts in question as well as the Commissioner's analysis and conclusions" – that is, findings of fact and law: ss. 44(7) and 45(4).[77]

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[72] *COIA*, ss. 44(7) and 45(4).
[73] FCA Reasons, at para. 83, AR, Part I, Tabs 3 (English) and 4 (Français).
[74] *PCA*, para. 90(1)(b).
[75] *MP Code*, subsections 28(5) and (6).
[76] FCA Reasons, at para. 16, AR, Part I, Tabs 3 (English) and 4 (Français).
[77] *COIA*, ss. 44(7) and 45(4).

The Commissioner does not have the power to recommend any measures in response to a finding that the *COIA* has been violated. Indeed, s. 47 provides that the Commissioner's conclusions are "not determinative of the measures to be taken as a result of the report."[78]

80. Those measures – i.e. sanctions and penalties – are to be taken by the Prime Minister. Moreover, he must decide on those measures based on a report that he cannot alter, as s. 47 of the *COIA* states explicitly:

> A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone...

81. There is, therefore, a division of labour. The Commissioner investigates, finds facts, interprets the law and reaches conclusions. With this foundation established, the Prime Minister can take subsequent action. But the Commissioner is the creature of statute interpreting and applying the *COIA*. The FCA's misunderstanding of the statutory scheme meant it failed to appreciate this division of labour and its natural consequence: that in interpreting the law and applying it to the facts as found, the Commissioner is acting as a federal board, commission or other tribunal subject to judicial review like any other federal administrative decision-maker.

iv. Other authorities relied on by the FCA are distinguishable

a. *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*

82. The principal authority relied upon by the FCA in holding that judicial review is unavailable to correct alleged errors of law and fact committed by the Commissioner is *Auditor General*. However, the reliance on *Auditor General* in fact underscores the novelty of the FCA's approach, which is the only case in Canada, to our knowledge, where judicial review has been held to be precluded because of the availability of alternative remedies in the political process. As Justice Sossin (writing extra-judicially) reminds us, "it is important to carefully scrutinize the particular statutory scheme in question in order to determine if a particular statutory right falls into the exceptional case where a statutory right is intended to be enforced through the legislature rather than through judicial action".[79]

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[78] *COIA*, s. 47.

[79] Lorne Sossin et al, *Practice and Procedure Before Administrative Tribunals* (Carswell, Looseleaf: 2025), § 38:12, Appellant's Book of Authorities [**ABOA**], Tab 17.

83. *Auditor General* was **not** a judicial review where an applicant asked the courts to exercise their jurisdiction to correct errors of law or fact. Rather the Auditor General applied for *mandamus* and a declaration to obtain documents he considered necessary to exercise his statutory powers. Indeed, in his reasons Dickson CJ noted that "no citizen is seeking to compel the Auditor General to carry out a statutory duty; rather, it is the Auditor General who is seeking to compel members and officers of the executive to carry out a duty which is allegedly implicitly correlative to his own statutory entitlement…"[80]

84. This Court's decision in *Auditor General* is, thus, far from a conventional application for judicial review. It did not involve an allegation that a creature of statute – the Auditor General – had misinterpreted the law or made factual errors that brought it outside the limits of lawfulness. Rather, it involved an interbranch entanglement over access to information thought necessary to perform the Auditor General's statutory functions, and the existence of a purported statutory duty on the part of third parties to cooperate with the Auditor General which this Court found did not exist. [81]

85. In addition, *Auditor General*'s conclusion that the only remedy available to the Auditor General was a political remedy was based on the statutory requirement for the Auditor General to report annually to Parliament whether he had "received all the information and explanations he required", which the Court held was a "mechanism … for resolving (or at least airing) disputes", and therefore, that "it would be inappropriate to intervene".[82] But the *COIA* does not provide for a reporting requirement of comparable specificity.

86. Finally, in *Auditor General*, the impact of this Court's decision was very different. There, this Court authoritatively interpreted the statutory scheme. Here, on the FCA's approach, the courts could not authoritatively interpret the statutory scheme, nor even police the boundaries of the scheme to correct errors of law and fact on judicial review.

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[80] *Auditor General*, at p. 86.
[81] Donald Brown and the Honourable John Evans, *Judicial Review of Administrative Action in Canada* (Carswell, Looseleaf: 2025) [**Brown and Evans**], § 1:23, ABOA, Tab 5.
[82] Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 *McGill LJ* 435, at p. 448.

b. Provincial ethics commissioners

87. The other Canadian authorities relied on by the FCA treated statutory ethics commissioners as officers of the legislature protected by parliamentary privilege, and not subject to judicial review, in situations where their statute specifically provided that reports were to be tabled in the legislative assembly, with consequences left to elected representatives.[83]

88. While the authorities might apply to any judicial reviews of the Commissioner in respect of the *MP Code* (a question that is not before this Court), it could not plausibly be true in respect of the *COIA*. Recall that the Commissioner wears two hats: enforcing an internal code of conduct for MPs (where a defence of parliamentary privilege is plausible), and administering a statutory scheme that applies to members of the executive branch of government (where a defence of parliamentary privilege is implausible). In the latter capacity, the Commissioner is administering and enforcing a statutory scheme, just like any other administrative decision-maker, and delivers his report to the Prime Minister and publishes it online, but does not table it in Parliament. The authorities on the provincial ethics commissioners are therefore readily distinguishable.

v. Judicial review of decisions remains an option even where statutory cabinet review procedures are available

89. Courts have made clear that judicial review remains available as a safeguard, even where the political review mechanism of cabinet review is expressly available for administrative decisions, has been engaged, and exhausted.[84] In this appeal, where no such political review mechanism is available, *a fortiori*, judicial review must be available.

90. In *Islands Protection Society*,[85] Lysyk J held that a statutory provision permitting the provincial cabinet to vary or rescind decisions of an environmental tribunal did not "represent a comprehensive right of final appeal which, once engaged, would preclude any recourse to judicial review" because the statutory provision and judicial review were "not coextensive but

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[83] FCA Reasons, at para. 91, citing *McIver v. Alberta (Commissioner)*, 2018 ABQB 240 at paras. 70-77; *Democracy Watch v. British Columbia (Conflict of Interest Commissioner)*, 2017 BCSC 123 at paras. 35-37.

[84] Brown and Evans, § 3.25, noting "appeals to a minister have also been held not to be an adequate alternative to judicial review", ABOA, Tab 5.

[85] *Islands Protection Society v. British Columbia (Environmental Appeal Board)*, 1988 CanLII 3057, at para. 17, 21, 22 (BC SC).

complementary. The one leading to Cabinet engages governmental policy; the other does not".[86] In the absence of clear statutory language, the possibility of cabinet review "ought not to be construed readily in such a way as to deny access to the courts for the purpose of …[applying administrative law] standards".[87] Since Cabinet petitions are often "decided on the basis of broad political, economic and social considerations, applicants are not normally required to pursue them before seeking relief in judicial review proceedings".[88]

91. If judicial review is not precluded when political oversight is provided for by statute – as in *Islands Protection Society* – judicial review ought not to be precluded where the statute does not provide for political review, as under the *COIA*.[89]

92. This Court has also noted that where political review mechanisms have been engaged and exhausted, judicial review remains available. In *Canadian National Railway Co. v. Canada (Attorney General)*,[90] for example, Peace River Coal invoked a statutory right to ask cabinet to review a decision of the Canadian Transportation Agency.[91] Subsequently, the courts entertained CN's application for judicial review of the cabinet decision.

93. This is the judicial review system operating as it should: statutory review mechanisms should be engaged and exhausted if such mechanisms are made available, with judicial review functioning subsequently as a backstop to ensure lawfulness.[92] In this case, since cabinet review was not available, the Appellant could proceed directly to commence a judicial review.

vi. The FCA's decision has absurd consequences

94. Finally, the FCA's decision has absurd consequences.

95. First, the Commissioner was established to remove political "partisanship" from the determination of whether an office holder violated the *COIA*, as the FCA notes.[93] It is particularly absurd in the situation at issue to conclude that there is an adequate alternative remedy because the

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[86] *Ibid.*, at para. 21.
[87] *Ibid.*, at para. 22.
[88] Brown and Evans, at §3.25, ABOA, Tab 5.
[89] *Re McAleenon*, [2024] UKSC 31, at para. 63.
[90] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 [***CN***].
[91] *Canada Transportation Act*, SC 1996, c 10, s. 40.
[92] *CN*, at para. 52.
[93] FCA Reasons, at para. 13, AR, Part I, Tabs 3 (English) and 4 (Français).

subject of the Commissioner's investigation and report was the Prime Minister himself.

96. Second, the logic of the FCA's decision would appear to deny a public office holder the right to judicially review the Commissioner's decision to impose an administrative monetary penalty (**"AMP"**). Under sections 52-62 of the *COIA*, the Commissioner is empowered to determine whether a public office holder has violated specific provisions of the *COIA*, to impose an AMP on the office holder for the violation, and to issue a public decision setting out the Commissioner's findings. But on the FCA's reasoning, an office holder would have no recourse but to seek a political remedy from the Prime Minister regarding the Commissioner's decision to impose an AMP. We are not aware of any other statutory regime for administrative monetary penalties in Canada in which judicial oversight of the interpretation and application of statutory provisions is unavailable. If judicial review is uncontroversially available for a Commissioner's decision to impose an AMP for a violation of the *COIA*, it should also be available for a Commissioner's decision issued under ss. 44(7) concerning a violation.[94]

97. In conclusion, the FCA's holding that the *COIA* creates "alternative political remedies" is a major, unwarranted development in public law. The decision below cuts against the grain of jurisprudence and undercuts the judicial review jurisdiction of the courts. Ultimately, the "culture of justification" created by *Vavilov* would not reach the *COIA* – and the thousands of federal office-holders subject to its provisions – if the decision below is allowed to stand.

B. Issue 2: Section 66 of the *COIA* Does Not Preclude Judicial Review of the Reasonableness of the Commissioner's Decisions

98. The proper answer to the first issue would lead to this Court allowing the appeal and permitting this matter to proceed to Stage 2, where the FCA could address the disclosure of the CTR and the application of *Vavilov* to the Commissioner's report.

99. However, it is reasonably anticipated that the Attorney General will advance the alternative argument before this Court that the partial privative clause in s. 66 of the *COIA* bars recourse to the courts.[95] In any event, it is in the interests of justice that this Court resolve the partial privative

[94] *COIA*, ss. 44(7) and ss. 52-62.
[95] *COIA*, s. 66.

clause issue on this appeal, because there is evidently disagreement on the FCA on the point, and the matter could very well come before this Court again on a further appeal.

100. The Appellant submits that the partial privative clause in s. 66 of the *COIA* does not bar its application for judicial review. Judicial review of the reasonableness of decisions made by creatures of statute is constitutionally entrenched, and s. 66 must be read consistently with the requirements of the Constitution.

i. Judicial review is constitutionally entrenched

101. Judicial review is a core feature of Canadian constitutional law. As this Court explained in *Dunsmuir*:

> 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.[96]

102. Judicial review is a "cornerstone" of our administrative law[97] – and cannot be performed by statutory bodies.[98] Pursuant to our separation of powers, the judiciary maintains the rule of law by interpreting and applying the law through the independent and impartial adjudication of references and disputes.[99] To permit an administrative decision-maker to determine the limits of its own powers is to violate the Constitution, as it usurps the powers of the courts. Canadian constitutional law reflects the common law principle "to the effect that the inherent power of the courts should not readily be taken to be wholly excluded from review".[100] As Farwell LJ memorably put it:

> Subjection ... to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited.[101]

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[96] *Dunsmuir*, at para. 27.
[97] *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 SCR 326, at p. 360.
[98] *Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] SCR 681.
[99] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (CanLII), at para. 28.
[100] Paul Craig, "Ultra Vires and the Foundations of Judicial Review" in Forsyth ed., *Judicial Review and the Constitution* (Hart, Oxford, 2000) [**Craig**], p. 47, at p. 55, ABOA, Tab 6.
[101] *R v. Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859 [*Shoreditch*] at p. 880.

103. Common law courts have traditionally had a strong aversion to privative clauses because, as Sir William Wade – not a scholar known for overstatement – once remarked, they give creatures of statute "dictatorial power".[102]

104. In Canada, the ability to quash administrative decisions has long been considered to be fundamental: "[it] cannot be taken away without express words in the statute".[103] Thus, where tribunals were created with "limited rights of appeal" and "strong privative clauses", the superior courts "generally followed the approach established in the seventeenth and eighteenth centuries, using the prerogative writs to review decisions regardless of privative clauses".[104]

105. This Court has gone further and recognized that the availability of judicial review is constitutionally required. In *Crevier v. Attorney General of Quebec*,[105] this Court located the constitutional basis of judicial review in the judicature provisions of the *Constitution Act, 1867*. In *Dunsmuir*, this Court cited *Crevier* for the proposition that the courts have a "constitutional duty to ensure that public authorities do not overreach their lawful powers", a duty grounded in the judicature provisions.[106] And, in *Vavilov*, this Court again used the language of "constitutional duty" to explain that courts must apply the reasonableness standard "to ensure that administrative bodies have acted within the scope of their lawful authority".[107] Lawfulness in this context means judicially enforced compliance with constitutional, statutory and common law limits, with the superior courts thereby upholding the rule of law.[108]

106. *Crevier* held that a statute insulating an administrative decision-maker from judicial review of jurisdictional matters "must be struck down as unconstitutional by reason of having the effect

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[102] *Constitutional Fundamentals* (Stevens & Sons, London, 1989), at p. 82, cited in David Dyzenhaus, "Disobeying Parliament? Privative Clauses and the Rule of Law" in Bauman and Kahana eds., *The least examined branch: the role of legislatures in the constitutional state* (CUP, 2006), p. 499, at p. 499 [**Dyzenhaus**].
[103] *Boston v. Lelievre*, 1864 CarswellQue 4 [*Boston*], at paras. 13-14, ABOA, Tab 1.
[104] Honourable Justice Malcolm Rowe and Michael Collins, "The History of Administrative Law" (2019), 34 *Can. J. Admin. L. & Prac.* 87, at p. 128, ABOA, Tab 16.
[105] *Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220 [***Crevier***].
[106] *Dunsmuir*, at para. 29, citing *Crevier* at p. 234.
[107] *Vavilov*, at para. 67.
[108] *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725 [***MacMillan Bloedel Ltd.***], at para. 38.

of constituting the tribunal a s. 96 court".[109] This means that **full** privative clauses that immunize administrative decision-makers from review are unconstitutional.[110]

107. But *Crevier* was based on a broader principle, as Laskin CJ explained: "[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review".[111] This broader principle means that the superior courts must always be able to determine the boundaries of an administrative decision-maker's powers – whether those rest on interpretations of law or findings of fact. It follows that **partial** privative clauses on questions of law and/or fact, are also unconstitutional.

108. It has long been understood that the core power of judicial review is designed "to see whether a limited jurisdiction has exceeded its bounds and has not acted in conformity with the law".[112] But findings of fact (especially so-called jurisdictional facts)[113] or factually suffused determinations[114] – not simply interpretations of law – also determine the boundaries of a decision-maker's authority. To quote the venerable words of Farwell LJ again, "it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact".[115] This has often involved close scrutiny of factual matters[116] and affidavit evidence.[117]

109. It is immaterial whether this review takes place in a provincial superior court or federal court (the Federal Court or FCA). Section 96 applies to Parliament as well as to the provincial legislative assemblies.[118] It follows that Parliament, no more than provincial legislatures, cannot

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[109] *Crevier*, at p. 234.
[110] See *e.g. Vavilov*, at para. 24.
[111] *Crevier*, at p. 238.
[112] *Boston*, at para. 15, ABOA, Tab 1.
[113] See generally Paul Daly, "Facticity: Judicial Review of Factual Error in Comparative Perspective" in Peter Cane et al eds., *Oxford Handbook of Comparative Administrative Law* (OUP, 2021), p. 901 [**Facticity**], at pp. 905-907, ABOA, Tab 8.
[114] See *e.g. Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at paras. 7-9.
[115] *Shoreditch*, at p. 880. See also *Blanchard v. Control Data Canada Ltd.*, [1984] 2 SCR 476 [***Blanchard***], at p. 494.
[116] See *e.g. Hespeler v. Shaw* (1858), 16 UCQB 104, at paras. 8-9, ABOA, Tab 3; Paul Daly, "Some Features of Pre-Confederation Judicial Review in Canada", *Administrative Law Matters*, 23 August 2023.
[117] See *e.g. Ex Parte Weade* (1856), 8 NBR 307, ABOA, Tab 2.
[118] *MacMillan Bloedel Ltd.*, at para. 10.

create administrative tribunals that determine the limits of their own powers. That responsibility lies with the courts. When Parliament creates a statutory decision-maker, it cannot eliminate judicial review of that decision-maker. The exigencies of the rule of law and the Constitution are such that there can be no "islands of power immune from supervision and restraint".[119]

110. It makes no difference whether the judicial oversight necessary to respect the strictures of s. 96 comes from a provincial superior court (as is the default),[120] or the federal courts established under s. 101 to ensure the better administration of the laws of Canada. In respect of federal boards, commissions and other tribunals, "it is clear that Parliament's intention was to grant [the federal courts] (and codify) the judicial review function over federal decision-makers as courts of superior jurisdiction".[121] Indeed, the *Federal Courts Act* expressly provides that both the Federal Court and FCA are "a superior court of record".[122]

ii. The core constitutional minimum of judicial review: reasonableness of alleged errors of law and fact

111. What is constitutionally entrenched are the "general principles" of administrative law as developed by the courts from time to time.[123] These principles establish the boundaries of lawfulness beyond which creatures of statute may not stray.[124] They now include the reasonableness of findings of law and fact.

112. Judicial review has ebbed and flowed from before Confederation to 1867 to *Crevier* to now. The prerogative writs have been displaced by general principles of reasonableness and procedural fairness.[125] Most recently *Vavilov* displaced *Dunsmuir* as the framework for judicial review. The language of jurisdiction used in *Crevier* is now obsolete in Canadian administrative law; in

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[119] *Kirk v. Industrial Relations Commission*, [2010] HCA 1, at para. 99.
[120] *Three Rivers Boatman Limited c. Conseil Canadien des Relations Ouvrières et al.*, [1969] RCS 607.
[121] FCA Reasons, at para. 32, citing *Quebec North Shore Paper v. C.P. Ltd.*, [1977] 2 SCR 1054, at pp. 1065-66, AR, Part I, Tabs 3 (English) and 4 (Français).
[122] *Federal Courts Act*, ss. 3 and 4.
[123] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339 [***Khosa***] at paras. 4, 19 and 36.
[124] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart, Oxford, 2001), at pp. 125-127, ABOA, Tab 13; T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, Oxford, 2013) [**Allan**], at p. 208, ABOA, Tab 4.
[125] Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (UBC Press, Vancouver, 2023) [**Daly, *Culture of Justification***], at pp. 17-25, ABOA, Tab 12.

Dunsmuir and then in *Vavilov*, this Court deprecated the notion that there is a category of jurisdictional questions for judicial review purposes.[126]

113. However, the fundamental notion that creatures of statute must respect the limits on their authority remains a constant.[127] The core power of the superior courts – to ensure the lawfulness of administrative action – also remains constant, on legal and factual matters alike: "Fine distinctions between 'law' and 'fact' risk preventing the courts from exercising [their] core competencies".[128] As Noel Lyon perspicaciously noted many decades ago, "it would make more sense to organize our thinking around the idea of acting without authority and let jurisdiction join certiorari in the museum of outworn tools of administrative law".[129] The means of ensuring lawfulness have evolved over time but the end has remained the same: to keep limited jurisdictions within the factual and legal bounds of their authority.

114. Two appellate decisions by distinguished jurists have usefully described these ebbs and flows.[130] At the time *Crevier* was decided, "jurisdiction" was the organizing principle of Canadian administrative law. The leading cases on what we would now call procedural fairness and substantive review were *Nicholson*[131] and *New Brunswick Liquor*[132] respectively.

115. *Nicholson* did not use the language of "jurisdiction" but has long been understood to stand for the proposition that a breach of procedural fairness or natural justice causes an administrative

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[126] *Dunsmuir*, at para. 59; *Vavilov*, at paras. 65-67.
[127] See *e.g. Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 (CanLII), [2021] 3 SCR 176, at paras. 27-28; *Pepa v. Canada (Citizenship and Immigration)*, 2025 SCC 21 (CanLII), at para. 128, per Rowe J.
[128] Paul Daly, "*Vavilov* on the Road" (2022), 35 *CJALP* 1, at p. 20 [**Daly, *Vavilov* on the Road**], ABOA, Tab 10; see also Daly, *Culture of Justification*, at pp. 225-226, ABOA, Tab 12.
[129] Noel Lyon, "Administrative Law—Continuing Search for a General Theory of Judicial Review of Administrative Action for Legality" (1980) 63 *CBR* 646 [**Lyon**], at p. 647.
[130] *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 (CanLII) (reasons of Gleason JA) [***Best Buy***]; *Northback Holdings Corporation v. Alberta Energy Regulator*, 2025 ABCA 186 (CanLII) (reasons of Khullar CJ) [***Northback Holdings***].
[131] *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311.
[132] *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 SCR 227 [***New Brunswick Liquor***].

decision-maker to lose "jurisdiction".[133] It follows that judicial review for failure to respect the exigencies of the duty of fairness cannot be ousted by statute either.[134]

116. In *New Brunswick Liquor*, Dickson J (as he then was) famously warned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so",[135] and held that in situations where a decision-maker was protected by a privative clause and acting within its area of expertise, a reviewing court should only intervene where the decision at issue was patently unreasonable.[136] *New Brunswick Liquor* recognized two ways in which an administrative decision-maker could lose jurisdiction: by providing a wrong answer on a question going to jurisdiction – or by making a patently unreasonable error. Both were "jurisdictional" errors. Neither, on the logic of *Crevier*, could be ousted by statute.

117. The Supreme Court subsequently made clear that errors of fact can also ground a conclusion of patent unreasonableness and, thus, a loss of jurisdiction.[137] *Blanchard* is particularly notable. As Lamer J (as he then was), observed:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.[138]

118. Having summarized the history, Gleason JA put it well in *Best Buy*:

> the Court in *Dunsmuir* and *Vavilov* did not overturn the previous decades-old case law determining that what were previously characterized as patently unreasonable factual errors, formerly called jurisdictional, remain reviewable, albeit now under the reasonableness standard.[139]

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[133] *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, at para. 18.
[134] Justice Joseph T Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *SCLR* (2d) 1 [**Robertson**], at paras. 92-93, ABOA, Tab 15, citing *In re Ontario Labour Relations Board*, [1953] 2 SCR 18.
[135] *New Brunswick Liquor*, at p. 233.
[136] *New Brunswick Liquor*, at p. 237.
[137] See *Northback Holdings*, at paras. 194-195, citing *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 SCR 644 and *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890.
[138] *Blanchard*, at p. 494.
[139] *Best Buy*, at para. 112.

She therefore held that a limited right of appeal could not oust judicial review of unappealable aspects of a decision: "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".[140] To conclude otherwise would be inconsistent with *Vavilov*'s teaching that "a reasonable decision is one that is justified in light of the facts".[141] As such, *Best Buy* holds that "[r]easonableness review is within the core irreducible minimum of judicial review protected by s. 96 of the Constitution *Act, 1867*".[142] Put another way, all exercises of public power must be reasonable: reasonableness is inherent in the nature of statutory authority.[143]

119. Khullar CJ came to a similar conclusion in *Northback Holdings*, holding that the core constitutional minimum of judicial review "includes review on questions of fact or mixed fact and law because a decision can be unreasonable based on its factual findings or its application of the law to the facts".[144] Both Gleason JA and Khullar CJ are correct: judicial review for the reasonableness of errors of fact and law – and, indeed, **any** error that is reviewable according to the "general principles" of administrative law[145] – is constitutionally entrenched.

120. "Jurisdiction" is no longer the operative organizing principle in Canadian administrative law. As Khullar CJ aptly observed, the "lesson from the experience with "jurisdictional questions" is that courts should not resuscitate it to inform the constitutional core of curial review".[146] Again, Noel Lyon sagely foresaw future developments:

> I submit that the Supreme Court will have completed the interpretation of sections 96 to 100 of the *British North America Act* in terms of underlying constitutional purposes, when it takes the next step of asserting that those sections entrench in the law of the constitution the power and responsibility of the superior courts to fulfil the will of legislatures by interpreting and enforcing the limits which those bodies enact on the powers they delegate to subordinate agencies.[147]

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[140] *Best Buy*, at para. 117. See also Daly, "Facticity" at p. 908, ABOA, Tab 8.
[141] *Vavilov*, at para. 126 (and at paras. 24, 36, 56, 67, 82).
[142] Daly, *Vavilov* on the Road, at p. 20, ABOA, Tab 10.
[143] *Minister of Immigration and Citizenship v. Li*, [2013] HCA 18, at paras. 23-31. See also Craig, at p. 57, ABOA, Tab 6.
[144] *Northback Holdings*, at para. 227.
[145] *Khosa*, at paras. 4, 19 and 36.
[146] *Northback Holdings*, at para. 196. See also Mark Mancini, "Foxes, Henhouses and the Constitutional Guarantee of Judicial Review" (2024), 102 *CBR* 315, at p. 341.
[147] Lyon, at p. 651. See similarly Allan, at pp. 213-214, ABOA, Tab 4.

121. It is time for this Court to recognize that what is constitutionally entrenched is the principle that administrative decision-makers must be subject to review on all reviewable grounds, with deference where appropriate.[148] What *Crevier* guarantees is that the general principles of judicial review are applicable to all administrative decisions.

iii. Section 66 of the *COIA* does not oust judicial review of the reasonableness of alleged errors of law and fact

122. With this constitutional context in mind, we turn to s. 66 of the *COIA*.

123. In enacting a privative provision, Parliament speaks out of both sides of its mouth: on the one hand, it creates a creature of statute and carefully sets out the limits on its powers; on the other hand, it purports to direct the courts to ignore those limits.[149] The literal effect of such a clause is to create unfettered discretion, yet as this Court has recognized, in the exercise of public power, no statutory discretion can be "untrammelled".[150] In similar terms, Trevor Allan has noted "the courts could not, consistently with the rule of law, acknowledge such discretion—giving a public authority the power to exercise coercion in any manner it chooses—even if Parliament has apparently imposed no limits (or even expressly excluded them)".[151]

124. This Court has made it clear that broad and strongly worded privative clauses that purport to oust judicial review completely are unconstitutional and do not have that effect.[152] Whenever this Court gave statutory provisions privative effect, it was only because the putative applicant disclaimed any argument based on s. 96 of the *Constitution Act, 1867*.[153]

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[148] Monica Popescu, « L'arrêt Vavilov : à la recherche de l'équilibre perdu entre la primauté du droit et la suprématie législative » (2021), 62 *Les Cahiers de Droit* 567, at p. 602.
[149] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, Cambridge, 2012), at pp. 65-66, ABOA, Tab 7.
[150] *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121, at p. 140.
[151] Allan, at p. 212, ABOA, Tab 4.
[152] *Vavilov*, at para. 24, citing *Dunsmuir*, at para. 31; *Crevier*, at pp. 236-37; *UES, Local 298 v. Bibeault*, [1988] 2 SCR 1048, at pp. 1089-90. See also Robertson, at para. 34, ABOA, Tab 15.
[153] *Farrell v. Workmen's Compensation Board*, 1961 CanLII 46 (SCC), [1962] SCR 48, at p. 52; *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] SCR 821, at p. 825. And see also *Kelly v. Sulivan* (1877) 1 SCR 3, where *certiorari* was not available given the presence of an appeal mechanism, consistent with the principle that "an appropriate alternative forum or remedy" may preclude judicial review. *Yatar*, at para. 61, citing Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press, Oxford, 2021), at p. 188, ABOA, Tab 9.

125. The same principles apply to **partial** privative clauses that purport to prevent the courts from determining whether a creature of statute has exercised its powers unreasonably. This Court should now make clear that partial privative provisions should be interpreted narrowly to preserve the ability of the courts to apply the general principles of administrative law. Lord Reid put the point well in *Anisminic*:

> It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.[154]

126. The FCA considered the legal effect of a partial privative clause identical to s. 66 in *Canada (Attorney General) v. Public Service Alliance of Canada* (**"*PSAC*"**):[155]

> 34 (1) Every order or decision of the Board is final and is not to 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.

There, as here, the partial privative clause purported to restrict judicial review on errors of law and errors of fact, whilst permitting judicial review on questions of jurisdiction, procedural fairness and fraud.

127. In *PSAC*, Gleason JA refused to accept that the exclusion of grounds of review of legal and factual error was effective. Giving effect to the exclusion would "[run] afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch".[156] As Gleason JA explained, the result would be that decisions of the Board would be "largely unreviewable", but given the constitutional basis of judicial review in Canadian law, "[t]his cannot be".[157] *PSAC* predates *Vavilov*, which eliminated "jurisdiction" as a category of questions attracting correctness review. Since *Vavilov*, Gleason JA's rule-of-law concerns have even greater force because the scope of correctness review has narrowed almost to vanishing point. As Kate Glover Berger observes, "legislative intent, even legislative intent clearly

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[154] *Anisminic v. Foreign Compensation Commission*, [1969] 2 AC 147, at p. 170. See also *R (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, at paras. 107, 111, 163-164.
[155] *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 [***PSAC***].
[156] *PSAC*, at para. 30.
[157] *PSAC*, at para 31.

articulated in an otherwise valid statute, is constrained by the rule of law".[158] The partial privative clause cannot be permitted to oust judicial review of alleged errors of law or fact. Indeed, giving effect to such a clause is to allow Parliament to flout the general principles of judicial review painstakingly crafted by this Court and eliminate the *Vavilovian* culture of justification.

128. The best way to avoid an unconstitutional outcome is to focus on what the partial privative clause *does* permit.

129. Section 66 of the *COIA* preserves judicial review on jurisdictional issues, as set out in s. 18.1(4)(a) of the *Federal Courts Act*: "acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction." This Court should hold that "jurisdiction" in this context is coextensive with the general principles of judicial review. As Gleason JA explained in *PSAC*, this is what Parliament would have understood to be the case:

> In 1990, when Parliament adopted subsection 18.1 of the *Federal Courts Act*, errors of jurisdiction in Canadian administrative law were understood to include errors of law, in circumstances where the Board was required to offer a correct interpretation, and patently unreasonable legal interpretations, as was noted in *P.S.A.C. v. C.F.P.A.*; see also *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983 at pp. 1003-1004, 102 N.R. 1. Such errors were also understood to include findings of fact that would be caught by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, as was noted in *C.U.P.W. v. Healy*. **Thus, properly read in context, "jurisdictional errors" for purposes of setting forth a ground (as opposed to a standard) of review within the meaning of subsection 18.1(4) of the *Federal Courts Act* include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(4)(*d*) of that Act**.[159]

130. Put another way, Parliament understood that "jurisdiction" meant "general principles of judicial review", which are apt to evolve over time. These general principles, as they evolve, are constitutionally entrenched (as explained above) and this has been enshrined in the *Federal Courts Act*. Today reasonableness, including the reasonableness of findings of law and findings of fact, is part and parcel of "jurisdiction" in the sense of remaining within the boundaries of lawfulness.[160]

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[158] Kate Glover Berger, "The Missing Constitutionalism of *Canada v. Vavilov*" (2021), 34 *JLSP* 68, at p. 87.
[159] *PSAC*, at para. 25. Emphasis added. See also *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 22 (CanLII) , [2010] 3 FCR 219, at paras. 33 and 58.
[160] David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst" (2020), 50 *Adv Q* 423, at pp. 427, 436-438, ABOA, Tab 14.

Together, administrative decision-makers and courts collaborate to develop and enforce the culture of justification: "a democratic society governed by the rule of law is always a work in progress that requires the ongoing commitment of its participants— both public officials and the public alike".[161] This is the rule of law, the separation of powers and the Constitution in action.

131. Our approach does not render the partial privative clause in s. 66 meaningless. Rather, it can be taken as a "legislative signal"[162] that the decision-maker in question "should benefit from a wider margin of appreciation" on reasonableness review.[163] Interpreting privative provisions is always fraught: when Parliament speaks about of both sides of its mouth, its intentions will generally be difficult to decipher. The best way to make sense of Parliament's words here is to take the privative language into account in carefully calibrating the reasonableness standard, not to authorize unreasonableness or neuter the culture of justification.

C. Issue 3: Section 66 of the *COIA* may be unconstitutional

132. We issued a Notice of Constitutional Question (**"NCQ"**) in this case.[164] We do not believe a NCQ was strictly necessary. As we have explained, s. 66 of the *COIA*, properly interpreted, does not exclude judicial review. If, however, we are wrong in our interpretation of s. 66 and judicial review of the alleged errors of law and fact in the Commissioner's report are beyond judicial review, s. 66 is unconstitutional.

133. If the partial privative clause in s. 66 of the *COIA* were effective, the combined effect of the privative clause and the exclusivity provisions of the *Federal Courts Act* would be to confer upon the Commissioner the authority to determine the limits of his own jurisdiction. That is a violation of s. 96 and any such legislation is of no force or effect.

134. Section 96 applies to Parliament. This means that Parliament cannot create an administrative decision-maker with the power to determine the limits of its own authority. To do

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[161] Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart, Oxford, 2018), at p. 94, ABOA, Tab 18.
[162] Dyzenhaus, at p. 513.
[163] Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85 *Sask LR* 89, at p. 115, ABOA, Tab 11.
[164] Notice of Constitutional Question, AR, Part 1, Tab 6.

so would violate s. 96 by infringing upon the core jurisdiction of the courts, which includes its supervisory jurisdiction over the executive.

135. Section 96 also limits the authority of Parliament in relation to the creation of courts under s. 101 of the *Constitution Act, 1867*. Specifically, Parliament cannot: create courts and designate them as superior courts of record, as it has done with the Federal Court and FCA;[165] confer on those courts exclusive original jurisdiction to issue judicial review remedies against federal administrative decision-makers (save for the exceptional remedy of *habeas corpus*)[166] that clearly oust superior court jurisdiction; and yet at the same time limit their supervisory jurisdiction by a complete or partial privative clause. As William Lederman argued in his classic article, "The Independence of the Judiciary" :

> When one realizes that the guaranteed jurisdiction of the provincial superior courts rests upon a wider basis of necessary implication than the mirror federal appointing power in section 96, as explained earlier, then it follows that **the same wider basis of implication is equally relevant to the federal superior courts** and should confer on them a similar guaranteed jurisdiction. … **the fact that section 101 contemplates federal superior courts might be said to mean also that some guaranteed substantial jurisdiction** is contemplated within the scope of section 91. [167]

136. Nor is it a satisfactory alternative to argue that the Appellant should have brought an application for judicial review on the grounds covered by the partial privative clause in s. 66 in a provincial superior court. Since the Appellant also pursued a ground of review that is not covered by s. 66 – procedural fairness – this would have required filing in both a provincial superior court and the FCA, raising the prospect of a multiplicity of proceedings and inconsistent results, which would necessitate an appeal to this Court to resolve.

PART IV: SUBMISSIONS ON COSTS

137. This is the first-ever appeal to raise the question of whether the decisions of the Ethics Commissioner are subject to judicial review, and the broader issue of whether a partial privative

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[165] *Hernandez*, at p. 233; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350, at para. 136; *Federal Courts Act*, ss. 3 and 4.
[166] *R. v. Miller*, 1985 CanLII 22 (SCC), [1985] 2 SCR 613, at pp. 640-641.
[167] W.R. Lederman, "The Independence of the Judiciary: III" (1956), 34 *CBR* 1139, at pp. 1175-76. Emphasis added. See also David Mullan, "The Uncertain Constitutional Position of Canada's Administrative Appeals Tribunals" (1981), 14 *OLR* 239, at pp. 266-69.

clause bars judicial review. It has been brought in the public interest by the Appellant which is a non-profit organization that is not seeking to benefit financially or otherwise from the proceeding. The Appellant submits that costs should not be awarded if it is unsuccessful in its appeal. However, the Court should award costs in the cause to the Appellant if it is successful in its appeal.

PART V: ORDERS SOUGHT

138. This Court should allow the appeal and remand this matter to the Federal Court of Appeal for Stage 2.

139. If s. 66 of the *COIA* ousts the Federal Court of Appeal's power to hear the application for judicial review, this Court should declare that s. 66 of the *COIA* is unconstitutional and of no force and effect.

140. This Court should award costs to the Appellant if it is successful in its appeal, but not award costs if the Appellant is unsuccessful in its appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of July, 2025

Sujit Choudhry
Paul Daly

Counsel for the Appellant, Democracy Watch

PART VI: TABLE OF AUTHORITIES

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