File number: 41576

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

B E T W E E N:

DEMOCRACY WATCH

APPELLANT
(Applicant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

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(Pursuant to Rules 47 and 57(2) of the *Rules of the Supreme Court of Canada*)

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I. OVERVIEW

1. In 1981, in *Crevier v A.G. (Québec)*,[1] this Court laid down the bedrock principle that Parliament and legislatures cannot completely shelter administrative decision-makers from judicial scrutiny. In consistently re-affirming this tenet in the ensuing 45 years, this Court has repeatedly held that it is a principle of constitutional importance.[2]

2. The scope and content of judicial review have been substantially developed and refined since *Crevier* was decided, and the vocabulary of administrative law has been entirely transformed. This Court has never retreated from the proposition that superior courts are required to act as a failsafe against unjustifiable administrative decisions. The Canadian Civil Liberties Association submits that the constitutional principle established in *Crevier* should be reaffirmed and restated to reflect the development of administrative law. It is the terminology in use when *Crevier* was decided, and in particular the meaning ascribed to the term 'jurisdictional', that has changed, and not the need to ensure that administrative tribunals are held to a reasonable level of account.

3. The proliferation of administrative tribunals is an enduring theme in administrative law jurisprudence over the past half-century. This trend, which continues to accelerate, mandates the "robust" form of judicial review endorsed by the Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[3] Having recently, and with respect correctly, identified the need for robustness in judicial review, this Court should not interpret privative clauses in a fashion that undermines or excludes its availability.

II. POSITION ON QUESTIONS IN ISSUE

4. The appellant has posited three questions in issue:

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

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[1] *Crevier v A.G. (Québec)*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220 ["*Crevier*"].

[2] See *e.g.*, *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230 at ¶106.

[3] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 ["*Vavilov*"].

(b) Does the partial privative clause in s. 66 of the Conflict of Interest Act preclude the application for judicial review?

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

5. CCLA maintains that the constitutional minimum for curial review is reasonableness. To the extent that a privative clause infringes upon this constitutional minimum, it is of no force and effect.

III. ARGUMENT

A. The constitutional requirement

6. In *Crevier*, the Quebec National Assembly established a Professions Tribunal to sit on appeal of decisions of Discipline Committees adjudicating regulatory matters for 38 different professions. The enabling legislation included a broadly worded privative clause that purported to insulate the Tribunal from judicial review. This Court concluded that the provision should be struck down, as "a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of its decisions on questions of jurisdiction".[4] Because superior courts are inherently empowered to determine their own jurisdictional limits, a legislature that purports to similarly empower a tribunal has purported to create a s. 96 court.

7. The concept of "jurisdiction" was at the core of the Court's reasoning in *Crevier*; however, at the time, the common law was only beginning to discard the notion that jurisdiction was a broad concept and that, in effect, tribunals did not have jurisdiction to err.

8. For example, in *Service Employees' International Union, Local No 333 v Nipawin District Nurses Association et al*, this Court held as follows:

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account,

[4] *Crevier*, *supra*, at p. 236.

> breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.[5]

9. It is noteworthy that the second and third examples would, in modern terms, be called palpable errors of fact, *i.e.*, "... findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference". That is, what would now be characterized as an error of fact was in 1975 characterized as jurisdictional error.[6]

10. *Harelkin v University of Regina*, decided in 1979, turned on a debate about whether a breach of the duty of procedural fairness was an "error going to jurisdiction" or an "error within jurisdiction". Only four of seven judges who sat on the appeal concluded it was the latter. Three held it was the former.[7]

11. It was in *CUPE v NB Liquor Corporation*, handed down on the same day as *Harelkin*, that Dickson J. (as he was) cautioned that courts should not be too eager "to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", marking a turning point in Canadian administrative law.[8]

12. By the time *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* was decided in 2011, the majority in this Court questioned whether, "for purposes of judicial review, the category of true questions of jurisdiction exists" at all.[9] In 2019 in *Vavilov*, the majority held that jurisdictional questions were no longer a distinct category of cases attracting a correctness review, apart from resolving questions about the jurisdictional boundaries between

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[5] *Service Employees' International Union, Local No 333 v Nipawin District Nurses Association*, 1973 CanLII 191 (SCC), [1975] 1 SCR 382 at p. 389.

[6] *Waxman v Waxman*, 2004 CanLII 39040 (ON CA) at ¶296.

[7] *Harelkin v University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561.

[8] *CUPE v NB Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 SCR 227 at p. 233 ["*NB Liquor*"].

[9] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at ¶34.

different administrative bodies.[10]

13. Throughout this evolution, this Court and courts across Canada continued to judicially review administrative decisions that legislatures had shielded with privative clauses. The gradual erosion and then elimination of questions of jurisdiction did not diminish the courts' supervisory role.

14. Although the Court largely jettisoned jurisdiction as a ground of judicial review in *Vavilov*, it also acknowledged that, "because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely", citing *Crevier*.[11] This gives rise to a paradox, as the preclusion to completely barring judicial review in *Crevier* was based on the constitutional requirement to correctly delineate the jurisdiction of administrative tribunals. In the wake of *Vavilov*, courts will defer to such delineation by tribunals themselves, provided they act reasonably.

15. It is evident that the constitutional protection of judicial review must be reformulated in a manner that reflects the evolution of administrative law since *Crevier* was decided. Any such reformulation must not only account for the evolution of administrative law but also for the continued proliferation of administrative tribunals and for the fact that these tribunals deal with an expanding number of diverse issues of profound significance to people's lives, such as employment rights, housing, income replacement for injured persons, pay equity, police misconduct, and involuntary medical treatment.

B. The modern administrative state

16. For the first half of the 20th century, courts of inherent and plenary jurisdiction throughout the common law world were perceived to be hostile to administrative tribunals and afforded them little deference. In their concurring reasons in *Vavilov*, Justices Abella and Karakatsanis referred to the 19th-century chauvinism of Albert Venn Dicey:

> Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social

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[10] *Vavilov*, *supra*, at ¶65.

[11] *Vavilov*, *supra*, at ¶24.

> and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system. … Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law".[12]

17. In the 1970s, this criticism of the common law's historic disdain for administrative tribunals, as an attempt by courts to "restrain the implementation of ameliorative social and welfare reforms", found wide academic and, eventually, judicial acceptance. As noted, matters changed decisively with this Court's decision in *CUPE v NB Liquor Corporation*, referred to above, which ushered in an era in which courts instructed themselves to show ever-increasing levels of deference to specialized administrative tribunals.[13]

18. The modern reality, however, is that administrative tribunals have been vested with many more responsibilities than simply "implementing ameliorative social and welfare reforms". This reality gives rise to a need for greater accountability. For one thing, tribunals do not only implement ameliorative social benefits; they also deny them. Moreover, these tribunals are ordinarily staffed with adjudicators appointed by the executive branch of government for fixed terms. The resulting lack of independence was aptly described as "a dependency relationship" by Lamer C.J.C. in closely analogous circumstances in *Canadian Pacific Ltd. v. Matsqui Indian Band*.[14] It is a recipe for arbitrariness.

19. Political oversight is insufficient to address injustices that invariably arise in the countless decisions of administrative tribunals that are made every day. Canadians should not have to rely on political, inherently collective, responses to address injustices at the hands of tribunals adjudicating individual disputes and, in particular, private disputes between non-state actors.

20. The depiction of courts as retrogressive defenders of property rights, thwarting legislative attempts at social reform, is out of date. There is an enduring, if not a heightened, need for effective judicial oversight of tribunals.

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[12] *Vavilov*, *supra*, at ¶206.

[13] *NB Liquor Corporation, supra*.

[14] *Canadian Pacific Ltd. v Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 SCR 3 at ¶95.

C. The need for effective judicial review

21. In the 40 years after *CUPE v NB Liquor Corporation* was handed down, this Court sought to fashion the appropriate standard for reviewing decisions of administrative tribunals. The common theme was the need for courts to show greater deference to tribunals while at the same time recognizing that the power of courts to judicially review tribunals was constitutionally protected.

22. In *Dunsmuir v New Brunswick*, the Court held as follows:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.[15]

23. *Dunsmuir* foreshadowed the paradox that crystallized in *Vavilov*, as it not only reaffirmed constitutional protection for judicial review; it also emphasized the need for courts to refrain from adopting an expansive view of what constituted a "true question of jurisdiction or *vires*" and to refrain from returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".[16]

24. The Court's continued acknowledgement of the constitutional role of the courts in overseeing administrative decisions has been adapted to the post-*Crevier* framework, and has been explicitly extended beyond the jurisdictional grounds identified in *Crevier*. In *Canada (Citizenship and Immigration) v Khosa*, provisions in the *Canada Labour Code* and the *Federal Courts Act* purported to bar review on non-jurisdictional grounds, including errors of law and fact. The Court held the provisions were ineffective:

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[15] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at ¶52 ["*Dunsmuir*"].

[16] *Dunsmuir, supra*, at ¶59.

> Where the privative clause applies, [*inter alia* with respect to errors of fact and law], the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies.[17]

25. The *Dunsmuir* analysis required that decisions concerning non-jurisdictional issues be reasonable. Thus, by 2009 at the latest, the constitutional guarantee of judicial review had become untethered from purely jurisdictional issues.

26. It bears repeating that the *Dunsmuir* analysis acknowledges that the rule of law is constitutionally entrenched, and cannot be ousted by legislation:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect.[18]

27. When this Court revisited the standard of review in *Vavilov*, it again emphasized the constitutional authority of the courts to review administrative decisions:

> ... [Because] judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, at pp. 236-37; *U.E.S. Local 298 v. Bibeault*, at p. 1090. ...[19]

28. In *Yatar v TD Insurance Meloche Monnex*, the Court reiterated this principle. Although the effectiveness of privative clauses was left for another day, the Court confirmed that judicial review is necessary "to 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".[20]

D. The constitutional minimum

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[17] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at ¶111.

[18] *Dunsmuir, supra*, at ¶31.

[19] *Vavilov*, *supra*, at ¶24.

[20] *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at ¶65.

29. Despite the growing acceptance that jurisdictional questions no longer exist, Canadian courts have continued to review decisions of administrative tribunals that are protected by robust privative clauses. In *Canada (Attorney General) v Public Service Alliance of Canada*, the Federal Court of Appeal pointed to an appendix of more than 40 decisions of that Court, decided in the previous two years, where privative clauses did not oust judicial review.[21]

30. In *PSAC*, the Court observed that the demise of the category of jurisdictional questions had not signalled the end of judicial review, and rejected the proposition that court oversight could be legislatively ousted:

> As the Board acknowledges, the recognition that there are few, if any, questions of jurisdiction could result in its decisions being largely unreviewable. This cannot be.[22]

31. In *Canada (Attorney General) v Best Buy Canada Ltd.,* Justice Gleason considered the effect of privative clauses given the *dicta* of this Court in *Vavilov* and the longstanding recognition of the constitutional authority of the courts to review administrative decisions. She concluded that the deferential reasonableness standard was appropriate where a legislature has enacted a strong privative clause. The limited role historically afforded to privative clauses:

> ... does not mean that privative clauses have been rendered meaningless. Rather, they are part of the relevant statutory framework – an important contextual factor in determining the parameters of a reasonable decision according to *Vavilov* ... [Such] clauses highlight the deferential nature of reasonableness review for decisions falling within the ambit of the clauses. I do not believe there is any other way to reconcile the collapsing of the patent unreasonableness and reasonableness standards of review into a single standard of reasonableness other than to recognize that review is available under the reasonableness standard for what were formerly characterized as patently unreasonable errors, which include serious factual errors, even in the face of a privative clause.[23]

32. Khullar C.J.A. came to the same conclusion in her dissenting reasons in *Northback Holdings Corporation v Alberta Energy Regulator.* She observed that if courts do not acknowledge that the constitutional requirement has both endured and evolved since *Crevier* was

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[21] *Canada (Attorney General) v Public Service Alliance of Canada*, 2019 FCA 41 at ¶23 ["*PSAC*"].

[22] *PSAC*, *supra*, at ¶31.

[23] *Canada (Attorney General) v Best Buy Canada Ltd.*, 2021 FCA 161 at ¶117.

decided, and if jurisdiction has been largely abandoned as a ground for judicial review, the constitutional guarantee would be left as a "empty shell".[24]

33. Khullar C.J.A. concluded her comprehensive review of the effect of *Vavilov* on the constitutional guarantee of judicial review as follows:

> The elimination of jurisdictional questions has left the constitutional minimum of curial review unclear. In my view, that issue should not be resolved on a case-by-case basis. It would encourage litigation about the availability of review on factual issues in the face of a privative clause until a general answer is given.
>
> I have concluded that the constitutional minimum includes review on questions of fact and mixed fact and law. Since the appellants did not have access to a statutory appeal to this Court on such questions, ordinary judicial review must be available to them. The privative clause in s 56 of *REDA* does not bar their judicial review applications to the Court of King's Bench.[25]

34. The CCLA urges this Court to adopt the framework proposed by Gleason J.A. and Khullar C.J.A. It is an appropriately deferential approach which does not abandon the court's constitutional role of ensuring procedural and substantive justice in decision making.

35. The majority and concurring reasons in *Vavilov* could not have been more strongly divided about the appropriate solution, but both recognized there was a problem. The majority observed that the *status quo* was "sometimes perceived as advancing a two-tiered justice system, in which those [who are] subject to administrative decisions are entitled only to an outcome somewhere between 'good enough' and 'not quite wrong'." The concurring reasons recognized that concerns expressed about the quality of administrative decision-making "must be taken seriously".[26]

36. In *Vavilov*, this Court recognized not only that the review of administrative tribunals needed to be "more robust" than it had been previously, but also that it was necessary for tribunals to "develop and strengthen a culture of justification".[27]

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[24] *Northback Holdings Corporation v Alberta Energy Regulator*, 2025 ABCA 186 at ¶182 ["*Northback*"].

[25] *Northback*, *supra*, at ¶¶233–234.

[26] *Vavilov, supra*, at ¶¶11, 283.

[27] *Vavilov, supra,* at ¶¶2, 11–14, 72, 143.

37. *Vavilov* requires nothing more and nothing less than that decisions of administrative tribunals be reasonable. Given the ubiquitous role played by tribunals, it cannot be asking too much to insist that they be reasonable, as this term is deferentially defined in *Vavilov*, in respect of both their factual and legal conclusions, the procedural protections they afford the parties, and their determinations about what disputes fall within their purview.

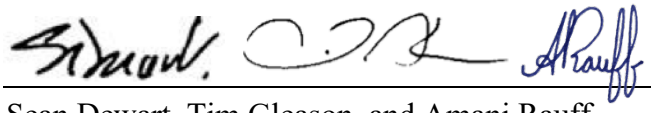
38. This amounts to a constitutionally entrenched minimum requirement that decisions be reasonable, with the result that legislative attempts to preclude judicial review are unconstitutional.

IV. COSTS

39. The CCLA does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 25, 2025



Sean Dewart, Tim Gleason, and Amani Rauff
Counsel for the intervener the Canadian Civil Liberties Association

V. TABLE OF AUTHORITIES