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A New Constitutional Guarantee of Judicial Review

On July 30, 2026, the Supreme Court of Canada released a landmark ruling in *Democracy Watch v Canada (Attorney General)*. The Court sought to determine whether the partial privative clause (a provision in a law that tries to limit or block courts from reviewing a decision) in s. 66 of the federal *Conflict of Interest Act* is a valid bar to judicial review on questions of fact and law, or whether it should be deemed inoperative to the extent it infringes on the constitutionally guaranteed core minimum of judicial review.

Chief Justice Wagner wrote the Court's unanimous decision. The Court determined that s. 66, a privative clause, purported to oust judicial review on questions of fact and law. It ruled that s. 66 is therefore inconsistent with ss. 96 to 101 of the *Constitution Act, 1867*. Pursuant to s. 52(1) of the *Constitution Act, 1982*, the Court declared s. 66 of no force and effect.

The Court ruled that a privative clause is unconstitutional if it prevents the federal courts from exercising a component of the s. 96 supervisory jurisdiction (to check whether decision-makers acted within their legal limits) assigned to them. Courts must be able to supervise the legality of every aspect of an administrative decision and every exercise of public authority. Where a statutory provision, properly construed, purports to limit any aspect of the courts' constitutionally enshrined supervisory jurisdiction, that provision is *ultra vires* (i.e., beyond the powers).

Background & Federal Court of Appeal Decision

The case grew out of political controversy. In May 2021, the Conflict of Interest and Ethics Commissioner released a report concluding then-Prime Minister Justin Trudeau had not contravened the *Conflict of Interest Act* when he participated in two funding decisions relating to the WE Charity. The report was the result of an investigation launched at the request of two members of Parliament who alleged the Prime Minister had contravened provisions of the Act that:

- Prohibit public office holders from making decisions that lead to a conflict of interest
- Prohibit public office holders from giving preferential

treatment,

- Require public office holders to recuse themselves from any discussion where they have a conflict of interest

Democracy Watch applied to the Federal Court of Appeal for judicial review of the Commissioner's decision, alleging that the Commissioner had made errors of fact and law in interpreting and applying the Act. The Attorney General of Canada moved to strike (asked the court to dismiss the case), arguing both that Democracy Watch lacked standing and that its application was barred outright by s. 66 of the Act, which reads:

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.

The motion judge found that Democracy Watch had public interest standing but referred the s. 66 question to a full panel and split the proceeding into two stages (Stage 1 and Stage 2).

In its decision following the Stage 1 hearing, the full panel of the Federal Court of Appeal unanimously dismissed Democracy Watch's application and concluded there were adequate alternative political remedies, making judicial review inappropriate. Democracy Watch appealed to the Supreme Court and asked:

- 1. Did the Federal Court of Appeal err in declining judicial review on the basis of an adequate alternative remedy?*
- 2. Can s. 66 of the Act bar judicial review on questions of fact and law?*

The Supreme Court

The Supreme Court allowed the appeal and sent the matter to the Federal Court of Appeal to proceed to Stage 2.

I. Adequate Alternative Remedies

On the question of adequate alternative remedies, the Supreme Court held that the Federal Court of Appeal erred. Political oversight of the Commissioner is not an adequate alternative to judicial review because nothing in the Act gives interested parties an alternative forum in which to seek the remedy available on judicial review: a consideration of the legality of the Commissioner's report. Because the Act prohibits anyone from altering the Commissioner's conclusions, only judicial review can overturn his decision.

The Federal Court of Appeal had not resolved the validity and applicability of s. 66 in any detail since its dismissal rested on the adequate alternative remedy ground.

II. Section 66 Cannot Bar Judicial Review on Questions of Fact & Law

Before the Supreme Court, the Attorney General of Canada took the position s. 66 validly ousts judicial review on questions of fact and law, while Democracy Watch maintained that legality review on questions of fact and law is constitutionally guaranteed, such that s. 66 cannot bar judicial review of the Commissioner's decision. The Court agreed with Democracy Watch.

Privative clauses have been understood as incontrovertible evidence of legislative intent to leave certain questions with the legislature's delegate, rather than with the courts. However, the courts are constitutionally empowered to supervise the exercise of delegated power to ensure it respects the boundaries of its inherent limits. In this decision, the Court made clear that legislation that purports to oust the constitutional power of the courts oversteps the limits of the legislatures' constitutional authority.

The Court's reasoning starts from the structure of the Constitution itself. The provisions that establish Canada's court system guarantee that superior courts exist and protect the core of what those courts do, including their role as the ultimate guardians of the rule of law. Section 96 courts transfer some of that jurisdiction to courts constituted under s. 101. Reviewing whether government decision-makers have stayed within their legal limits is one of those core, protected functions, and it stops government from veering into arbitrary action. For that reason, laws that strip courts of this reviewing power exceed the proper role of Parliament or a legislature. The Court concluded that its prior decisions suggesting privative clauses could validly block review of legal or factual errors were never meant to protect genuinely unreasonable decisions from correction. The power to protect against arbitrariness is at the very heart of the courts' constitutionally protected jurisdiction.

Scrutinizing the wording of s. 66, the Court found the provision explicitly limits the scope of judicial review to certain grounds set out in the *Federal Courts Act*. This privative clause purports to oust judicial review of the Commissioner's decision for errors of fact and law, and to that extent, it conflicts with the Constitution. The Court therefore declared that part of s. 66 to be of no force and effect, clearing the way for Democracy Watch's application to proceed to Stage 2.

Notably, the question of what minimum standard of review is constitutionally guaranteed was not decided in this case, and the Court expressly left that question for another day.

Key Implications

For parties subject to the authority of regulators, tribunals, commissioners, and other statutory decision-makers, the decision's practical implications are significant:

- A privative clause in the enabling statute no longer functions as a categorical bar to judicial review.
- Where a decision-maker has exceeded the limits of its delegated authority, a court retains the capacity to intervene.
- Existing partial privative clauses throughout the federal and provincial statute books are now subject to the same substance-based scrutiny the Court applied to s. 66 of the Act.
- Legislative drafters will need to calibrate accountability regimes to this constitutional floor rather than attempt to legislate beneath it.