

August 24, 2026

Just Keep Watching: Insights From *Democracy Watch v Canada (AG)*, 2026 SCC 28

By: Sue Lu

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

On July 30, 2026, the Supreme Court of Canada (SCC) released its highly anticipated decision for *Democracy Watch v Canada (AG)*, [2026 SCC 28 \(CanLII\)](#) (*Democracy Watch*). For many years prior to this decision, Canadian legislatures incorporated privative clauses into their various laws to restrict the ability of courts to review decisions made by administrative bodies. *Democracy Watch* has now clarified that privative clauses that purport to oust what the Supreme Court calls “legality review” are unconstitutional; all aspects of an administrative decision are potentially subject to judicial review. This ruling ends the uncertainty that surrounded privative clauses and the ability for decisions made by administrative bodies to be reviewed, and may be the most important development in administrative law since *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) (*Vavilov*).

Professor Nigel Banks has [written for ABLawg on his insights into this decision previously](#); this post aims to delve deeper into the decision itself and some of the implications it will have on administrative law going forward.

Background

In 2020, two members of Parliament requested an investigation of then-Prime Minister Justin Trudeau under s. 44 of the *Conflict of Interest Act*, [SC 2006, c 9, s 2](#) (COIA) related to his participation in two funding decisions relating to the [WE Charity](#). After the conclusion of this investigation, the Conflict of Interest and Ethics Commissioner [released a report that concluded that Trudeau had not contravened the COIA](#).

Democracy Watch, a public-interest organization, applied to the Federal Court of Appeal for judicial review of the Commissioner’s report, alleging that the Commissioner erred in both fact and law. The Attorney General for Canada brought a motion to strike the application for judicial review, citing s. 66 of the COIA, which is a partial privative clause that prevents the courts from conducting judicial review of Commissioner orders or decisions for errors of fact and law. The Federal Court of Appeal, in [Democracy Watch v Canada \(AG\), 2024 FCA 158](#) (FCA Decision), finding that Democracy Watch had an adequate alternative remedy, dismissed Democracy Watch’s appeal (see paras 84-86). Democracy Watch then appealed to the SCC.

Two issues were presented to the SCC: (1) did the Federal Court of Appeal err in declining judicial review on the basis of an adequate alternative remedy; and (2) can s. 66 of the COIA bar judicial review on questions of fact and law?

The SCC Decision

The SCC unanimously allowed Democracy Watch's appeal on both issues and referred the case back to the Federal Court of Appeal.

Adequate Alternative Remedies

On the first issue, the SCC held that the political oversight of the Commissioner is not an adequate alternative remedy to judicial review. An adequate alternative remedy's process and remedy does not need to be identical to those available in judicial review; as long as the concerns of the applicant can be addressed appropriately, then it is an adequate alternative (at para 19). In the preceding FCA Decision, the Federal Court of Appeal found that the "political oversight" provided for in the COIA was an adequate alternative remedy for judicial review (at para 88). The SCC felt differently, ruling that Democracy Watch did not have another remedy available to them. Although Chief Justice Wagner noted that sometimes courts can decline to hear an application for judicial review if another process is able to adequately address an applicant's concerns (i.e. the decision to grant judicial review is discretionary), the Court found that political oversight could not substitute judicial review (at para 36). The COIA itself also did not provide another process for legality review of the Commissioner's decision, so Democracy Watch had no other way to obtain its sought relief.

Chief Justice Wagner is careful to point out that this conclusion does not usurp Parliament's role as it relates to the enforcement of the COIA (at para 35). Parliament is still able to supervise the conduct of the Commissioner's activities, and in choosing whether to give effect to his recommendations. However, if the Commissioner is alleged to have overextended his statutory-given powers, the rule of law requires that the courts are able to exercise their statutory authority to correct it.

Privative Clauses, Judicial Review, and the Rule of Law

On the second issue, the SCC found that s. 66 of the COIA is of no force or effect to the extent that it bars judicial review of questions of fact and law related to the Commissioner's decisions. One of the most significant parts of this decision is the SCC's assertion that judicial review is constitutionally guaranteed. Chief Justice Wagner, writing for the unanimous court, began the written reasons for the decision by highlighting the rule of law, stating that "[t]he rule of law is a 'fundamental postulate of our constitutional structure,'" and that "an unlimited power is, definitionally, not a legal power" (at para 1). Indeed, pursuant to the rule of law, any and all public power must be exercised in accordance with the law and within the limits that the law prescribes. This is one of the pillars of our democracy.

In the decision, Chief Justice Wagner emphasized a hitherto seldom used term, "legality review", which describes the courts' authority to review the legality of an exercise of a delegated power,

and goes on to state that the availability of legality review is constitutionally protected (at paras 7-8).

Where does the SCC find authority for legality review to be constitutionally protected? In the decision, Chief Justice Wagner noted that legal powers and authorities being bounded is intrinsic to the very idea of a constitution (at para 7); therefore, all exercises of public authority are subject to the courts' supervisory jurisdiction and does not exceed its limit. The Court stated that ss. 96-101 of the *Constitutional Act, 1867* protects the core constitutional jurisdiction of the superior courts, including "the powers and jurisdiction essential to [the superior courts'] role as the cornerstone of the unitary justice system and the primary guardians of the rule of law (at para 40)." As a result, the *Constitutional Act, 1867* guarantees a right to legality review over all exercises of public power as all aspects of administrative decisions are ultimately sourced in law (at para 71). What matters for constitutional purposes, as the Court stated, is that courts are constitutionally empowered to accomplish their supervisory role and ensure delegated powers stay within their limits (at para 71).

Section 66 of the COIA reads as follows:

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.

For convenience, s. 18.1(4) of the *Federal Courts Act*, [RSC 1985, c F-7](#) provides the following (I have added strikethroughs to connote which grounds for review were precluded by COIA):

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- ~~(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;~~
- ~~(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;~~
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- ~~(f) acted in any other way that was contrary to law.~~

Evidently, subsections 18.1(4)(c), (d), and (f) bar many grounds for legality review, leaving applicants with few courses of action. The Court accepted that s. 66, when properly interpreted, purports to oust judicial review for questions of fact and law. For that reason, the Court found that

s. 66 of the COIA is of no force and effect to the extent that it infringes upon the ability of the courts to conduct judicial review of administrative decisions, and any legislation which prevents judicial review is *ultra vires*.

The Court drew from the history of administrative law and the development of judicial review (see paras 45-67), illustrating that Canadian law has long recognized that the courts have power to review administrative decisions to safeguard against governmental actors that act unlawfully or irrationally. The SCC noted that Canadian courts first followed the model of administrative review first set out in *Anisminic Ltd. v Foreign Compensation Commission*, [1969] 2 A.C. 147 (*Anisminic*), a case from the UK. *Anisminic* put forward a “jurisdictional model” of administrative review. The SCC then examined the Courts’ turn towards a more deferential model starting with *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp.*, [1979 CanLII 23 \(SCC\)](#) (*CUPE*), *Dunsmuir v New Brunswick (Dunsmuir)*, [2008 SCC 9 \(CanLII\)](#), and *Vavilov*. The decision noted that “by the time *Vavilov* overtook *Dunsmuir*, privative clauses no longer served an independent or additional function in identifying the standard of review” (at para 62). The Court traced privative clauses from being “paper tigers” in *Anisminic*, to interpretive indicators in a statutory scheme, to something that appeared irrelevant over the scope of legality review.

Since legality review appears to encompass all aspects of administrative decisions, it is a broad form of review. The Court stops short of clarifying what the standard of review for constitutionally protected legality review is. At para 67, the Court states that the reasonableness standard articulated in *Vavilov* is not constitutionally entrenched, but rather, the availability of legality review is (at para 67).

As stated at para 76 of the decision, “[...] 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*.” In other words, judicial review is one of the essential constitutional functions of the courts, and if a particular provision prevents it, then it is unconstitutional.

The Court makes it clear that legislatures are still able to provide guidance on procedures for judicial review, so long as the courts are not barred from conducting their supervisory role (at para 75). As such, legislatures seem to have the freedom to determine how administrative decisions are reviewed but cannot put barriers on what administrative decisions are reviewed.

Commentary

Administrative law tends to attract debate. Central to this debate are two viewpoints: one focusing on the rule of law – a Diceyan perspective – and the other having a more functionalist approach (Heckman et al, *Administrative law: cases, text, and materials*, 8th ed (Toronto: Emond Publishing, 2021), at 24-2). For those who champion the Diceyan perspective, the judiciary is the guardian of the rule of law, and checks and constrains the potentially arbitrary power of the executive branch and its statutory delegates. On the other hand, the functionalist perspective looks at the relationship between courts and administrative actors as partners who work together to preserve the rule of law and democratic values. Under a functionalist perspective, legislative intent is respected – since

Parliament or the legislatures allocated decision-making authority to administrative actors, and not the courts.

With the SCC's decision in *Democracy Watch*, Wagner's Court appears to be swinging its support to the Diceyan side and championing the rule of law in the administrative state. As mentioned multiple times in the decision, courts are constitutionally empowered to act as a check and balance to administrative bodies. Without the clarification from the SCC of this power, administrative bodies' powers would be broader and more difficult to constrain. Yet, from a functionalist point of view, if the courts are able to review every administrative decision, then why should law-makers place power in administrative bodies? And if the legislature wants to delegate power to administrative bodies, should that not be shown due deference?

Chief Justice Wagner may have, whether intentionally or not, left the door open on what the role of privative clauses following this decision is – at para 62 of the decision, he suggested that privative clauses may be “an integrated part of the statutory scheme.” This may indicate, for example, that privative clauses can form a part of how reasonableness review is conducted, allowing for some deference to legislative intent. On the other hand, this part of the discussion is situated in the context of the historical evolution of privative clauses, so this may have served as an example of what impacts constitutionally invalid clauses still have in administrative decisions.

Ultimately, however, the rule of law is necessary to ensure that the legal system is able to do what it is there for – to provide checks and balance against the powers that legislatures and the executive have. So while administrative bodies may lose some authority, as every decision they make is subject to the possibility of review, it appears that the courts will be empowered to perform their duties.

It will be interesting to see if *Democracy Watch* will result in the courts receiving more judicial review requests, and what developments in administrative law that this predicted increase will result in.

Looking Forward

Given that this is a landmark decision from the SCC, *Democracy Watch* will likely have long-reaching implications and influence on the law moving forward. It is likely that legislation with partial privative clauses that limit judicial review on certain grounds will need to be revisited, and we can expect that privative clauses that currently exist in legislation will be challenged; as Nigel Banks argued in [his previous post on *Democracy Watch*](#), provincial legislatures may need to rethink their current architecture of judicial supervision. With this decision, the SCC has chosen to support and uphold the rule of law as opposed to taking a more deferential and functionalist approach to administrative law. Whether this trend will continue remains undetermined, but the SCC has made it clear: all administrative decisions are available for the courts to review.

This post may be cited as: Sue Lu, “Just Keep Watching: Insights From *Democracy Watch v Canada (AG)*, 2026 SCC 28” (24 August 2026), online: ABlawg, http://ablawg.ca/wp-content/uploads/2026/08/Blog_SL_Democracy_Watch2.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

