File No. 40570

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

TRANSALTA GENERATION PARTNERSHIP and TRANSALTA GENERATION (KEEPHILLS 3)

Appellants
(Appellants)

- and –

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA and THE MINISTER OF MUNICIPAL AFFAIRS FOR THE PROVINCE OF ALBERTA

Respondents
(Respondents)

APPELLANTS' FACTUM

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is a case about the rule of law. It calls on the Court to play its vital role in restraining unlawful government action. Its fundamental question is whether the law is whatever a Minister of the Crown says it means, or what the legislature says it is.[1]

2. The Alberta Court of Appeal (**ABCA**) found itself powerless to question whether a Minister's regulation was authorized by law except in an "egregious" case—presumably leaving regulations intact in other cases where a Minister of the Crown acts outside its delegated authority (and therefore acts unlawfully), but in a "non-egregious" way. This approach has been described as "hyperdeference."[2] But *Vavilov* warns that a weak "rubber stamp" form of judicial review like this has no place in Canadian law—as the B.C. Court of Appeal put it recently (refusing to follow the ABCA): "To require that the impugned regulation be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose is, in my respectful view, simply incompatible with the governing *Vavilov* standard."[3] This case provides this Court with the opportunity to affirm this important principle.

3. The regulation at issue here is admitted by the Government to be aimed directly at three electric utilities. In 2016 those utilities agreed by contract to help the Alberta Government accelerate its carbon reduction goals by shutting down their coal-fired generating units many years before the end of their regulated and economic lives. But then the Minister of Municipal Affairs (the **Minister**) made a regulation denying eligibility for certain property tax depreciation *to only those three utilities and no other taxpayers*, by creating a new special class of taxpayers—anyone party to an "off-coal agreement." And, in an Orwellian twist, the government argued—and the ABCA accepted—that there is no discrimination here because all members of this newly-created class are treated equally.

4. The government admits "This change has been made in order that additional compensation is not available outside of the off-coal agreements."[4] Not surprisingly, the assessment and taxation provisions of the *Municipal Government Act* say nothing about changing

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[1] *Liversidge v Anderson*, [1942] AC 206, at 245 (*per* Lord Atkin, dissenting) [Authorities, Tab 8].
[2] See note 130 below and accompanying discussion.
[3] *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, at para. 94.
[4] Advice to Minister, Appellants' Record ("AR") Tab 16, p.112, item 4.

a taxpayer's property assessment because it has signed a government contract. And, equally unsurprisingly, the government's own municipal tax guide confirms that depreciation isn't "compensation" at all, but is something that "must be subtracted from the cost of improvements to accurately value the improvements in their current condition."[5]

5. The ABCA found legislative sanction for the Minister's actions by giving a Henry VIII-like interpretation to a statute that empowers the Minister to make regulations about "any … matter considered necessary to carry out the intent of" the taxing statute.[6] The ABCA did not, however, clearly explain how this regulation (or the Government's stated reasons for it) had anything to do with the "intent of" the governing property tax legislation—certainly not legislation that has fair and equitable treatment as a core purpose. The ABCA did say that "[d]ifferentiating between properties is fundamental to a functional assessment regime."[7] But this regulation does not differentiate between properties. It differentiates *between the persons who own the properties*, and targets a small subset of them with adverse treatment.

6. If *Katz*'s[8] hyperdeferential presumption of validity ever applied to discriminatory regulations, it is time for this Court to clearly say that it applies no longer. Regulations that on their face single out a specific group for discriminatory and harmful treatment shouldn't be presumed valid; they should be presumed invalid—unless the government can show clear legislative authority for what it did. Canadian courts have long applied such a rule to retroactive regulations. Discriminatory regulations like the ones at issue here deserve no less scrutiny.

7. While standard of review is an important issue that is directly engaged by the ABCA's decision, the regulation at issue here fails on any of the three possible standards of review—the ABCA's hyperdeference, *Vavilov* correctness, or *Vavilov* reasonableness. The appellants argue that the rule of law requires a correctness review of ministerial regulations—which are not, as the ABCA thought, "the creation of law through the exercise of a legislative function."[9] But because the regulation here *is* egregious and completely unrelated to (and in conflict with) the statutory

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[5] Alberta Municipal Affairs, *Guide to Property Assessment and Taxation in Alberta* (Edmonton: Alberta Municipal Affairs, 1 January 2018) ("Alberta Guide"), at p. 7 [Authorities, Tab 12].
[6] Reasons for Judgment Reserved of the Alberta Court of Appeal, ("ABCA Decision") AR Tab 3, p. 49, at para. 85 (citing the Alberta *Municipal Government Act*, RSA 2000, c M-26, ("*MGA*"), s. 322(1)(i)).
[7] *Ibid*, at para. 84.
[8] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 SCR 810 [***Katz***].
[9] *Auer v Auer*, 2022 ABCA 375 (CanLII) [***Auer***], at para. 20.

scheme, it is also wrong and unreasonable. It therefore fails on any standard of review.

8. This case raises some tough questions, but the answer to all of them is quite simple:

> "L'état, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec* … *United States v. Nixon*, … *Marbury v. Madison*, … *Magna Carta* … . From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. …[10]

B. Statement of Facts

1. Alberta's property tax regime, linear property, and depreciation

9. "In Alberta property is taxed based on the *ad valorem* principle. *Ad valorem* means 'according to value.' This means the amount of tax paid is based on the value of the property."[11] So says the Minister in the *Guide to Property Assessment and Taxation in Alberta* (the **Guide**). That Guide also tells us that:

> The purpose of assessment and taxation legislation in Alberta is to establish and maintain a property assessment system that fairly and equitably distributes taxes, and promotes transparency, predictability and stability for municipalities and taxpayers.[12]

10. The Guide explains that "'Assessment' is the process of estimating a dollar value on a property for taxation purposes"[13] and that the "cost approach" to determining assessed value "is used … in situations where few comparable sales are available, or when the improvements are unique or specialized."[14] It uses a simple formula[15] to summarize the cost approach:

> Market value of land + (cost of improvements – depreciation) = value of property

11. Finally, the Guide explains that for unique properties that seldom trade in the

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[10] *Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 [***Tennant***], at para. 23 [citations omitted].
[11] Alberta Guide, at p. 2.
[12] *Ibid*.
[13] *Ibid*., at p. 3.
[14] *Ibid*., at p.7.
[15] *Ibid.*

marketplace, that are priced atypically when they do sell, or that cross municipal boundaries, a "regulated standard" is used to determine value.[16] These include pipelines, telecommunications systems, and electric power systems.

2. How electric generation facilities are assessed and the role of depreciation

12. One type of property that uses a regulated standard is "electric generation facilities." These are a type of "linear property"[17] under a set of annual regulations known as "Minister's Guidelines," made under s. 322 of the *MGA.* Included within the Minister's Guidelines is a set of Linear Property Guidelines that govern the assessment of linear property, including electric power generation properties.[18] TransAlta[19] is the owner of a number of these facilities, either on its own or in various joint venture arrangements with other utilities.

13. The Minister's Guidelines clearly establish and follow a modified cost approach to valuation of electric generation facilities. That makes sense given the Guide's explanation of the cost approach, because these generating facilities trade infrequently and consist of unique and specialized improvements. The Minister's Guidelines incorporate the 2005 Alberta Construction Cost Guide[20] to determine which costs are eligible for inclusion, and then uses "modifiers" to adjust those costs to the current assessment year.

14. A key ingredient of this approach is depreciation, which must be deducted from the facility cost to arrive at the value of the property. The Guide explains how depreciation works, and its important relationship to value, as follows:

> Once the cost of improvements have been determined, the assessor makes a deduction for depreciation of the improvement. Depreciation is a loss in value due to any reason. This includes normal wear and tear or a change in needs or style of a building.
>
> **Depreciation must be subtracted from the cost of improvements to accurately value the improvements in their current condition**.[21]

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[16] *Ibid.*, at pp. 7-8.
[17] *MGA*, ss. 284(1)(f.01) and (k).
[18] *2017 Alberta Linear Property Assessment Minister's Guidelines*, AR Tab 15, p. 82 ("Linear Guidelines").
[19] The appellants are referred to in this factum as "TransAlta."
[20] 2005 Alberta Construction Cost Reporting Guide [Authorities, Tab 11]
[21] Alberta Guide, at p.7 (emphasis added); see also *T. Eaton Realty Co. v Alberta (Assessment Appeal Board)*, [1992] AJ No 368; 127 AR 143.

15. Although the process followed differs under the Linear Guidelines, it reflects the same basic approach: a base cost is determined based on the facility's adjusted historical cost, and then depreciation is accounted for using a percentage to arrive at a current value.[22] (For example, a facility with a $100 base cost and a depreciation factor of 0.68 would be assessed at $68.)

16. Depreciation is a function of the age of the asset and an assumption about the asset's lifespan. The asset's cost is amortized over expected life to arrive at an annual depreciation amount. (That amortization can be constant (straight line) or "lumpy" as different assumptions are made about how the facility will age from year to year.) This is exactly what the Minister's Guidelines do,[23] through a series of depreciation tables in Schedule C that tie the age of the facility to a percentage depreciation factor that is used each year to adjust the base cost for depreciation.[24]

17. Presumably to avoid lengthy debates about how quickly a facility is *actually* aging, and therefore what the Schedule C amount *should* be, the Guidelines say that the Schedule C factor is "fixed and certain" and "reflect[s] all physical, all functional, all economic, and net salvage considerations," and therefore must be applied "without adjustment or modification."[25]

18. This is not, however, all that the Guidelines say about depreciation. In addition to the Schedule C depreciation, a second type of depreciation is also provided for in Schedule D. Unlike Schedule C, Schedule D depreciation "is only allowed on a case-by-case basis when acceptable evidence is documented and provided to the assessor" and "is limited to highly unusual site specific circumstances such as catastrophic physical failure."[26]

19. Schedules C and D, therefore, work together to capture all types of depreciation for a

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[22] See Linear Guidelines, s. 2.004 (AR Tab 15, p. 90). The Linear Guidelines' approach to calculating assessed value was briefly summarized in *Alberta (Minister of Municipal Affairs) v Ember Resources Inc.*, 2018 ABQB 971 [***Ember Resources***], at para. 3. The Formula is A (Base Cost) x B (Assessment Year Modifier) x C (Depreciation Factor) x D (Additional Depreciation Factor).

[23] *BP Energy Canada v Woodlands (County)*, [2005] AMGBO No 207, at para. 80 [***BP Energy***] [Authorities, Tab 1].

[24] *Ibid*. For example, Table 2.30 (AR Tab 15 p. 99), Column 7 provides the depreciation factors for TransAlta's Keephills 3 unit for each year of chronological age (see s. 2.01, "GEN 244" (AR Tab 15, p. 93), which says to use Table 2.30, column 7 for Keephills 3).

[25] Linear Guidelines, AR Tab 15, p. 88, s. 1.003(c) and p. 90, s. 2.003 (a).

[26] *Ibid*, ss. 2.003(b) and 2.004 (e).

facility: Schedule C captures the expected and predictable events and characteristics that may affect a facility's value from year to year, while Schedule D captures the extraordinary and unexpected ones. Schedule C is fixed and certain, while Schedule D requires judgment by an assessor on a case-by-case basis. Given the Guide's recognition that "depreciation must be subtracted from the cost of improvements to accurately value the improvements in their current condition," both types of depreciation are necessary to determine value.

20. The allowable depreciation under Schedules C and D is not tied to the accounting net book value of each property and is not dependent on the revenue the owner receives (or losses it suffers) as a result of its operations. Nor is it related to depreciation for income tax purposes or any other purpose.

21. The Minister's Guidelines, and therefore the Linear Guidelines included therein, are updated annually. Among other things, the "assessment year modifier" that is used to convert original asset cost to the current year is updated annually to reflect inflation. In addition, as new generation assets come online and old ones are retired, the list of generation facilities is updated accordingly.

3. Coal-fired generation and the Off-Coal Agreements

22. TransAlta's generating facilities each received approval to operate from the Alberta Utilities Commission (**AUC**)[27] and were given a regulated end of life (retirement) date. TransAlta's Keephills 3 Unit began operations in 2011 and had a regulated end of life of 2061. The Genesee 3 Unit, operated by Capital Power but 50% owned by TransAlta, entered service in 2005 and had a regulated end of life of 2055. TransAlta also had a 50% interest in the Sheerness 1 and 2 Units operated by ATCO, which had regulated end of life dates in 2036 and 2040.[28]

23. The Keephills 3, Genesee, and Sheerness Units made electricity from burning coal.

24. In 2016, the Alberta Government wanted to make climate-related commitments to end the burning of coal for electricity generation in Alberta by 2030.[29] But as the holders of regulatory approvals that ran well past 2030—including for TransAlta's Keephills 3 unit that had

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[27] *Hydro and Electric Energy Act*, RSA 2000, c H-16 ("*HEEA*"), s. 11.
[28] Affidavit of Brett Gellner ("Gellner Afftidavit"), AR Tab 12, p. 75, paras. 3-6, and Affidavit of Kate Chisholm ("Chisholm Affidavit"), AR Tab 11, p. 72, at paras. 3-6.
[29] Gellner Affidavit, *ibid.* at paras. 8-13; Chisholm Affidavit, *ibid.*, at paras. 8-12.

only begun operation 5 years earlier—the owners of these coal-fired generating units had the legal right to operate those units until their regulated retirement dates, and through those operations to recover their substantial invested capital. As of 2030, the unrecovered capital cost (net book value) of these units was in the range of three billion dollars.[30]

25. Had the Government simply revoked the existing approvals, it undoubtedly would have faced a constructive taking or other claim from the owners who had billions invested in these assets that had been approved, built and used to serve the public. The Province would also have risked substantial reputational damage in the investment community if it stranded billions of dollars in invested capital. (The burden of such reputational damage would fall on the public, as future investors would either charge a risk premium to invest in capital projects in the Province—making such projects (including future power plants) more expensive for all those who would use and rely on them—or would avoid the Province altogether.)

26. As a result, and to avoid these significant risks, instead of unilaterally revoking the Owners' rights to operate in accordance with their regulatory approvals, the government negotiated "**Off-Coal Agreements**" with TransAlta, Capital Power, and ATCO[31] (the **Off-Coal Parties**). The Province acknowledged not only that "the Province has determined that it is in the public interest to ensure that no more carbon dioxide and other air contaminants emanate from the combustion of coal after 2030", but also that "the Province has determined that it is in the public interest to maintain a positive investment environment… ."[32]

27. Under these Off-Coal Agreements, the Off-Coal Parties gave a comprehensive release of claims against the Province and others (s. 7), committed to cease burning coal by December 31, 2030 (s. 2), agreed to spend tens of millions of dollars on investments in the electricity business in Alberta over the next 14 years (to the end of 2030) (s. 5(a)), and made other significant

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[30] Schedule A to the Capital Power Off-Coal Agreement (AR Tab 21, p. 149) shows the Net Book Value of its affected facilities was $1,820,521,752.25. Application of the Schedule A formula yielded 14 annual payments of $52,414,828.49. For some unexplained reason, the Crown included only a redacted version of the TransAlta Agreement (AR Tab 22, p. 160) in the record in the courts below. However, TransAlta's annual payment was $39,851,704.60 (about 80% of Capital Power's) so its NBV amount must have been in the range of 80% of Capital Power's NBV, or approximately $1.4 billion.

[31] AR Tabs 21 and 22, pp. 135-160. The Crown refused to produce the ATCO Agreement.

[32] AR Tabs 21 and 22, pp. 135 and 150.

commitments.[33]

28. The Province, in exchange, agreed to make a series of annual "transition payments" to the Off-Coal Parties over the next 14 years (s. 3(a)). These payments were equal to a portion of each affected generating unit's net book value. Schedule A to each Agreement sets out that the payments represented the projected net book value of the affected generating units as of 2030 "multiplied by the years stranded," less a "flat deduction," discounted to produce a net present value. The Off-Coal Agreements (in s. 4) further contained an adjustment clause under which the amount of the "transition payment" could be adjusted up or down if an audit determined the owner's "net book value of the plants" was something other than the amount used in Schedule A.

29. The Off-Coal Agreements were therefore clearly intended to provide compensation for each owner's stranded capital that resulted from their lost rights to generate and sell coal-fired electricity between 2031 and each unit's regulated end of life—no more and no less.

4. AUC approves coal asset retirement and natural gas conversion

30. The Off-Coal Agreements expressly contemplated that the coal-fired generating units might be converted to natural gas fuel.[34] This not only would achieve the Off-Coal Agreements' objective to have the Off-Coal Parties invest in and continue to generate electricity in the Province, but would also realize an immediate reduction in greenhouse gas emissions (by 45% in the case of TransAlta's Keephills 3 facility).[35]

31. On February 8, 2019, the AUC approved TransAlta's application to convert its Keephills 3 Unit from a coal-fueled to natural-gas fueled generating unit. The AUC recognized, among other things, that "ash-handling equipment associated with ash production would be retired,"[36]

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[33] These included funding "programs and initiatives to support the communities surrounding the Plants and the employees … negatively affected by the phase-out of coal fired generation" (s. 5(c)); "fulfill[ing] … existing and future legal obligations to affected employees, including severance and pension obligations" (s. 5(d)); continually maintaining a significant business presence in Alberta and to continuing electricity generation in Alberta (s. 5(b)); and obtaining the agreement of any purchaser of the power plants to continue to observe the above covenants (ss. 11(m) and (n)).

[34] AR Tab 21 p. 138, ss. 5(a) and (d); AR Tab 22, p. 153 s. 5(a).

[35] *Coal-to-Gas Conversion of Keephills Power Plant Unit 3* (2019), Decision 23809-D01-2019 (AUC), at paras. 13 and 32 [Authorities, Tab 2].

[36] *Ibid.,* at para. 14.

"the coal mining operation at the Highvale Mine and associated infrastructure, currently used to supply coal to the power plant, would no longer be required,"[37] and that "[e]xisting coal burning and handling equipment would be retired."[38] The AUC granted similar orders for Capital Power's Genesee 1, 2, and 3 Units and for the Sheerness Units partly owned by TransAlta.[39]

5. Minister targets Off-Coal Parties with denial of additional depreciation

32. The Off-Coal Agreements say nothing about property tax or depreciation allowances for property tax purposes. Although section 7(a) releases certain legal remedies otherwise available to the Off-Coal Parties as a result of shutting down their coal-fired operations, claiming accelerated depreciation relief under the Linear Guidelines was not among them. Nor was property tax or depreciation discussed at all during negotiation of the Off-Coal Agreements.[40]

33. The requirement to cease burning coal at the end of 2030 meant that certain power plant equipment used in connection with burning coal would be rendered obsolete.[41] For obvious reasons, this caused the Off-Coal Parties to think about Additional Deprecation under Schedule D of the Linear Guidelines, as the Schedule C depreciation was based on the assumption that the coal-fired generating units would run to the end of their regulated lives.[42] Their employees therefore began to have discussions with the Assessment Services Branch of Alberta Municipal Affairs in 2017 about the availability of additional depreciation.[43]

34. Meanwhile, the Minister's staff were preparing the routine annual updates to the Minister's Guidelines for 2017, which culminated in new a Ministerial Order[44] making Minister's Guidelines (including the Linear Guidelines[45]) being promulgated effective December 31, 2017, for use in taxation year 2018.

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[37] *Ibid.* at para. 15.
[38] *Ibid.*, at para. 15. See also AUC formal approval order, *ibid*, Appendix I para. 3. See also Gellner Affidavit, AR Tab 12, pp. 77-78, paras. 10-12; Chisholm Affidavit, AR Tab 11, p. 74, at paras. 10-11.
[39] *Dismantling and Removal of Works and Installations at the Sheerness Power Plant* (2022), Decision 27460-D01-2022 (AUC) [Authorities, Tab 3]; *Genesee Dual-Fuel Project* (2019) Decision 24715-D01-2019 (AUC) [Authorities, Tab 4]; *Genesee Generating Station Units 1 and 2 Repowering Project* (2021), Decision 26204-D01-2021 (AUC) [Authorities, Tab 5].
[40] Gellner Affidavit, AR Tab 12, p. 78, at para. 14; Chisholm Affidavit, AR Tab 11, p. 74, at para. 13.
[41] *Ibid.*, Gellner Affidavit, at para. 12; Chisholm Affidavit, at para. 11.
[42] For example, Table 2.30 Column 7 contemplates Keephills 3 operating for 50 years (or more), and the Table amortizes original construction costs over that period: AR Tab 15, pp. 99-100.
[43] Tutt Affidavit, AR Tab 9, pp. 68-69; McMeckan Affidavit, AR Tab 10, pp.70-71.
[44] Ministerial Order MAG:021/17, AR Tab 14, p. 81.
[45] AR Tab 15, p. 82. A Department blackline showing the amendments is at AR Tab 18, p. 120.

35. But, in addition to the typical annual updates, the Minister also made a significant change to the Linear Guidelines—the addition of a new category of taxpayer unknown to that point: anyone party to an Off-Coal Agreement. This unique group of 3 taxpayers was now to be denied the right to seek additional depreciation treatment for their obsolete coal-related electric generation assets, meaning that their property value would be assessed on the fiction that those assets would remain in use well beyond 2030. These specific changes to the Linear Guidelines (the **Off-Coal Amendments**) included the following:

> [1.001](w) ***Off-Coal Agreement*** means an arrangement of transition payments from the Government of Alberta and owners of coal-fired units that were originally slated to operate beyond 2030 to discontinue using coal as a fuel source by December 31, 2030.
>
> [1.003](d) Schedule D—provides the process of determining additional depreciation … There will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation.
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> [2.003](c) The combined effect of Schedule C and Schedule D for ACCs beginning with GEN shall not exceed total depreciation of 80%. Accordingly, if a depreciation factor of 0.200 is achieved under Schedule C, no additional depreciation is allowed under Schedule D. There will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation.
>
> [2.004](e) Subject to section 1.003(d) …, the assessor may allow additional depreciation (Schedule D) on a case-by-case basis …

36. A briefing note to the Minister[46] explained the rationale for these changes as follows:

> Off-coal agreements compensate for all losses and the guideline establishes rules allowing the Government of Alberta to meet the climate change strategy of closing all coal-fired EPG [electric power generation] plants in Alberta by 2030.
>
> Closing coal-fired EPG plants will reduce linear property assessments, and potentially linear taxes, in affected municipalities.
>
> **4. Electric Power Generation - Off Coal (Attachment E)**
>
> Sections have been reworded to limit the circumstances that may result in additional depreciation of EPG facilities being applied.

[46] Advice to Minister for Decision, December 4, 2017 AR Tab 16, p. 111.

> This change has been made in order that additional compensation is not available outside of the off-coal agreements signed by the province and electric power generators.
>
> Some electrical power generation stakeholders may be concerned at the limitation of additional depreciation circumstances for coal fire[d] plants. This change will be viewed as a positive by municipal stakeholders.

37. Nothing in the record or in the Off-Coal Amendments suggests that the Minister considered the effect of section 292(2.1) of the *MGA*, which requires that each assessment must reflect "the specifications and characteristics" of the linear property being assessed and "must reflect the records of the … Alberta Utilities Commission." Approval of the AUC would be required to stop burning coal because doing so requires either a complete unit shutdown or a change of fuel source from coal to something else.[47] But the resulting change in the AUC's records—retirement of coal-related assets—can no longer be reflected in the assessed property's specifications and characteristics because the Off-Coal Amendments prohibit it.

6. The courts below

38. TransAlta challenged its assessment before the Municipal Government Board (**MGB**), but was required to bring an application to the Court of King's Bench of Alberta to make its challenge to the validity of the Guidelines (the MGB's jurisdiction to do so having been removed by section 488.1(2) of the *MGA*).[48] TransAlta challenged the Off Coal Provisions as being, among other things, *ultra vires*, discriminatory, and enacted in bad faith.[49]

39. When considering whether the Minster acted within the scope of his authority, the Chambers judge, without citing any particular provision of the *MGA*, reasoned that "[t]he Minister is empowered under the *MGA* to set applicable depreciation in a manner consistent with the government's policy objectives."[50] She then found that the Minister "was making a valid

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[47] *HEEA* ss. 11, 21, and 22. Practically speaking, as the actual natural gas conversion approvals discussed below illustrate, these power plants had existing approvals to operate as coal-fired, and so a change to natural gas fuel required an amendment of the approval. Complete shutdown requires approval (s. 21 of HEEA) or notice to the AUC (s. 22 HEEA), which in either case would alter the AUC's records.

[48] *TransAlta Generation Keephills 3, TransAlta Generation Partnership, Capital Power Corporation and Capital Power (G3) LP v Designated Linear Assessor of the Province of Alberta*, (2019) DL 011/19 [Authorities, Tab 10].

[49] Originating Application, AR Tab 6, p. 58.

[50] *TransAlta Generation Partnership v Regina*, 2021 ABQB 37 (CanLII) [**Chambers Decision**], AR Tab 1 at 13, at para. 57.

policy decision in furtherance of the government's policy of reducing coal-fired emissions."[51]

40. The Chambers judge also found that the Off-Coal Amendments "arose from a high-level policy decision by the Legislature to reduce greenhouse gas emissions by moving away from coal-fired electrical generation."[52] But she did not identify what legislation she was referring to. There are no such legislative provisions in the *MGA*.

41. The Chambers Decision does not contain any analysis of whether the Minister's purpose was consistent with the purpose of the statute under which the Minister acted. Nor did she identify where the Legislature gave the Minister the broad power to make regulations to implement what the Minister believed the government's non-property tax polices might be.

42. The ABCA, recognizing that the *MGA* does not give the Minister authority to enact environmental policy under the guise of depreciation schedules, suggested that "[w]hat the chambers judge was, in our view, trying to convey is that the Minister made a lawful policy choice to keep consideration of off-coal agreements and related legislation *out of* the valuation standards for linear property *in furtherance of the objectives of the assessment and taxation provisions of the MGA*."[53] It did not identify where the Chambers judge made this finding. The ABCA went on to say "This is not to say that we agree with all the language used by the chambers judge to explain her reasons," saying that she "conflate[d] environmental policy with assessment policy."[54]

43. In the end, the ABCA upheld the Chambers Decision because "there is nothing in the text or scheme of the *MGA* assessment and taxation provisions and applicable [regulations] that constrains the Minister … ." [55]The ABCA did not refer to the Minister's contemporaneous briefing note and its commentary about the rationale for these changes, nor did it identify the statutory powers within which such a purpose might fit. For the ABCA, the fact that it considered the Minister's actions to be "legislative" was a complete answer that rendered the Minister's actions virtually unreviewable.

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[51] *Ibid*.
[52] *Ibid*., p. 19, at para. 103 (emphasis added).
[53] ABCA Decision, AR Tab 3, p. 46, at para. 70 (emphasis in the original).
[54] *Ibid*., at para. 71.
[55] *Ibid*., at p. 47, para. 74.

PART II – STATEMENT OF ISSUES

44. This appeal raises the following issues: (i) do the Off-Coal Amendments discriminate without statutory authority? (ii) whether they do or don't, are they consistent with the "intent of the statute" as s. 322(1)(i) requires? and (iii) what standard of review applies to both questions?

PART III –STATEMENT OF ARGUMENT

45. The standard of review for executive regulations is an important question that requires resolution. This case, where the Minister's position seems to be "the specifications and characteristics of any property, and therefore the value of any property, are whatever I say they are," is a good illustration of why judicial review of regulations is important for upholding accountability and the rule of law.[56] Important as the standard of review is, however, these discriminatory regulations are so clearly not authorized by law they cannot survive under any standard of review.

46. There are three possible approaches to the standard of review in this case. One approach is the special *Katz* standard for regulations that the ABCA applied (hyperdeference). The other two are correctness or reasonableness under *Vavilov*. The Off-Coal Amendments fail all of these standards for the same reason: they discriminate against the appellants without statutory authorization.

47. The appellants submit that the *Katz* hyperdeferential standard is indefensible, and that executive delegated legislation implicates the rule of law and so should be reviewed for correctness under *Vavilov,* as explained below. But, in this appeal, that does not change the outcome, because the Off-Coal Amendments are wrong, unreasonable *and* egregious. A regulation that is so egregious that it fails the hyperdeferential standard could not withstand a *Vavilov* correctness or reasonableness review either. It is therefore the unauthorized discrimination issue that this factum addresses first.

A. Discriminatory Off-Coal Amendments are invalid on any standard of review

48. "A regulation cannot discriminate between persons or classes of persons to which it applies unless the enabling statute either expressly or implicitly permits such discrimination."[57] The Off-Coal Amendments use superficially neutral language to gloss over the fact that the

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[56] So said Lord Atkin in *Liversidge*, *supra*, quoting Lewis Carroll's Humpty Dumpty at p. 245.
[57] Paul Salembier, *Regulatory Law & Practice* 3d ed (LexisNexis, 2021), at p. 303 [Authorities, Tab 17].

government is actually singling out a small, identifiable group and targeting it with different, more onerous treatment. That targeting is undeniable and is admitted in the Minister's Briefing Note. The Off-Coal Amendments make the recognition of accelerated depreciation available to all linear property owners except the Off-Coal Parties. If they were listed by name, its effect would be the same.

49. This group alone is singled out with an assessment process that prohibits them—and only them—from seeking recognition of all applicable depreciation. This prevents the assessor from producing a fair and equitable assessment (as required by s. 293(1) of the *MGA*). It also prohibits the assessor from taking into account something that, according to the Minister's own Guide, "must be subtracted from cost to arrive at an accurate value."[58] This undermines the statutory scheme. The Off-Coal Parties are targeted for this disadvantageous treatment not because of any specifications or characteristics of their property—the statutory criteria—but rather because they settled prospective constructive taking claims against the Crown by signing an Off-Coal Agreement—something the statute doesn't refer to or contemplate at all. There was no basis for the ABCA to "readily infer"[59] this power to discriminate as it did.

1. The Off-Coal Amendments *do* deprive TransAlta of meaningful rights

50. The Chambers judge found the Guidelines did not discriminate because they did not "deprive the Applicants of a form of depreciation to which they previously were entitled" and did not "deprive the Applicants of a form of depreciation applicable to other forms of linear property."[60] But this is a complete misreading of what s. 2.004(e) of the Guidelines provides for—this section formerly gave the Off-Coal Parties and all other linear property owners *the right to have the assessor consider the evidence and decide* if additional depreciation is available in the circumstances.

51. After the amendments, all other property owners—including all owners of other coal-fired electric generation facilities—continue to have the right to seek recognition of Schedule D Depreciation. The Off-Coal Parties do not. This is presumably why the Minister's Briefing Note describes the effect of the Off-Coal Amendments as a "limitation of additional depreciation"

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[58] Alberta Guide, at p. 7.
[59] ABCA Decision, AR Tab 3, p. 49, at para. 85.
[60] Chambers Decision, AR Tab 1, p. 15, at para. 72.

about which "[s]ome electrical power generation stakeholders may be concerned."[61]

52. Consider this example: a statutory auto insurance scheme established by regulation allows people with good driving records to apply for a rebate. The adjudicating official must consider things like claims history, driving record, and the like. But then, as part of a broader government push to "make immigrants pay their fair share", the responsible Minister amends the regulations to say that "There will be no recognition or rebate based on a good driving record for any driver who has immigrated to Canada in the preceding 10 years." Who would say that an immigrant who has lived in this country for 9 years has not been "deprived of a rebate to which they were previously entitled," and therefore has not suffered discrimination?

53. The Chambers judge did not recognize that the Off-Coal Parties' claims for additional depreciation are real. Various AUC decisions[62] confirm that the coal and ash handling equipment at the generating units subject to the Off-Coal Agreements was taken out of service between 2020 and 2023, as the units were converted to natural gas fuel. However, the *decision* to make this significant change to the facilities was made much earlier—the design, engineering, approval procurement, and construction of major projects like these takes years. Without the Off-Coal Amendments, the Off-Coal Parties would have been able to seek different or additional depreciation treatment based on the change in expected life of this equipment.[63]

54. Alberta's MGB has decided that under Schedule D, "[a]ny event or circumstance that would shorten the anticipated useful life of the asset or otherwise require an unanticipated adjustment to Schedule C's allocation scheme may qualify as acceptable evidence of loss" to establish additional depreciation.[64] One MGB decision (upheld by the ABCA on appeal) found the "event or circumstance" qualifying for accelerated depreciation was the repeal of the National Energy Program, which required the property owner to pay higher (market) prices for

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[61] AR Tab 16, p. 113 (under "Other Changes").
[62] Noted at para. 31, *supra*.
[63] Under International Financial Reporting Standards (IFRS), reporting entities must conduct an "impairment analysis" in every period and adjust (write down) assets where their useful life is curtailed: see IAS 36 Impairment of Assets. The assessor might have applied a similar methodology as soon as the Off-Coal Agreements were signed, or at some later stage, or may have applied some other method.
[64] *BP Energy*, at para. 82.

feedstock, rendering its styrene plant uneconomic.[65] Clearly, a requirement to stop burning coal and to retire either the entire plant or its coal-related assets could qualify under Schedule D absent the Off-Coal Amendments.

55. The assessor might have had to decide how and when to recognize additional depreciation and over what period, and how much to include. It might even have denied the request for additional depreciation altogether if there were valid reasons to do so. But that doesn't change the undeniable fact that by prohibiting these taxpayers and only these taxpayers from seeking accelerated deprecation treatment arising from a fundamental change in circumstances, the Minister discriminated against them.

2. Statute must clearly authorize discrimination

56. This Court, in *Montreal v Arcade Amusements*,[66] described *Kruse v Johnson* as the "classic" statement of the rule against administrative discrimination. *Kruse* tells us that delegated legislation is unreasonable and *ultra vires* if it is "partial and unequal in [its] operation as between different classes."[67] Beetz J. in *Arcade Amusements* emphasized the profound significance of this principle, noting that it "has been observed from time immemorial in British and Canadian public law"[68] and that it "transcends the limits of administrative and municipal law" as "a principle of fundamental freedom."[69]

57. "Partial and unequal as between different classes" describes the Off-Coal Amendments perfectly—they first create a fictitious sub-class of coal-fired electric generation properties whose owners signed Off-Coal Agreements, and then treat them differently from all others.

58. *Arcade Amusements* confirms that the difference between legitimate regulatory classification (a normal and even essential part of administering a statutory regime) and illegitimate administrative discrimination turns on statutory wording. A statutory delegate has no power to make discriminatory distinctions unless the statute either expressly grants the power to

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[65] *Strathcona (County) v Alberta Assessment Appeal Board*, 1995 ABCA 165, affirming *Shell Canada v County of Strathcona No. 20* (1992), Board Order 54/92 (Alta. Assessment Appeal Board) [Authorities, Tab 9].
[66] *Montreal v Arcade Amusements*, 1985 CanLII 97 (SCC), [1985] 1 SCR 368 [***Arcade Amusements***], at p. 404.
[67] *Kruse v Johnson*, [1898] 2 Q.B. 91, at p. 99 [***Kruse***] [Authorities, Tab 7].
[68] *Ibid*., at p. 404.
[69] *Ibid*., at p. 413.

do so, or implicitly delegates that power by necessary inference.[70]

59. Even *Katz* didn't change this important rule. Abella J., author of this Court's judgment in *Katz*, expressly said so in her dissenting opinion in *Green v Law Society of Manitoba*:[71]

> *Katz* suggests a deferential approach when reviewing impugned delegated legislation, but the list of adjectives set out in para. 28 does not represent an exhaustive template … there are other grounds for finding delegated legislation to be unreasonable, such as those set out in *Kruse v. Johnson*…

Abella J. then quoted Lord Russell's description in *Kruse* of laws that are "partial and unequal in their operation as between different classes."

60. In *Shell Canada v. Vancouver*,[72] McLachlin J. (as she then was, dissenting although not on this point) went further and said that simply finding implied authority isn't enough in some cases, including in property tax cases:

> Discrimination in the granting of licences, taxes and municipal privileges is generally viewed as requiring express authorization by the empowering legislation because of the presumption that the legislature intends all citizens to be treated equally on such matters. Therefore, unless the statute clearly provides the contrary, the municipality has no power to discriminate.

61. The rule prohibiting administrative discrimination is connected to the equally fundamental principle that officials cannot use statutory powers to further their own arbitrary purposes, untethered from the statute. As Rand J. put it in *Roncarelli v Duplessis*, legislation cannot be "taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."[73] Nor can it authorize "irrelevant purposes of public officers acting beyond their duty."[74] While the Chambers judge concluded that the Minister's purpose here was to do something supposedly related to climate policy goals[75] (although she didn't explain how these regulations, by targeting people who sign pro-climate contracts, could possibly achieve that), she did not consider how

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[70] *Ibid*, at p. 413. *Arcade Amusements* was about a municipal by-law, but confirmed the same principle applies to regulations *Ibid*., at p. 406, p. 410. See also *Forget v Quebec (Attorney General)*, 1988 CanLII 51 (SCC), [1988] 2 SCR 90, at para. 30 (emphasis added).
[71] *Green v Law Society of Manitoba*, 2017 SCC 20 (CanLII), [2017] 1 SCR 360, at para. 78.
[72] *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 SCR 231 [***Shell***], at para. 60 (emphasis added).
[73] *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 [***Roncarelli***], at p. 140.
[74] *Ibid*., at p. 143.
[75] Chambers Decision, AR Tab 1, pp. 13 and 19, at paras. 57 and 103.

this was consistent with the "nature and purpose" of the property tax legislation under which the Minister acted.

62. Many cases have found unauthorized discrimination in analogous circumstances. The Federal Court of Appeal in *BC Ferry*[76] struck down a regulation that made vessels in "inland waters" eligible for a tax exemption, but defined "inland waters" as fresh water only. Its effect was to exclude some ships—BC Ferry's ferries among them—even though they operated wholly within Canada, because they traveled salt water routes. There was no statutory authorization to treat vessels in different parts of the country differently. The Court refused to read into an express general power to make "distinctions between 'classes of conveyances'" [77] the implied power to give a fiscal preference to areas of Canada with fresh water internal waterways while denying the same benefit to those with salt water routes.

63. Similarly, this Court, in *Alaska Trainship Corporation et al v Pacific Pilotage Authority*,[78] struck down regulations requiring licensed pilots on large ships, but exempting ships registered in Canada. Without a "fairly clear indication" in the statute that the place of registration mattered for safety or pilotage registration, trying to find it in the grants of regulation-making power under the statute "[took] such provisions beyond their ordinary meaning."[79] And in *Attorney General of Canada v Silk*,[80] this Court said regulations that created a different unemployment benefits qualifying period for fishermen were *ultra vires* and invalid because they created "a harsher requirement than that faced by other insured persons which was not authorized by [the statute]."[81]

64. *Tesla v. Ontario*[82] is a more recent example. The Ontario government canceled a subsidy for electric cars, but continued to fund the subsidy for a two-month transition period for car orders that had already been placed. But Tesla was excluded from the transitional subsidies because they only applied to orders for cars from a "franchised dealership", and Tesla did not operate through dealerships. Myers J. held that the government's decision to limit the transitional

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[76] *British Columbia Ferry Corp. v M.N.R.*, 2001 FCA 146 (CanLII), [2001] 4 FC 3 [***BC Ferry***].
[77] *BC Ferry*, at para. 28.
[78] *Alaska Trainship Corporation et al v Pacific Pilotage Authority*, [1981] 1 SCR 261 [***Alaska Trainship***].
[79] *Alaska Trainship,* at p. 277.
[80] *Attorney General of Canada v Silk*, 1983 CanLII 122 (SCC), [1983] 1 SCR 335 [***Silk***].
[81] *Silk,* at p. 335.
[82] *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062 (CanLII) [***Tesla***].

subsidy to franchised dealers was "not at all related" to its purpose of cushioning dealers in Ontario from the effect of ending the subsidies: "All it seems to do is to include in the transition all dealerships in Ontario who had eligible cars on their lots or on order except Tesla."[83]

65. The rule against unauthorized discrimination applies equally in property tax cases.[84]

66. If TransAlta had not signed an Off-Coal Agreement it would be eligible to seek additional depreciation treatment for any reason. Now, at least for the units mentioned in the Off-Coal Agreement, it can't. TransAlta's other coal-fired generating properties continue to be eligible, as are all other coal-fired generating units. And the governing statue says nothing at all about drawing distinctions on this basis. It is hard to imagine a clearer case of unauthorized discrimination—on any standard of review.

3. The *MGA* doesn't authorize discrimination against Off-Coal Parties

67. As this Court has reiterated many times, including in *Vavilov*, the guiding principle for statutory interpretation is "the 'modern principle' …, that is, that the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.'"[85] "Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose."[86]

68. Here, the ABCA missed important aspects of the wording of the statute itself, the context of property assessment and tax legislation, and the real nature of the discrimination involved here—which did not involve not differentiating between types of property but, rather, imposed a disadvantage on a specific group of property owners. As a result, the ABCA failed to appreciate that the Minister's interpretation of his own authority was unsustainable—whether it is called wrong, unreasonable, or egregious.

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[83] *Tesla*, at para. 60.
[84] See, e.g., *Arcade Amusements*; *Jonas v Gilbert*, 1881 CanLII 36 (SCC), 5 SCR 356 [***Jonas v. Gilbert***]; *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 [***Montreal Port Authority***].
[85] *Vavilov*, at para. 117, quoting *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.
[86] *Ibid*., at para. 118.

i. Grammatical and ordinary sense and wording of related provisions

69. The ABCA correctly recognized that "[t]he language of the *MGA* does not expressly authorize the Minister to draw distinctions between different types of 'electric power generation properties.'"[87] If McLachlin J.'s statement in *Shell*[88] is the law—which it should be—that is a complete answer. But there is more in the statute that should have also caused the ABCA to recognize that implying such a power is inconsistent with, and undermines, the statutory scheme.

70. The *MGA* doesn't expressly authorize drawing distinctions between any types of designated industrial property: section 292(2)(a) requires the use of a singular "valuation standard" for all designated industrial property—not multiple standards.[89] And section 322(1)(g.01) authorizes the Minister to prescribe sub-classes, but only "for the purposes of section 297(2.1)", which requires a municipal council to enact a bylaw to effect the division into sub-classes (something not done here).

71. The MGA leaves "valuation standard" to be defined by regulation. The *Matters Respecting Assessment and Taxation Regulation* (**MRAT**)[90] makes it clear that a valuation standard is an approach to valuation. Section 4 of MRAT sets "market value" as the default valuation standard for land. Section 5 of MRAT says that the valuation standard for improvements is that set out in sections 7, 8, or 9 of MRAT. Section 8(1) then says the valuation standard (singular) for Linear Property is "that calculated in accordance with the procedures referred to" in the Linear Guidelines. Section 8(2) reiterates that the assessor "must follow the procedures" set out in the Guidelines. The same procedure—a cost-based approach—applies to all types of linear property: determine a base cost, adjust that cost to the current year, and apply the Schedule C and D depreciation factors.[91] None of the *MGA*, MRAT, or the *Guidelines* themselves contemplate different valuation standards or procedures being applied to different

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[87] ABCA Decision, AR Tab 3, p. 49, at para. 84.

[88] That discrimination in taxation requires express authorization by the empowering legislation "because of the presumption that the legislature intends all citizens to be treated equally on such matters"; *Shell*, at para. 60. See note 72 above and accompanying discussion.

[89] Section 322(1) does grant the minister the power to "establish valuation standards for property," but does not contemplate different standards within the class of "designated industrial property." The ABCA did not address the use of the plural in s. 322(1) and the singular in s. 292(2)(a).

[90] *Matters Relating to Assessment and Taxation Regulation*, Alta Reg 220/2004.

[91] *BP Energy*, at para. 80

pieces of linear property of the same type.

72. The ABCA heavily relied on the italicized words below (italicized by the ABCA)[92] in s. 292(2) as authorizing (or even requiring) the Minister to ignore the concept of value in making valuation standards for linear property:

> (2) Each assessment must reflect
>
> (a) the valuation standard *set out in the regulations* for designated industrial property, and
>
> (b) the specifications and characteristics of the designated industrial property *as specified in the regulations*.

73. But the ABCA didn't refer to the very similar wording in s. 289(2), which applies to assessment of all other (i.e. non-regulated) types of property. This makes the regulated assessment process equivalent to the non-regulated one—both look at a property's characteristics and apply guidelines to arrive at a property value. Just because one class of property looks at things like comparable sales to arrive at a market-related value while the other looks at historical cost, inflation, and depreciation to arrive at a cost-based value doesn't mean that they are doing fundamentally different things. On the contrary, the similar wording suggests the two exercises share a similar objective—a property assessment system that reflects property value so as to fairly and equitably distribute taxes.

74. Recall that what the ABCA should have been looking for here was statutory authorization to discriminate between different properties of the same type (or, more accurately, between different property owners.) Simply saying that the regulations can specify things isn't a license to discriminate—every regulation "specifies" or "prescribes" something. If that was enough to authorize discrimination, there would be no such thing as a case of unauthorized discrimination, and we have clearly seen that isn't so. If even regulations authorizing a minister to "designate … certain classes" isn't enough to authorize discrimination (as in *BC Ferry*[93]), a simple power to "specify" won't do it.

75. Nor did the ABCA appear to focus on the *MGA*'s reference to "specifications and characteristics of the designated industrial property" in s. 292(2)(a). It is these things that give

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[92] ABCA Decision, AR Tab 3, p. 27, at para. 12 and p. 44, at para. 63.
[93] At para. 4.

rise to differential treatment. An assessment of property A that differs from property B is justified because the two have different characteristics and specifications. The ABCA never addressed whether payments under the Off-Coal Agreements were "specifications" or "characteristics" of the property. If they are not, they cannot be considered in the assessment.

76. The ABCA also didn't consider the effect of s. 292(2.1) which, as noted above, requires that "the specifications and characteristics… referred to in subsection [292](2)(b) must reflect the records of the … Alberta Utilities Commission". In fact, the ABCA said the *MGA* "empowered the Minister to decide … what property specifications and characteristics would be relevant …"[94] for assessment of linear property. But s. 292(2.1) says exactly the opposite—it says the specifications and characteristics *must include* those contained in the records of the AUC. If that is so, how could these Guidelines possibly comply with this requirement when it was expected that the Off-Coal Parties would be applying to the AUC to convert their coal-fired units to natural gas, taking the coal-related assets out of service and thereby altering the records of the AUC?

77. The ABCA did not seem to appreciate the significance of section 284(1)(c)'s confirmation that "'assessment' means a value of property determined in accordance with this Part and the regulations." That means that the aim of any regulations made under s. 322(1) must be to arrive at "a value of property". Given that depreciation must be accounted for to arrive at an accurate valuation,[95] how can excluding otherwise applicable depreciation possibly aid in arriving at a value of the property? Especially when, without it, the underlying assumption to value these properties will be the fiction that the coal-related assets continue in service for decades after they are retired?

ii. Entire context: fair and equitable taxation

78. Part of the context here is s. 293(1) of the *MGA*, which provides that assessors must prepare *all* assessments—including linear assessments assessments—"in a fair and equitable manner."[96] This confirms the *Guide*'s recognition that the purpose of the assessment and taxation regime "is to establish and maintain a property assessment system that fairly and equitably

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[94] ABCA Decision, at para. 64.
[95] Alberta Guide, at p.7.
[96] See *Ember Resources*, at para. 43, quoting the MGB: "It would be absurd to interpret a legislated standard as intending to discriminate between similar properties without that intent being clearly expressed or without the benefit of some identifiable overriding policy objective."

distributes taxes."[97]

79. The phrase "fair and equitable" calls out an important contextual factor that the ABCA overlooked: the long history of judicial interpretation and application of the principle of fairness and equity in taxation. The ABCA itself has in the past recognized that fair and equitable treatment of property owners is "one of the fundamental principles underlying municipal taxation in Canada."[98] This Court recognized the principle of fair and equal taxation as early as 1881, in *Jonas v. Gilbert*, as follows:

> Unless the legislative authority otherwise ordains, everybody having property or doing business in the country is entitled to assume that taxation shall be fair and equal, and that no one class of individuals, or one species of property, shall be unequally or unduly assessed.[99]

80. This bedrock principle is part of the legal context of the statute, which, as Sullivan observes, is relevant to statutory interpretation in two ways: both as a source of legislation, "as when common law rules or concepts are codified," and because "it supplies the legal norms which inform statutory interpretation. These norms are relevant because they are part of the legal culture in which law makers as well as interpreters operate."[100]

81. On more than one occasion, this Court has pointed to regulations that violate this principle of even-handedness in taxation as paradigm cases of invalidity. In *Arcade Amusements*, Beetz J. identified as a "separate but cumulative" cause of invalidity, in addition to the presumption against discrimination, "a departure from the principle of equality in taxation."[101] And in *Vavilov*, this Court said that "a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system [cannot] ignore that system and base its determination on a 'fictitious' system it has arbitrarily created,"[102] citing its earlier decision in the *Montreal Port Authority* case.[103]

82. The entire context matters. Yet it is nowhere to be found in the ABCA's analysis.

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[97] Alberta Guide, at p. 2.
[98] *Lougheed Tomasson Inc. v Calgary (City of)*, 2000 ABCA 81 (CanLII), at para. 10.
[99] *Jonas v Gilbert*, at p. 366.
[100] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (LexisNexis Canada, 2022), at §1.05(3) [Authorities, Tab 18].
[101] *Arcade Amusements*, at p. 406.
[102] *Vavilov*, at para. 111, citing *Montreal Port Authority*, at para. 40.
[103] *Montreal Port Authority*.

iii. Classification based on the property, not the owner

83. Fair and equitable taxation also means that property is classified for assessment purposes based on its characteristics. Indeed, the *MGA* makes this requirement explicit in ss. 289(2)(a) and 292(2)(b). This means the classification does not change based on who owns the property.[104]

84. In *Okanagan North Growers' Cooperative v British Columbia*, the B.C. Supreme Court struck down a regulation under the *Assessment Act* that classified land based on the business the landowner was in.[105] Such a classification would be authorized only if the statute had expressly set out a specific assessment regime for land belonging to a particular owner—as it did, for example, for land owned by the Crown.[106] The Court quoted from *Inland Natural Gas Co. Ltd.*, which found a similar regulation *ultra vires*:

> **One does not define a type of land or improvement by naming the owner** … [The statute] requires the Lieutenant-Governor in Council to define the types of land or improvements. **This is objects not beings**. The unsoundness of the contention for the respondents is revealed by an illustration. Take the Vancouver Hotel property. If one person asked another what type of land and improvements it was he would consider that he was not getting a responsive answer if he was told that it was owned by Canadian National Railways. He would expect to hear an answer to the effect that it was a prime, downtown, urban land developed as an hotel.[107]

85. The Off-Coal Amendments have the same problem. If one asked what type of property the Keephills 3 Plant is, it would be nonsense to say in reply "it's owned by a utility that signed an Off-Coal Agreement with the Province." It is equally nonsensical to describe the specifications and characteristics of the property by noting that TransAlta is a party to an Off-Coal Agreement.

86. The Off-Coal Amendments, which impose a disproportionate tax burden on a few utilities because of a characteristic of the owners (being parties to Off-Coal Agreements) rather than a characteristic of the property, are very different than the municipal taxation by-law that

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[104] *Burlington Resources Canada Ltd. v Peace River (Assessor of Area #27)*, 2005 BCCA 72 (CanLII), at para. 35, citing *British Columbia (Assessor of area #21 - Nelson/Trail) v Cominco Ltd.*, 1998 CanLII 6431 (BC CA).
[105] *Okanagan North Growers' Cooperative v British Columbia (Assessor of Area No. 19 - Kelowna)*, 1994 CanLII 2791 (BC SC), [1994] B.C.J. No. 2380 [***Okanagan North***].
[106] *Ibid*., at para. 15.
[107] *Inland Natural Gas Co. Ltd. v Assessors of the Assessment Areas of Penticton et al*. September 25th, 1978, Vancouver Registry No. A781585 (unreported) (B.C.S.C.), quoted in *Okanagan North*, at para. 17 (emphasis added).

this Court upheld in *Catalyst Paper*.[108] In *Catalyst*, the tax rate was higher for all industrial property than for residential property. It was true that this meant one taxpayer in the district, Catalyst, paid much more than residential taxpayers. But the difference wasn't targeted at a particular owner. Catalyst paid more than residential taxpayers because its property was in a different class, not because the municipality had targeted one owner among a class of property owners for differential treatment. And—critically—the differential treatment between residential and industrial classes was expressly authorized in the statute.

iv. Misreading of s. 322(1)(i) basket clause

87. When it decided to "readily infer"[109] that the Minister was authorized to do what it did here, relying on the basket clause in s. 322(1)(i),[110] the ABCA did not recognize that the *MGA does* expressly provide for different treatment based on the owner of the property in other circumstances. Section 362 provides exemptions for property held by government, churches, and other bodies. Section 363 provides that property held by certain community organizations is exempt, but a municipal council may make it taxable by by-law. Section 298(1) provides that no assessment shall be prepared for certain property held by government and other bodies. When the statute authorizes different treatment because of who owns the property, it clearly says so. Here it does not.

88. The basket clause in s. 322(1)(i) ("respecting any other matter considered necessary to

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[108] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 SCR 5 [***Catalyst Paper***].

[109] ABCA Decision, AR Tab 3, at para. 85

[110] The Minister also argues that s. 322.1 applies here. That section was passed in response to a 2007 challenge to previous minister's guidelines: *Calgary (City) v Alberta (Minister of Municipal Affairs)*, 2008 ABQB 433 at paras. 2, 12, 21 and 37. Section 322.1 speaks entirely of past guidelines and says they "are declared valid as of the dates on which they were established." Surprisingly, the Minister argues that this *also* validated *future* versions of guidelines that would not come into existence until years or decades later—effectively the Legislature saying "whatever the Minister may do in the future is hereby authorized." But "the power to make regulations under a Henry VIII clause is not exempted from the general rules of administrative law. Any regulation that is made must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object…" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), at para. 87).

carry out the intent of this Act") must be interpreted *ejusdem generis*.[111] The subparagraphs of s. 322(1) that precede the general basket clause in s. 322(1)(i) empower the Minister to make regulations about, *inter alia*, information to be provided in assessing linear property (s. 322(1)(c.1)), valuation standards for property (s. 322(1)(d)), and specifications and characteristics of linear property (s. 322(1)(d.3)). The basket clause in s. 322(1)(i) is part of a family of regulation-conferring powers which together set out the normal aspects of a property assessment regime aimed at assessing the value of property—as s. 284(1)(c) confirms. This includes classifying types of property (not types of owners). The more general provision in s. 322(1)(i) should be interpreted accordingly.

89. A broadly drafted basket clause conferring "open-ended power" to make such rules as the Minister considers necessary "cannot be read in isolation," but has to be read in light of the rest of the section in which it is found.[112] The Minister's power to make regulations and guidelines must "be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation."[113] If the only limit on that power were the Minister's "own discretionary determination of the wisdom of its proposed regulation in light of any policy objective," that would be "akin to unfettered discretion."[114]

90. This is why "the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework."[115] The ABCA did not identify the "rational connection" between the purpose of Part 9 of the *MGA*— to produce a fair and equitable assessment that reflects value based on the specifications and characteristics of property—and treating properties owned by parties to Off-Coal Agreements differently than properties owned by people who aren't.

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[111] Sullivan, at §8.07; *National Bank of Greece (Canada) v Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029, at para. 12.
[112] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII), [2012] 3 SCR 489, at para. 29.
[113] *Ibid*., at para. 50.
[114] *Ibid*., at para. 28.
[115] *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 SCR 140, at para. 74. See also *Katz*, at para. 27, quoting Lysyk J in *Waddell v Governor in Council*, 1983 CanLII 189 (BC SC), 8 Admin. L.R. 266, at p. 292.

91. The ABCA read in not only the power to create different standards within the class of designated industrial property, but also "readily inferred" the power to distinguish between "coal-fired and other types of electric power generation properties," and upheld the Off-Coal Amendments on this basis.[116]

92. There are a number of problems with this analysis. Most importantly, the Linear Guidelines *do not* draw distinctions "between coal-fired and other types of electric power generation properties." The many other coal-fired electric power generation properties that were not included in the Off-Coal Agreements are not caught by the Off-Coal Amendments (for example, TransAlta's Sundance Units 1-6 and Keephills Units 1 and 2,[117] and any other coal-fired units in the Province owned by persons who didn't sign an Off-Coal Agreement). The Off-Coal Amendments distinguish between electric power generation properties mentioned in Schedule A of the Off-Coal Agreements and electric power generation properties that are not.

93. Nor did the ABCA clearly explain how excluding a depreciation event that on its face would otherwise be caught by the description in s. 2.004(e)—but only for three targeted taxpayers—carries out the "intent of the statute." While the ABCA referred to the policy goal of a stable and predictable assessment system,[118] it didn't articulate how treating *these specific* properties differently than all others would achieve that objective. Nor did it explain how singling out these properties would alleviate "difficulties inherent in assessing 'designated industrial property.'"[119] What about these three owners' coal-fired generating units makes them more difficult to assess than all others, and how does denying additional depreciation alleviate that problem? The ABCA never answered these critical questions.

94. This brings us to another error: the (implicit) finding that a payment under a contract to which the property owner is a party has something to do with the "specifications and characteristics" of the property itself. Both courts below—and the Minister—were under the mistaken impression that the transition payments under the Off-Coal Agreements formed part of the specifications and characteristics of the property. They don't. Suppose two neighboring properties have valuable hotels on them, and both burn down. On the assessment date, there is no

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[116] ABCA Decision, AR Tab 3, p. 49, at para. 85.
[117] Gellner Affidavit, AR Tab 12, p. 76, at para. 6.
[118] ABCA Decision, AR Tab 3, p. 45, at para. 67.
[119] *Ibid*.

longer a hotel on either property. But the owner of Hotel A has received a significant payment from its insurer, while the owner of Hotel B was unfortunately uninsured. When it comes time to determine the value of these properties—by any method—would it make any sense to value A higher than B because owner A received a payment from its insurer?

95. Put simply, the ABCA's finding of an implicit power to do what the Minister did here is just "too great a stretch from the core purposes intended by [the Legislature] and from the powers granted" under the statute.[120]

4. Minister bears the burden to justify discrimination

96. There is a presumption in administrative law "that a statutory delegate must not exercise its discretion in a discriminatory manner."[121] To give effect to this important rule, the burden of justifying discriminatory delegated legislation must be on the statutory delegate. If the statutory delegate believes it is authorized to discriminate, it should not be difficult for it to articulate why.

97. It is true that regulations *in general* are presumed to be valid. But the presumption of validity, applying to regulations generally, can easily co-exist with a presumption of invalidity in the more specific case of discriminatory regulations. This has long been the explicit rule for retroactive regulations.[122] While a similar rule can be drawn implicitly from the discrimination case law, it is now time for this Court to make it explicit in discrimination cases as well.

98. Requiring a statutory delegate to justify discrimination without an obvious or express statutory basis simply follows from the rule in *Kruse v Johnson*, part of our law since "time immemorial." It would make no sense to say that the victim of a discriminatory regulation has the burden of proving a negative, that the discrimination is *not* authorized by the statute. If a regulation discriminates in a way that isn't connected on its face to statutory language creating the claimed power to discriminate, it is presumptively invalid.

99. Regulations that discriminate are, like regulations that deprive someone of a vested right,

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[120] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (CanLII), [2012] 3 SCR 489 [***Broadcasting Reference***], at para. 33.
[121] David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* 7th ed (Thomson Reuters, 2020), at p. 203.
[122] Sullivan, at § 25.13(1).

"out of keeping with Canadian notions of decent legislative behaviour."[123] It is "presumed that the legislature does not intend to delegate a power to legislate retroactively or retrospectively or to interfere with vested rights"[124]—a presumption that exists alongside the more general presumption of validity for regulations without tension. Discriminatory regulations should, like retroactive and retrospective ones, be presumed invalid. The rationale is essentially the same: "courts presume that legislatures want to do the right thing."[125] It is not the right thing to discriminate arbitrarily and without explicit authorization, any more than it is the right thing to take away vested rights.

100. Regardless of where the burden lies, the general principle that regulations are presumed to be valid should not be stretched beyond its logical application, as the ABCA did in this case when it said that courts must strain to interpret both the statute and the regulation "where possible" in a manner so as to find the regulation *intra vires*.[126] That is plainly inconsistent with this Court's approach in the *Broadcasting Reference*, where the Court refused to make "too great a stretch from the core purposes intended by Parliament and from the powers granted."[127]

101. In this case, not only is there no express authorization to discriminate in the way that the Off-Coal Amendments do, all indications of text, context, and purpose show that the Minister was never intended to have such an extraordinary power. This is unauthorized discrimination, plain and simple, on any standard of review.

B. Hyperdeference is the wrong standard of review and undermines the rule of law

102. The ABCA in this case and in *Auer* applied an unusual version of the *Katz* test that has been described as "hyperdeferential"[128] and "unique in all of administrative law."[129]

103. The ABCA started from the premise that executive regulations are truly like statutes and

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[123] *Casamiro Resource Corp. v British Columbia (Attorney General)*, 1991 CanLII 211 (B.C.C.A.), (1991), 55 B.C.L.R. (2d) 346, 80 D.L.R. (4th) 1, (1991), 45 L.C.R. 161 at 169; Paul Salembier, *Regulatory Law & Practice*, 3d edition (LexisNexis, 2021), at pp. 307-8 [Authorities, Tab 17].
[124] Sullivan, at § 25.13(1).
[125] Sullivan, at §1.05(3).
[126] ABCA Decision, AR Tab 3, p. 39, at para. 51, citing *Katz*, *supra*, at para. 25.
[127] *Broadcasting Reference*, at para. 33.
[128] Paul Daly, "Regulations and Reasonableness Review," *Administrative Law Matters* (January 29, 2021); *Portnov v Canada (Attorney General)*, 2021 FCA 171 (CanLII) [***Portnov***], at para. 19; *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210 (CanLII) [***Innovative Medicines***], at para. 30.
[129] *Innovative Medicines*, at para. 30.

that therefore respect for separation of powers requires a hyperdeferential review.[130] With respect, this gets it backwards, and rests on a fundamental misunderstanding of what regulations are—and who creates them and in what capacity. If anything, the central principle that animates *Vavilov* and this Court's administrative law jurisprudence—the rule of law—requires less deferential review of executive regulations, not hyperdeference.

104. Deference to a ministerial regulation that actually does what the legislature wanted is one thing—but what if the regulation does the opposite? What if a minister does something the legislature never intended her to have the power to do? Then the minister's regulation is *thwarting* the democratically established will of the people's elected representatives. And a court that defers to this wrong interpretation is actually *undermining* the rule of law, not upholding it. This is why the rule of law requires an "umpire who can meaningfully assess whether the law has been obeyed" and why "both the umpire and the assessment must be fully independent from the body being reviewed."[131] And this is why hyperdeference is wrong-headed and an abdication of the courts' important constitutional role.

105. Executive regulations, unlike primary legislation or municipal by-laws, are created without direct accountability to the electorate and without public debate. Unlike a tribunal decision, a decision to create executive regulations happens without any opportunity for those who are affected to make submissions on the scope of the decision-maker's statutory grant of authority or the effect the decision has on them.[132] In this context, meaningful and robust judicial review is a crucial check on an arbitrary exercise of power.

1. If *Katz* created a hyperdeferential standard, *Vavilov* overruled it

106. The ABCA took the view that "the principles in *Katz* have not been overtaken or modified by *Vavilov* as some have suggested."[133] But in *Portnov* (decided before the ABCA's decision here), the Federal Court of Appeal pointed out that the aspect of *Katz* that the Alberta Court of Appeal fastened on to create the hyperdeferential test—the strong presumption of validity for regulations and the very narrow ways it can be rebutted—has been overtaken by this

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[130] *Auer*, at para. 20; ABCA Decision, AR Tab 3, p. 47, at para. 74.
[131] *Tennant*, at para. 23.
[132] John M. Evans, "Reviewing Delegated Legislation after *Vavilov*: Vires or Reasonableness?" (2021) 34 Can. J. Admin. L. & Prac. 1, at p. 21 [**Evans**] [Authorities, Tab 13].
[133] ABCA Decision, AR Tab 3, p. 38, at para. 46.

Court's modern administrative law jurisprudence, especially *Vavilov*.[134] *Innovative Medicines* (decided by the same Court after the ABCA's decision) reiterates this position, and is critical of the ABCA's hyperdeferential approach.[135] And the B.C. Court of Appeal, in *British Columbia (Attorney General) v. Le*, similarly disagreed, saying "To require that the impugned regulation be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose is, in my respectful view, simply incompatible with the governing *Vavilov* standard."[136]

107. *Vavilov* mentions *Katz* just once: as authority confirming that "an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers."[137] That is hardly a ringing endorsement of hyperdeference. As this Court went on to say in the next sentence, "Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a 'fictitious' system it has arbitrarily created."[138] That is this very case.

108. *Vavilov* itself and several commentators and courts responding to the ABCA's decisions in this case and *Auer* show why a hyperdeferential approach is wrong:

(a) *Vavilov* "involve[d] a recalibration of the governing approach," so that in all judicial review cases courts "should look to [*Vavilov*] first in order to determine how this general framework applies."[139]

(b) *Vavilov* addresses the status of prior jurisprudence in general, and it does not suggest that *Katz* supports a "separate line of authority" for regulations as the ABCA said in *Auer*.[140] "[E]arlier cases, like *Katz*, remain good law only if they are consistent with *Vavilov*."[141]

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[134] *Portnov*, at paras. 21-22.
[135] *Innovative Medicines*, at paras. 30-38.
[136] *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, at para. 94.
[137] *Vavilov*, at para. 111.
[138] *Ibid*., citing *Montreal Port Authority*, at para. 40.
[139] *Vavilov*, at para. 143.
[140] *Auer*, at para. 8.
[141] *Innovative Medicines*, at para. 32.

(c) The ABCA's argument that there is a unique standard for regulations, outside the framework of *Vavilov*, is a "regulation carve out" from *Vavilov*[142] that runs counter to this Court's intention in *Vavilov* to "ensure that the framework … accommodates all types of administrative decisionmaking."[143]

(d) "*Vavilov* says this judicial fastening onto differences in form must stop. Complexity, confusion and incoherence must be replaced with simplicity, clarity and coherence … These are furthered if we use the same methodology—the methodology in *Vavilov*—to review matters that, in their real essence and true nature, are substantially the same."[144]

(e) *Vavilov*'s unified template for judicial review "was hard-won. It attempts, with reason, to capture the complexity of delegated power without tracking all of its infinite features."[145]

(f) "In administrative law, in developing our methodologies, too often we have fastened onto differences in form. We have developed different rules for matters that, in their real essence and true nature, are substantially the same. The result? Unnecessary complexity, confusion and incoherence."[146] That complexity, confusion and incoherence have real-world effects on litigants.[147]

(g) *Vavilov* says that the new framework supplants the old category of jurisdictional review "in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute."[148]

2. Executive regulations and true legislation are different things

109. The ABCA went wrong in *Auer* by reasoning that Governor-in-Council regulations are virtually unreviewable because they are equivalent to "the creation of law through the exercise of

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[142] Paul Daly, "Resisting which Siren's Call? *Auer v Auer*, 2022 ABCA 375 and *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381" *Administrative Law Matters* (November 24, 2022).
[143] *Vavilov*, at para. 11.
[144] *Portnov*, at para. 36.
[145] Mancini, Mark, *One Rule To Rule Them All: Subordinate Legislation and the Law of Judicial Review* (December 15, 2023). Ottawa Law Review, Forthcoming.
[146] *Innovative Medicines*, at para. 35.
[147] *Vavilov*, at para. 21.
[148] *Vavilov*, at para. 66 (emphasis added).

a legislative function."[149] Then, in this case, the ABCA stretched that already questionable logic "to extend beyond the Governor-in-Council and to another type of executive action that takes legislative form"[150]—ministerial guidelines under the *MGA*. The ABCA emphasized that it believed it was "reviewing legislative action, not an administrative decision," so that, according to the Court, cases about review of administrative action were simply not applicable.[151]

110. But the Off-Coal Amendments are an administrative action, not legislation enacted by an elected legislature. A regulation promulgated under a statute "is not an enactment passed by Parliament."[152] It is "an enactment made by the Government"[153]—that is, the Executive, as an administrative actor. The ABCA, by equating this kind of administrative action to the creation of law through a legislative function, "distort[ed] the source of authority for subordinate legislation."[154]

111. Legislatures pass statutes pursuant to "constitutionally-granted, primary legislative power," which is why they "are entirely immune from judicial interference" except on constitutional grounds.[155] By contrast, subordinate legislative power is "parasitic on primary legislative authority" and "[w]hen Ministers or the Governor in Council promulgate regulations, they are acting in their executive capacity, on the understanding that their capacity is bound and limited by the primary law."[156] And their work is done in secret.[157] There is no record of debates.[158] There is no question period. In short, there is no democratic process. This bears little resemblance to passing legislation through Parliament or a provincial legislature.

112. Perhaps it is attractive to make controversial policy—or, as in this case, laws that target someone unfairly—through regulations instead of legislation because that means "avoid[ing]

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[149] *Auer*, at para. 20.
[150] Paul Daly, "Resisting which Siren's Call? *Auer v Auer*, 2022 ABCA 375 and *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381" *Administrative Law Matters* (November 24, 2022).
[151] ABCA Decision, AR Tab 3, p. 47, at para. 74 (emphasis added).
[152] *The King v Singer*, 1940 CanLII 37 (SCC), [1941] SCR 111 at 115.
[153] *Ibid.*
[154] Mancini, Mark, *One Rule To Rule Them All: Subordinate Legislation and the Law of Judicial Review* (December 15, 2023). Ottawa Law Review, Forthcoming.
[155] Mancini, "*Vavilov*'s Domain."
[156] *Ibid*.
[157] Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dalhousie LJ 519 [**Neudorf, "Delegated Legislation"**] at p. 521 [Authorities, Tab 15].
[158] Lorne Neudorf, "Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation," Canadian Parliamentary Review (Spring 2016) 29 at p. 26 [Authorities, Tab16].

opposition or scrutiny."[159] That is hardly a reason for less rigorous judicial review. On the contrary, judicial review matters as a mechanism of accountability and transparency for regulations even more than in other contexts, because there may be no other.[160]

113. The chambers judge's concern about "overturn[ing] the will of elected officials" was entirely misplaced. The case she cited on this point[161] concerned a by-law enacted by elected municipal councilors, not a minister acting behind closed doors. The Court of Appeal followed a similarly mistaken path, refraining from meaningful scrutiny because "a court reviewing regulations must take care to avoid examining the merits of an authorized policy choice."[162] But that assumes the answer to the question the court was supposed to ask: *does* the legislation authorize what the Minister did? If the court won't meaningfully engage on this question, who will? In judicial review, "reviewing courts are in the business of enforcing the rule of law … . That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers."[163]

C. The Off-Coal Amendments should be reviewed for correctness

114. The question in this case is who determines the limits of the Minister's power to enact regulations: the Minister himself, or the courts? This is not the same kind of problem as review of an adjudicated decision by an administrative decision maker. Nor is it the same as reviewing rules or regulations made by an independent statutory tribunal. And whether the answer is that the courts decide (correctness), or that the Minister's own view is entitled to deference

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[159] *Ibid.*, at p. 29.

[160] Unlike an administrative adjudicator, a statutory delegate creating a regulation "is under no duty to provide an opportunity for those affected to be heard before their legal rights or interests are adversely affected by the delegated legislation" (Evans, at p. 24). Most of the written law in Canada is delegated legislation (John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov," at p. 1.) One scholar has calculated that at the federal level delegated legislation is made at a rate of 5:1 compared to primary legislation (Neudorf, "Delegated Legislation," at p. 521).Hyperdeference would insulate most lawmaking from any meaningful scrutiny. Judicial review is "what ensures [that delegated legislation] conforms to its 'delegated' nature and does not undermine fundamental constitutional principles of democracy and the rule of law" (Keyes, at p. 1).

[161] *2326169 Ontario Inc. v The City of Toronto*, 2016 ONSC 6221 (CanLII) [***2326169 Ontario***].

[162] ABCA Decision, AR Tab 3, at para. 50.

[163] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 (CanLII), at para. 78.

(reasonableness), the Off-Coal Amendments fail. But there are strong reasons to apply *Vavilov's* correctness standard to ministerial regulations.

115. *Vavilov* recognizes exceptions to presumptive reasonableness. The list of exceptions is not exhaustive. Others can arise where it is "consistent with the framework and the overarching principles" established in *Vavilov* to recognize them.[164] Correctness review is warranted based on legislative intent or where required by the rule of law.[165] Both apply here.

116. *Vavilov* recognized three places where correctness review is required by the rule of law: constitutional questions, general questions of law of central importance to the legal system, and questions regarding jurisdictional boundaries between administrative bodies. The scope of executive power to make regulations is analogous to those examples. It has constitutional implications and it is about the boundaries between the powers of different branches of government.

117. While *Vavilov* eliminated *jurisdiction* as a distinct category,[166] it did not do the same with respect to *vires*. *Vires* and jurisdictional questions are different. "[J]urisdiction is normally reserved for the power of those exercising adjudicative functions, while *vires* is generally associated with the review of delegated legislation and other administrative action that is not subject to the duty of fairness."[167] *Vavilov* does not change "the imperative of applying correctness review where there is a direct challenge to the *vires* of a regulation."[168] To hold otherwise would "undermine the rule of law and jeopardize the proper functioning of the justice system."[169]

118. That imperative flows from the rule of law. 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."[170] In this context, judicial review implicates "the courts' constitutional duty to ensure that public authorities do not overreach their lawful

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[164] *Vavilov*, at para. 70.
[165] *Vavilov*, at para. 69.
[166] *Vavilov*, at para. 65.
[167] Evans, at p. 20.
[168] *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (CanLII), [2018] 1 SCR 635, at para. 63 (per Côté J., dissenting).
[169] *Vavilov*, at para. 70.
[170] *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para. 29.

powers."[171] Those words are from *Dunsmuir*, but surely the Court's departure from *Dunsmuir*'s standard of review framework is not also a repudiation of these bedrock legal principles. The rule of law requires a correctness review for executive regulations like these.

119. The basis for the presumption of reasonableness under *Vavilov*—legislative intent—also supports correctness *vires* review of executive regulations.

120. As Evans argues, it would be wrong to assume that "like delegated adjudicative powers, the delegation of legislative powers normally authorizes the delegate to interpret the statutory grant of authority and determine whether the delegated legislation in issue falls within it, and that judicial deference on these questions of law is therefore warranted."[172] Adjudicators, as Evans observes, "typically have express or implied power to decide any question of fact and law necessary to decide a dispute properly before them, including the interpretation of their enabling legislation."[173] By contrast, "[u]nlike adjudicative decision-making powers, delegated legislative powers have not normally been thought to include the power to decide questions of law, such as the interpretation of the scope of the legal authority delegated: such a power is not necessary for the delegate to exercise its statutory power to enact delegated legislation or to fulfil its mandate."[174]

121. It makes much more sense to presume that legislatures intends courts to be the disinterested referees when there are questions about the scope of delegated executive rule-making power: "Lawmaking by the executive is not what is expected or apparent from the constitutional framework and it can be safely presumed that Parliament does not intend to casually lend its lawmaking powers to others."[175]

122. *Vavilov* says "[w]here a legislature has created an administrative decision maker for the specific purpose of *administering a statutory scheme*, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it."[176] But a Minister interpreting the scope of his statutory power to enact secondary legislation "consistent with the intent of" a statute is doing

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[171] *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, at para. 29.
[172] Evans, at p. 5 [Authorities, Tab 13].
[173] *Ibid*., at p. 20.
[174] *Ibid*., at p. 21.
[175] Neudorf, "Delegated Legislation," at p. 557.
[176] *Vavilov*, at para. 24.

something different from a board or tribunal determining how the law applies to a matter before it. The rationale for the presumption does not extend to ministerial regulation-making.

D. Off-Coal Amendments fail a robust *Vavilov* reasonableness review

123. Part III(A) of this Factum shows that whether one is searching for statutory authorization for these discriminatory amendments on a correctness *or* a reasonableness standard, it just isn't there. There is no reasonable reading of this statute that yields the power to single out and assess differently a handful of electric power generation properties just because *their owners* settled potential claims against the Crown. There is no rational connection between the owner receiving settlement funds and the value of the property itself. Nor is there even arguable statutory authorization to alter what would otherwise be fair and equitable assessments in order accomplish climate policy goals, as the Chambers Judge found the Minister was doing.

124. The ABCA didn't perform a *Vavilov* "robust form of [reasonableness] review."[177] Nor did the Chambers Judge (as the ABCA noted, while she purported to follow *Vavilov*, "it is unclear how this standard of review informed her analysis"[178] as she applied *Katz* instead.[179]) And neither Court recognized that "in situations where a regulation targets a particular individual or group, judicial review for reasonableness may be more searching: more may be required by way of justification. This flexibility is built into the *Vavilov* framework."[180]

125. As *Vavilov* says, reasonableness review "does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it."[181] Rather, it "confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority."[182]

126. An administrative action is unreasonable because of either of two "fundamental flaws": "a failure of rationality internal to the reasoning process" or "when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it."[183] Both flaws are

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[177] *Vavilov*, at para. 13.
[178] ABCA Decision, AR Tab 3, p. 37, at para. 40.
[179] *Ibid.*, at p. 40, para. 53.
[180] Paul Daly, "Resisting which Siren's Call?"; see also Mancini, at p. 36.
[181] *Vavilov*, at para. 109.
[182] *Vavilov*, at para. 68.
[183] *Vavilov*, at para. 101.

evident here.

127. The requirement for rationality flows from this Court's recognition in *Vavilov* of the need to "develop and strengthen a culture of justification in administrative decision making."[184] An administrative decision maker can't say, in effect, "this is my decision because I say so." The lack of justification and rationality could not withstand reasonableness review. But that is exactly the Minister's rationale here—an argument the ABCA accepted.

128. The ABCA read the words "as set out in the Regulations" in s. 292(2) of the MGA as giving the Minister complete and untrammeled discretion to decide how any particular property should be assessed. This interpretation would allow the Minister to define and redefine terms and procedures in the Guidelines *ad infinitum*, to manipulate the assessment process so that a single property is given a specific value regardless of how it actually stacks up against other similarly situated property—and nobody could complain, and no court could intervene, because the assessment would have been carried out "in accordance with the Regulations."

129. But if that is the standard, why have an assessment regime at all? And why require a fair and equitable assessment if the assessed value is just whatever the Minister says it is? If that is what the Legislature wanted, would it not have just said "the assessed value shall be whatever the Minister determines"? In short, there is no rational connection between untrammeled ministerial discretion to make an assessed value whatever the Minister wants it to be and an *ad valorem* tax system that has as its aim a fair and equitable assessment.

130. When formal reasons are not provided, as in this case, *Vavilov* confirms that judicial review still "prioritizes the decision maker's justification for its decisions."[185] Even without formal reasons, "the reasoning process that underlies the decision will not usually be opaque," and the reviewing court "must look to the record as a whole to understand the decision."[186] The record and the context can "reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*."[187] The record amply shows that here.

131. This Court also observed in *Vavilov* that "[i]t can happen that an administrative decision

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[184] *Vavilov*, at para. 2.
[185] *Vavilov*, at para. 137.
[186] *Ibid*.
[187] *Ibid.*

maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose."[188] Here, the Minister's reading of the statute doesn't consider any of the legislative scheme, its purpose, the legal context, or long-established principles of assessment law, at all—all of which reveal the Minister's interpretation to be unsustainable.

E. Conclusion

132. Assessment is the exercise of valuing a property. If the Off-Coal Amendments are valid—on any standard of review—they must have something to do with assessing property value. They don't. In fact, they make it impossible for an assessor to arrive at a value that reflects the characteristics and specifications of the property, which are the criteria set out in the *MGA*.

133. Depreciation is simply a recognition that someone buying a car won't pay the same price for a 10 year-old taxi as for a car bought new yesterday. And if a municipality compensated the taxi owner for cancelling its taxi license early, would that affect what the taxi is worth? These regulations fail because there is no rational connection between what they actually do (prohibit accounting for a key specification and characteristic of property) and what they are supposed to do—establish a standard for determining a property's value based on its characteristics and specifications. The requirement that the Off-Coal Parties should continue to be assessed on the basis that their obsolete coal-related assets continue in service years after their retirement has no rational connection to the statutory objective of valuing property. Whether it is called unreasonable or just plain wrong, the Minister had no legal authority to make these regulations.

134. In evaluating these regulations the ABCA got it exactly backwards—discriminatory regulations should be presumed *invalid* unless the legislature clearly authorizes the discrimination. That can't be shown here.

135. The ABCA got it equally wrong when describing the proper role of a court reviewing executive regulations. Hyperdeference is an abdication of a court's proper role in upholding the rule of law. And if the courts won't play their important role, who can?

136. This case provides a paradigmatic example of administrative discrimination and excess of statutory powers. The rule of law requires that this Court uphold the law and declare the Off-Coal Amendments invalid.

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[188] *Vavilov*, at para. 122.

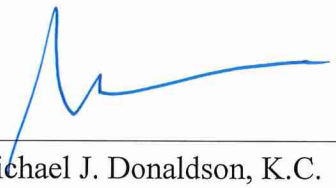
PART IV - COSTS

137. The Courts below awarded costs to the Minister. The appellants request that those costs awards be set aside, and that they be awarded their costs throughout.

PART V – ORDER SOUGHT

138. The appellants request an order setting aside the judgments of the courts below and declaring the Off-Coal Amendments invalid, with costs to the appellants throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Dated at Calgary, Alberta this 5th day of February, 2024.

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