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JUDICIAL REVIEW IN LABOUR LAW

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This award-winning looseleaf service provides a comprehensive overview of what the courts have done, and are currently doing, when confronted with applications for judicial review of decisions made by labour tribunals. It discusses current case law from all Canadian jurisdictions and includes a discussion of the procedure and remedies available.

What's New in this Update:

This release features updates to Part I: Scope, History and Evolution (Chapter 5 (The Current Standard for Judicial Review)), Part II: Judicial Review of Labour Relations Boards (Chapter 6 (Grounds for Review: Exceeding Jurisdiction), Chapter 7 (Grounds for Review: Breach of Natural Justice), Chapter 8 (Effect of Privative Clauses)), and Part III: Judicial Review of Labour Arbitration Tribunals (Chapter 9 (Modern Evolution of Judicial Review Standards) and Chapter 10 (Grounds for Review: Exceeding Jurisdiction)).

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Highlights:

Part I—Scope, History and Evolution—Chapter 5—The Current Standard for Judicial Review—§ 5:6. Constitutional Right to Judicial Review—Complementing the framework for judicial review established in *Vavilov* is the Supreme Court of Canada's decision in 2026 in *Democracy Watch v. Canada (Attorney General)*, 2026 CarswellNat 2837, 2026 CarswellNat 2836, 2026 SCC 28 (S.C.C.). Gathering threads from other decisions where the court dealt with the constitutional limits on the scope of privative clauses shielding administrative action from judicial review, the court in *Democracy Watch* held that there is a "core constitutional minimum of legality review of all aspects of an administrative decision." This guarantee, the court held, finds its sources in the principle of the rule of law, the long tradition of judicial review in England and Canada, and the provisions of ss. 96-101 of the *Constitution Act 1867*. The specific issue before the court in *Democracy Watch* was whether the privative clause in section 66 of the federal *Conflict of Interest Act*, which prohibited judicial review of the Conflict of Interest Commissioner's orders or decisions on questions of fact or law, was constitutionally valid. The court found that the prohibition was inconsistent with ss. 96-101 of the *Constitution Act 1867* and declared it to be of "no force or effect" under s. 52(1) of the *Constitution Act 1982*. In doing so, the court took a novel approach to the interpretation of privative clauses that on their faces limit or prohibit judicial review of administrative action. As the Supreme Court of Canada noted, courts have traditionally avoided squarely confronting the issue of whether legislatures can limit judicial review through the use of privative clauses by, in effect, "reading down" such clauses so that they only prohibited decisions made within the administrative body's jurisdiction. The court in Democracy Watch rejected this approach. It held that privative clauses purporting to limit or prohibit judicial review should be interpreted in accordance with the evident legislative intent to exclude judicial review of the legality of some or all aspects of the administrative body's decisions or actions. But such a legislative intent, the court held, is incompatible with the rule of law and with the inherent powers of the courts arising from ss. 96-101 of the *Constitution Act 1867*. Privative clauses limiting or ousting review of the legality of administrative bodies' actions or decisions are thus *ultra vires* and of no force or effect. This reasoning and conclusion regarding privative clauses limiting or prohibiting judicial review would logically make privative clauses such as are typically found in labour relations legislation ultra vires of Parliament or a provincial legislature and of no force or effect.

Part II—Judicial Review of Labour Relations Boards—Chapter 6—Grounds for Review: Exceeding Jurisdiction—I. Absence of Subject Matter Jurisdiction—§ 6:3. After New Brunswick Liquor—A party wishing to argue on judicial review

that a labour relations board's decision is vitiated by what would formerly have been known as "jurisdictional error," but which under *Vavilov* might be a matter for correctness review, (for example, a provincial board certifying a bargaining unit of employees at an employer allegedly coming under federal jurisdiction) must normally have raised the issue before the board, not for the first time on judicial review (*A.U.P.E. v. Alberta Health Services*, 2025 ABKB 465, 2025 CarswellAlta 1873 (Alta. K.B.)). Following *Vavilov*, the OLRB's decision was reviewed for reasonableness when it found that an employee's highly critical social media post about his employer was "defamatory" and that a particular incident was not "harassment" (*Song v. Ontario Labour Relations Board*, 2026 ONSC 166, 2026 CarswellOnt 461 (Div. Ct.)). In both instances, the Divisional Court found, the Board had used the words in a non-technical sense and had not exceeded its jurisdiction by determining whether the tort of defamation had been committed (a matter for the Ontario Superior Court), nor had it exceeded its jurisdiction by deciding whether harassment prohibited by Ontario *Human Rights Code* had occurred (which was a matter for the human rights tribunal).

Part II—Judicial Review of Labour Relations Boards—Chapter 6—Grounds for Review: Exceeding Jurisdiction—IV. Reasonableness of the Decision—§ 6:29. Unfair Labour Practices Decisions since 1990—The Quebec Superior Court upheld as reasonable on the *Vavilov* standard a labour relations board decision rejecting a complaint of interference in the administration of a trade union (see *Féderation des syndicate de l'ensignment (FSE-CSQ) v. Tribunal administrative du travail*, 2026 QCCS 842; c.f. *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227 (S.C.C.) on the employers' right to control use of its IT systems). The provincial Ministry of Education had withdrawn union representatives' access to a database containing teachers' educational qualifications due to concerns, as the board had found, for the confidentiality of their personal information; there had been instances of leaks of the information despite the representatives' signing of confidentiality agreements. The union could still access the database, but required the teacher's permission, and had free access to the employer manual on educational qualifications and to the database of employer decisions concerning teachers. The court upheld as reasonable the board's conclusion that the ministry had not been influenced by anti-union animus and held that the board had properly considered the compliant from the viewpoint of the unfair labour practice provisions of the *Labour Code*, C.Q.L.R. c. C-27 rather than that of access to information legislation. In a 2025 judgment, the Saskatchewan Court of King's Bench found reasonable a labour relations board decision determining that a union and an individual acting as its agent had engaged in bad faith bargaining when they engaged in campaigns aimed at changing the composition of the board of directors of the co-op employing the members of the bargaining unit the union

represented (*UNCW, Local 1400 v. Saskatoon Co-operative Ltd.*, 2025 SKKB 177, 2025 CarswellSask 445 (Sask. K.B.). The specific purpose of the campaign was to effect a change in the employer's position in the collective bargaining then ongoing between the union and the co-op by changing the membership of the co-op's board of directors. The board found that such a non-bargaining response to the co-op's bargaining position had potential to harm the bargaining relationship. The reviewing court determined that the board's interpretation of the scope of the duty to bargain in good faith was supported by case law and that the board's reasons were intelligible and thus reasonable.

Part II—Judicial Review of Labour Relations Boards—Chapter 8—Effect of Privative Clauses—I. Standard "No Certiorari" Clauses—§ 8:1 Constitutional Guarantee of Judicial review of Administrative Action—The effect of privative clauses, and their place in the general scheme of Canadian administrative law, must now be considered in light of the Supreme Court of Canada's decision in *Democracy Watch v. Canada*, 2026 SCC 28 (S.C.C.). In *Democracy Watch*, the Supreme Court found that there is "a core constitutional minimum of legality review of all aspects of an administrative decision." Drawing on other decisions such as *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 120, 127 D.L.R. (3d) 1 (S.C.C.), and *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577) (S.C.C.), in which the court dealt with the constitutional limits on the scope of privative clauses shielding administrative action from judicial review, the court found three grounds for this constitutional guarantee. The first was the principle of the rule of law, under which every administrative action must have a legal source. The second was the long tradition of judicial review of administrative action in England and in Canada. The third was ss. 96-101 of the *Constitution Act 1867* providing for the establishment of superior courts, which have an inherent power to review the legality of administrative action. These conclusions were the result of the novel approach taken in *Democracy Watch* to the interpretation of privative clauses that on their faces limit or prohibit judicial review of administrative action. As the Supreme Court of Canada noted, courts have in the past avoided squarely confronting the issue of whether legislatures can limit judicial review by using privative clauses. Instead, courts have traditionally "read down" such clauses by interpreting them as only applying to decisions made within the administrative decision-maker's jurisdiction. The court in *Democracy Watch* rejected this approach. It held that privative clauses purporting to limit or prohibit judicial review should be interpreted in accordance with the evident legislative intent to exclude judicial review of some or all aspects of an administrative body's actions. But such a legislative intent, the court held, is incompatible with the rule of law and the inherent powers of the superior courts arising from ss. 96-101 of the *Constitution Act 1867*. Privative clauses limiting or ousting judicial review of administrative bodies' actions would thus be ultra vires and of no force or effect under s. 52(1) of the *Constitution Act*

1982.

Part III—Judicial Review of Labour Arbitration Tribunals—Chapter 10—Grounds for Review: Exceeding Jurisdiction—I. Absence of Subject-Matter Jurisdiction—§ 10:8. Jurisdiction over Collective Agreement or Party—In some instances, the two considerations of subject matter jurisdiction and jurisdiction *in personam* jurisdiction can interact in unusual ways. In *R.W. Tomlinson Ltd. v. Labourers International Union of North America, Local 527*, 2025 ONCA 861, 2025 CarswellOnt 20671 (Ont. C.A.), the Ontario Court of Appeal dealt with a situation in which a unionized corporation and two non-unionized ones, all forming part of a group of companies, brought civil actions against the union for actions on the picket line during a strike. The actions all relied on substantially the same facts. The Court of Appeal, upholding the Divisional Court on this point, held that *Weber* meant that the unionized corporation's claim properly came under the exclusive jurisdiction of an arbitrator under the collective agreement between it and the union, given the wording of the collective agreement. The civil courts' jurisdiction was ousted because the unionized corporation's claim came under the subject matter jurisdiction of an arbitrator and, as a party to the collective agreement, it was subject to the arbitrator's *in personam* jurisdiction. The claims of the non-unionized corporations could proceed in the civil courts, since the arbitrator did not have jurisdiction over these corporations *in personam*. The court stayed the actions in the civil courts in the circumstances, however, until the proceedings before the arbitrator were completed so as to avoid parallel proceedings that could "undermine" the labour arbitration ones.