Federal Court of Appeal  Cour d'appel fédérale

Date: 20221205

Docket: A-169-21

Citation: 2022 FCA 208

Present: **STRATAS J.A.**

BETWEEN:

DEMOCRACY WATCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 5, 2022.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The applicant has brought a judicial review challenging a decision of the Conflict of Interest and Ethics Commissioner under the *Conflict of Interest Act*, S.C. 2006, c. 9. The decision concerns the alleged conduct of the Prime Minister in participating in two decisions involving a charity known as "WE Charity".

[2] The Commissioner concluded that the Prime Minister did not contravene three sections of the *Conflict of Interest Act*: subsection 6(1) (participating in the making of a decision that would be a conflict of interest), section 7 (giving preferential treatment to a person or organization) and section 21 (failing to recuse from a matter in which there would be a conflict of interest).

[3] The Attorney General moves to strike the applicant's judicial review on three grounds: the applicant's lack of standing to bring the application, the purported bar to certain grounds of judicial review contained in section 66 of the *Conflict of Interest Act*, and *res judicata* concerning the legal issues in this case.

[4] In my view, the applicant has public interest standing to maintain the judicial review. However, the issue whether the bar in section 66 of the *Conflict of Interest Act* applies should be left to the panel hearing the application, along with the *res judicata* issue. Therefore, I would refer those two portions of the Attorney General's motion to strike to the hearing panel of this Court that will decide the merits of the application for judicial review.

A. The applicant's public interest standing

[5] To obtain public interest standing, the applicant must show that the application for judicial review raises serious justiciable issues, the applicant has a real stake or genuine interest in the issues raised, and the application is a reasonable and effective means of bringing the issues before the courts: *Canada (Attorney General) v. Downtown Eastside Sex Workers United*

Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524; *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27.

[6] A number of cases have confirmed that the applicant has been given public interest standing in circumstances and in subject-matters substantially similar to this case: *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195; *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388; *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291; *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613. On that basis alone, I would dismiss this ground for striking out the application.

[7] As will be seen from the analysis of the issues below, the application for judicial review raises serious justiciable issues.

[8] I am also satisfied the applicant has a real stake or genuine interest in the issues raised in this application. The applicant's participation in many cases similar to this and the submissions it makes on this motion satisfy this requirement.

[9] I am also concerned that if the applicant is not given public interest standing, the Commissioner's decision will be immunized from any review. The potential for immunization of public decision-making is a weighty factor under the test for public interest standing: *Downtown Eastside* at paras. 31-34; *Council of Canadians with Disabilities* at paras. 33-40 and 56-59 and see the judicial standpoint against immunization of public decision-making in cases such as

Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315, *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24, and *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, 185 C.P.R. (4th) 83 at para. 44. This case seems similar to *Harris v. Canada*, [2000] 4 F.C. 37, 187 D.L.R. (4th) 419 (C.A.): unless the applicant is given standing, immunization of the Commissioner's decision from any review, at least by courts, is a real possibility.

[10] For the foregoing reasons, the applicant has public interest standing to advance and prosecute this application. Therefore, the portion of the Attorney General's motion to strike on the ground of lack of standing will be dismissed.

B. Section 66 of the *Conflict of Interest Act*: the Attorney General's main ground to strike this application

[11] Section 66 of the Act provides that every decision of the Commissioner is final and shall not be reviewed unless the grounds in paragraphs 18.1(4)(*a*), (*b*) or (*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, apply. Those grounds are that the decision-maker, here the Commissioner:

- "acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction" (paragraph 18.1(*a*)),

- "failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe" (paragraph 18.1(*b*))

- "acted, or failed to act, by reason of fraud or perjured evidence" (paragraph 18.1(*e*)).

[12] The Attorney General submits that the grounds the applicant advances in the application do not fall within section 66. As a result, this Court cannot consider them.

[13] The Attorney General submits that section 66 reflects the fact that the Commissioner is an officer of Parliament and is accountable to Parliament in some respects for the exercise of powers. Section 66 allocates the review of decisions by the Commissioner between this Court and Parliament, depending on the type of issue. Hard-core legal issues—the statutory limits on the Commissioner, procedural fairness and legal circumstances that would completely vitiate the Commissioner's proceedings, such as fraud—are for the Court to decide. All other issues are for Parliament.

[14] On the basis of the text, context and purpose of section 66, I agree with the Attorney General's submissions concerning what section 66 does and the reasons for that.

C. Does this application fall outside of section 66 of the *Conflict of Interest Act*?

[15] Originally, the applicant raised four grounds in support of its application for judicial review of the Commissioner's decision. It has now undertaken to withdraw one of the four grounds in its notice of application: the allegation of reasonable apprehension of bias on the part of the Commissioner.

[16] The three remaining grounds the applicant raises all assert errors of law and fact. The Attorney General says that all of these fall outside the permissible grounds in section 66. Therefore, this Court has no power to consider them.

[17] Given my analysis of section 66 of the Act, above, I agree: the three grounds do assert errors of law and fact and, thus, fall outside the permissible grounds in section 66.

[18] But that is not the end of the analysis. There is one remaining question that arises due to a recent decision of this Court: can the applicant still prosecute and potentially succeed in this application for judicial review in the face of the section 66 bar? Below, I describe the content and contours of this question.

[19] However, before doing so, I must assess whether this question is appropriately answered by a single judge acting on an interlocutory basis in these particular circumstances. Should it be answered now? Or should it be answered by the hearing panel charged with the responsibility of deciding this application on the merits?

D. The jurisprudence on whether the motion should be decided now

[20] Interlocutory motions such as this are heard by a single judge of this Court. Where appropriate, the judge can decline to deal with the motion and adjourn it to the appeal panel for its consideration. This is a discretionary call based on certain principles. The most complete,

recent discussion of these principles is found in *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, 156 C.P.R. (4th) 289.

[21] Rule 3 in the *Federal Courts Rules*, S.O.R./98-106 governs the Court's discretion: the Court is to "secure the just, most expeditious and least expensive determination of every proceeding on its merits". *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 spells out some of the more salient elements in Rule 3 that affect the Court's discretion (at para. 10):

> Where the motion is clear-cut or obvious, it might as well be decided right away. Efficiency and judicial economy support this: *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at paragraph 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 240, 267 N.R. 135. However, if reasonable minds might differ on the outcome of the motion, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at paragraph 9; *Gitxaala Nation v. Canada*, 2015 FCA 27 at paragraph 7. Sometimes the novelty, quality or incompleteness of the submissions may make it sensible to leave the motion for the appeal panel to determine: *Gitxaala Nation*, above at paragraphs 9-12.

(See also *Mediatube* at paras. 9-11 and *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at paras. 40-42.)

[22] Another important factor is whether an advance ruling would allow the hearing to proceed in a more timely and orderly fashion: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at para. 11, citing *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at para. 6 and *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, 51 C.H.R.R. 228, aff'd 2005 FCA 389; see also *Mediatube* at paras. 12-13.

E. The motion should be left to the hearing panel of this Court that will decide the application on its merits

[23] For the reasons set out below, the nature of the key question in this motion—whether the applicant can still prosecute and potentially succeed in this application for judicial review in the face of the section 66 bar—is deeply uncertain in law. Thus, this motion is far from clear-cut or obvious. The motion should be left for the hearing panel that will decide the application on its merits.

[24] Given that this question will be answered by a panel of this Court, I shall keep my explanations concerning the legal uncertainty to a minimum. Nevertheless, it will be helpful to the parties to flag some of the elements of uncertainty. That will assist them in addressing them in their memoranda of fact and law for the application. In the Court's experience, this sort of approach by the Court often leads to more focussed and more useful submissions: *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, 174 C.P.R. (4th) 85 at paras. 6-12.

[25] In *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, this Court considered a statutory appeal from the Canadian International Trade Tribunal under section 68 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). Subsection 68(1) of the *Customs Act* permits certain parties to appeal from the Canadian International Trade Tribunal to this Court only "on any question of law". By implication, subsection 68(1) of the *Customs Act* bars appeals on any other grounds such as question of fact or questions of mixed fact and law where there is no extricable principle of law. Thus, subsection 68(1) is a statutory partial restriction on review.

[26] The majority of the Court in *Best Buy* held that statutory partial restrictions on review do not preclude an applicant from bringing a separate application for judicial review raising the other grounds. In other words, despite subsection 68(1) of the *Customs Act*, this Court could review the administrative ground on all grounds, albeit in two proceedings: an appeal under subsection 68(1) and a separate application for judicial review. In effect, the statutory partial restrictions on review in subsection 68(1) can be disregarded, just as courts disregard privative clauses.

[27] Applied to this case, the majority reasons in *Best Buy* suggest that the applicant can raise grounds in support of its application that do not fall within the grounds permitted by section 66 of the *Conflict of Interest Act*. In other words, section 66 can be disregarded just as if it were a privative clause.

[28] The minority of the Court in *Best Buy* took a different view of the matter. In its view, subsection 68(1) of the *Customs Act* means what it says: this Court can only entertain an appeal "on any question of law" and nothing else. The minority would have enforced the statutory partial restriction on review in subsection 68(1) according to its terms.

[29] Applied to this case, the minority reasons in *Best Buy* suggest that the applicant can only raise grounds in support of its application that are permitted by section 66 of the *Conflict of Interest Act*. Section 66 cannot be disregarded.

[30] Normally, the existence of majority and minority reasons in a decision in this Court gives rise to no difficulty: the majority decisions state the law. But deeper analysis of the majority and minority reasons in *Best Buy* shows a real uncertainty as to whether the differently worded section in this case—section 66 of the *Conflict of Interest Act*—is effective to bar the grounds the applicant raises in its notice of application.

[31] What was the basis for the majority's holding in *Best Buy*? The majority in *Best Buy* stated (at para. 112) that "a complete bar on the availability of judicial review *for any type of issue* would offend the rule of law" [emphasis added]. For good measure, the majority in *Best Buy* added (again at para. 112) that the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 has suggested that statutory partial restrictions on review cannot "bar access to judicial review *or to review for particular sorts of issues*" [emphasis added]. Taken literally, these words have implications for section 66 of the *Conflict of Interest Act*, which is a statutory partial restriction on review. They seem to suggest that this Court should overlook section 66's bar against the "review [of] particular sorts of issues" and entertain all of the grounds the applicant raises in its judicial review.

[32] As we shall see, *Vavilov* is not the only authority from the Supreme Court of Canada that arguably speaks to this question. Other authorities, some from the Supreme Court, some from elsewhere, also arguably speak to it as well. The minority in *Best Buy* draws our attention to some of these.

[33] The minority, analyzing *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 and other Supreme Court authorities, held that statutory partial restrictions on review prompted by a valid legislative objective—such as (arguably) section 66 of the *Conflict of Interest Act* in this case—are valid and do not offend the rule of law. Only complete bars against any review whatsoever of any issues offend the rule of law. According to the minority, courts must obey statutory partial restrictions on review (at paragraph 57):

> *Crevier* has oft been cited for the proposition that a legislature cannot completely oust judicial review: see e.g. *Vavilov* at para. 24; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 31. As Stratas J.A., for this Court, recently framed it, "[p]ut positively, *Crevier* stands for the proposition that there must always be at least some prospect or degree of review": *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 2021 CarswellNat 1003 at para. 102 [*Canadian Council for Refugees*]. This is indeed *all* it stands for. It does not imply that the legislature cannot limit or preclude judicial review of administrative decision for certain types of issues: see e.g. *Canadian Council for Refugees* at para. 102, citing *United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 333 [S.C.R.]; *Capital Regional District v. Concerned Citizens of British Columbia et al.*, [1982] 2 S.C.R. 842, 141 D.L.R. (3d) 385; *Vavilov* at paras. 45-52. On the contrary…*Crevier* [at pp. 236-37] actually explicitly states that the legislature may oust judicial review on issues not touching jurisdiction. [emphasis in original]

[34] In the above passage, the minority refers to a number of decisions from the Supreme Court. But it also focuses on one portion of this Court's decision in *Canadian Council for Refugees*, a decision that pre-dates *Best Buy* that refers to many Supreme Court decisions. The minority suggests that the majority reasons in *Best Buy* are inconsistent with that portion of *Canadian Council for Refugees*. The majority in *Best Buy* did not cite *Canadian Council for Refugees*.

[35] It is useful to examine the portion of *Canadian Council for Refugees* that the minority in *Best Buy* cites. Citing a number of binding Supreme Court authorities, it suggests (at paragraphs 102-103) that only total bars against review, not statutory partial restrictions on review, are invalid:

> For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review. The *complete barring of review* by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-28; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327 at para. 38; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 24. Put positively, *Crevier* stands for the proposition that *there must always be at least some prospect or degree of review*: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 at 601 S.C.R. (dissenting but not disputed by the majority on this point), citing, with approval, J. H. Grey, "Sections 96 to 100: A Defense" (1985), 1 Admin. L.J. 3 at 11. *This principle is limited to the complete ousting of any review of an administrative decision, not legislative limitations on the availability or scope of review*: see, *e.g., United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 333 S.C.R.; *Capital Regional District v. Concerned Citizens of British Columbia et al.*, [1982] 2 S.C.R. 842, 141 D.L.R. (3d) 385; *Vavilov* at paras. 45-52.
>
> For this reason, *full privative clauses that purport to immunize administrative decision-making entirely from review* are read down to permit review, albeit usually on a deferential basis: see, *e.g., National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449. [emphasis added]

[36] But isn't a majority decision of this Court binding on all future cases that arise in this Court? As a general matter, what cases bind this Court? On these questions, it is useful to review the applicable law.

[37] Obviously this Court is bound by decisions of the Supreme Court that cannot be distinguished. As well, this Court is bound by an earlier decision of this Court unless the earlier decision overlooks an earlier authority that is determinative or unless the earlier decision can be distinguished on a principled basis: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149; *R. v. Sullivan*, 2022 SCC 19. This is so even where, as in *Best Buy*, the earlier decision contains majority and minority opinions: *Janssen Inc. v. Canada (Attorney General)*, 2021 FCA 137 at paras. 80-82.

[38] It will be for the panel hearing this application to decide, but it seems to me that this issue is best addressed by cutting to the core of things. We have two cases, *Canadian Council for Refugees* and *Best Buy*, expressing different views, the latter not citing the former, against a backdrop of binding Supreme Court cases. In these unusual, somewhat confused circumstances, the focus should not be on *Miller*/*Sullivan* and the non-mention of *Canadian Council for Refugees* in the majority reasons in *Best Buy*, but rather on which decision, *Canadian Council for Refugees* or *Best Buy*, best respects the binding decisions of the Supreme Court that speak to this issue.

[39] To answer that question, the parties will have to interpret those Supreme Court decisions. That will be challenging. Often the signals in them are unclear. And often the language in them must be translated from the language of the administrative law doctrine as it existed when they were decided to the language of the administrative law doctrine of today. To take one example, many of the relevant Supreme Court decisions speak of “jurisdiction” but that term is not so much in vogue today: see *Vavilov* at paras. 65-68.

[40] It has been suggested at recent legal conferences that the observations of the majority in *Best Buy* were *obiter*. The Court was dealing with a statutory appeal from the Canadian International Trade Tribunal on questions of law and judicial review on other issues had been brought or was before the Court. Strictly speaking, then, it was not necessary for the Court in *Best Buy* to opine on whether a judicial review on other issues was available. But does this matter? Jurisprudential clarifications on fundamental issues, even when *obiter*, must be given great weight, sometimes even determinative weight, where, as was the case in *Best Buy*, full submissions on either side of the point have been made and the court's reasoning is detailed. This Court often follows well-developed, considered *obiter*, which the *obiter* in *Best Buy* certainly is.

[41] Courts outside of the Federal Court system have yet to assess *Best Buy* in detail, probably because of its recent vintage. The Court of Appeal for Ontario has adopted a slightly different position from *Best Buy*: judicial reviews may be brought and prosecuted alongside statutory partial restrictions on review but only where the appeal is not an adequate recourse. See *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446, aff'g for different reasons, *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507; see also *Ladouceur v. Intact Insurance Company*, 2022 ONSC 5206 (Div. Ct.); *contra*, *Tipping v. Coseco Insurance Company*, 2021 ONSC 5295 at para. 39.

[42] This much seems certain: courts have disregarded legislative provisions that purport to bar any review whatsoever of an administrative decision. In other words, total bars on any review of administrative decisions by courts are not enforced.

[43] Such attempts by legislatures to totally immunize administrative decision-making are disregarded because of the constitutional guarantee of the rule of law and because of the need for all administrative decision-makers to be accountable for their exercises of public power.

[44] Our Court has firmly endorsed this:

> "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
>
> Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

(*Tennant*, above at paras. 23-24; see also *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404 at paras. 6-7, aff'd 2019 FCA 148, [2019] 3 F.C.R. 503.)

[45] But for statutory partial restrictions on review that further a valid and substantial legislative purpose, it is an open question as to which reasons of this Court—those of the

majority in *Best Buy* or those in *Canadian Council for Refugees* —conform with the binding law of the Supreme Court.

[46] No doubt, the parties to this motion will want to closely analyze the Supreme Court's seminal decision in *Vavilov* to see if it provides any guidance.

[47] As the majority in *Best Buy* notes, the closest the Supreme Court in *Vavilov* came to dealing with the uncertain question at issue in the case at bar was at paragraph 110. There, the Supreme Court stated that "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" [emphasis added]. The majority in *Best Buy* interpreted this sentence as an indication that applicants can start parallel judicial review proceedings in every case where an issue cannot be advanced under a circumscribed statutory right of appeal or, as I have put it, a statutory partial restriction on review. The minority disagreed.

[48] Is the Supreme Court saying in paragraph 110 of *Vavilov* that judicial review is always available alongside a statutorily circumscribed right of appeal? Or is it saying that the mere existence of a statutorily circumscribed right of appeal does not automatically preclude the possibility of judicial review. In some cases, might there be something more—such as where, as a matter of statutory interpretation, the authentic meaning of the circumscribed right of appeal precludes a separate proceeding seeking review? Or does *Vavilov* not speak to the issue at all?

[49] In *Vavilov*, the Supreme Court continually asserts the primacy of the authentic meaning of statutes passed by our elected representatives over judge-made rules. This is well-founded under a principle known as the "hierarchy of laws"—that absent unconstitutionality, legislative provisions trump judge-made rules: see *Canada (Attorney General) v. Utah*, 2020 FCA 224, 455 D.L.R. (4th) 714 and the numerous authorities cited therein. Is this principle relevant to the analysis in this case? Does it square with an interpretation of paragraph 110 in *Vavilov* that there can never be a statutory partial restriction on review (such as section 66 in this case) even where Parliament is prompted by good, compelling reasons to enact it. At what point does the constitutional principle of the rule of law kick in to override Parliament's choice?

[50] The parties might also consider whether the practical effects of the rival positions in *Canadian Council for Refugees* and *Best Buy* are relevant to the analysis and, if so, how. *Vavilov* aims (at paras. 7 and 10) to simplify administrative law and make it more coherent. But one effect of the majority reasons in *Best Buy* is that there may often be two review proceedings rather than just one—an appeal brought under the statutorily circumscribed right of appeal and a separate application for judicial review covering other grounds—with all the procedural difficulties, complexities and costs that can be associated when there are multiple proceedings over the same subject-matter. Or are those procedural difficulties easily surmounted through mechanisms such as consolidation? Might this problem seldom arise in practice because the statutory appeal, albeit circumscribed, will usually be sufficient to deal with any major flaws in the administrative decision?

[51] Adding to the uncertainty are the conflicting positions taken by the Attorney General on this issue. In *Best Buy* (at para. 47), it appears that the Attorney General argued that judicial review is always available to cover things not reviewable under circumscribed rights of appeal. But in this case, the Attorney General takes a different position. And in *Canadian Council for Refugees*, the Attorney General did not appear to have any position at all. Perhaps in none of these cases did the Attorney General consider the position through in any depth. This motion gives the Attorney General the opportunity to do so.

[52] Statutory provisions restricting review of administrative decisions, such as the ones in issue in this case, are often enacted for seemingly good and valid legislative purposes. Take, for example, the requirement in section 72.1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, that judicial review in the Federal Court can only be brought after that Court has granted leave. It seems intended to screen relatively unmeritorious proceedings in order to preserve the scarce resources of the Federal Court. Does *Best Buy* affect this? If so, is the legislative purpose behind the restriction on automatic review relevant to the analysis? If so, what sorts of purposes might qualify and does section 66 embody a sufficiently valid purpose?

[53] Often appeals from major, federal administrative decision-makers are restricted to questions of law, and sometimes leave to appeal must first be sought: *e.g.*, *Telecommunications Act*, S.C. 1993, c. 38, s. 64(1) (“with leave” on a “question of law or of jurisdiction”); s. 72(1) of the *Canadian Energy Regulator Act* enacted by S.C. 2019, c. 28, s. 10 (“with leave” on a “question of law or of jurisdiction”); *Customs Act*, R.S.C. 1985, c. 1 (2d Supp.), s. 68(1) (“question of law”); *Broadcasting Act*, S.C. 1991, c. 11, s. 31(2) (“a question of law or a question

of jurisdiction"); *Competition Act*, R.S.C. 1985, c. C-34, ss. 30.24 and 34(3.1) (a "question of law alone"); *Canada Transportation Act*, S.C. 1996, c 10, s. 41(1) ("a question of law or a question of jurisdiction on leave"); *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 62(1) ("question of law"). These sorts of provisions can be said to minimize the uncertainty and delay in the carrying out of an administrative decision by restricting review. And their effect may not be significant: it may be said that provisions such as these bar only reviews of factual findings or factually suffused questions of mixed fact and law, matters on which there is only a low probability of success in the reviewing court. But if the constitutional principle of the rule of law applies to cut down these sorts of provisions, so be it.

[54] This issue is becoming more important. It is beginning to spread, with possible ramifications for other areas of administrative law. For example, some have tried to argue that administrative schemes that require prerequisites to be satisfied before administrative proceedings can take place ultimately obstruct access to full, unlimited review by a court: *Prairies Tubulars (2015) Inc. v. Canada (Border Services Agency)*, 2022 FCA 92.

[55] As can be seen from the foregoing analysis, the issue is most complex. In fact, the Supreme Court of the United Kingdom split four ways on it in *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22; [2019] 2 W.L.R. 1219. There we see a spectrum of positions: from doubt about whether Parliament could ever legislate to exclude judicial review to acceptance that a clear provision passed by Parliament could do just that.

[56] Therefore, a cloud of uncertainty and complexity presently hovers over all statutory provisions that limit the review of administrative decisions, such as section 66 of the *Conflict of Interest Act* in this case. Are they enforceable according to their terms? Or can they be disregarded? It is to be hoped that one day soon the Supreme Court of Canada will settle this important, fundamental issue once and for all.

[57] Thus, this issue should not be decided on an interlocutory basis. A panel of this Court hearing the merits of the application should decide it.

[58] To be clear, while I have taken a stab at making rudimentary legal observations to assist the parties in identifying and addressing the issues, the panel determining the merits of this application for judicial review in this case is not bound by any of my observations. It has a completely free hand to decide all questions of law.

F. The *res judicata* issue raised by the Attorney General

[59] Given the extent to which the foregoing issues may pervade this case, the application might not be barred by *res judicata*. In the circumstances, it is safest to leave this issue to the hearing panel to decide.

G. Disposition

[60] The portion of the Attorney General's motion challenging the applicant's standing to maintain this application will be dismissed. The remainder of the motion will be adjourned to the hearing panel that will determine the application for judicial review. The parties will make further submissions on the motion in their memoranda of fact and law to be filed on the application. Finally, the Court's order will regulate certain consequential procedural matters.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-169-21
STYLE OF CAUSE:	DEMOCRACY WATCH v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	DECEMBER 5, 2022

WRITTEN REPRESENTATIONS BY:

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