Court File No.: A-169-21

FEDERAL COURT OF APPEAL

BETWEEN:

DEMOCRACY WATCH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICANT'S APPLICATION RECORD – STAGE 1
VOLUME II OF III
MEMORANDUM OF FACT AND LAW

ATTORNEY GENERAL OF CANADA
Department of Justice
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Per: Sharon Johnston

Tel: 613-513-4282
Fax: 613-954-1920
Email: Sharon.johnston@justice.gc.ca

Counsel for the Respondent

RAVENLAW LLP
1600-220 Laurier Avenue West
Ottawa, ON K1P 5Z9

Per: Michael Fisher

Tel: 613-567-2901
Fax: 613-567-2921
Email: mfisher@ravenlaw.com

Counsel for the Applicant

TABLE OF CONTENTS

TAB **PAGE NO.;**

Volume I

1. Notice of Application, dated June 11, 2021 1

2. *Trudeau III Report*, Conflict of Interest and Ethics Commissioner [excerpted from Certified Tribunal Record] 10

Volume II

3. Memorandum of Fact and Law of the Applicant, dated April 3, 2023 56

Volume III

Legislation

4. *Canada Energy Regulator Act*, SC 2019, c 28, s 10

5. *Canada Labour Code*, RSC 1985, c L-2

6. *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2

7. *Constitution Act, 1867*, 1867, 30 & 31 Vict, c 3

8. *Customs Act*, RSC 1985, c 1 (2nd Supp)

9. *Federal Courts Act*, RSC, 1985, c. F-7

10. *Federal Public Sector Labour and Employment Board Act*, S.C. 2013, c 40

11. *Nuclear Liability* and *Compensation Act*, SC 2015, c 4, s 120

12. *Parliament of Canada Act*, R.S.C., 1985, c. P-1

13. *Status of the Artist Act*, SC 1992, c 33

Caselaw

14. *CAIMAW v Paccar of Canada Ltd*, [1989] 2 S.C.R. 983

15. *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161

16. *Canada (Attorney General) v National Police Federation*, 2022 FCA 80

17. *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII)

18. *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 (CanLII)

19. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII)

20. *Canadian Merchant Service Guild v Algoma Central Corporation*, 2022 FCA 155

21. *Canadian National Railway Company v Emerson Milling Inc.*, 2017 FCA 79

22. *Canadian Union of Postal Workers v. Healy*, 2003 FCA 380

23. *Clark v Air Line Pilots Association*, 2022 FCA 217

24. *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC)

25. *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208 (CanLII)

26. *Democracy Watch v Canada (Attorney General)*, 2023 FCA 39 (CanLII)

27. *Dunsmuir v New Brunswick*, 2008 SCC 9

28. *Global Television v Communications, Energy and Paperworkers Union of Canada*, 2004 FCA 78

29. *Grant v Unifor*, 2022 FCA 6

30. *Ladouceur v Intact Insurance Company*, 2022 ONSC 5206 (CanLII)

31. *Paris c Syndicat des employés de Transports R.M.T. (Unifor-Québec)*, 2022 CAF 173

32. *Public Service Alliance of Canada v Canadian Federal Pilots Assn.*, 2009 FCA 223

33. *Reference Re Senate Reform*, 2014 SCC 32

34. *R v Hinchey*, [1996] 3 SCR 1128

35. *Tipping v Coseco Insurance Company*, 2021 ONSC 5295 (CanLII)

36. *UES, Local 298 v Bibeault*, 1988 CanLII 30 (SCC)

37. *Watson v Canadian Union of Public Employees*, 2023 FCA 48

38. *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446 (CanLII)

Secondary Sources

39. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Thomson Reuters Canada Ltd., 2022) (looseleaf)

40. Paul Daly, “Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review” (17 November 2020), online (blog): <https://www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/#_ftn10>

TAB 3

Court File No.: A-169-21

FEDERAL COURT OF APPEAL

B E T W E E N :

DEMOCRACY WATCH

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICANT'S MEMORANDUM OF FACT AND LAW

PART I – STATEMENT OF FACT

OVERVIEW

1. The decisions of the Conflict of Interest and Ethics Commissioner ("Commissioner") are protected by a partial privative clause in section 66 of the *Conflict of Interest Act*. There is no statutory right of appeal. An application for judicial review is therefore the only means to ensure the Commissioner has rendered a reasonable decision. Yet, the Respondent Attorney General claims this privative clause precludes judicial review of errors of law and fact. If this were so, the Commissioner's decisions would effectively be insulated from any form of judicial review or

oversight. Not only would this offend the rule of law, which guarantees judicial oversight of administrative decision-makers, it would also overturn decades of jurisprudence involving identically worded privative clauses applicable to federal labour relations boards, which are routinely the subject of judicial review, including by the Attorney General of Canada. In *Vavilov*, in which the Supreme Court reformulated the framework applicable to judicial review and statutory appeals, it could not have been the Court's intent to remove court oversight of administrative decisions on grounds protected by partial a privative clause in situations where no statutory right of appeal exists, especially given that administrative decisions protected by a full privative clause are still subject to review on all grounds..

2. The *Conflict of Interest Act* is significant legislation, and the conflict of interest regime, administered by the Commissioner, an appointee of the Governor in Council, is crucial to the proper functioning of our democratic process. It would undermine public confidence in the integrity of public office holders if the Commissioner's decisions were immune from judicial scrutiny for errors of law or fact. Certainly, the partial privative clause signals the Commissioner's decisions are entitled to deference by reviewing courts, a consideration in the courts' application of the reasonableness standard of review. However, given the judicial branch's central constitutional role of ensuring the legality of the decisions and actions of all public office holders, Parliament cannot oust the courts' jurisdiction to review the Commissioner's decisions for errors of law or fact on the reasonableness standard.

3. Accordingly, the partial privative clause in section 66 of the *Conflict of Interest Act* is no bar to the present Application for judicial review. This Honourable Court should, therefore, dismiss the Attorney General of Canada's objection to its authority to hear the Application and permit the Application to proceed to a hearing of the merits of three remaining grounds in issue.

FACTUAL BACKGROUND

The Notice of Application and Motion to Strike

4. On May 14, 2021, the Commissioner rendered the decision in the form of a report titled "Trudeau III Report,"[1] pursuant to the *Conflict of Interest Act*, further to an investigation of the Prime Minister's conduct in participating in two decisions involving the interests of charity called "WE Charity".[2] By this decision, the Commissioner concluded the Prime Minister did not contravene three provisions of the *Conflict of Interest Act*: subsection 6(1), which prohibits public office holders from participating in the making of a decision that would be a conflict of interest; section 7, which prohibits them from giving preferential treatment to a person or organization; and section 21, which requires them to recuse themselves from a matter in which they would be in a conflict of interest.

5. On June 11, 2021, the Applicant applied for judicial review of the Commissioner's decision.[3] It is proceeding with three grounds in support of the application, two alleged errors of law concerning the Commissioner's interpretation of subsection 6(1) of the *Conflict of Interest Act* and an error of fact in relation to the Prime Minister's relationship with a founder and principal of the charity.

6. Subsequently, the Respondent Attorney General of Canada moved to strike the application on the grounds that (1) the Applicant lacked standing and (2) the Application was

---

[1] *Trudeau III Report*, Conflict of Interest and Ethics Commissioner, excerpted from the Certified Tribunal Record, Applicant's Application Record ("AAR"), Tab 2.
[2] *Ibid.*
[3] Notice of Application, dated June 11, 2021, AAR, Tab 1.

based on grounds barred from judicial review by section 66 of the *Conflict of Interest Act*.[4]

Section 66 of the *Conflict of Interest Act* states that:[5]

Orders and decisions final	**Ordonnances et décisions définitives**
66 Every order and decision of the Commissioner is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.	**66** Les ordonnances et décisions du commissaire sont définitives et ne peuvent être attaquées que conformément à la *Loi sur les Cours fédérales* pour les motifs énoncés aux alinéas 18.1(4)a), b) ou e) de cette loi.

7. Section 66 of the *Conflict of Interest Act* is a partial privative clause, as errors of law or fact are not included in the grounds listed in paragraphs 18.1(4)(a), (b) or (e) of the *Federal Courts Act*.[6] Other federal legislation contain practically identical partial privative clauses,[7] notably the *Canada Labour Code*[8] and *Public Sector Labour Relations and Employment Board Act*.[9] By contrast, a full privative clause would simply provide that every decision is final and shall not be questioned or reviewed in any court.[10]

8. This Honourable Court ruled on December 5, 2022, that the Applicant has public interest standing but left the issue of whether the Application was barred by section 66 of the *Conflict of*

---

[4] *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208 (CanLII), at paras 3, Applicant's Book of Authorities ("ABOA"), Tab 25.
[5] *Conflict of Interest Act* (S.C. 2006, c. 9, s. 2), s 66, ABOA, Tab 6.
[6] *Federal Courts Act*, RSC, 1985, c. F-7, s 18.1(4)(a), (b) and (e), ABOA, Tab 9.
[7] See: *Status of the Artist Act*, SC 1992, c 33, s 21(1), ABOA, Tab 13; *Nuclear Liability* and *Compensation Act*, SC 2015, c 4, s 63, ABOA, Tab 11; and *Canada Energy Regulator Act*, SC 2019, c 28, s 170, ABOA, Tab 4.
[8] *Canada Labour Code*, RSC 1985, c L-2, s 21(2), ABOA, Tab 5.
[9] *Federal Public Sector Labour and Employment Board Act*, SC 2013, c 40, s 34(1), ABOA, Tab 10.
[10] See, for example, *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 67, ABOA, Tab 27.

Interest Act to the panel hearing the application.[11]

Motion for a Certified Tribunal Record and Order to proceed in stages

9. In response to the Applicant's motion for production of a Certified Tribunal Record ("CTR"), on February 21, 2023, this Honourable Court ordered that the Application will proceed in two stages.[12] At Stage 1, the Court will hear and determine the legal issue of whether section 66 bars the Application and, if it does not, at Stage 2 the Court will hear and determine the remaining issues on judicial review. The Court ordered the Commissioner to produce a CTR for Stage 1 of this proceeding comprising records related to the issues concerning section 66 of the *Conflict of Interest Act*, and also set out a schedule for each stage of the proceeding.[13]

10. Accordingly, this memorandum addresses only the legal issues to be considered in Stage 1 of this proceeding concerning the effect of section 66 of the *Conflict of Interest Act* on the present Application for judicial review.

---

[11] *Democracy Watch v Canada (Attorney General)*, 2022 FCA 208 (CanLII), at paras 4, 5-10, 11-56 and 60, ABOA, Tab 25.
[12] *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39 (CanLII), at para 16, ABOA, Tab 26.
[13] *Ibid.* at para 18.

PART II – ISSUES

11. This stage of the proceeding raises a single issue: Can the partial privative clause in section 66 of the *Conflict of Interest Act* bar judicial review of alleged errors of law or fact?

12. The Applicant respectfully submits that the answer to this question is “no”.

PART IV – SUBMISSIONS

The rule of law guarantees judicial oversight of administrative decision-makers

13. In *Vavilov*, the Supreme Court revised the framework for judicial review of administrative decisions. In doings so, the Supreme Court reaffirmed the longstanding principle that courts have a duty to enforce the constitutional principle of the rule of law. While legislatures can limit judicial interference in administrative decision-making, they cannot insulate administrative decision-makers from judicial oversight:

> Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, **legislatures cannot shield administrative decision making from curial scrutiny entirely** … Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.[14]

14. There was a well-established presumption that, as a starting part, an administrative decision is reviewable on the deferential standard of reasonableness.[15] The Supreme Court in *Vavilov* adopted this presumption and clarified the circumstances where it could be rebutted, including where the legislature explicitly prescribed a standard or provided a statutory appeal mechanism.[16] In a statutory appeal, the Supreme Court ruled that appellate standards of review,

---

[14] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at para 24 [emphasis added], ABOA, Tab 19, citing: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31; ABOA, Tab 27; *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220 at 236-37, ABOA, Tab 24; *UES, Local 298 v Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 SCR. 1048 at 1090, ABOA, Tab 36; and the *Constitution Act, 1867*, 1867, 30 & 31 Vict, c 3, s 96, ABOA, Tab 7.

[15] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at para 25, ABOA, Tab 19.

[16] *Ibid.* at para 33.

not the reasonableness standard, applied.[17] Notably, this was a significant departure from recent jurisprudence which the Court found was justified by "compelling reasons."[18] Among these, the Court emphasized the distinction between statutory appeal mechanisms and judicial review and also their co-existence:

> That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. **The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding.** However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain …..[19]

15. The Court was clear that the fact that a statutory right of appeal is restricted to specific issues "does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal."[20] The Court added that "any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism." The Court made no further comments about the availability of, or limitation to, applications for judicial review for issues outside the ambit of legislated appeal mechanisms nor, for that matter, for issues about which a privative clause, full or partial, purports to restrict the right to judicial review.

---

[17] *Ibid*. at para 37.
[18] *Ibid.* at paras 18 & 38.
[19] *Ibid*. at para 47 [emphasis added].
[20] *Ibid*. at para 52.

16. A privative clause, whether full or partial, cannot oust the courts' jurisdiction to review delegated authority, because this would be contrary to the rule of law. As Brown and Evans have explained:

> To entrust to the repository of a statutory grant of authority the power to determine conclusively the legal limits on its power is incompatible with the notion of limited government and the rule of law. Thus, it is ultimately the responsibility of the courts, constitutionally located at arm's-length from the Executive, to ensure that governmental action complies with the law. Hence, courts have been resistant to legislative provisions that limit or remove the jurisdiction of the superior courts to review the legality of governmental action, and have construed some preclusive clauses so narrowly as to give them minimal effect, if any. Even the most explicit provisions—the so-called "no-certiorari" clauses — are interpreted as preserving the courts' power to set aside an administrative decision on the ground that it was made in excess of a tribunal's jurisdiction, including a breach of the duty of fairness. Indeed, preclusive clauses which are interpreted as protecting tribunals from all judicial review, even for jurisdictional error, are unconstitutional.[21]

17. In an article cited approvingly by this Court,[22] Professor Daly argues that reasonable review is constitutionally entrenched:

> … **There is nothing, on the face of *Vavilov*, to prevent a legislature from eliminating reasonableness review**. As the majority puts it [at paragraph 35], "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law." But the "rule of law" here means only that limited class of cases in which correctness review applies to allow the courts to furnish a final, definitive answer to a question in the interests of uniformity. As long as the courts are able to review constitutional questions, questions of central importance to the legal system or questions of overlapping jurisdiction for correctness, nothing seems to stand in the way of legislation to eliminate reasonableness review.
>
> […]
>
> … On the face of it, *Vavilov* would permit legislative ouster of reasonableness review. **But only on the face of it.** Indeed, *Hamlet* springs to mind: "God hath given you one face, and you make yourself another."

---

[21] Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Thomson Reuters Canada Ltd., 2022)(looseleaf) at 13:60 & 13:67, ABOA, Tab 39.
[22] *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161, para 118, ABOA, Tab 15.

First, **in the same paragraph that eliminated jurisdictional error as a category of correctness review [paragraph 67] one finds the following assertion: "A proper application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their lawful authority." The language of constitutional duty is the language of *Crevier* and *Dunsmuir*. It suggests that reasonableness review *cannot,* in fact, be ousted, for its elimination may prevent courts from doing their constitutional duty**.

Second, **although the point is not expressed in constitutional terms, the majority was very clear [at paragraph 14] that it was directing administrative decision-makers to henceforth "adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness.'"** If reasonableness review has been eliminated, administrative decision-makers need never demonstrate that their exercise of public power can be justified in terms of rationality and fairness. This would knock the legs from under a central pillar of the architecture of *Vavilov*.

The result, I submit, is that ***Vavilov* establishes a core constitutional minimum of reasonableness review. With respect, the insistence that correctness review – and only correctness review – must be constitutionally entrenched is, and has been, misplaced**. Julius Grey put the point with admirable clarity in the mid-1980s:

> **What *Crevier* does entrench is *some* degree of review. The courts will not interfere at the same moment on all issues or against all tribunals. However, they now clearly possess a constitutional right to step in when the bounds of tolerance are exceeded by any decision-maker. Clearly, the precise location of the bounds of tolerance is left to the court and that is quite consistent with the general trends in modern administrative law**.

In short, **the "bounds of tolerance" are supplied in *Vavilov* by reasonableness review**. Inasmuch as constitutional questions, questions of central importance to the legal system and questions of overlapping jurisdiction have a "constitutional dimension," correctness review is also constitutionally entrenched.

Indeed, this description of the constitutional foundations of *Vavilov* provides an explanation for an otherwise mysterious passage in the majority reasons. **Having established institutional design as a key, grounding concept in the selection of the standard of review, the majority considered limited rights of appeal – such as those restricted to questions of law or jurisdiction – and observed [at paragraph 52]: "the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal." If respect for institutional design choices is so important, why can unappealable aspects of**

> **decisions nonetheless be judicially reviewed? The answer is that reasonableness review is constitutionally entrenched**. A limitation of a right of appeal cannot, constitutionally, effect the elimination of reasonableness review of aspects of a decision.[23]

18. Furthermore, if a full privative clause cannot oust the courts' authority to judicially review administrative decisions, there is no principled basis for a partial privative clause to do so, especially where there is otherwise no statutory right of appeal on any questions of law or fact. Since the Supreme Court directed in *Vavilov* that privative clauses are no longer a contextual factor in determining the standard of review,[24] their longstanding purpose remains: they are a signal from the legislature that courts are not to intrude unduly into delegated administrative decision-making.[25]

19. In our respectful submission, there is nothing in *Vavilov* to suggest that a partial privative clause, like section 66 of the *Conflict of Interest Act*, in contrast to a full privative clause, bars access to judicial review of the matters which fall outside its ambit of the grounds the legislature has expressly permitted for review. To find otherwise, would, in effect, undo decades of jurisprudence in respect of administrative tribunals with partial privative clauses practically identical to section 66 of the *Conflict of Interest Act*. As detailed below, the language in this privative clause is not new or unique to this legislation. Given *Vavilov* comprehensively reconsidered the legal framework for judicial review and the rationale for the revised approach, if the Supreme Court had intended that outcome, it would have said so explicitly,.

---

[23] Paul Daly, "Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review" (17 November 2020), online (blog): <https://www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/#_ftn10> [emphasis added], ABOA, Tab 40.
[24] *Ibid.* at para 49.
[25] See *Global Television v Communications, Energy and Paperworkers Union of Canada*, 2004 FCA 78 at paras 14-16, ABOA, Tab 28.

This Court has affirmed that partial privative clauses do not bar judicial review

20. In a pre-*Vavilov* decision, *Canada (Attorney General) v Public Service Alliance of Canada* ("*PSAC*"), this Court conclusively decided the present issue: a partial privative clause does not prohibit judicial review of other grounds, including mixed errors of fact and law.[26] In that case, the Attorney General applied for judicial review of decisions by the Federal Public Sector Labour Relations and Employment Board ("Board") that the union's unfair labour practice complaints, presented pursuant to the federal labour relations regime, were timely. The Board itself intervened to argue that its decisions at issue were unreviewable, because the privative clause in subsection 34(1) of the *Federal Public Sector Labour and Employment Board Act*,[27] only permitted judicial review in accordance with the grounds in paragraphs 18.1(4)(a), (b) or (e) of the *Federal Courts Act*.[28] Notably, the Attorney General of Canada, applicant in that case, argued that the Board's decisions are subject to judicial review on the reasonableness standard.[29]

21. The Court's reasons for rejecting the Board's argument still hold today. For instance, the Court emphasized in *PSAC* that both the Federal Court of Appeal and the Supreme Court have reviewed numerous decisions by the Board and the Canada Industrial Relations Board ("CIRB"), whose decisions are subject to an identical privative clause in subsection 22(1) of the *Canada*

---

[26] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at paras 5 & 12, ABOA, Tab 17.
[27] *Federal Public Sector Labour and Employment Board Act*, SC 2013, c 40, s 34(1), ABOA, Tab 10.
[28] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at paras 10-14, ABOA, Tab 17.
[29] *Ibid*. at para 16.

Labour Code,[30] on the deferential reasonableness standard.[31] The Court cited 43 cases in the two years preceding its reasons to emphasize the issue had already been settled by the jurisprudence. Since *Vavilov*, this Court has continued to review Board and CIRB decisions, on grounds other than those in paragraphs 18.4(a), (b) or (e) of the *Federal Courts Act*, for reasonableness.[32] As this Court explained in *Watson v Canadian Union of Public Employees*: "Under subsection 22(1) of the Code, Board decisions may only be reviewed on the grounds referred to in paragraphs 18.1(4)(*a*), (*b*), and (*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Nevertheless, these decisions are reviewable under the reasonableness standard."[33]

22. Further, according to the Court in *PSAC*, the historical context of the term "jurisdiction" in paragraph 18.1(4)(a), when Parliament adopted it in 1990, was understood to "include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(1)(d) of that Act."[34] In *Canadian Federal Pilots Association*, which

---

[30] *Canada Labour Code*, RSC 1985, c L-2, s 21(2), ABOA, Tab 5.
[31] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at para 21, ABOA, Tab 17.
[32] For example: *Clark v Air Line Pilots Association*, 2022 FCA 217 at paras 8-9 ABOA, Tab 23; *Canadian Merchant Service Guild v Algoma Central Corporation*, 2022 FCA 155, ABOA, Tab 20; *Canada (Attorney General) v National Police Federation*, 2022 FCA 80 at paras 34 & 40, ABOA, Tab 16.
[33] *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 16, ABOA, Tab 37, citing: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 49, ABOA, Tab 19; *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 at paras 23 & 34, ABOA, Tab 17; *Grant v Unifor*, 2022 FCA 6, 340 ACWS (3d) 227 at paras 7-8, ABOA, Tab 29; and *Paris c Syndicat des employés de Transports R.M.T. (Unifor-Québec)*, 2022 CAF 173, [2022] A.C.F. No. 1455 (QL) at paras 2 & 14, ABOA, Tab 31 .
[34] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at paras 24-25, ABOA, Tab 17, citing: *Canadian National Railway Company v Emerson Milling Inc*., 2017 FCA 79 at para 18, ABOA, Tab 21; *Public Service Alliance of Canada v Canadian Federal Pilots Assn*., 2009 FCA 223 at paras 27-35, ABOA, Tab 32; *CAIMAW v Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1003-1004, ABOA, Tab 14; and *Canadian Union of Postal Workers v. Healy*, 2003 FCA 380 at paras 22 & 30, ABOA, Tab 22.

the Court cited in support of its reasons in *PSAC*, Justice Evans held that the power to review Board decisions as being in excess of jurisdiction, pursuant to paragraph 18.1(4)(a) of the *Federal Courts Act*, permitted the Court to review a decision where it was alleged either the Board had incorrectly decided a question of true jurisdiction for which the correctness standard applied or otherwise had rendered an unreasonable decision on a question of law, including if it renders an unreasonable interpretation of its enabling legislation.[35] In an earlier decision, Justice Evans found "a degree" of overlap in the grounds set out in subsection 18.1(4) of the *Federal Courts Act*, and that partial privative clauses, like section 66 of the *Conflict of Interest Act*, did not prevent the Court from reviewing allegedly erroneous findings of fact, as such findings also went to the question of whether the decision-maker exceeded its jurisdiction.[36] Questions of law and fact both engage the rule of law and, therefore, are subject to judicial oversight.

23. Third, the Court in *PSAC* also emphasized Justice Rothstein's concurring reasons in *Khosa* suggesting that the partial privative clause in the *Canada Labour Code* identified categories of questions for which Parliament prescribed a correctness standard of review, while the unlisted grounds were subject to the then-applicable *Dunsmuir* standard of review analysis. While the majority embraced a presumptive application of the reasonableness standard, the starting point of the revised standard of review analysis in *Vavilov*, Justice Rothstein's comments in *Khosa* reinforce that the purpose of a partial privative clause, such as found in section 66 of the *Conflict of Interest Act*, is not to bar judicial review on errors of law or erroneous factual findings.

---

[35] *Public Service Alliance of Canada v Canadian Federal Pilots Assn.*, 2009 FCA 223 at paras 27-35, ABOA, Tab 32.
[36] *Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at paras 21-22 & 30, ABOA, Tab 22.

24. Finally, it is difficult to overstate the implication of the Attorney General of Canada's argument in this case, given the direct ramifications it would have in effectively insulating all Board and CIRB decisions from substantive review. The Court in *PSAC* clearly ruled that applying the partial privative clause, as the Board argued, would render its decisions largely unreviewable, since, in administrative law, questions of jurisdiction were becoming exceeding rare, if they even existed at all.[37] This would impermissibly undermine the rule of law, as the availability of judicial review "is a constitutional imperative and cannot be ousted by a privative clause,"[38] a principle affirmed in *Dunsmuir*[39] and, as noted above, has been reaffirmed in *Vavilov*. The "vital impact" of the privative clause is only that it confirms courts are to afford considerable deference to the administrative tribunal's decisions.[40]

Post-*Vavilov*, this Court re-affirmed that privative clauses cannot oust judicial oversight

25. This Court's majority decision in *Best Buy*, addressing the statutory appeal mechanism under the *Customs Act*,[41] confirms that a privative clause does not oust judicial review of grounds for which a limited statutory right of appeal is not available.[42] While the legislative circumstances in that case were different in that the *Conflict of Interest Act* has no statutory appeal mechanism, the majority ruling is directly applicable here. First, the majority decision affirmed this Court's earlier decision in *PSAC*, which addressed a practically identical privative clause as section 66 of the *Conflict of Interest Act*, and which the panel recognized as binding on

---

[37] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at paras 30-31, ABOA, Tab 17.
[38] *Ibid.* at para 32.
[39] *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-29 & 31, ABOA, Tab 27.
[40] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 (CanLII) at para 34, ABOA, Tab 17.
[41] *Customs Act*, RSC 1985, c 1 (2nd Supp), ABOA, Tab 8
[42] *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161 (CanLII), para 71, ABOA, Tab 15.

it, is dispositive.[43] Second, the majority held that an administrative decision is always subject to judicial review, except to the extent a statutory appeal mechanism is available for the same issue.[44] As that narrow exception is not present here, all aspects of the Commissioner's decision are subject to judicial review on the deferential reasonableness standard.

26. In *Best Buy*, the situation was that, under the *Customs Act*, a party has the right to appeal tariff decisions on questions of law to the Canadian International Trade Tribunal, whose decisions are protected by a privative clause that precludes any review aside from an appeal to this Court "on any question of law."[45] The issue on appeal, however, involved a question of fact. The majority found that, while the question could not be raised on appeal, as the *Customs Act* permitted appeals on questions of law only, the appellant could have concurrently filed an application for judicial review challenging questions of fact.[46] Judicial review remained available on a residual basis for all other aspects of the decision that cannot be appealed.

27. After an extensive historical overview of administrative law, the majority emphasized that, while the Supreme Court in *Vavilov* revised the applicable framework for judicial review established in *Dunsmuir*, it affirmed the underlying principle that "judicial review functions to maintain the rule of law while giving effect to legislative intent."[47] At the same time, *Vavilov* maintained the basic judicial review framework established in *Dunsmuir* with certain exceptions, including that statutory appeals would be subject to appellate as opposed to judicial review principles.[48] And as the majority further emphasized, in *Vavilov* "the Supreme Court determined

---

[43] *Ibid.* at para 126.
[44] *Ibid.* at para 71.
[45] *Ibid.* at paras 67-68.
[46] *Ibid.* at para 71.
[47] *Ibid.* at para 107.
[48] *Ibid*. at para 107-109.

that, as a matter of principle, the availability of a limited appellate review does not foreclose the availability of judicial review."[49]

28. While *Vavilov* did not squarely address the issue before the Court in *Best Buy*, the majority found that, as the Supreme Court would have been aware of the existence of statutes containing a limited right of appeal, the Supreme Court's "failure to indicate that such a clause would bar access to judicial review is telling."[50] The majority added:

> Moreover, nowhere in *Vavilov* does the Supreme Court endorse the notion that privative clauses may bar access to judicial review or to review for particular sorts of issues. **A complete bar on the availably of judicial review for any type of issue would offend the rule of law** as the Supreme Court noted in *Dunsmuir*, a holding that was specifically endorsed in *Vavilov* at para. 24. Further, **the Court in *Dunsmuir* and *Vavilov* did not overturn the previous decades-old case law determining that what were previously characterized as patently unreasonable factual errors, formerly called jurisdictional, remain reviewable, albeit now under the reasonableness standard**.[51]

29. As the rule of law guarantees judicial review for any type of issue in an administrative decision, as the majority affirmed, all aspects of the decision are amenable to judicial oversight review. Judicial oversight of a question of law in that case, through the a statutory appeal mechanism that on its face precluded, could not immunize questions of fact from judicial review.

30. In fact, the majority in *Best Buy* emphasized that in the revised *Vavilov* framework "factual issues may give rise to unreasonable decisions" and can be the subject of judicial review.[52] Therefore, *Vavilov* cannot be read as "as endorsing the notion that privative clauses are to be henceforth read as barring access to judicial review for all factual issues," especially given

---

[49] *Ibid.* at paras 110-111.
[50] *Ibid.* at para 111.
[51] *Ibid.* at para 112 [emphasis added].
[52] *Ibid.*at para 113-115.

the "limited role afforded to privative clauses by the Supreme Court over the last several decades and the recognition by that Court that the rule of law requires review for factual errors."[53]

31. As such, according to the majority, the Supreme Court in *Vavilov* established that a privative clause only serves to establish "the deferential nature of reasonableness review for decisions falling within the ambit" of the clause, and that "review is available under the reasonableness standard for what were formerly characterized as patently unreasonable errors, which include serious factual errors, even in the face of a privative clause. Such errors now come within the ambit of unreasonable errors."[54]

32. The majority further found that the constitutionally entrenched right to judicial review of any issue that is not subject to a right of appeal is reflected directly in section 18.5 of the *Federal Courts Act*, which states that if a statutory right of appeal exists, then judicial review is restricted.[55] Where there is a limited right of appeal on errors of law, as under section 68 of the *Customs Act*, factual errors may be judicially reviewed concurrently, under the narrow basis for review applicable to factual matters.[56]

33. Finally, as discussed above, the majority emphasized that the Court had already decided practically the same issue in the *PSAC* case, as discussed above. Furthermore, while pre-*Vavilov* decisions of this Court hearing statutory appeals under the *Customs Act* considered errors of fact and errors of mixed fact and law on a reasonableness standard, this was because at that time there was no distinction between statutory appeals and judicial review applications.[57] Since *Vavilov*

---

[53] *Ibid.* at para 116.
[54] *Ibid*. at paras 117-118.
[55] *Ibid.* at para 119, referring to the *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(d) & 18.5, ABOA, Tab 9.
[56] *Ibid.* at paras 119-123.
[57] *Ibid.* at paras 127-128.

directed that appellate principles apply to statutory appeals, "it is now necessary that the small range of reviewable factual issues that do not constitute errors of law as they go slightly beyond findings based on lack of evidence be pursued by way of an application for judicial review."[58]

34. By contrast, the minority in *Best Buy* concluded that any judicial review was precluded by the limited right of appeal and privative clause in the *Customs Act*.[59] According to the minority, in this legislative regime, only questions of law can be subject to review by the Court, to the exclusion of questions of mixed fact and law and factual issues, in order to respect "Parliament's institutional design choices."[60] This did not offend the rule of law because, based on the minority's reading of the Supreme Court's 1981 decision in *Crevier,* "Parliament may restrict judicial review to questions of law."[61] The minority found that *PSAC* was not binding because, unlike in *PSAC*, the legislative scheme at issue in *Best Buy* permitted a statutory right of appeal of errors of law and, therefore, the privative clause restricting access to judicial review could be applied without restricting judicial oversight by statutory appeal of errors of law.[62] Thus, the minority in *Best Buy* essentially found that, as a bare minimum, there is only a constitutionally entrenched right of judicial review on questions of law and nothing more.[63] That said, the minority allowed that "an egregiously incorrect and unsupported finding of fact would be reviewable on a section 68 appeal."[64]

---

[58] *Ibid.*
[59] *Ibid.* at para 3.
[60] *Ibid*. at para 46.
[61] *Ibid.* at paras 57-60, citing *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220 at 236-37, ABOA, Tab 24.
[62] *Ibid.* at paras 51-63.
[63] *Ibid.*
[64] *Ibid*. at para 25.

35. Even applying the minority decision in *Best Buy* to the present Application, the partial privative clause in the *Conflict of Interest Act* could not preclude judicial review on questions of law or egregious findings of fact, as the Respondent Attorney General of Canada has contended in its motion to dismiss it. This alone would be sufficient for the Application to proceed to be heard on its merits. However, in the Applicant's respectful submission, the majority's holding in *Best Buy*, that judicial review is available for any ground for which there is no statutory right of appeal, provides a complete answer to the Respondent's position.

36. This is not contradicted by this Honourable Court's jurisprudence, including the *Canadian Council for Refugees* case,[65] one of the authorities the minority in *Best Buy* cited in support of its interpretation of the Supreme Court's *Crevier* decision. In that case, the Court allowed an appeal of the Federal Court's ruling that refugee protection regulations violated the *Charter*, because the claimant's proper recourse was not to challenge the legislation itself but to apply for judicial review of the administrative action in question.[66] While the claimants argued that judicial review would have been ineffective, because of the federal government's ability to assert privilege over relevant documents, the Court ruled that, while the legislature may place "limitations on the availability or scope of review," it could not completely immunize administrative decision-making from review, and there were safeguards including a process to compel production to ensure a fair proceeding.[67] And while the decision may suggest partial restrictions on judicial review may be valid, it did does not comment on a limited statutory

---

[65] *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 (CanLII), [2021] 3 FCR 294 at para 102, ABOA, Tab 18.
[66] *Ibid*. at paras 84, 93 & 96.
[67] *Ibid.* at para 102.

appeal and privative clause as in the *Customs Act*, nor a partial privative clause as in the *Conflict of Interest Act*.

Ontario jurisprudence supports access to judicial review in the absence of a statutory appeal

37. In *Yatar*, the Ontario Court of Appeal ruled that a statutory right of appeal does not oust judicial review on grounds that fall outside the scope of appeal, but as judicial review is a discretionary remedy, having regard for the legislative scheme in issue in that case, the Court would only exercise that discretion in rare cases.[68] In that case, after the provincial Licence Appeal Tribunal refused the appellant's claim for statutory accident insurance benefits, the appellant commenced a statutory appeal, which is available for questions of law only, and an application for judicial review on issues of mixed fact and law, which were heard concurrently. In addition to a statutory right of appeal, the legislation also provided for reconsideration of the tribunal's decision. In addressing the question of the scope of its authority on judicial review, the Court held that it would restrict judicial review to circumstances "where the adequate alternative remedies of reconsideration, together with a limited right of appeal, are insufficient to address the particular factual circumstances of a given case."[69] The Court was nevertheless clear that, its discretion notwithstanding, an application for judicial remained available.[70]

---

[68] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446 (CanLII), paras 38-42, 47-48 and 53-57, ABOA, Tab 38.
[69] *Ibid.* at para 45.
[70] *Ibid.* at para 40. And see the Ontario Superior Court of Justice, Divisional Court, rulings in *Tipping v Coseco Insurance Company*, 2021 ONSC 5295 (CanLII), ABOA, Tab 35, and *Ladouceur v Intact Insurance Company*, 2022 ONSC 5206 (CanLII), ABOA, Tab 30, where the Divisional Court exercised its discretion not to hear applications for judicial review of Licence Appeal Tribunal decisions.

The quasi-constitutional nature of the *Conflict of Interest Act*

38. The *Conflict of Interest Act* occupies a central place and performs an indispensable function in the democratic process. The Commissioner, who is appointed by the Governor in Council, has two statutory functions: (1) ensuring, under section 87 of the *Parliament of Canada Act* and under the *Conflict of Interest Act*, that public office holders (members of the Governor In Council, its staff and appointees, and certain GIC appointees) comply with the ethics and integrity requirements of the *Conflict of Interest Act*; and (2) ensuring under section 86 of the *Parliament of Canada Act* that Members of Parliament comply with their own ethics code.[71]

39. Given their purposes and provisions, the *Parliament of Canada Act* and *Conflict of Interest Act* are statutes that further the unwritten constitutional principles of democracy, constitutionalism and the rule of law.[72] As the Supreme Court of Canada's judgment in *R v Hinchey* stated, federal ethics rules are one of many statutes and codes that "regulate behaviour" of government officials "for the important goal of preserving the integrity of government" which is “crucial to the proper functioning of a democratic system.”[73] Justice L’Heureux-Dubé wrote for the majority that:

> Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question. … [T]he importance of preserving integrity in the government has arguably increased given the need to maintain the public’s confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people’s lives.[74]

40. Therefore, when administering the *Conflict of Interest Act*, the Commissioner exercises significant statutory powers as a defender of the constitutional principles of the rule of law and

---

[71] *Parliament of Canada Act*, RSC, 1985, c P-1, s 81, ABOA, Tab 12
[72] *Reference Re Senate Reform*, 2014 SCC 32 at para 25, ABOA, Tab 33.
[73] *R v Hinchey*, [1996] 3 SCR 1128 at paras 13 & 15, ABOA, Tab 34.
[74] *Ibid*. at para 14,

democracy, and is charged with maintaining the integrity of the Government of Canada, not just for parliamentarians but for all Canadians.

41. The Commissioner is accountable to Parliament, but the Commissioner's decisions are final.[75] There is no alternative recourse other than an application for judicial review to challenge these decisions. Subsection 86(4) of the *Parliament of Canada Act* states explicitly that Parliament has no oversight role with regard to the Commissioner's enforcement or rulings under the *Conflict of Interest Act*.[76]

42. The Respondent Attorney General of Canada's position that alleged errors of law and fact fall outside the scope of the partial privative clause in section 66 of the *Conflict of Interest Act* would, thus, effectively insulate the Commissioner's decisions from judicial oversight. This position cannot be sustained, as the rule of law requires judicial oversight of delegated decision-makers like the Commissioner — and is particularly troubling in this context where Parliament would be insulating the Court's ability to oversee review of decisions concerning the integrity of public office holders. To find otherwise would only serve to decrease the public's confidence in the administration of the *Conflict of Interest Act* and the integrity of government.

Conclusion

43. For all of the above reasons, the partial privative clause in section 66 of the *Conflict of Interest Act* does not oust the Applicant's right to judicial review of the errors of law or fact in the Commissioner's decision alleged in this Application. This Honourable Court should dismiss the Respondent's motion to dismiss the Application and allow it to continue to Stage 2 for

---

[75] *Parliament of Canada Act* RSC, 1985, c P-1, s 47, ABOA, Tab 12.
[76] *Ibid.*, s 86(4).

judicial review of the errors of law and fact in the Commissioner's decision that are alleged in the Application.

PART V – ORDER SOUGHT

44. The Applicant respectfully requests an Order of this Honourable Court that:

(a) Section 66 of the *Conflict of Interest Act* does not bar the Applicant's Application for judicial review;

(b) The three remaining grounds in the Application shall proceed to be heard on their merits;

(c) Such other relief as Applicant may request and that this Honourable Court may allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, this 3rd day of April 2023

Michael Fisher (LSO #58032F)
RAVENLAW LLP/s.r.l.
220 Laurier Ave. W., Suite 1600
Ottawa, Ontario K1P 5Z9
Tel: (613) 567-2901 ext. 227
Fax: (613) 567-2921
Email: MFisher@ravenlaw.com

Counsel for the Applicant
Democracy Watch

PART VI: AUTHORITIES

Legislation

Canada Energy Regulator Act, SC 2019, c 28, s 10

Canada Labour Code, RSC 1985, c L-2

Conflict of Interest Act, S.C. 2006, c. 9, s. 2

Constitution Act, 1867, 1867, 30 & 31 Vict, c 3

Customs Act, RSC 1985, c 1 (2nd Supp)

Federal Courts Act, RSC, 1985, c. F-7

Federal Public Sector Labour and Employment Board Act, S.C. 2013, c 40

Nuclear Liability and *Compensation Act*, SC 2015, c 4, s 120

Parliament of Canada Act, R.S.C., 1985, c. P-1

Status of the Artist Act, SC 1992, c 33

Jurisprudence

CAIMAW v Paccar of Canada Ltd, [1989] 2 S.C.R. 983

Canada (Attorney General) v Best Buy Canada Ltd, 2021 FCA 161

Canada (Attorney General) v National Police Federation, 2022 FCA 80

Canada (Attorney General) v Public Service Alliance of Canada, 2019 FCA 41 (CanLII)

Canada (Citizenship and Immigration) v Canadian Council for Refugees, 2021 FCA 72 (CanLII)

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 (CanLII)

Canadian Merchant Service Guild v Algoma Central Corporation, 2022 FCA 155

Canadian National Railway Company v Emerson Milling Inc., 2017 FCA 79

Canadian Union of Postal Workers v. Healy, 2003 FCA 380

Clark v Air Line Pilots Association, 2022 FCA 217

Crevier v Attorney General of Quebec, 1981 CanLII 30 (SCC)

Democracy Watch v Canada (Attorney General), 2022 FCA 208 (CanLII)

Democracy Watch v Canada (Attorney General), 2023 FCA 39 (CanLII)

Dunsmuir v New Brunswick, 2008 SCC 9

Global Television v Communications, Energy and Paperworkers Union of Canada, 2004 FCA 78

Grant v Unifor, 2022 FCA 6

Ladouceur v Intact Insurance Company, 2022 ONSC 5206 (CanLII)

Paris c Syndicat des employés de Transports R.M.T. (Unifor-Québec), 2022 CAF 173

Public Service Alliance of Canada v Canadian Federal Pilots Assn., 2009 FCA 223

Reference Re Senate Reform, 2014 SCC 32

R v Hinchey, [1996] 3 SCR 1128

Tipping v Coseco Insurance Company, 2021 ONSC 5295 (CanLII)

UES, Local 298 v Bibeault, 1988 CanLII 30 (SCC)

Watson v Canadian Union of Public Employees, 2023 FCA 48

Yatar v TD Insurance Meloche Monnex, 2022 ONCA 446 (CanLII)

Secondary Sources

Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Thomson Reuters Canada Ltd., 2022)(looseleaf)

Paul Daly, “Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review” (17 November 2020), online (blog): <https://www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/#_ftn10>