

August 10, 2026

***Democracy Watch* and its Implications for the Practice of Channeling Limited Judicial Supervision to Appellate Courts**

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Matter Commented On: *Democracy Watch v Canada (Attorney General)*, [2026 SCC 28 \(CanLII\)](#)

This post assesses the implications of the Supreme Court's unanimous and important decision in *Democracy Watch* for those many scenarios in which a provincial legislature channels some part, but only some part, of the judicial supervision of a regulatory tribunal to the province's appellate courts. The drafting technique, at least in Alberta, is quite consistent. Step one, make provision for an appeal of a decision of a regulator to the Court of Appeal with a short limitation period; step two, confine that appeal to points of law or jurisdiction (i.e. no appeal on findings of fact or mixed findings of law and fact); step three, stipulate that the appeal is not as of right, but is subject to a leave or permission to appeal application; step four, confirm, by way of a broadly drafted privative clause, that the usual avenues for judicial review in the Court of King's Bench are foreclosed.

In this post I argue that the Court's *Democracy Watch* decision will require provincial legislatures to rethink the above architecture of judicial supervision, or face a growing practice of parallel proceedings in which parties commence judicial review proceedings in both the Court of Appeal and the Court of King's Bench. The Court's earlier decision in *Yatar v TD Insurance Meloche Monnex*, [2024 SCC 8 \(CanLII\)](#) had already highlighted this possibility, but the Court's conclusion in *Democracy Watch* that step four in the above design is unconstitutional will increase the incentive to launch parallel proceedings.

Here is a representative example of the relevant clauses from sections 45 and 56 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3 \(REDA\)](#):

45(1) A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law.

...

56 Subject to [sections 38, 42 and 45](#), every decision of the Regulator or a person carrying out the powers, duties and functions of the Regulator is final and shall not be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, by way of injunction, certiorari, mandamus, declaratory judgment, prohibition, quo warranto, application to quash or set aside or otherwise, to question, review, prohibit or restrain the Regulator or any of the Regulator's proceedings.

As a result of these provisions, the Court of Appeal only grants permission to appeal if an applicant can identify a point of jurisdiction or an extricable question of law. Applications for permission to appeal that the Court identifies as raising only mixed questions of fact and law have routinely been denied. See, for example, *Benga Mining Limited v Alberta Energy Regulator*, [2022 ABCA 30 \(CanLII\)](#), *Dutta Energy Corporation v Alberta Utilities Commission*, [2025 ABCA 246 \(CanLII\)](#) (*Benga*), *Apex Utilities Inc v Alberta Utilities Commission*, [2024 ABCA 111 \(CanLII\)](#) (the latter two both dealing with the similar provisions in the *Alberta Utilities Commission Act*, [SA 2007, c A-37.2](#)). If permission to appeal is granted, the standard of review, at least since *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) (*Vavilov*), on any questions of law or jurisdiction is correctness. Earlier ABLawg posts have expanded on this; see Bankes, “[Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response](#)” and, Fluker, Yewchuk and Bankes, “[Yatar v TD Insurance Meloche Monnex: Limited Statutory Rights of Appeal and The Availability of Judicial Review](#)”.

Similarly, and with some rare exceptions (discussed in both blog posts cited above), applications for judicial review in the Court of King’s Bench of decisions of the Alberta Energy Regulator (AER) and the Alberta Utilities Commission (AUC) have been rejected on the basis of the privative clause in the relevant statutes. A case in point is *Northback Holdings Corporation v Alberta Energy Regulator*, [2025 ABCA 186 \(CanLII\)](#), affirming [2023 ABKB 700 \(CanLII\)](#) (*Northback*).

Northback is the companion case to *Benga*, cited above. The AER, acting as the provincial arm of a Joint Review Panel (JRP), rejected *Benga*’s proposed Grassy Mountain coal project. The Court of Appeal denied *Benga* permission to appeal that decision, largely on the basis that the case raised only mixed questions of fact and law, whereupon *Benga*, now acting under the name of *Northback*, brought an application for judicial review of that same AER/JRP decision in the Court of King’s Bench. The AER moved to strike on the basis of section 56 of *REDA* (the privative clause). Court of King’s Bench Justice Allison Kuntz ruled that the statutory right of appeal gave *Benga/Northback* sufficient opportunity to have the AER decision reviewed and that this, together with the privative clause, “is sufficient to bar further judicial review” (at para 40). For my earlier commentary on this decision see [here](#). Our collective comment (Fluker, Yewchuk and Bankes) on the Supreme Court’s decision in the *Yatar* case (above) also noted that Justice Kuntz’s decision “must surely be vulnerable on appeal in light of the decision in *Yatar*, although any appeal will also need to grapple with the implications of the *REDA* privative clause.” That said, on the appeal of *Northback* to the Court of Appeal, the majority of that Court declined to interfere, largely on the basis that the appellants had failed to provide timely notice of an intention to attack the constitutional validity of section 56 (*Northback*, ABCA at para 54) – the precise issue addressed in *Democracy Watch*.

Chief Justice Ritu Khullar dissented in *Northback*, concluding that “the constitutional minimum includes review on questions of fact and mixed fact and law” as well as questions of law and jurisdiction (at para 65). Furthermore, “[t]he privative clause purports to bar review on such questions, but it is ineffective to do so” (at para 65.) Accordingly, the Chief Justice would have remitted the judicial review application to the Court of King’s Bench for a new hearing.

The Supreme Court of Canada denied leave to appeal in each of *Benga* and *Northback*, but with its *Democracy Watch* decision, the Court has decisively sided with Chief Justice Khullar (cited with approval at para 71) in extending the constitutional minimum content of judicial supervision to include “legality review.” This term describes the claim that “every exercise of public authority is subject to the courts’ supervisory jurisdiction to ensure that it does not exceed its legal limits” (at para 8). Chief Justice Wagner, writing for the Court, went on to say that:

... the legality of every aspect of an administrative decision, and every exercise of public power, is subject to the supervision of the courts. Where a statutory provision, properly construed, purports to limit any aspect of the courts’ constitutionally enshrined supervisory jurisdiction, that provision is *ultra vires*. (at para 76)

I applaud this result. It is, as others have said (see especially [Paul Daly](#)), a significant victory for the rule of law and an important restraint on the arbitrary exercise of the administrative power of the state, including by ministers of the Crown. But it will be important to manage the implications of the decision so as to avoid parallel proceedings where a jurisdiction has adopted the institutional architecture for judicial supervision described in the first paragraph of this post. Why? Because with this decision, the types of parallel proceedings initiated by *Benga*/*Northback* will become routine for parties with deep pockets.

If so, this will be an unfortunate unintended consequence of *Democracy Watch*. There is no good policy argument for splitting cases into parallel proceedings at different levels of court for different categories of issues. The legislature did not intend parallel proceedings – the legislature simply intended to narrow the scope of judicial supervision. Neither do I think for one moment that the Supreme Court intended to favour parallel proceedings. Instead, parallel proceedings are an unintended consequence of the combined effect of the Supreme Court’s evolving views of the constitutional scope of judicial review and an older institutional architecture designed to both channel and narrow judicial supervision.

So, what might be the solution? Obviously provincial legislatures cannot undo the core conclusions of *Democracy Watch*. That’s the entire point of the case; judicial review for legality is constitutionally protected. But provincial legislatures can and should address the evil of parallel proceedings in relation to the same decision.

I addressed one possible solution to this challenge in my part of the collective ABlawg post on the *Yatar* decision (above). In that post I argued that provincial legislatures can address this issue by “ridding the statute book of statutory appeal provisions – perhaps with the advice and assistance of provincial law reform bodies such as the Alberta Law Reform Institute.” My more extended comments were as follows:

But if parallel filings must be accepted as a necessary consequence of enacting statutory appeal rights that attempt to channel and confine judicial supervision, then I think that it is time to reconsider whether it is worth the effort. Parallel proceedings are wasteful. They engage parties in two tracks of litigation rather than one, with resulting increased fees and increased allocation of time from both the parties and the courts. Well-heeled corporate entities may have the resources to contest decisions that do not favour their

interests but that in turn requires others, including those who might have intervened in the regulatory proceeding in question, to muster the resources not only to participate in a statutory appeal but also any application for judicial review. Resources may be further stretched where the appeal route itself entails two stages: a leave or permission application and, where leave is granted, a merits stage. Multiple tracks will inevitably involve sterile issues of categorization: does this aspect of the case belong in the appeal track or the judicial review track? Multiple litigation tracks are also confusing to the public and even harder to explain to the public; witness, for example, efforts to explain the multiple tracks in the Grassy Mountain litigation (above).

In sum, it may be preferable for both constitutional reasons and efficiency reasons to treat statutory appeals as a failed experiment and get rid of them. The result would be to restore all elements of judicial supervision to the superior courts of the provinces according to the ordinary rules, and to the Federal Court with respect to federal boards, commissions, and other tribunals.

That of course is not the only solution. Another possibility, perhaps more elegant, would be to *expand* the scope of the Court of Appeal's supervisory jurisdiction to encompass all avenues of judicial review (that is to say, to add review for legality to the existing categories of law and jurisdiction). This would provide a constitutionally acceptable structure that would permit a province to retain other elements of the current architecture that might be considered attractive, including: (1) a shorter limitation period than the norm, (2) a permission to appeal process (although this may be more controversial, see Fluker's comments in the joint post on *Yatar* referenced above), and (3) elimination of one level of court review. It would also draw on a smaller group of justices. While this does not guarantee subject matter expertise, as a matter of practice, the ranks of Alberta's appellate courts have consistently included justices with backgrounds as members of the energy and regulatory bars. See for example, Justice Ho who gave the permission to appeal decision in *Benga*, and Justice Woolley, a member of the panel in the Court's most recent complex utility decision in *FortisAlberta Inc v Alberta Utilities Commission*, [2026 ABCA 258 \(CanLII\)](#).

The decision in *Democracy Watch* makes consideration of this sort of law reform pressing but it also confirms that provincial legislatures continue to have some freedom of movement:

To be clear, legislatures are competent to prescribe procedures for judicial review, provided that the supervisory role of the courts is not ousted. Legislation may, for example, validly set out specific timelines or fora for judicial review of certain issues without functionally foreclosing judicial review for legality. In the same vein, as already noted, legislated standards of review are valid, provided they respect the limits of the rule of law: *Vavilov*, at para. [35](#). And, of course, the common law bases to decline to consider the merits of an application for judicial review — for instance, the presence of an adequate alternative remedy, non-justiciability, mootness, or prematurity — are fully consistent with the requirements of the rule of law: they constitute an exercise of, not a limit on, the supervisory jurisdiction of the courts. (at para 75)

In conclusion, the Court's unanimous decision in *Democracy Watch* confirms that the structure of channeled judicial supervision described in the first paragraph of this post is fatally flawed. It is fatally flawed because it purports to eliminate judicial supervision of anything other than errors of law or jurisdiction. In light of that flaw, affected parties will be able to commence parallel proceedings in each of the Court of King's Bench and the Court of Appeal in order to test "the legality of every aspect of an administrative decision" (at para 76). Such parallel proceedings are in nobody's interest. Provincial Attorneys General should, and as a matter of priority, take steps to minimize the risks of parallel proceedings, while observing the Supreme Court's commitment to the availability of full-spectrum legality review.

This post may be cited as: Nigel Bankes, "*Democracy Watch* and its Implications for the Practice of Channeling Limited Judicial Supervision to Appellate Courts" (10 August 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/08/Blog_NB_DemocracyWatch.pdf

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