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 -

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Interveners

APPELLANT'S REPLY FACTUM

Pursuant to Section 56 of the *Supreme Court Act*, RSC, 0985, c S-26 and
the Order of the Chief Justice dated October 14, 2025

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1. *Vavilov* brought simplicity and clarity to an area of Canadian law long plagued by complexity and confusion.[1] In response to the interveners, we reiterate that simplicity and clarity should remain this Court' s touchstones in administrative law, and emphasize the utility of the contextual reasonableness standard.

2. We address the three issues in this appeal in the order of importance accorded to them by the interveners: (1) the core constitutional minimum of judicial review; (2) s. 66 of the *Conflict of Interest Act* (**"*COIA*"**); and (3) the adequacy of parliamentary oversight as an alternative remedy to enforce the *COIA*.

A. The Supervisory Jurisdiction is a Constitutionally Protected "Core" Function that Includes the General Principles of Judicial Review as Developed by the Courts

3. Our position is simple and clear: the general principles of judicial review, as they are developed over time by the courts, are constitutionally entrenched because ensuring the lawfulness of administrative action is one of the core functions of Canada's s. 96 courts. These principles extend to s. 101 courts designated as superior courts of record with exclusive original jurisdiction to issue judicial review remedies in respect of federal administrative action.

4. Several interveners suggest that *Crevier* froze the core constitutional minimum in 1981.[2] This suggestion must be rejected. *Crevier* **recognized** that judicial review is constitutionally entrenched. But that **entrenchment** occurred earlier, under s. 96 of the *Constitution Act, 1867*. What was entrenched in 1867 was not the particular scope of judicial review at any point in time, but rather, the abstract legal proposition that a creature of statute cannot determine the lawful limits of its own powers. This Court should confirm that those limits are capable of incremental development by the judiciary, as they have been for centuries.

5. *Crevier* only referred to "jurisdiction" because "jurisdiction" was the organizing principle of judicial review in 1981. Even long before then, however, the slipperiness of this "verbal coat of many colours"[3] was well known. Even prior to *Vavilov*, this Court confirmed that jurisdiction has no analytical utility as a test or standard for judicial review purposes.[4] *Vavilov* so confirmed.[5]

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.
[2] AGO, at paras. 25, 28, 31; AG Sask, at para. 37; AGBC, at para. 19.
[3] *United States v. L. A. Tucker Truck Lines Inc.*, 344 US 33 (1952), 39, per Frankfurter J.
[4] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230 (***CHRC***), at para. 38.
[5] *Vavilov*, at paras. 65-68.

Reanimating "jurisdiction" now would be a mistake. The simplest and clearest option is to recognize that one of the "core" functions of superior courts is their supervisory jurisdiction over creatures of statute, within the boundaries determined by the common law of judicial review.

6. In terms of core functions, this Court should reassert constitutional fundamentals. First, s. 96 has distinct aspects: the three-part *Residential Tenancies Reference* test **and** the *MacMillan Bloedel* "core" functions test.[6] The Court should reject the AGO's attempt to elide the distinction between the test for "shadow" courts and the test for "core" functions.[7] Second, the supervisory jurisdiction forms part of the constitutional core.[8] Third, a "core" function may evolve incrementally over time through judicial decisions, as has been the case, for example, with contempt of court. The same is true of the supervisory jurisdiction.

7. Selecting only certain bases for review to be part of the "core" – as some interveners propose – is a recipe for complexity and confusion.[9] The simplest and clearest approach is to recognize that the "core" is the supervisory jurisdiction as it develops incrementally in the time-honoured fashion of the common law. Moreover, the contextual reasonableness standard in *Vavilov* already strikes a balance between the policy goals of empowering administrative decision-makers to act quickly and decisively **and** ensuring that their decisions are adequately justified to those whose lives they affect. Finally, legislatures and executives should not be permitted to pick and choose those parts of the *Vavilovian* culture of justification they desire to comply with.[10]

8. The reasonableness standard can account for privative clauses by treating them as part of the governing statutory scheme and easing the constraints on an administrative decision-maker within reasonableness review, analogous to how "broad, open-ended or highly qualitative language … contemplates that the decision maker is to have greater flexibility".[11]

9. The contextual standard can also account for legislative specifications of the standard of

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[6] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725, at paras. 27-28, 35, 38.
[7] AGO, at para. 23.
[8] *Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] SCR 681; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 SCR 207, at para. 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras. 29-30; *CHRC*, at para. 40, *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 SCR 291, at para. 51.
[9] AG Alta, Part Bii; CCLI, at para. 29; AG Sask, at para. 3.
[10] CCLA, at para. 2. See also *ibid.*, at para. 18.
[11] *Vavilov*, at para. 110.

review, such as the "patent unreasonableness" standard, an issue raised by the AGBC.[12] The specification of "patent unreasonableness" in legislation is a signal that "utmost deference" be shown to administrative decisions.[13] It can be comfortably accommodated within *Vavilov's* reasonableness standard.[14]

B. The *COIA* Preserves Review for Compliance with the General Principles of Judicial Review and is Consistent with the Core Constitutional Minimum

10. When Parliament enacted the *COIA* in 2006, it knew that *Pushpanathan* had held that a privative clause could not oust judicial review, but rather, was relevant to determining the standard of review.[15] It is entirely consistent with Parliamentary intent for judicial review of the reasonableness of decisions under the *COIA* to be available in 2026 notwithstanding a partial privative clause. In any event, s. 66 preserves review for "jurisdiction", giving ample scope for the Federal Court of Appeal's supervisory jurisdiction.

11. There may be other regimes where decisions of legislative officers are not reviewable, as suggested by the SK Ombuds intervener. This is not one of them. There is no doubt that the Commissioner's report under the *COIA* is a decision subject to judicial review, as the AGC concedes several times (relying on ss. 2 and 28(1)(b.1) of the *Federal Courts Act*, which designate the Commissioner as a "federal board, agency or tribunal" when enforcing the *COIA*).[16] That the Commissioner's decisions under the *MP Code* may not be reviewable has no bearing on the reviewability of the Commissioner's decisions under the *COIA*. Neither does the fact that the Prime Minister ultimately determines any actions to be taken in response to the Commissioner's report.

12. When interpreting s. 66 of the *COIA*, it is important to begin with the core constitutional minimum of judicial review. As the AGSK recognizes, this has long been the common law approach to privative clauses.[17] However, contrary to the AGSK's suggestion, it is always

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[12] *Vavilov*, at para. 34;.
[13] *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635, at para. 29.
[14] Paul Daly, "Patent Unreasonableness after *Vavilov*" (2021), 34 CJALP 167; *Koebisch v. Rocky View (County)*, 2021 ABCA 265, at para. 24; *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, at para. 77.
[15] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at para. 31.
[16] AGC, at paras. 17, 47-50, 53, 58, 70, 79.
[17] AG Sask, para. 21.

necessary when dealing with questions of constitutionality to first define the parameters of the constitutional right or provision at issue and read down legislation to comply with it if possible, striking down the law if reading down is not possible.[18]

13. Moreover, there is no role under s. 96 for any proportionality test.[19] There is no equivalent in the *Constitution Act, 1867* to s. 1 of the *Canadian Charter of Rights and Freedoms*.[20] Establishing such a test would cause complexity and confusion. The simple and clear approach is to recognize that the general principles of judicial review form part of the core function of the superior courts. While *Vavilov* held that the application of these principles can be influenced by the policy considerations underlying legislation at issue, policy cannot eliminate the demands of justification.[21]

C. Parliamentary Oversight is not an Adequate Alternative Remedy in this Case

14. The AG Alta's proposal that a privative clause creates a rebuttable presumption that an alternative dispute resolution mechanism is adequate would introduce confusion and complexity to the law of judicial review. It unclear how the presumption could be rebutted. This Court had an unhappy experience with rebuttable presumptions and "case by case analysis"[22] in the *Dunsmuir* era which it should not repeat. Moreover, a presumption would place a thumb on the scales in favour of the government, and possibly allow it to shield demonstrably procedurally unfair or substantive unreasonable decisions from scrutiny. *Yatar* rightly rejected a similar argument as inconsistent with constitutional principle.[23]

15. When determining adequacy of an alternative remedy, as the CFE correctly suggests, it is necessary to compare the relief sought and the nature of the suggested alternative.[24] But *Strickland* drew a distinction between an adequate alternative **remedy** and **forum**.[25] Neither strand of *Strickland* should lead this Court to decline to exercise jurisdiction.

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[18] AG Sask, Part Bi; Paul Daly, "2023 Developments in Administrative Law of Interest to Energy Lawyers" (2024), 12 *Energy Regulation Quarterly* 7, "Constitutionalism Traditionalism" subsection.
[19] CLASP, *passim*, is wrong to suggest otherwise; see also City of Surrey, *passim*.
[20] CCR, at para. 9.
[21] TLABC, at para. 33; AGBC, Part E; AGO, at para. 36.
[22] AG Sask, at para. 29.
[23] *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, at para. 49.
[24] CFE Factum, at para. 28.
[25] *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713, at para. 42.

16. Political oversight by Parliament can **never** be an adequate alternative **remedy** for the interpretation and application of legal concepts. It fails *Yatar*'s standard of "a meaningful and adequate means to challenge decisions" on the basis that they are "unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair."[26] Parliament ceased to operate as a high court centuries ago. Here, as in *Yatar*, there is simply no statutory review or appeal mechanism available to the appellant.

17. Parliament may be the proper **forum** for questions of a political nature, as the Canadian Constitutional Law Initiative suggests.[27] The *Auditor General* case should be read as standing for this point, given its strong undertones of "notions of justiciability".[28]

18. *Auditor General* itself was a case where Parliament was the proper forum. Dickson J explained that the Auditor General sought a judicial remedy as an Officer of Parliament, not "*qua* ordinary citizen" against "other political actors" (Ministers and Deputy Ministers), thereby raising a question of "constitutional balance of powers"; and concluded that such a dispute was more appropriate for the House of Commons, given that body's "purely political character", in contradistinction to the "capacities and nature" of the courts.[29]

19. But Parliament is not the proper forum here. This appeal is fundamentally different. It is about whether a creature of statute, the Commissioner reasonably interpreted and applied the *COIA*, which imposes binding legal obligations on "public office holders" regarding conflict of interest. The *COIA*'s conflict of interest rules apply not only to Ministers and Parliamentary Secretaries, but also to "[o]ver 2,700 appointed federal officials", including heads of Crown corporations, and members of federal boards.[30] The appeal does not raise questions about the "constitutional balance of powers" among "political actors". The appellant has brought suit "*qua* citizen", as a public interest litigant. Courts have precisely the appropriate "capacities and nature" to answer the profoundly important questions raised by the appellant. This Court should allow the Federal Court of Appeal to do so.

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[26] *Yatar*, at para. 65.
[27] CCLI, at paras. 34-35.
[28] *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49, at p. 97.
[29] *Auditor General*, pp. 97-98.
[30] Office of the Conflict of Interest and Ethics Commissioner, *Commissioner's Role and Mandate*; *Who Must Comply*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of DECEMBER, 2025

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