Federal Court of Appeal | Cour d'appel fédérale

Date: 20210805

Docket: A-348-19

Citation: 2021 FCA 161

CORAM: **NEAR J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

BEST BUY CANADA LTD.

Respondent

Heard by online video conference hosted by the Registry on January 19, 2021.

Judgment delivered at Ottawa, Ontario, on August 5, 2021.

REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRING REASONS BY:	GLEASON J.A.
CONCURRED IN BY:	LEBLANC J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] This is an appeal by the Attorney General of Canada from a decision of the Canadian International Trade Tribunal (CITT), reported as *Best Buy Canada Ltd.*, 2019 CanLII 110846 (CA CITT), 2019 CarswellNat 14479 (WL Can) [*Best Buy* (CITT 2019)]. In that decision, the

CITT classified television stands imported by the respondent, Best Buy Ltd., as "parts" of televisions, under tariff item No. 8529.90.90 of the schedule to the *Customs Tariff*, S.C. 1997, c. 36.

[2] The CITT decision under appeal was itself a reconsideration of an earlier CITT decision, reported as *Best Buy Canada Ltd.*, 2017 CanLII 149295 (CA CITT), 22 T.T.R. (2d) 57 [*Best Buy* (CITT 2017)]. Canada appealed the 2017 decision to this Court, which remitted the matter back to the CITT, *Canada v. Best Buy Canada Ltd.*, 2019 FCA 20, 2019 CarswellNat 168 (WL Can) [*Best Buy* (FCA 2019)], which in turn maintained its original result. Canada once again appeals the CITT's decision.

[3] This appeal raises the question of whether this Court may review a CITT decision for issues other than questions of law, contrary to the wording of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). In my view, subsection 67(3) and section 68 of the *Customs Act* preclude this Court from reviewing CITT decisions for errors of fact or mixed fact and law that are not so egregious as to rise to the level of errors of law.

[4] Canada alleges the CITT both erred in law, and in applying the law to the facts of the case. I am not convinced that the CITT made an error of law. Further, given my conclusion that this Court may only review CITT decisions on questions of law, I would accordingly dismiss the appeal.

II. Background

[5] The goods in issue, which I refer to as "the Best Buy stands", are metal and wooden models of floor stands for flat-panel televisions. On October 2, 2014, Best Buy requested an advance ruling from the CBSA on the tariff classification of the goods. Best Buy, relying on an earlier CITT decision dealing with similar floor stands, *Sanus Systems v. President of the Canada Border Services Agency* (8 July 2010), AP-2009-007 (CITT), 2010 CarswellNat 5288 (WL Can), 14 T.T.R. 576 [*Sanus Systems*], sought to have the goods classified under tariff item No. 8529.90.90.

[6] Prior to issuing its advance ruling on the Best Buy stands, the CBSA, in August 2015, filed a request with the World Customs Organization (WCO) Harmonized System Committee (the "WCO Committee") for guidance on the tariff classification of audio-visual carts designed to hold televisions and other audio-visual apparatuses. The request informed the WCO Committee of the CITT ruling in *Sanus Systems* and set out the CBSA's position that the goods in *Sanus Systems* were not "parts" of televisions but instead "furniture".

[7] The WCO Committee held a vote and decided to direct the Secretariat to prepare Classification Opinions classifying television stands like those at issue in *Sanus Systems* as "furniture", not "parts" of televisions. The Classification Opinions were published on June 1, 2016. I refer to the stands covered by these Classification Opinions as "the WCO stands".

[8] In July 2016, the CBSA provided Best Buy with its advanced ruling on the goods in issue, classifying them as "furniture" under tariff heading No. 94.03, in accordance with the Classification Opinions.

[9] Best Buy appealed to the CITT, which allowed the appeal: *Best Buy* (CITT 2017). Canada appealed the CITT's decision to this Court, which allowed the appeal and remitted the matter back to the CITT for reconsideration.

[10] In remitting the matter, this Court relied on section 11 of the *Customs Tariff*, which reads:

Interpretation	**Interprétation de la liste des dispositions tarifaires**
11 In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.	**11** Pour l'interprétation des positions et sous-positions, il est tenu compte du Recueil des Avis de classement du Système harmonisé de désignation et de codification des marchandises et des Notes explicatives du Système harmonisé de désignation et de codification des marchandises et de leurs modifications, publiés par le Conseil de coopération douanière (Organisation mondiale des douanes).

[11] This Court found that, "[a]lthough the Opinions were relevant because they dealt with goods that were materially the same as those before the Tribunal, the Tribunal failed to consider or have regard to the Opinions as required under the *Customs Tariff*": *Best Buy* (FCA 2019) at para. 5. It thus remitted the matter with instructions to the CITT to have regard to the Opinions in its redetermination.

III. The CITT decision under appeal

[12] The CITT maintained its position that the WCO Classification Opinions, which dealt with wheeled audio/video equipment floor stands, were not relevant in the classification of the Best Buy stands, the latter being television-specific, non-wheeled floor stands. It reiterated that, "[h]aving had regard to the classification opinions, the Tribunal finds that they cover goods of different form and function than the goods at issue": *Best Buy* (CITT 2019) at para. 14. This was material because, in the CITT's view, the goods in issue were more like cases and cabinets than those covered by the classification opinion. The explanatory notes to heading No. 85.29, which captures "Parts suitable for use solely or principally with the apparatus of headings 85.25 to 85.28", explicitly includes cases and cabinets specialized to receive televisions: *Best Buy* (CITT 2019) at para. 14.

[13] Finally, the CITT repeated at length its rejection, as set out in its original decision, of Canada's argument that "parts" of televisions must be articles essential to the functionality of the devices: *Best Buy* (CITT 2019) at paras. 19–20. It therefore maintained its original decision, namely that the floor stands are "parts" of televisions, rather than "furniture".

IV. Issues and standard of review

[14] Canada launched this appeal in September 2019, prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. It also filed its written submissions in March 2020, prior to this Court's decisions

in *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151, 2020 CarswellNat 4287 (WL Can) [*Neptune*]; and *Canada (Attorney General) v. Impex Solutions Inc.*, 2020 FCA 171, 2020 CarswellNat 4332 (WL Can) [*Impex*]. In *Vavilov*, the Supreme Court of Canada changed how courts must treat appeals from administrative tribunals. In *Neptune* and *Impex*, this Court addressed how these changes impact the way it must conduct appeals from CITT decisions under section 68 of the *Customs Act*, which are limited to questions of law. In *Neptune*, Rennie J.A. posited that "[t]here may nonetheless be judicial review of questions of fact or mixed fact and law from which a legal issue cannot be extricated by virtue of general principles and section 28 of the *Federal Courts Act*": at para. 15. However, in both *Neptune* and *Impex*, this Court found that the issues before it were questions of law that fell within the ambit of section 68. Rennie J.A.'s comments in *Neptune* were therefore *obiter dicta*.

[15] In its written submissions, Canada argued that it is a question of law whether the CITT had sound reason to, in this case, disregard the WCO Classification Opinion. The standard of review on an appeal from a CITT decision on a question of law, by way of section 68 of the *Customs Act*, is now correctness: *Vavilov* at para. 37; *Neptune* at para. 18; *Impex* at para. 32.

[16] However, Canada also argued that the CITT's application of the law to the facts was unreasonable. Canada argued that the CITT considered irrelevant factors in reaching its conclusion about the inapplicability of the WCO Classification Opinion: namely, the practices and procedures of the WCO Committee; and the opinion of an interior designer who testified as a witness. Canada acknowledged that these were, in both instances, issues of mixed fact and law.

[17] In light of the *obiter* comments made in *Neptune*, Canada requested, and was granted, time after the hearing of this case to make additional submissions on the issue of whether matters other than questions of law are reviewable and, if so, via what procedure and under which standard of review?

[18] In its supplementary submissions, Canada argued that judicial review of CITT decisions on questions of mixed fact and law that do not rise to the level of an error of law is available via an application for judicial review, under paragraph 28(1)(e) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In its supplementary submissions, Best Buy agreed with this proposition. Both parties agreed that the standard of review on such questions of fact or mixed fact and law is reasonableness.

[19] However, Canada also acknowledged that the Supreme Court's decision in *Vavilov* has now cast doubt on this proposition and, performing a role it submitted was somewhat akin to that of an *amicus curiae*, Canada presented arguments against this Court accepting jurisdiction to review CITT decisions on the basis of errors of fact or mixed fact and law that are not sufficiently egregious to rise to the level of questions of law as contemplated by the operation of subsection 67(3) and section 68 of the *Customs Act*.

[20] Thus, before addressing the issue of whether the CITT's application of the law to the facts was reasonable, this Court must first decide whether it has jurisdiction to review the CITT's decision on such questions of mixed fact and law.

[21] Finally, if this Court did conclude that it has jurisdiction to review CITT decisions for errors beyond the scope of the appeal as set out in section 68 of the *Customs Act*, it would also be required to determine how, as a matter of procedure, this review can be conducted. Generally, past practice in statutory appeals under the *Customs Act* was to review the CITT decision for reasonableness on the whole: see e.g. *Igloo Vikski Inc. v. Canada (Border Services Agency)*, 2014 FCA 266, 2014 CarswellNat 4603 (WL Can) at para. 2 [*Igloo Vikski* (FCA)], reversed but not on that point, *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 [*Igloo Vikski* (SCC)]. Both parties agreed that, after *Vavilov*, a separate application for judicial review would be necessary. Thus if this Court were to decide it could review the CITT decision for errors beyond those contemplated by section 68 of the *Customs Act*, it would also have to determine how to deal with the procedural challenge caused by requiring separate proceedings for review of matters of law—under section 68 of the *Customs Act*—and on any of the other grounds for review under the *Federal Courts Act*.

V. Analysis

[22] In my view, the CITT did not err in law by declining to classify the Best Buy stands in accordance with the WCO Classification Opinion. Further, the only mechanism for review of a CITT decision made under the *Customs Act* is the section 68 appeal. Given that appeals under section 68 are limited in scope to questions of law, I am of the view that CITT tariff classification decisions may not be interfered with unless an extricable legal error warrants this Court's intervention. Given my conclusion on this issue, it is unnecessary to deal with the procedural problems conducting such a review would pose.

A. Did the CITT err in law by not following the WCO Classification Opinion?

[23] Canada contends that the CITT, by considering the process by which the WCO produces a classification opinion, made an error in law when it decided the Opinions do not apply in this case. According to Canada, interpreting and applying WCO Explanatory Notes and Classification Opinions are questions of law, reviewable on a correctness standard.

[24] In my view, Canada has failed to demonstrate that the appeal raises an extricable legal question to which this Court must provide the correct answer. While I agree that interpretation of how the different provisions of the *Customs Tariff* interact will generally raise questions of law (see e.g. *Impex* at para. 40; *Neptune* at para. 18), the actual application of the provisions to a set of facts is more likely to be a matter of mixed fact and law: *Impex* at para. 34, citing *Canada (Border Services Agency) v. Decolin Inc*., 2006 FCA 417, 356 N.R. 284 at para. 41. In other words, whether a specific product fits the description of a tariff item number, in light of its physical characteristics and relevant Explanatory Notes and Classification Opinions, will generally not be a question of law.

[25] It is possible that a reviewable error of law may be extricated from a CITT finding of fact or application of law to the facts. For example, findings of fact must generally be supported by evidence, and making a finding of fact without any supporting evidence has often been characterized as an error of law, as opposed to one of fact: see e.g. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, 24 D.L.R. (4th) 453 at p. 604, cited with approval in *R. v. J.M.H.*, 2011 SCC 45,

[2011] 3 S.C.R. 197 at para. 25. Thus an egregiously incorrect and unsupported finding of fact would be reviewable on a section 68 appeal.

[26] The CITT's application of the relevant law may also be reviewable for an error of *law* if, in applying a legal rule or principle, it effectively misinterpreted or undermined the rule or principle. As the Supreme Court, Iacobucci J.A., put it in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at para. 39:

> […] After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[27] In my view, this Court's analysis of one of the issues raised in *Impex* illustrates this principle at work with regard to a CITT tariff classification decision. The case dealt with whether certain disposable shoe coverings were plastic or textile. This Court determined that, in misapplying the tariff schedule, the CITT had effectively erred in law. The relevant portion reads as follows:

> [41] I am also satisfied that the appellant's second ground of appeal, which concerns the Tribunal's alleged failure to consider Note 1 to Chapter 39 upon determining that the goods in issue were articles of plastics, raises a question of law. The appellant contends that this Note directed the Tribunal to determine first whether the goods' constituent material was a textile defined in Section XI, and more particularly a nonwoven defined in the Explanatory Notes to heading No. 56.03, before even considering whether Chapter 39 covered the goods in issue. In refusing or in neglecting to do so, the argument goes, the Tribunal overlooked a crucial analytical step prescribed by Note 1 to Chapter 39.

> [42] This second issue requires the Court to determine whether Note 1 to Chapter 39 entails that the goods' constituent material must be assessed in light of Section XI before turning to Chapter 39. In other words, the issue is whether the logic and structure of the Tariff Schedule require that a constituent material that combines textiles and plastics be assessed in a specific order. If they do, then it is an error of law not to assess that material in that order. This, again, is a question of law reviewable on a standard of correctness.

[28] Thus in *Impex*, the issue was not that the CITT allegedly erred in weighing certain factors against each other, or in unreasonably exercising a discretionary power conferred to it. Instead, this Court concluded that the CITT's reasoning evidenced a misapprehension of the requirements of the tariff schedule—in other words, of the applicable law. Had this Court not intervened, the proper functioning of the legal rule—the interplay of the different sections of the tariff schedule involved—would have been undermined. The appellant successfully demonstrated that the CITT's tariff classification decision on the merits raised an extricable question of law, reviewable on a section 68 appeal.

[29] However, in this case, no question of law was properly raised. A question of law is defined by its substance, not its form: see *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at paras. 49–50 [*Emerson Milling*]. In substance, this appeal is not about whether the CITT must have regard to WCO Classification Opinions, as that question is settled: see *Best Buy* (FCA 2019). Section 11 of the *Customs Tariff* requires the CITT have regard to WCO Classification Opinions when determining a tariff classification: see also *Best Buy* (FCA 2019).

[30] What having proper regard entails is also settled. In its earlier decision in this matter, this Court, in remitting the matter to the CITT, summarized what this provision requires, at paragraph 4:

> The phrase "regard shall be had" under section 11 of the *Customs Tariff* entails that, while not binding, opinions of the WCO must "at least be considered" in determining the classification of goods imported into Canada (*Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 8, [2016] 2 S.C.R. 80 [*Igloo Vikski*]). Similarly, this Court has examined the definition of "regard" in the context of section 11 of the *Customs Tariff*, and found that it means "to consider, heed, take into account, pay attention to, or take notice of" (*Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 at para. 13, [2004] F.C.J. No. 615 [*Suzuki*]). Having "regard" further entails that the Tribunal should respect WCO opinions unless there is "sound reason" to do otherwise (*Suzuki* at para. 13). The Tribunal may ultimately disagree with the Opinions but it must consider them and provide a sound reason as to why it chose not to follow them.

[31] I would reiterate that, generally, the CITT should respect and follow WCO Classification Opinions. This means that the CITT should seek to, if possible, make tariff classifications that are in harmony with WCO Classification Opinions, rather than in opposition to them.

[32] However, where the CITT is of the view that such a harmonious classification is *not* possible, the CITT is not bound to follow the WCO Classification Opinions: see *Best Buy* (FCA 2019) at para 4; (*Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, 319 N.R. 299 at paras. 14–17 [*Suzuki*]. The language of section 11 makes the WCO Explanatory Notes and Classification Opinions factors that must be weighed in the tariff classification process, not binding criteria. It must balance the WCO Classification Opinions and Explanatory Notes against any other factors it considers relevant. For example, it might weigh WCO Classification Opinions against apparently contradictory expert evidence: see e.g. *Suzuki* at para. 17. The appropriate weight to place on a WCO Classification Opinion will vary depending on the

specific facts of the case and, most importantly, the characteristics of the goods in issue as compared to those covered by relevant Classification Opinions.

[33] As a matter of law, the CITT is entitled to classify a product contrary to a WCO Classification Opinion when it has "sound reason" to do so: *Best Buy* (FCA 2019) at para. 4; *Suzuki* at para. 14. Whether it has sound reason in any specific case is unlikely to be a question of law but instead, as is the case here, one that can only be answered with reference to a particular set of facts. In other words, it will generally be a question of mixed fact and law.

[34] Nevertheless, Canada argues that the CITT erred in law by taking into account WCO internal processes as part of its assessment of the WCO opinions. The CITT did indeed cite portions from its decision in *Mattel Canada Inc*., 2019 CanLII 110865 (CA CITT), 2019 CarswellNat 14487 (WL Can), that describes how the WCO Classification Opinions are created: *Best Buy* (CITT 2019) at para. 9. However, in my view, it is open to the CITT to consider, in having "regard" to WCO Classification Opinions, how or why those opinions were produced. For example, it might be appropriate for the CITT to take notice of how goods reviewed by the WCO for a Classification Opinion came before the WCO, so that the CITT can assess whether the goods it is classifying are sufficiently similar to those covered by the WCO Classification Opinion. As the CITT noted, the Classification Opinions themselves are short, technical descriptions of products, and without further context—such as the background leading to publication of a specific Classification Opinion—the CITT might not be able to properly have "regard" to an opinion. Indeed, I am reticent to read into section 11 of the *Customs Tariff* strict limits on what the CITT can consider in reaching a tariff classification. In my view, it is

important that this specialized tribunal be able to consider the disputes that come before it in context, which might include taking notice of the WCO's deliberation processes.

[35] In sum, Canada has failed to convince me that the CITT, by taking into account the deliberative process the WCO Committee used to create the Classification Opinions, made an error of law in its tariff classification decision.

B. Is the CITT's application of the law to the facts reviewable by this Court?

[36] This Court has, in the past, reviewed CITT decisions for issues of mixed fact and law. For example, in *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167, 446 N.R. 352 [*HBC Imports*], this Court reviewed, and upheld, the reasonableness of the CITT's classification of a type of toboggan. In framing the issue before it, this Court noted:

> [4] The question of whether the Astra Sled should be classified under heading 95.03 requires an interpretation of the expression "other toys" as used in this heading and the application of this interpretation to the Astra Sled. This is a question of mixed fact and law which requires an interpretation of the Tribunal's own statute. The standard of review is reasonableness, which means that deference is to be given to the Tribunal (*Canadian Tire Corp. Ltd. v. President of the Canada Border Services Agency*, 2011 FCA 242, at paragraph 4; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654).

[37] While other decisions are not so explicit, in many cases this Court has effectively reviewed the CITT's decision on the merits, assessing the reasonableness of its application of the law to the facts before it, without identifying an extricable legal principle at issue: see e.g. *Canada (Attorney General) v. RBP Imports Inc.*, 2018 FCA 167 at paras. 3–5 [*RBP Imports*];

Containerwest Manufacturing Ltd. v. Canada (Border Services Agency), 2016 FCA 110 at para. 12 [*Containerwest Manufacturing Ltd.*]; *Igloo Vikski* (FCA) at para. 2. In these decisions, this Court did not distinguish between questions of fact, of law and of mixed fact and law, but instead reviewed the CITT's decision on a tariff classification for its reasonableness on the whole.

[38] However, these decisions came before the Supreme Court of Canada's decision in *Vavilov*, in which it noted the following, at paragraph 8:

> […] While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[39] In *Vavilov*, the Supreme Court of Canada reiterated that respect for legislative intent is the "polar star" of judicial review: at para. 33, citing *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 149. It also held that lower courts should no longer effectively ignore the language of statutory appeal mechanisms and treat appeals launched under them as, essentially, applications for judicial review: *Vavilov* at para. 45. Instead, courts are now required "to give effect to the legislature's institutional design choices to delegate authority through statute": *Vavilov* at para. 36.

[40] In my view, the Supreme Court's *dicta* in *Vavilov* provides sufficient basis for this Court to refocus its approach in dealing with statutory appeals under the *Customs Act* in order to more accurately reflect Parliament's intent. In its post-*Vavilov* decisions on appeals under the *Customs Act*, this Court has not had to decide the issue of whether it lacks jurisdiction to review CITT

decisions for errors falling outside the apparent scope of the section 68 statutory appeal, as these cases turned on questions of law: *Neptune* at para. 18; *Impex* at para. 40. This case, in which Canada has, in my view, failed to identify an extricable legal issue, but nonetheless also challenges the reasonableness of the CITT's classification decision on the merits, requires this Court to first decide whether it has jurisdiction to conduct such a review.

[41] At first blush, the language of the *Customs Act* would seem to preclude this Court from reviewing CITT decisions via any procedure other than the statutory appeal provided in that Act. As the statutory appeal is only available on questions of law, this Court would appear to lack jurisdiction to review CITT decisions for any errors other than purely legal ones. The relevant sections of the legislation read as follows:

Appeal to the Canadian International Trade Tribunal	**Appel devant le Tribunal canadien du commerce extérieur**
67 (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.	**67 (1)** Toute personne qui s'estime lésée par une décision du président rendue conformément aux articles 60 ou 61 peut en interjeter appel devant le Tribunal canadien du commerce extérieur en déposant par écrit un avis d'appel auprès du président et du Tribunal dans les quatre-vingt-dix jours suivant la notification de l'avis de décision.
[…]	[…]
Judicial review	**Recours judiciaire**
(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order,	**(3)** Le Tribunal canadien du commerce extérieur peut statuer sur l'appel prévu au paragraphe (1), selon la nature de l'espèce, par ordonnance, constatation ou déclaration, celles-ci

finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.	n'étant susceptibles de recours, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues à l'article 68.
[…]	[…]
Appeal to Federal Court	**Recours devant la Cour d'appel fédérale**
68 (1) Any of the parties to an appeal under section 67, namely,	**68 (1)** La décision sur l'appel prévu à l'article 67 est, dans les quatre-vingt-dix jours suivant la date où elle est rendue, susceptible de recours devant la Cour d'appel fédérale sur tout point de droit, de la part de toute partie à l'appel, à savoir :
(a) the person who appealed,	**a)** l'appelant;
(b) the President, or	**b)** le président;
(c) any person who entered an appearance in accordance with subsection 67(2),	**c)** quiconque a remis l'acte de comparution visé au paragraphe 67(2).
may, within ninety days after the date a decision is made under section 67, appeal therefrom to the Federal Court of Appeal on any question of law.	
Disposition of appeal	**Issue du recours**
(2) The Federal Court of Appeal may dispose of an appeal by making such order or finding as the nature of the matter may require or by referring the matter back to the Canadian International Trade Tribunal for re-hearing.	**(2)** La Cour d'appel fédérale peut statuer sur le recours, selon la nature de l'espèce, par ordonnance ou constatation, ou renvoyer l'affaire au Tribunal canadien du commerce extérieur pour une nouvelle audience.
[Emphasis added]	[Nos soulignés]

[42] Read together, the plain and ordinary meaning of the provisions indicate Parliament's intent to limit judicial review of CITT decisions to statutory appeals on questions of law: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27. Subsection 67(3) purports to limit the ability of a court to interfere with a CITT decision except via the statutory appeal mechanism provided for in section 68. Subsection 68(1) only allows for appeal on questions of law.

[43] This meaning is supported by the legislative context. The *Customs Act* provides for *de novo* appeal before the CITT of a CBSA tariff classification decision. Prior to this appeal, the CBSA conducts two levels of internal review: *Customs Act*, ss. 59–60. By the time a tariff classification matter reaches this Court, any contested factual issues have thus already been subject to multiple levels of review. Similarly, the application of the law to the facts—the tariff classification of the product—has also first been decided by the CBSA, reviewed internally, and then reviewed *de novo* by the CITT. What the statutory scheme contemplates for this Court to review are contested legal issues, and *not* factual ones.

[44] Further support for this interpretation can be found by comparing the appeal procedure provided for in the *Customs Act* to similar procedures for review of other types of CITT decisions. The CITT is a quasi-judicial tribunal created by the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.). It decides a wide variety of matters brought before it pursuant to several different statutory authorities. Appeals to the CITT from certain CBSA decisions are available, for example, under subsection 61(1) of the *Special Import Measures Act*,

R.S.C. 1985, c. S-15 [*SIMA*]. Subsection 61(3) makes these decisions final and conclusive except where subject to appeal, and subsection 62(1) makes appeals to this Court available on questions of law. Notably absent in the *SIMA* is the language used in the *Customs Act* to expressly eliminate judicial review of all other CITT decisions made under the *SIMA*. Indeed, unlike the *Customs Act*, the *SIMA* explicitly provides for launching an application for judicial review of certain decisions on grounds other than provided for in the statutory appeal mechanism. For example, section 76 of the *SIMA* provides:

Application for judicial review	**Contrôle judiciaire**
76 Subject to subsection 61(3) and Part I.1 or II, an application for judicial review of an order or finding of the Tribunal under this Act may be made to the Federal Court of Appeal on any of the grounds set out in subsection 18.1(4) of the *Federal Courts Act*.	**76** Sous réserve du paragraphe 61(3) et des parties I.1 et II, les ordonnances ou conclusions du Tribunal prévues à la présente loi sont sujettes au contrôle judiciaire de la Cour d'appel fédérale pour l'un des motifs prévus au paragraphe 18.1(4) de la *Loi sur les Cours fédérales*.

[45] The availability of judicial review is also dealt with at section 96.1 of the *SIMA*, which enumerates at length the types of CITT decisions and issues subject to judicial review, as opposed to being reviewable under that legislation's statutory appeal mechanism.

[46] As Canada points out, the explicit reference in the *SIMA* to the availability of judicial review of CITT decisions made under that Act can be contrasted with Parliament's explicit statement that CITT decisions made under subsection 67(3) of the *Customs Act* are "not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68." In my view, the comparison further supports

the plain and ordinary interpretation of the meaning of the *Customs Act*, which is that judicial review outside the statutory appeal mechanism, and thus for questions of mixed fact and law, is unavailable. If Parliament's institutional design choices are to be respected, factual issues and issues of mixed fact and law for which no legal question can be extracted must *not* be subject to review by this Court.

[47] This conclusion runs contrary to the position taken on this issue by both parties. Canada argues, and Best Buy agrees, that paragraph 28(1)(e) of the *Federal Courts Act* provides this Court with broad jurisdiction to review CITT decisions for matters not subject to the statutory appeal mechanism. In other words, all matters not captured by the term "question of law". In support of this proposition, Canada argues that the "rule of law" requires judicial review be available to guard against unreasonable CITT rulings on matters of fact or mixed fact and law. As a subsidiary argument, Canada points to past jurisprudence of this Court recognizing the possibility of judicial review of CITT decisions, and indeed of other tribunals subject to similar limited scope appeal clauses, for matters falling outside the scope of the statutory appeal.

[48] I have already described why I view this Court's past practice of reviewing these matters on a reasonableness standard, within the procedural vehicle of a section 68 appeal, as of limited import in determining how it should conduct statutory appeals under the *Customs Act* going forward. *Vavilov* implemented "a holistic revision of the framework for determining the applicable standard of review": at para. 143. The Supreme Court explicitly noted that past cases dealing with "the effect of statutory appeal mechanisms […] will necessarily have less precedential force" after *Vavilov*: at para. 143. In my view, the past cases in which mixed

questions were reviewed, under section 68, on a reasonableness standard, effectively ignored subsection 67(3) and Parliament's institutional design choice. *Vavilov* makes clear that this past practice should no longer be sustained going forward. Furthermore, in truth the jurisprudence leans *both* ways.

[49] As noted above, in some cases this Court has, either explicitly or implicitly, reviewed the CITT's application of the law to the facts: see e.g. *HBC Imports* at para. 4; *RBP Imports* at paras. 3–5; *Containerwest Manufacturing* at para. 12; *Igloo Vikski* (FCA) at para. 2.

[50] However, in others, this Court limited its inquiry to whether a reviewable error of law occurred, and declined to review the CITT's findings of fact or application of law to those facts. In *Star Choice Television Network Inc. v. Canada (Commissioner of Customs and Revenue)*, 2004 FCA 153, 2004 CarswellNat 1004 (WL Can) at para. 9, Strayer J.A. noted that questions of law were "the only matter properly in issue on this appeal", before concluding the CITT had not made a reviewable error of law. In *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA), 25 Admin L.R. (3d) 101 at para. 36, Sharlow J.A. wrote that "[u]nder subsection 67(3) and subsection 68(1) of the *Customs Act*, customs tariff classification decisions of the CITT are not subject to judicial review and are subject to appeal to this Court only on questions of law", before concluding that the CITT had not made a reviewable error of law. And indeed, in one of its handful of decisions on a section 68 appeal, the Supreme Court noted in *obiter* that, by virtue of subsection 67(3) of the *Customs Act*, "CITT findings of fact are immune from appellate review": *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 at para. 26.

[51] Thus in my view, past jurisprudence does not provide a persuasive argument as to why the clear meaning of the *Customs Act* should be disregarded and judicial review of CITT decisions be permitted outside of the section 68 statutory appeal mechanism. Given that that mechanism is restricted in scope to matters of law, I am of the view that this Court may only intervene in a CITT decision if it discloses a reviewable error of law.

[52] Does this conclusion offend the "rule of law"? Canada argues that it is the constitutional role of the courts to supervise the executive branch of government, and that in order to be fulfilled, this role requires full review of administrative decisions on all matters. In other words, reasonableness review of administrative decisions is constitutionally entrenched, and cannot be limited by legislative act.

[53] It is true that the Supreme Court, in *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 [*Crevier*], held that the legislature cannot completely oust judicial review via use of a privative clause. It is worth reviewing the facts of that oft-cited case, and briefly unpacking the Supreme Court's holding.

[54] *Crevier* dealt with the question of whether a provincial legislature can entirely eliminate judicial review of an administrative tribunal empowered to make findings of fact and rule on matters of law. The administrative scheme at issue was set up under Québec's *Professional Code*, R.S.Q. 1977, c. C-26, which at the time granted the Professions Tribunal judicial powers to hear appeals of disciplinary decisions made by the different professional orders' Disciplinary Committees. The Professions Tribunal was composed of judges of the Provincial Court, *i.e.* not

judges appointed by the federal government under section 96 of what was then still the *British North America Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, since reprinted in R.S.C. 1985, Appendix II., No. 5. At the time, article 194 of the *Professional Code* purported to completely eliminate recourse to the Superior Courts for review of Professions Tribunal decisions. It read:

194. No extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against the persons mentioned in section 193 acting in their official capacities.	**194.** Aucun des recours extraordinaires prévus aux arti-cles 834 à 850 du Code de procédure civile ne peut être exercé ni aucune injonction accordée contre les person-nes visées à l'article 193 agissant en leur qualité officielle.

[55] The articles of the *Code of Civil Procedure* referred to dealt with applications for judicial review. The most relevant provision was article 846, which read:

846. The Superior Court *may*, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court, in the following cases:	**846.** La Cour supérieure peut, à la demande d'une partie, évoquer avant jugement une affaire pendante devant un tribunal soumis à son pouvoir de surveillance ou de contrôle, ou reviser le jugement déjà rendu par tel tribunal:
1. when there is want or excess of jurisdiction;.	1. dans le cas de défaut ou d'excès de juridiction;
2. when the enactment upon which the proceedings have been based or the judgment rendered is null or of no effect;	2. lorsque le règlement sur lequel la poursuite a été formée ou le jugement rendu est nul ou sans effet;
3. when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, or will not be done;	3. lorsque la procédure suivie est entachée de quelque irrégularité grave, et qu'il y a lieu de croire que justice n'a pas été, ou ne pourra pas être rendue;

4. when there has been a violation of the law or an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice	4. lorsqu'il y a eu violation de la loi ou abus de pouvoir équivalant à fraude et de nature à entraîner une injustice flagrante.
However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgments of the court seized with the proceeding are not susceptible of appeal.	Toutefois, ce recours n'est ouvert, dans les cas prévus aux alinéas 2, 3 et 4 ci-dessus, que si, dans l'espèce, les jugements du tribunal saisi ne sont pas susceptibles d'appel.
[Emphasis added, *italics in original*]	[Nos soulignés]

[56] The Supreme Court struck down article 194 on the basis that it had the effect of constituting the Professions Tribunal a section 96 court. Chief Justice Laskin, writing for the Court, held the following:

> It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. (*Crevier* at pp. 236–37 [Emphasis added])

[57] *Crevier* has since 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 decisions 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; *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, as the emphasized portion of the above cited passage makes clear, *Crevier* actually explicitly states that the legislature may oust judicial review on issues not touching jurisdiction.

[58] It is also clear from the above cited passage that, at the time, the Supreme Court considered "questions of jurisdiction" to be a more narrow and important category of question than "questions of law". In my view, it follows that, according to the reasoning espoused in *Crevier*, a statutory scheme that allows for appeal of an administrative decision on a question of law meets the constitutional threshold articulated in *Crevier*.

[59] The Supreme Court in *Crevier* was pre-occupied with the lack of any appeal from a decision of the Professions Tribunal to a Superior Court. Comparing to the legislative scheme at issue in this case, it is clear that the Supreme Court's holding in *Crevier* would limit Parliament's ability to completely insulate the CITT from *any* Superior Court review. In the *Customs Act*, Parliament has not attempted to do so. Instead, it has provided an appeal mechanism, and simply

limited what can be appealed to questions of law. Similar to the *Code of Civil Procedure* at the time *Crevier* was decided, the *Federal Courts Act* makes clear that the traditional judicial review remedies provided for in that Act—injunction, *certiorari*, prohibition, etc.—are unavailable when a statutory appeal from an administrative decision is provided for: *Federal Courts Act*, s. 18.5.

[60] In my view, *Crevier* supports the position that Parliament may restrict judicial review to questions of law. A statutory provision having this effect, such as section 68 of the *Customs Act*, meets any threshold established in *Crevier*. To hold otherwise would be to eliminate any possibility that Parliament could, via statute, restrict the ambit of judicial review of administrative action. What purpose would the specific provisions of the *Customs Act*, and many other federal statutes that restrict review, serve if recourse to the Courts could always be had on all issues under the general provisions of section 18 and section 28 of the *Federal Courts Act*?

[61] This is also why, in my view, the case of *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 [*PSAC*], does not bind this panel into allowing a judicial review to proceed in this matter. In *PSAC*, the Federal Public Sector Labour Relations and Employment Board (the Board) argued that, by virtue of a privative clause found in its constituting statute, its decisions were not amenable to review for errors of law, erroneous findings of fact or any other departures from law: *PSAC* at paras. 10–12. This Court rejected that argument, holding that the Board's decisions were reviewable for their reasonableness: *PSAC* at para. 34.

[62] There are two factors that differentiate *PSAC* from this case. Firstly, the legislation at issue in *PSAC* did not provide for a statutory appeal, and only provided for a limited judicial review on the grounds of jurisdictional or procedural fairness issues, or fraud: *PSAC* at paras. 10–11. According to the Board, this meant that it could not be reviewed on matters of law.

[63] There is of course, no such argument being made here. The CITT's decisions are clearly reviewable for errors of law, and on a correctness basis. Thus the limits on the availability of judicial review being contemplated in this case are significantly more narrow than those argued for by the Board and rejected by this Court, in *PSAC*. I am not convinced that the reasoning and outcome in *PSAC* would have been the same had the Board's statute provided for full review of its decisions on matters of law. I view the very different nature of the review mechanisms at issue in *PSAC* and in this case as sufficient to distinguish the cases.

[64] Were the cases not distinguishable, *PSAC* was nevertheless decided before the Supreme Court of Canada's decision in *Vavilov*. As noted above, *Vavilov* explicitly required lower courts rethink their approach to dealing with statutory appeals, with a view to giving effect to legislative intent. In my view, this major change in the law since *PSAC*, a change which goes to the heart of the issue in this application, is sufficient to warrant this panel to treat the issue as a novel one, and not consider itself bound by the panel's holding in *PSAC*.

[65] Further, in apparent contrast to the *dicta* in *PSAC*, this Court, in recent decisions, found it lacked jurisdiction to review administrative decisions for factual and policy issues where the applicable statutes limited appeals to questions of law and jurisdiction: *Emerson Milling* at para.

26; *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, 2020 CarswellNat 3692 (WL Can) at paras. 69, 78 [*Bell Canada*].

[66] It is true that, in both those cases, the applicable legislation also provided for appeals to the Governor in Council: *Canada Transportation Act*, S.C. 1996, c. 10, s. 40; *Telecommunications Act*, S.C. 1993, c. 38, s. 12(1). The availability of this other mechanism for appeal played a part in this Court's reasoning declining jurisdiction: *Emerson Milling* at para. 12; *Bell Canada* at paras. 48–50. However, I do not think that the Governor in Council review provided for in those schemes fulfills a factual review function. I am of the view that the validity of a statutory provision limiting appeals to this Court on questions of law is not conditional upon the availability of Governor in Council review for matters falling outside the scope of the appeal. As such, I do not see how this Court can review CITT decisions for issues of fact or mixed fact and law on an application for judicial review pursuant to the *Federal Courts Act*. In my view, subsection 67(3) and section 68 of the *Customs Act* preclude the possibility of such an application. While paragraph 28(1)(e) of the *Federal Courts Act* contemplates applications for judicial review of CITT decisions, as noted above, the CITT makes decisions pursuant to a variety of statutory authorities and some, such as the *SIMA*, do allow for judicial review. The *Customs Act* expressly does not. I would not disregard this expression of Parliament's intent.

[67] Given that Canada acknowledges that its second line of argument on the merits attacks the CITT's application of the law to the facts, I see no need to deal comprehensively with that argument. Indeed, doing so would be engaging in the exact judicial review exercise I have just concluded this Court is precluded from conducting.

C. What is the appropriate procedural path for conducting judicial review?

[68] Given my conclusion that judicial review is unavailable outside of the statutory appeal mechanism provided for in the *Customs Act*, there is no need for me to address how a party might conduct both an appeal and an application for judicial review of the same decision. However, it is worth noting that if this Court was to accept the position of the parties and find that judicial review was available pursuant to sections 18 and 28 of the *Federal Courts Act*, under a separate and parallel application, it is clear that such a process would be more burdensome and more complicated than the efficient and timely system of review contemplated by the *Customs Act* alone. This would fly in the face of the intent of Parliament to simplify and expedite the review of the highly technical decisions of the CITT.

[69] Thus, in my view, the only procedure by which this Court may review a CITT decision is an appeal made under section 68 of the *Customs Act*.

VI. Conclusion

[70] I would dismiss the appeal, with costs.

"D. G. Near"

J.A.

GLEASON J.A. (Concurring Reasons)

[71] I have had the opportunity of reading the reasons of my colleague, Near, J.A. in draft, and, while I concur in result, I arrive at my conclusion by a slightly different path. As is more fully articulated below, it is my view that a slightly broader range of factual determinations made by the CITT may be reviewed by this Court than my colleague would permit, although such review would require the filing of an application for judicial review. While this conclusion does not affect the result in this appeal, it is, in my opinion, nonetheless important to leave the door open to this sort of review, which might be determinative in a future case under the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp) or another statute containing a privative clause.

[72] That said, I reach the same conclusion as my colleague in terms of the disposition of this appeal as the slightly broader basis for factual review that I contemplate is not available in an appeal. Moreover, even if an application for judicial review had been filed, the sorts of factual errors alleged by the appellant in the instant case would provide no basis for intervention. Thus, like my colleague, I would dismiss this application for judicial review.

[73] I commence my analysis of these issues by noting that I agree that this Court's decision in *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151, 2020 CarswellNat 4287 [*Neptune*] does not settle the issue of whether factual determinations of the CITT may be reviewed by this Court as the issue was not central to the determination in that case. The comments made on the issue in *Neptune* are accordingly non-binding *obiter dicta*. The present case is the first time this issue has been squarely before this Court in the context of the CITT, although a very similar issue was before the Court recently in *Canada (Attorney General)*

v. Public Service Alliance of Canada, 2019 FCA 41, 432 D.L.R. (4th) 170 [*PSAC*] in the context of federal labour tribunals, where this Court reached an opposite conclusion from that of my colleague.

[74] For my colleague, the *dicta* of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*] constitute an invitation to this Court to breathe new life into the privative clause in the *Customs Act*, such that it forecloses judicial any review of factual determinations, other than what my colleague qualifies as "egregious" factual determinations, or those for which there is no evidence, which would constitute errors of law and thus could be raised in a statutory appeal under section 68 of the *Customs Act*. With respect, I disagree with that approach for several reasons.

[75] First, I do not believe that the *dicta* in *Vavilov* support this reasoning, especially when one understands *Vavilov* in the context of how administrative law has developed in Canada and considers that the Supreme Court reconfirmed in *Vavilov* much of what it had earlier determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]. Second, my colleague's approach is inconsistent with section 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Third, I believe that this issue was settled in *PSAC*, which is binding on this panel. Fourth, contrary to what my colleague suggests, I do not believe that this Court's decisions in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 [*Emerson Milling*] and *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, 2020 CarswellNat 3692 [*Bell Canada*] mandate my colleague's approach as the Court was not asked in either of those cases to rule on the availability of an application for judicial review as

opposed to deciding on the bounds of a permissible appeal. In addition, there were important differences in the statutory context in *Emerson Milling* and *Bell Canada*. Finally, my colleague's approach sits uncomfortably with how cases of this nature have been considered by this Court and the Supreme Court of Canada since *Dunsmuir*. I explore each of these points more fully below.

I. The Impact of the Supreme Court's Decision in Vavilov

[76] Turning first to the *dicta* in *Vavilov*, to put that case in context, it is useful to commence with a brief overview of how administrative law has developed over the last several decades, with particular focus on the availability of review for factual errors and the curial treatment of privative clauses. For it is only by understanding this context that one can appreciate the import of the decision in *Vavilov*.

A. Historical Overview

[77] Historically, review for factual errors made by administrative decision-makers was not available unless they fit into the category of jurisdictional error. However, legal errors made by administrative decision-makers were reviewable if they appeared on the face of the record. See Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2021, release 1), ch. 1 at 1-11 to 1-14.

[78] With the growth of the administrative state, legislatures inserted privative clauses into many statutes in an attempt to shield the decisions of administrative decision makers from curial review. In the years following adoption of provisions like subsection 67(3) of the *Customs Act*, Canadian courts, including the Supreme Court of Canada, determined that privative clauses could not shield patently unreasonable administrative decisions from review because this would violate the rule of law, which could not allow such fundamentally flawed administrative decisions to stand. In order to provide a basis for judicial intervention, under the administrative law framework then in force, patently unreasonable decisions were characterized as instances where an administrative decision maker exceeded its jurisdiction.

[79] Patently unreasonable decisions included those tainted *both* by patently unreasonable legal determinations *and* by patently unreasonable factual determinations. Legal determinations were patently unreasonable if they offered an interpretation that could not be rationally supported by the relevant legislation (see, e.g. *C.U.P.E v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, at 237). In the context of collective agreement provisions, a patently unreasonable interpretation was characterized as one the provisions could not reasonably bear (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 341). Factual determinations were characterized as being patently unreasonable where the evidence, viewed reasonably, was incapable of supporting the administrative decision-maker's findings of fact (see, e.g. *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389 [*Lester*] at 687).

[80] As concerns factual determinations, the starting point for the discussion of these principles in the Supreme Court's jurisprudence of the era is the decision in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6, one of the seminal cases enshrining the principle of deference in Canadian administrative law. There, the Supreme Court considered the ambit of review of determinations made by the Saskatchewan Labour Relations Board, whose decisions were protected by a strongly-worded privative clause. It stated as follows at 388-389:

> There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.
>
> **A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include** acting in bad faith, **basing the decision on extraneous matters, failing to take relevant factors into account**, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts: *Anisminic, Ltd. v. Foreign Compensation Commission et al.; Noranda Mines Ltd. v. The Queen et al., supra; Farrell et al. v. Workmen's Compensation Board, supra; R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.*
>
> [Footnotes omitted and emphasis added.]

[81] The Supreme Court's reference to "basing a decision on extraneous matters" and "failing to take relevant factors into account" can be read as encompassing factual matters.

[82] The possibility of seriously erroneous factual determinations constituting patently unreasonable error was confirmed by the Supreme Court of Canada in its subsequent decision in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, 14 D.L.R. (4th) 289. There, the Supreme Court was faced with judicial review of a decision of a labour arbitrator, whose decision was protected by a privative clause. In concurring reasons, two judges who wrote separately for the Court, confirmed that a narrow range of factual errors were subject to review for being patently unreasonable.

[83] Justice Lamer, who wrote for two members of the Court, stated at 492-495:

> **In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of *which* errors of law result in the loss of jurisdiction.** […] this Court has tended since *Nipawin, supra,* and C.U.P.E., *supra,* to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, **only unreasonable errors of law can affect jurisdiction.**
>
> […]
>
> **In looking for an error which might affect jurisdiction, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact.** In addition to the difficulty of classification, **the distinction collides with that given by the courts to unreasonable errors of fact. An unreasonable error of fact has been categorized as an error of law**. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. **What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has**

> **the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.**
>
> […]
>
> **In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.** I hasten to add that **the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subject to review, only unreasonable errors of fact are, but no others.**

[84] Justice Beetz, who wrote for the remaining members of the Court, noted at 480-481:

> Whatever the arbitrator's jurisdiction, strictly speaking, **an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice would divest him of his jurisdiction and be a basis for judicial review by evocation, regardless of any privative clause.**
>
> **I cannot say that the arbitrator's award constituted such an abuse.**
>
> [...] I am far from certain that I would have decided as the arbitrator did, but I also cannot say that the less severe penalty which is imposed instead of the ultimate penalty is, in view of all the circumstances, **clearly abusive, flagrantly unjust, absurd, contrary to common sense, and lacking any basis in the evidence as a whole.**
>
> [emphasis added]

[85] The notion that certain types of serious factual errors will support intervention even in the face of a privative clause was again endorsed by the Supreme Court of Canada in *Lester*, where the Court again reviewed a decision of a labour board, whose decisions were protected by a privative clause. While holding that the board's decision was patently unreasonable because there was no evidence to support that a successorship had occurred under a rational interpretation of the relevant provisions in the legislation, Justice McLachlin (as she then was) described the

sort of factual error that might allow intervention under the patently unreasonable standard is the following way at 687:

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. **Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere**.
>
> [emphasis added]

[86] In *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, 144 D.L.R. (4th) 385, the Supreme Court again addressed the issue in the context of review of a decision of a labour arbitrator, that was protected by a privative clause. In overturning the arbitrator's conclusion on the issue of just cause, Justice Cory, writing for the majority of the Court stated at paras. 41- 45 and 47- 48:

> 41 A number of decisions of this Court have considered the circumstances which will give rise to a finding that a decision of an administrative body is patently unreasonable. The test has been articulated somewhat differently for findings of fact and findings of law.
>
> 42 Where a tribunal is interpreting a legislative provision, the test is:
>
> . . . was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?
>
> See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, at p. 237.
>
> 43 A slight variation of this test applies to arbitrators interpreting a collective agreement. In those circumstances, a court will not intervene "so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear":*Bradco*, *supra*, at p. 341.

44 **It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient.** As Estey J., dissenting in part, noted in *Douglas Aircraft Co. of Canada v. McConnell*, 1979 CanLII 51 (SCC), [1980] 1 S.C.R. 245, at p. 277:

> . . . **a decision without any evidence whatever in support is reviewable as being arbitrary**; but on the other hand, **insufficiency of evidence in the sense of appellate review is not jurisdictional,** and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.

45 **When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact**": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, 1990 CanLII 22 (SCC), [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

[...]

47 **In order to decide whether a decision of an administrative tribunal is patently unreasonable, a court may examine the record to determine the basis for the challenged findings of fact or law made by the tribunal**. As Gonthier J., writing for the majority in *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1370, observed "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis." In *Lester*, supra, this Court conducted a review of the record to determine if there was any evidence which could reasonably support a particular factual finding made by a labour relations board.

48 Therefore, **in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence that formed the basis for the inference**. I would stress that this is not to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that **even if a court disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can only substitute its opinion for**

> **that of the tribunal where the evidence viewed reasonably is incapable of supporting the tribunal's findings.**
>
> [emphasis added]

[87] It was against this backdrop that the provisions in the *Federal Courts Act* providing for judicial review of federally-regulated decision-makers were enacted. To a certain extent, they provided for review on a somewhat broader basis than that which was historically available at common law.

[88] Currently enshrined in sections 18, 18.1-18.5 and 28 of the *Federal Courts Act*, these provisions allow for judicial review by the Federal Court of Appeal (for the tribunals named in subsection 28(1) of the *Federal Courts Act*), or by the Federal Court (for all other federally-regulated administrative decision-makers), except where a statutory right of appeal is provided. Subsection 18.5 of the *Federal Courts Act*, which is of central importance to the issues before us, provides that access to judicial review is foreclosed *only* to the extent a right of appeal is present. It states:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la

or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[89] Grounds for review are listed in subsection 18.1(4) of the *Federal Courts Act*, which provides:

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**(4)** Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	**a)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	**b)** n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	**c)** a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(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;	**d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	**e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.	**f)** a agi de toute autre façon contraire à la loi.

[90] With the growth in number and expertise of administrative decision-makers and the increasing complexity of questions remitted to them, the Supreme Court of Canada determined that, at least in certain instances, legal determinations made in the absence of a privative clause should be afforded deference. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 DLR (4th) 1 [*Southam*], building on its earlier decision in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [*Pezim*], the Supreme Court developed a third standard of review somewhere between correctness and patent unreasonableness, which has been termed reasonableness *simpliciter*. Such standard required that a decision withstand a somewhat probing examination. The Supreme Court held that the difference between a merely unreasonable and a patently unreasonable decision was in the immediacy or obviousness of the defect. If the defect was apparent on the face of the decision-maker's reasons, then the decision was patently unreasonable. Conversely, if it took some significant searching or testing to find the defect, then the decision was unreasonable but not patently unreasonable.

[91] In *Southam*, the new reasonableness *simpliciter* standard of review was applied to all aspects of a decision of the Competition Tribunal, including its determinations of mixed fact and law. The relevant legislation provided for a right of appeal to this Court on issues of law and, with leave, on issues of fact.

[92] Perhaps not surprisingly, the determination of which of three standards of review might apply and discernment of their respective content proved increasingly complex and much litigation was devoted to the point.

[93] The Supreme Court of Canada developed the so-call “pragmatic and functional” analysis to assist in this discernment. As developed particularly in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 1222, 60 D.L.R. (4th) 193, this analysis required a reviewing court to consider several contextual factors to ascertain the applicable standard of review. These principally were: the presence or absence of a privative clause in the legislation creating the decision-maker; the expertise of the administrative decision-maker as compared to that of a court in respect of the point(s) in issue; the purpose of the statute conferring jurisdiction on the decision maker and of the provision(s) in issue; and the nature of the problem solved in the decision under review.

[94] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court confirmed that the foregoing analysis applied to each of the determinations made by an administrative decision-maker. In result, different standards of review could, and frequently did, apply to different parts of a decision.

[95] The increasing complexity of the requisite analysis and its concomitant impact on predictability and cost in judicial review matters gave rise to significant criticism, causing the

Supreme Court of Canada to largely jettison and re-work the entire framework for judicial review in *Dunsmuir*.

[96] In *Dunsmuir*, the Supreme Court collapsed two of the three previous standards of review of patent unreasonableness and reasonableness *simpliciter* into a single deferential standard of review called reasonableness. Thus, post-*Dunsmuir*, there were and are but two standards of review: correctness and reasonableness.

[97] The Supreme Court held in *Dunsmuir* that the reasonableness standard was presumptively applicable in most cases, but held that the presumption could be rebutted where the question fell into one of four defined categories or where the contextual factors enumerated in *Pushpanathan* might require selection of the correctness standard. The four categories for application of correctness set out by the Court in *Dunsmuir* were: (1) constitutional questions; (2) questions relating to the jurisdictional boundaries between two or more competing administrative decision-makers; (3) questions of central importance to the legal system as a whole; and (4) what the majority termed "true questions of jurisdiction or vires", which were said to encompass jurisdiction "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (at para. 59).

[98] The single framework for review under the deferential reasonableness standard was defined in *Dunsmuir* as being concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with assessment of whether a

decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and applicable law.

[99] Notably, under *Dunsmuir*, the presence of a privative clause in a decision-maker's constituent statute no longer limits the scope of the Court's review to patent unreasonableness. Indeed, in *Dunsmuir*, the decision of the adjudicator under review was protected by a strongly-worded privative clause in s. 101(1) of the New Brunswick *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, which provided that "Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court". The presence of this provision in the adjudicator's constituent statute played no role in the Supreme Court's analysis of whether the decision was reasonable. Instead, the Court applied its newly-formulated approach to reasonableness and overturned the adjudicator's statutory interpretation.

[100] In reaching its decision, the Supreme Court made two points of particular relevance for the present appeal. First, it noted that the sort of review it had fashioned under the newly-formulated reasonableness standard was required by rule of law principles and that judicial review is constitutionally guaranteed in Canada. At paragraphs, 27-31 Bastarache and Lebel, JJ., writing for the majority, stated as follows:

> [27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while

exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in

> this respect (*Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:
>
> > Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]
>
> See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[101] Second, it was clear that the newly-formulated reasonableness standard applies to *both* legal and factual determinations made by an administrative decision-maker. Indeed, this is inherent in the formulation of the standard itself, which requires that a reasonable decision be defensible in light of *both* the applicable facts and law.

[102] Subsequent to the decision in *Dunsmuir*, courts, including this one and the Supreme Court of Canada, applied the newly-formulated reasonableness standard in judicial review of administrative decisions, including those where the decision was shielded by a privative clause (see, e.g. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp*

& Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458; *Igloo Vikski*; *PSAC* and the various cases listed in the appendix to that decision).

[103] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*], which was decided the year after *Dunsmuir*, the Supreme Court of Canada confirmed that the *Dunsmuir* formulation of reasonableness applies under the *Federal Courts Act* and that questions of law are subject to reasonableness review, despite the wording of paragraph 18.1(4)(*c*), which contemplates review for errors of law. The majority held that the paragraph merely listed the grounds of review as opposed to the standard of review to be applied to errors of law. As for questions of fact, however, both the majority and the minority held that paragraph 18.1(4)(*d*) of the *Federal Courts Act* sets out both the grounds of review and the parameters of what reasonableness requires for review of factual errors. The majority noted that it was "[…] clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*" (at para. 46). Justice Rothstein, writing in dissent, concurred on this point.

[104] It is noteworthy that the decision of the Immigration Appeal Division that was the subject of review in *Khosa* was protected by a privative clause, albeit the clause was less broadly worded than the one in section 67 of the *Customs Act*. Subsection 162(1) of the *Immigration and Refugee Protection Act* provided that the Immigration Appeal Division had "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction".

[105] One further development of the case law of the Supreme Court of Canada in the wake of *Dunsmuir*, decided prior to *Vavilov,* merits mention, namely the decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 [*Edmonton East*]. There, the Supreme Court confirmed that the *Dunsmuir* reasonableness analysis applied to statutory appeals in addition to judicial review applications.

[106] With this background in mind, it is now possible to turn to examine the decision of the Supreme Court of Canada in *Vavilov*.

B. The Decision of the Supreme Court of Canada in *Vavilov*

[107] In *Vavilov*, the Supreme Court set out a revised framework applicable to judicial review in Canada, but, in so doing, confirmed that the "revised framework will continue to be guided by the principles underlying judicial review […] articulated in *Dunsmuir* [...]: that judicial review functions to maintain the rule of law while giving effect to legislative intent" (at para. 2). The Court also, with three exceptions, maintained the previous framework enshrined in *Dunsmuir*. More specifically, it confirmed that reasonableness is a single standard, that takes it colour from context, and that reasonableness is concerned both with the existence of justification, transparency and intelligibility within the decision-making process and with assessment of whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and applicable law. In *Vavilov,* the Court gave more definition to this

formulation of the reasonableness standard, but did not overturn the fundamental approach set out in *Dunsmuir*.

[108] In terms of the three changes to the previous framework wrought by *Vavilov*, the Supreme Court determined that the contextual factors from *Pushpanathan* (which, it will be recalled, included the presence of a privative clause) henceforth play no role in selection of the standard of review. Second, it abolished the category of so-called "true questions of jurisdiction", which were previously held in *Dunsmuir* to give rise to correctness review. Following *Vavilov*, such questions are now instead subject to reasonableness review, just like most issues in a judicial review application. Thus, currently, unless a statute specifically sets out the applicable standard of review, reasonableness will be applied in judicial review of all questions except constitutional questions, questions relating to the jurisdictional boundaries between two or more competing administrative decision-makers and questions of central importance to the legal system as a whole.

[109] The third change to the previous framework for conduct of judicial review wrought by *Vavilov* concerns the approach to statutory appeals. The Court held that, absent statutory language to the contrary, statutory appeals henceforth will be subject to appellate as opposed to judicial review principles, thereby overturning its earlier holdings on the point, including in *Edmonton East*, *Pezim* and *Southam*. The standards from *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 are accordingly now applicable to statutory appeals from administrative decisions. Thus, in a statutory appeal, errors of law are now subject to review under the correctness standard whereas, where an appeal is provided for factual issues, errors of fact or of

mixed fact and law from which a legal issue cannot be extricated are subject to review for palpable and overriding error.

[110] In so deciding, the majority of the Supreme Court held at paragraph 45 of *Vavilov*, that "The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of the court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding". The majority reconfirmed this point at paragraph 52, where it noted:

> [...] statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, **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**, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.
>
> [emphasis added]

[111] Thus, the Supreme Court determined that, as a matter of principle, the availability of limited appellate review does not foreclose the availability of judicial review. Indeed, such holding mirrors what subsection 18.5 of the *Federal Courts Act* already provides. This holding is important in the present case. While Supreme Court did not specifically address the issue now before us in *Vavilov*, it must have been aware that several statutes, like the *Customs Act*, which

contain a limited right of appeal, also contain a privative clause. Thus, its failure to indicate that such a clause would bar access to judicial review is telling.

[112] Moreover, nowhere in *Vavilov* does the Supreme Court endorse the notion that privative clauses may bar access to judicial review or to review for particular sorts of issues. A complete bar on the availably of judicial review for any type of issue would offend the rule of law as the Supreme Court noted in *Dunsmuir*, a holding that was specifically endorsed in *Vavilov* at para. 24. Further, the Court in *Dunsmuir* and *Vavilov* did not overturn the previous decades-old case law determining that what were previously characterized as patently unreasonable factual errors, formerly called jurisdictional, remain reviewable, albeit now under the reasonableness standard.

[113] To the contrary, the Supreme Court specifically contemplates in *Vavilov* that factual issues may give rise to unreasonable decisions. In providing further guidance as to the conduct of reasonableness review and the characteristics of a reasonable decision, the Supreme Court in *Vavilov* elucidated that there are two types of flaws that may render a decision unreasonable: either a failure of rationality in the reasoning process, where reasons are given, or the untenable nature of the decision in light of the legal and factual constraints that bear on it (at para. 101).

[114] Factual issues may give rise to an unreasonable decision under either type of flaw. The majority indicated in respect of a failure of rationality in the reasoning process, quoting from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 and *Southam* at paragraph 102 of its reasons in *Vavilov*, that a reviewing court "must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence

before it to the conclusion at which it arrived". Clearly, this contemplates a decision-maker's treatment of factual issues.

[115] The Court likewise contemplated that failure to reasonably address factual issues might lead to an untenable result. The majority commented on this point as follows at paragraph 126:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

[116] Thus, under the reasonableness standard of review delineated in *Vavilov*, factual determinations can be the subject of review. In light of this, I do not believe that one can read the *dicta* in the case as endorsing the notion that privative clauses are to be henceforth read as barring access to judicial review for all factual issues. This is particularly so in light of the limited role afforded to privative clauses by the Supreme Court over the last several decades and the recognition by that Court that the rule of law requires review for factual errors, the most serious of which were formerly called jurisdictional. Such errors now come within the ambit of unreasonable errors.

[117] This does not mean that privative clauses have been rendered meaningless. Rather, they are part of the relevant statutory framework – an important contextual factor in determining the parameters of a reasonable decision according to *Vavilov* and the case law of this Court – and such clauses highlight the deferential nature of reasonableness review for decisions falling within the ambit of the clauses. I do not believe there is any other way to reconcile the collapsing of the patent unreasonableness and reasonableness standards of review into a single standard of reasonableness other than to recognize that review is available under the reasonableness standard for what were formerly characterized as patently unreasonable errors, which include serious factual errors, even in the face of a privative clause.

[118] This view is shared by Professor Paul Daly, who has written extensively on administrative law matters. In a blog post entitled "Unresolved Issues after Vavilov IV: The Constitutional Foundations of Judicial Review" (17 November 2020), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/#_ftn31>, he explained the following:

> Let me put the difficulty in stark terms. There is nothing, on the face of *Vavilov*, to prevent a legislature from eliminating reasonableness review. As the majority puts it, "where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law." But the "rule of law" here means only that limited class of cases in which correctness review applies to allow the courts to furnish a final, definitive answer to a question in the interests of uniformity. As long as the courts are able to review constitutional questions, questions of central importance to the legal system or questions of overlapping jurisdiction for correctness, nothing seems to stand in the way of legislation to eliminate reasonableness review.
>
> This is not merely a theoretical difficulty. There are a couple of ways in which reasonableness review could be eliminated, directly or indirectly. In Alberta, s.

539 of the *Municipal Government Act* provides: "No bylaw or resolution may be challenged on the ground that it is unreasonable". Meanwhile, in various provincial statutes, and, most famously, British Columbia, patent unreasonableness has been prescribed as the standard of review of some types of administrative action. **Indirectly, reasonableness review could be ousted by providing for a limited right of appeal.** For example, the Federal Court of Appeal has interpreted various provisions relating to statutory appeals on issues of "law or jurisdiction" as excluding the consideration of factual matters. Where an appellate court whose jurisdiction is circumscribed in this way refuses to grant leave or finds that a matter raised by a party is outside the scope of the appeal clause, reasonableness review is unavailable. This would be a simple solution and would provide significant clarity. Here, however, I would invoke Einstein: everything should be made as simple as possible, but no simpler.

Appearances, moreover, may be deceptive. On the face of it, *Vavilov* would permit legislative ouster of reasonableness review. But only on the face of it. Indeed, *Hamlet* springs to mind: "God hath given you one face, and you make yourself another."

First, in the same paragraph that eliminated jurisdictional error as a category of correctness review one finds the following assertion: "A proper application of the reasonableness standard will enable courts to fulfill their *constitutional duty* to ensure that administrative bodies have acted within the scope of their lawful authority." **The language of constitutional duty is the language of *Crevier* and *Dunsmuir*. It suggests that reasonableness review *cannot*, in fact, be ousted, for its elimination may prevent courts from doing their constitutional duty.**

Second, although the point is not expressed in constitutional terms, the majority was very clear that it was directing administrative decision-makers to henceforth "adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness.'" If reasonableness review has been eliminated, administrative decision-makers need never demonstrate that their exercise of public power can be justified in terms of rationality and fairness. This would knock the legs from under a central pillar of the architecture of *Vavilov*.

The result, I submit, is that *Vavilov* establishes a core constitutional minimum of reasonableness review. With respect, the insistence that correctness review – and only correctness review – must be constitutionally entrenched is, and has been, misplaced. Julius Grey put the point with admirable clarity in the mid-1980s:

> What *Crevier* does entrench is *some* degree of review. The courts will not interfere at the same moment on all issues or against all tribunals. However, they now clearly possess a constitutional right to step in when the bounds of tolerance are exceeded by any

> decision-maker. Clearly, the precise location of the bounds of tolerance is left to the court and that is quite consistent with the general trends in modern administrative law.

In short, the "bounds of tolerance" are supplied in *Vavilov* by reasonableness review. Inasmuch as constitutional questions, questions of central importance to the legal system and questions of overlapping jurisdiction have a "constitutional dimension," correctness review is also constitutionally entrenched.

Indeed, this description of the constitutional foundations of *Vavilov* provides an explanation for an otherwise mysterious passage in the majority reasons. Having established institutional design as a key, grounding concept in the selection of the standard of review, the majority considered limited rights of appeal – such as those restricted to questions of law or jurisdiction – and observed: "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, or by individuals who have no right of appeal." **If respect for institutional design choices is so important, why can unappealable aspects of decisions nonetheless be judicially reviewed? The answer is that reasonableness review is constitutionally entrenched. A limitation of a right of appeal cannot, constitutionally, effect the elimination of reasonableness review of aspects of a decision.**

How, then, should courts address direct and indirect limitations on reasonableness review post *Vavilov*? Consider first direct limitations, that is those imposed by eliminating grounds of review or specifying a deferential ground of review. Here, the legislative language can be taken as an indication that the decision-maker should benefit from a wider margin of appreciation. As was the case with privative clauses prior to *Vavilov*, they would not be enforced to the letter, but their spirit would be respected. *Vavilovian* reasonableness review is capacious enough to accommodate this solution. In *Vavilov*, the majority recognized that "the language chosen by the legislature in describing the limits and contours of the decision maker's authority" may differ from case to case, sometimes allowing "greater flexibility", sometimes "tightly constraining the decision maker". Where a ground of review has been eliminated, or patent unreasonableness specified as the standard of review, these statutory provisions can be taken as "language chosen by the legislature" to give "greater flexibility" to the decision-maker. In this way, reasonableness review is preserved and the constitutionally entrenched core minimum of judicial review safeguarded. This is a fairly simple solution, which takes advantage of the thick conception of reasonableness review set out in *Vavilov*, and provides crystalline clarity about the scope of judicial review.

The second question, of indirect limitations, is slightly more complex. **Where an appeal is limited to questions of law or jurisdiction, it is arguable that any issue relating to the "constitutional duty" to ensure that administrative decision-makers remain within the boundaries of their authority will fall**

> **within the appeal clause. Historically, this was certainly the case, as such clauses respected the constitutional boundaries set out in *Crevier*. However, the core constitutional minimum I have ascribed to reasonableness review includes matters which go beyond questions of law or jurisdiction.** For example, the harsh consequences a decision visits upon an individual as a matter of fact – perhaps leaving them homeless – would probably not fall within a limited appeal clause; this would be problematic, as it would limit the courts' ability to police the boundaries of administrative decision-makers' authority and ensure that exercises of state power are publicly justified, to exclude any such issues. Similarly, the responsiveness of a decision to the arguments of the parties and evidence presented is a key feature of *Vavilovian* reasonableness review but again would not necessarily come within the scope of a limited appeal clause. The contemporaneity requirement might also be in play in some cases, as on appeal a decision-maker may seek to defend its position by relying on documents and other material not referenced in its decision; on a statutory appeal, the court's analysis will be on the correctness of the outcome, whereas on reasonableness review, the question for the court will be whether the reasons adequately justify the outcome.
>
> **These considerations help to explain why the majority in *Vavilov* refused to accept that a limited appeal clause could oust judicial review of matters not falling within the clause. Doing so would be unconstitutional.**
>
> [Footnotes omitted and emphasis added]

II. Paragraph18.1(4)(d) and Section 18.5 of the Federal Courts Act

[119] The foregoing approach, moreover, is consistent with section 18.5 of the *Federal Courts Act*, the statute that creates the right to judicial review before the Federal Courts. As noted, it provides that access to judicial review is barred only to the extent a right of appeal otherwise exists in respect of an issue.

[120] The combined effect of this provision and the treatment of privative clauses in the case law of the Supreme Court of Canada leads to the conclusion that factual errors made by the CITT may be reviewed in the context of a judicial review application under the reasonableness

standard. Conversely, errors of law are reviewable under the correctness standard in the context of a statutory appeal under section 68 of the *Customs Act*. Any overlap in proceedings could be addressed through joinder of an appeal with an application or other appropriate directions as might be required from time to time.

[121] I hasten to underline that the scope of review in respect of factual matters is limited, providing for intervention only in a narrow range of cases beyond those where there is a complete lack of evidence on a point. Thus, there should be relatively few cases where an overlap might occur.

[122] Paragraph 18.1(4)(*d*) of the *Federal Courts Act* provides that erroneous factual findings may provide the basis for intervention only if the decision was based on them and if they were "made in a perverse or capricious manner or without regard to the material before" the decision maker. The statutory formulation of the test before the Federal Courts for unreasonable factual determinations is akin to what the Supreme Court said about the nature of unreasonable factual findings in *Vavilov*, where the majority noted at paragraph 126 that unreasonable factual determinations arise where the "… decision maker has fundamentally misapprehended or failed to account for the evidence before it".

[123] As concerns, more specifically, the case law interpreting paragraph 18.1(4)(*d*) of the *Federal Courts Act,* in *Rohm & Haas Canada Limited v Canada (Anti-Dumping Tribunal)* (1978), 22 N.R. 175, 91 D.L.R. (3d) 212, Chief Justice Jacket defined the notion of perversity as "willfully going contrary to the evidence" (at para. 6). As for the criteria of "capriciousness" or

of the finding's being made without regard to the evidence, such would include circumstances where there was no evidence to rationally support a finding, (see, e.g. *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 FC 282 (C.A.), 20 Admin. L.R. (3d) 159 at para. 22) or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings. As noted by Justice Evans in the oft-cited *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), [1999] 1 FC 53, 157 F.T.R. 35 at paragraphs 14-17:

> [14] It is well established that section 18.1(4)(d) of the *Federal Court Act* does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members in assessing evidence relating to facts that are within their area of specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual. Thus, in order to attract judicial intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made "without regard to the evidence": see, for example, *Rajapakse* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 649 (F.C.T.D.); *Sivasamboo* v. *Canada (Minister of Employment and Immigration)*, 1994 CanLII 3532 (FC), [1995] 1 F.C. 741 (F.C.T.D.).
>
> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina* v. *Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate

> resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

III. The Case Law of this Court

[124] Turning now to the relevant case law of this Court, as noted, an issue very similar, if not identical, to the present was before the Court in *PSAC*. There, the Federal Public Sector Labour and Employment Board (the FPSLREB) intervened in a judicial review application from one of its decisions to argue that the combined effect of the privative clause in its constituent statute and the decreased role of jurisdictional error in the Supreme Court's administrative law jurisprudence was to render its legal and factual determinations largely unreviewable. The relevant privative clause, identical to the privative clause in the constituent statute of the Canada Industrial Relations Board, is set out in subsection 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, enacted by the *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40. It provides:

No review by court	**Impossibilité de révision par un tribunal**
34 (1) Every order or decision of the Board is final and is not to 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.	**34 (1)** Les décisions et ordonnances de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)a), b) ou e) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.

[125] This Court roundly rejected the submissions of the FSPLREB, holding at paragraphs 23-33 as follows:

> [23] First, they fly in the face of the myriad decisions of this Court and of the Supreme Court of Canada in which decisions of the Board, the CIRB or their predecessors, involving alleged errors of law, fact or mixed fact and law, have been reviewed under the deferential reasonableness standard (or previously under the patent unreasonableness standard) despite the presence of the privative clauses in subsection 34(1) of the *FPSLREBA* and subsection 22(1) of the *Canada Labour Code*. The 43 cases listed in the Appendix to these reasons have been decided on this basis in the last two years. For each prior year, several additional cases would be added to the list. Thus, contrary to what the Board asserts, this issue *has* been definitively settled by the jurisprudence.
>
> [24] Second, as this Court held in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 18, the term "jurisdiction", when used in a provision like paragraph 18.1(4)(*a*) of the *Federal Courts Act*, must be understood in its appropriate historical context. This is in accordance with the principles of statutory interpretation, which require a court to have regard to the appropriate context when interpreting legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21, 221 N.R. 241; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.
>
> [25] In 1990, when Parliament adopted subsection 18.1 of the *Federal Courts Act*, errors of jurisdiction in Canadian administrative law were understood to include errors of law, in circumstances where the Board was required to offer a correct interpretation, and patently unreasonable legal interpretations, as was noted in *P.S.A.C. v. C.F.P.A.*; see also *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983 at pp. 1003-1004, 102 N.R. 1. Such errors were also understood to include findings of fact that would be caught by

paragraph 18.1(4)(*d*) of the *Federal Courts Act*, as was noted in *C.U.P.W. v. Healy*. Thus, properly read in context, "jurisdictional errors" for purposes of setting forth a ground (as opposed to a standard) of review within the meaning of subsection 18.1(4) of the *Federal Courts Act* include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(4)(*d*) of that Act.

[26] Third, contrary to what the Board asserts, the decisions of the Supreme Court of Canada in *Dunsmuir* and *Khosa* cannot be understood to narrow the range of Board decisions that may be judicially reviewed. Rather, they hold that a common standard of review framework is to be applied to all federal administrative decision-makers and that, unless one of the exceptions discussed in *Dunsmuir* obtains, the applicable standard of review is reasonableness. This is evident both from the reasons of the majority in *Khosa*, at paragraphs 43 to 51 and from the reasons of Rothstein J. at paragraph 111 in the same case, where he discussed the import of the privative clause found in section 22 of the Canada Labour Code. He there wrote as follows:

> Section 22(1) expressly provides for review on questions of jurisdiction, procedural fairness, fraud or perjured evidence, but excludes review for errors of law or fact through express reference to s. 18.1(4) of the [*Federal Courts Act*]. Where the privative clause applies, i.e. with respect to s. 18.1(4)(*c*), (*d*), or (*f*), the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies. There is no role for the *Dunsmuir* standard of review analysis where s. 22(1) expressly provides for review on questions of jurisdiction, natural justice and fraud. Correctness review applies in these cases.

[27] While the majority in *Khosa* disagreed that the *Dunsmuir* analysis applied only to paragraphs 18.1(4)(*c*) to (*f*) of the *Federal Courts Act*, they did not disagree that issues falling within the purview of paragraphs 18.1(4)(*c*) to (*f*) are subject to the *Dunsmuir* analysis. Thus, when read in their appropriate context, subsection 34(1) of the *FPSLREBA* and subsection 18.1(4) of the *Federal Courts Act* do not preclude review in the instant cases.

[28] Fourth, the cases on which the Board relies enumerated in paragraph 14 of these Reasons do not constitute a binding ruling on this issue. Rather, to the extent these cases may contain passages that might support the Board's interpretation, the Court's comments are made only in passing and do not settle the issue. The relevant authorities, which do settle the issue, are *P.S.A.C. v. C.F.P.A.* and *C.U.P.W. v. Healy*, which, as already noted, directly contradict the Board's arguments. Also relevant are the multitude of cases where this Court has reviewed under the reasonableness standard decisions like those challenged in this application. Thus, the case law relied upon by the Board is not determinative.

[29] Fifth, contrary to what the Board asserts, its interpretation would not lead to greater expedition. Under the Board's approach, this Court would be required to decide as a preliminary issue what paragraph in subsection 18.1(4) of the *Federal Courts Act* applies to each argument advanced in an application for judicial review and to determine the Court's jurisdiction based on the characterization of issue. This sort of formalistic preliminary question-type analysis harkens back to the now abolished division in judicial review matters that limited review under the former section 28 (as opposed to section 18) of the *Federal Courts Act* to decisions made on a judicial or quasi-judicial basis: see *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177 at p. 197, 58 N.R. 1 (*per* Wilson J.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879 at pp. 895-902, 100 N.R. 241. This requirement led to convoluted, costly and lengthy debates about the character of a decision under review that did little to advance the substance of litigation, and these requirements were consequently abolished in the 1990 amendments to the *Federal Courts Act*: see *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 8. To adopt the Board's approach would reintroduce similar debates and delays in the judicial review process, which are antithetical to the sound labour relations that the *FPSLRA* is designed to foster. Thus, the Board's interpretation would in fact end up undermining the purpose of the Act.

[30] Finally, contrary to what the Board says, its interpretation runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch: see *Dunsmuir* at paras. 27-29; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13, 421 D.L.R. (4th) 381. Given recent pronouncements by the Supreme Court of Canada, the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited, if such issues may still even be said to exist at all. Although the category of true questions of jurisdiction was recognized in *Dunsmuir* at para. 59 as attracting correctness review, the Supreme Court has repeatedly emphasized its narrow and exceptional nature: see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 26; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 at para. 32. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41, 36 Admin L.R. (6th) 1, the Supreme Court cast doubt on the category's future:

> 41. The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential

> impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

[31] As the Board acknowledges, the recognition that there are few, if any, questions of jurisdiction could result in its decisions being largely unreviewable. This cannot be.

[32] In *Dunsmuir*, the Supreme Court of Canada underscored that judicial review must be available as a constitutional imperative and cannot be ousted by a privative clause. At paragraph 31, Bastarache and LeBel JJ., writing for the majority, stated:

> 31. The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] S.C.R. 120, at p. 127).

[33] Thus, for all the foregoing reasons, contrary to what the Board asserts, its decisions in the instant cases are amenable to review by this Court.

[126] In my view, the foregoing is determinative and binding on this panel in light of the principles applied by this Court regarding the binding nature of decisions reached by a panel of the Court on subsequent panels (*Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, at paras. 8-10).

[127] On the other hand, the decisions in *Emerson Milling* and *Bell Canada* are not dispositive. Both dealt with the scope of errors that could be reviewed in the context of an appeal for issues of law as opposed to the issue now before us, namely, whether an application of judicial review remains open for issues of fact in the face of a privative clause. Moreover, as my colleague notes,

the legislation involved in *Emerson Milling* and *Bell Canada* allowed for appeals to the federal cabinet in addition to the statutory appeal to this Court. Such provisions might well have rendered access to judicial review for factual or policy issues unavailable in *Emerson Milling* and *Bell Canada* under section 18.5 of the *Federal Courts Act*.

[128] Finally, the case law of this Court in cases of this nature and, indeed, the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 [*Igloo Vikski*], considered both legal issues and issues of mixed fact and law in the context of statutory appeals, as my colleague notes at paragraph 21 of his reasons. That this occurred is not surprizing given that the Supreme Court in its administrative case law decided prior to *Vavilov* had removed all distinctions between statutory appeals and applications for judicial review. However, by reasons of the new edict that appeals are henceforth to be decided under appellate as opposed to judicial review principles, it is now necessary that the small range of reviewable factual issues that do not constitute errors of law as they go slightly beyond findings based on a lack of evidence be pursued by way of an application for judicial review.

IV. Application of these Principles to the Present Appeal

[129] From the foregoing, it follows that this appeal should be dismissed as the issues of mixed fact and law raised by the appellant cannot be raised in the context of an appeal under section 68 of the *Customs Act*. However, even if the appellant had filed an application for judicial review, the same result would obtain as the alleged errors of mixed fact and law raised by the appellant

fall well short of the sort of error that might lead to review under paragraph 18.1(4)(*d*) of the *Federal Courts Act*.

[130] In this regard, as my colleague notes, the appellant challenges the CITT's consideration of the practices and procedures of the WCO Committee and of the opinion of an interior designer who testified as a witness. Consideration of these matters cannot be said to be "perverse" and each was rationally connected to the issues before the CITT. The CITT also adequately explained the use it made of such evidence in its reasons. Its consideration of the matters impugned by the appellant accordingly would not give rise to review under paragraph 18.1(4)(*d*) of the *Federal Courts Act*.

V. Proposed Disposition

[131] In light of the foregoing, I would dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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