SCC File No.: 40582

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

BETWEEN:

ROLAND NIKOLAUS AUER

Appellant

- and -

AYSEL IGOREVNA AUER and ATTORNEY GENERAL OF CANADA

Respondents

- and –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF SASKATCHEWAN, ADVOCATES FOR THE RULE OF LAW, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, ASSOCIATION QUEBECOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, CHICKEN FARMERS OF CANADA, EGG FARMERS OF CANADA, TURKEY FARMERS OF CANADA, CANADIAN HATCHING EGG PRODUCERS, THE NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, HIV & AIDS LEGAL CLINIC ONTARIO, HEALTH JUSTICE PROGRAM, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, ECOJUSTICE CANADA SOCIETY, THE CITY OF CALGARY, CANADIAN COUNCIL FOR REFUGEES

Interveners

AND BETWEEN:

SCC File No.: 40570

TRANSALTA GENERATION PARTNERSHIP and TRANSALTA GENERATION (KEEPHILLS 3)

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

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PART I. OVERVIEW AND STATEMENT OF FACTS

1. The administrative state reaches everyone. But its regulations have a particularly profound impact on socially marginalized people who often live in poverty. Regulations—including subordinate legislation—shape their daily lives by determining whether they have a roof over their head, access to health care, and receive income support benefits. In this context, their ability to meaningfully review the legality of regulations matters.

2. Meaningful review has always been integral to judicial review.[1] It is a part of the rule of law and an inherent function of the court.[2] Meaningful review takes on heightened importance when assessing the legality of state action that significantly impacts people's lives.[3] These well-established principles of administrative law are lost, however, when it comes to reviewing the legality of subordinate legislation. *Katz* establishes a "hyper-deferential" threshold for finding that subordinate legislation is contrary to law—a threshold "unique in all of administrative law."[4] The result is doctrinal inconsistency and the creation of a "meaningful review-free zone"—the adverse consequences of which are heavily borne by disadvantaged communities.

3. The HIV & AIDS Legal Clinic Ontario and the Health Justice Program (together, the "**Health Coalition**") intervenes to explain the impact of regulations on marginalized communities, and in particular the doctrinal flaws underpinning the *Katz* threshold. In so doing, the Health Coalition makes two submissions:

(a) For marginalized communities, their access to and experience of health care, and more generally the social determinants of health, are shaped by intersecting and overlapping regulations; and,

(b) The hyper-deferential threshold in *Katz* is doctrinally flawed, undermines the culture of justification, and thwarts meaningful review.

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[1] *Canadian National Railway Company v Canada,* 2023 FCA 245 ¶ 7-9.
[2] *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161 ¶ 100 ["***Best Buy***"].
[3] *Canada v Vavilov*, 2019 SCC 65 ¶ 133-135 ["***Vavilov***"]; Lorne Sossin, "The Impact of Vavilov: Reasonableness and Vulnerability" (2021) *Supreme Court Law Review* 265.
[4] *Innovative Medicines Canada v Canada (Attorney General),* 2022 FCA 210 ¶ 30.

PART II. POSITION ON THE QUESTIONS IN ISSUE

4. The Health Coalitions' submissions are set out above at paragraph 3.

PART III. STATEMENT OF ARGUMENT

A. Regulations Profoundly Impact Marginalized and Low-Income People

5. In Canada, for every one piece of enabling legislation enacted, five regulations (including subordinate legislation) are imposed.[5] The result is a vast regulatory state. However, the effects of regulations weigh heavily on marginalized people and people who live in poverty. These groups often rely on the state, navigating through a labyrinth of regulations, to meet their basic needs. For them, whether or not a regulation is lawful under its enabling Act is not an academic question. It could mean the difference between having access to income support payments, housing subsidies, health care and medical coverage—or not.

6. Specifically for the communities that the Health Coalition serves, intersecting regulations (including subordinate legislation) shape (i) the social determinants of health impacting their well-being and (ii) access to health care.

7. ***Social Determinants of Health.*** Health is not merely affected by the availability and quality of health care, but also by access to other basic needs and social inclusion. The "social determinants of health" include non-medical factors that influence health outcomes.[6] They are the conditions in which people are born, grow, work, live, and age, and the wider set of systems shaping the conditions of daily life.[7] These factors are legislatively recognized across Canada.[8]

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[5] Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada", (2018) 41-2 *Dalhousie Law Journal* 519 at 521.

[6] Michael Elten and Veronica Montgomery, "The Social Determinants of Health: A Snapshot of Hastings and Prince Edward Counties August 2017" (August 2017).

[7] "Social Determinants of Health at CDC" (8 December 2022), online: *Centre for Disease Control and Prevention; Rio Political Declaration on Social Determinants of Health* (21 October 2011) at para 6, online: *World Health Organization* (endorsed by Canada in May 2012).

[8] *Poverty Elimination Strategy Act,* RSPEI 1988, c P-14.1, preamble; *Public Health Protection and Promotion Act,* SNL 2018, c P-37.3, ss 5(g); *Alberta Health Act,* SA 2010, c A-19.5, preamble.

8. For marginalized and low-income communities, overlapping regulatory regimes shape the social determinants of health. A typical client that the Health Coalition represents often faces intersectional legal problems that arise directly from regulations. [9] For example, disability support payments may be terminated because an individual did not follow complex income reporting requirements;[10] eligibility for a housing subsidy can be lost due to not reporting a change in household composition as required by regulation, with the result being eviction into homelessness;[11] or the complex maze of subordinate immigration legislation that erects barriers to reuniting refugees with their families.[12]

9. ***Access to Health Care.*** Regulations affect who can access health care, as well as the ways in which marginalized people experience health care. For example, regulations determine how immigration status prevents access to insured health care services and drug coverage under a provincial plan, and what health services will be covered.[13] Regulations govern the process through which a person is held in a psychiatric facility without their consent.[14] Public health authorities' power to monitor populations to prevent the spread of diseases stems from regulations.[15]

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[9] Subordinate legislation also impacts the social determinants of health of marginalized communities. Some examples include the following: the operation and suspension of income benefit programs during the pandemic (*Certain Emergency Response Benefits Remission Order*: SI/2022-32); government issued lump-sum payments for HIV-infected persons and the victims of Thalidomide (*HIV-infected persons and Thalidomide Victims Assistance Order*, PC 1990-0872; see also *Wenham v. Canada (Attorney General)*, 2018 FCA 199); housing assistance program for homeless veterans (*Veteran Homelessness Program*, PC 2023-0367).

[10] General, O Reg 222/98, s 12 under *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sch B; *1404-04449 (Re),* 2016 ONSBT 4960.

[11] General, O Reg 367/11, s 28 under *Housing Services Act*, *2011*, SO 2011, c 6, Sched 1; *MacKenzie v Ottawa Community Housing Corporation*, 2021 ONSC 1640.

[12] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 117(9)(d) under *Immigration and Refugee Protection Act*, SC 2001, c 27.

[13] *General*, RRO 1990, Reg 552, ss 1.2-1.14, 16-23 under *Health Insurance Act*, RSO 1990, c H.6; *General,* O. Reg. 201/96 under *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10; *SKC v Ontario (Health Insurance Plan),* 2012 CanLII 63724 (ON HSARB).

[14] *General*, RRO 1990, Reg 741, ss 7.2, 13, 15, *Mental Health Act*, RSO 1990, c M.7; *DB (Re)*, 2022 CanLII 87763 (ON CCB).

[15] *Reports*, RRO 1990, Reg 569, *Health Protection and Promotion Act*, RSO 1990, c H.7.

10. The issues arising from the operation of regulations are not discrete but intersect and multiply in complex ways for marginalized communities. They pile on to the existing barriers that such individuals face in their daily lives. An individual could experience one, some, or all of these legal problems arising from navigating regulations simultaneously, sequentially, or some combination of them at various times. Accordingly, marginalized people living in poverty "are constantly involved with the law in its most intrusive forms" and are "always bumping into sharp legal things".[16]

11. One safeguard for "bumping into sharp legal things" is to ensure that the courts can exercise their oversight function and meaningfully review the legality of subordinate legislation, given the ways they impact the lives of poor and marginalized people. *Katz* does not do that and the burden of this doctrinal failing significantly impacts marginalized and low-income communities.

B. The Katz Threshold Thwarts Meaningful Review

12. *Katz* sets out a threshold at which a court may find that a subordinate legislation is legal under the delegated legislative authority. The Health Coalition submits that threshold should be rejected for four reasons: (i) the threshold is doctrinally flawed; (ii) the threshold adversely impacts marginalized and low-income people; (iii) the threshold undermines the inherent review function of courts; and (iv) meaningful review does not undermine the separation of powers.

13. Before setting out the doctrinal submissions, a word on terminology. This Court should consider using the word "legality" rather than "*vires*" in the interests of promoting plain language. These appeals are about whether a subordinate legislation falls within the delegated authority provided by the legislature to the executive branch. The analysis is about legality.[17] Everyone who accesses administrative bodies should be able to understand the language of the very test that determines the legality of regulations governing their lives. "Legality" does that; "*vires*" does not.

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[16] Stephen Wexler, "Practicing Law for Poor People" (1970) 79 *Yale Law Journal* 1049 at 1050 [Health Coalition's Book of Authorities ("**HCBOA**"), Tab 1].
[17] *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220 at 237-38 ["***Crevier***"]; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 ¶ 13.

1. The *Katz* Threshold is Doctrinally Flawed

14. Under *Katz*, a subordinate legislation is presumptively valid and is to be interpreted in a generous manner favouring its legality.[18] In this context, *Katz* sets out a threshold which must be met for a court to find that a subordinate legislation is beyond the delegated authority: a court must determine the impugned subordinate legislation is "'irrelevant', 'extraneous', or 'completely unrelated' to the statutory purpose" of the enabling legislation,[19] or "manifestly unjust" or "partial and unequal in [its] operation."[20]

15. Under the *Katz* threshold, it is not enough for an applicant to show that there lacks a reasonable connection between the object of an enabling Act and the subordinate legislation enacted under it. Rather, the gulf between the legislation and the subordinate legislation must rise to the level of an "egregious case."[21] Such an approach is doctrinally flawed for three reasons.

16. ***First***, even before *Katz* was decided, this Court cautioned against adopting a hyper-deferential threshold in reviewing subordinate legislation. In *Reference re Broadcasting Regulatory Policy*—decided one year before *Katz*—Justice Rothstein said it cannot be the case that "any link, however tenuous, between a proposed regulation and a policy objective [in an enabling Act is] a *sufficient* test for conferring jurisdiction [on the delegated law-maker]."[22] For him, such an approach would result in perfunctory review. Yet the *Katz* threshold cemented this principle: as long as there is any link between the enabling Act and the subordinate legislation, it passes muster under the *Katz* test.

17. Recent cases show how the *Katz* threshold compels courts to find subordinate legislation lawful, despite its tenuous connection to the enabling Act. In *Wildlands League,* environmental groups challenged the legality of a subordinate legislation under the *Endangered Species Act*. The subordinate legislation created exemptions for commercial activities otherwise prohibited under the *Act* based on dangers to "species at risk." The Ontario Court of Appeal agreed with the

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[18] *Katz Group Canada Inc v Ontario (Health and Long-Term Care),* 2013 SCC 64 ¶ 25 ["***Katz***"].
[19] *Katz* ¶ 28.
[20] *Green v Law Society of Manitoba,* 2017 SCC 20 ¶ 78.
[21] *Katz* ¶ 28; *Thorne's Hardware Ltd v The Queen,* [1983] 1 SCR 106 at 111.
[22] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* 2012 SCC 68 ¶ 25 [emphasis added].

environmental groups that the *Act* is "not a resource-management statute" and its "fundamental purpose is to protect [species at risk], and is not the promotion of economic and social interests."[23] Yet the Court upheld the subordinate legislation as legal under *Katz* because the *Act* had some sparse references to "economic interests", which the subordinate legislation purported to advance.

18. In other words, in finding that the express statutory purpose was the protection of endangered species and the subordinate legislation did not align with that objective, that should have been the end of the analysis. The subordinate legislation lacked a reasonable or rational connection to the enabling Act. However, because the *Katz* threshold accepts any tenuous connection to the enabling Act, the Court focused on passing references to economic activities in the enabling Act and found the subordinate legislation lawful.

19. ***Second***, the *Katz* threshold undermines the culture of justification. That culture presumes meaningful review—which *Katz* thwarts.

20. The culture of justification is a "paradigm shift" in the law.[24] In *Vavilov*, this Court explained its significance in relation to administrative decision-makers providing justified, intelligible, and transparent reasons. However, the culture of justification is about more than the quality of reasons. At its core, the culture of justification "means that the lawfulness of administrative action depends on…whether the government has provided a rational justification for it."[25] A "rational justification" does not depend on reasons. In many cases, neither the duty of fairness nor the statutory scheme will require that formal reasons be given at all.[26]

21. In reviewing the legality of subordinate legislation, it will rarely be the case that the Governor-in-Council (or other body exercising delegated powers) will provide reasons for why it adopted a particular set of regulations. That is neither expected, nor how "the system" functions. Meaningful review rooted in the culture of justification anticipates such circumstances. In fact,

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[23] *Wildlands League v Ontario (Natural Resources and Forestry),* 2016 ONCA 741 ¶ 89.
[24] Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law", (2016) 21 *Appeal* at 143; *Rezaei v Canada*, 2020 FC 444 ¶ 38.
[25] Janina Boughey, "The Culture of Justification in Administrative Law: Rationales and Consequences", (2021) 54-2 *UBC Law Review* at 404 [emphasis added].
[26] *Vavilov* ¶ 136.

Vavilov predicted how such analysis could function. For example, a reviewing court must look to the record as a whole to understand the decision, and in doing so, the court "will often uncover a clear rationale for the decision." In *Catalyst*—which involved reviewing subordinate legislation—this Court noted that "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw."[27]

22. Despite these advances in administrative law, the *Katz* threshold threatens the culture of justification by permitting perfunctory justifications. Under the *Katz* threshold, if an applicant challenges the legality of a subordinate legislation on judicial review, all the state has to do in court is establish some tenuous link between a subordinate legislation and its enabling Act, as evidenced in *Wildlands League* discussed above (at paragraph 17). Such a process is inconsistent with the culture of justification. Even without reasons, the culture of justification demands that the state adduce "rational justifications," accounting for the totality of the context underpinning its decision.

23. ***Third***, modern administrative law has outpaced the historical foundations of *Katz*. The *Katz* threshold entered Canadian administrative law "at a time when 'legislative' decisions [...] could not be set aside unless 'jurisdiction' was lost through some rare and significant error" such as an "'egregious' exceedance of authority."[28] However, concepts of "jurisdiction" and the requirement to demonstrate an egregiously significant error have lost force in the law over the last fifty years. The doctrinal basis for the *Katz* threshold has been left behind.[29]

2. The *Katz* Threshold Adversely Affects Marginalized and Low-Income People

24. Doctrinal debates should not be determined in a vacuum, divorced from their impact on people's lives. In these appeals, the *Katz* threshold sets an effectively impossible bar to challenge the legality of subordinate legislation—the burden of which heavily weighs on marginalized communities who often must navigate the legal system on their own.

25. The *Katz* threshold adversely impacts low-income and marginalized people, who are disproportionately single mothers, immigrants or refugees, racialized, non-binary or transgender,

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[27] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 ¶ 29.
[28] *Portnov v Canada (Attorney General),* 2021 FCA 171 ¶ 20-21 ["***Portnov***"].
[29] *Portnov,* ¶ 22; *Vavilov* ¶ 2, 14.

Indigenous people, and/or living with disabilities.[30] When such individuals interact with and rely on subordinate legislation for their health care needs and the social determinants that affect their well-being, there must be a meaningful path to review the legality of such subordinate legislation. The *Katz* threshold does not provide that. Insofar as there is any connection—however "tenuous"—between the enabling Act and the subordinate legislation, *Katz* endorses the latter as "legal." The result is that the *Katz* threshold "not quite giv[es] governments *carte blanch[e]* to do as they like, but [seriously curtails] any chance of challenging their policies in court."[31]

26. Marginalized people should get a fair shot. If subordinate legislation is going to shape critical aspects of their lives, then the law should ensure that these individuals will have an opportunity to meaningfully review whether such subordinate legislation is consistent with the enabling Act. At present, it is an unfair playing field. The *Katz* threshold demands that marginalized individuals demonstrate that the challenged subordinate legislation and its enabling legislation are "completely unrelated"—a threshold that is, by design, nearly impossible to meet.

3. The *Katz* Threshold is Contrary to the Court's Inherent Review Function

27. Any legal "test" for assessing the legality of subordinate legislation must respect and preserve the Court's inherent oversight function in a manner that enables meaningful review. Meaningful review has roots in the rule of law and the inherent review function of the courts.[32] As the Federal Court of Appeal explained, "'L'etat, c'est moi' and 'trust us, we got it right' have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them…must obey the law."[33] That democratic imperative can only be met if "there is an umpire who can meaningfully assess whether the law has been obeyed."[34]

28. Under the *Katz* threshold, meaningful review is restricted. If any link between a subordinate legislation and an enabling Act can satisfy the threshold—as Justice Rothstein predicted—the

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[30] "Disaggregated trends in poverty from the 2021 Census of Population" (9 November 2022) at "Highlights", online: *Statistics Canada*.
[31] Peter S Spiro, "The Supreme Court Sends a Clear Message in *Katz Group v Ontario* that Judges Should Defer to Government Policy" (25 November 2013), online: *TheCourt.ca.*
[32] *Best Buy* ¶ 100, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 ¶ 27; *Crevier* at 234-237.
[33] *Canada (Citizenship and Immigration) v Tennant,* 2018 FCA 132 ¶ 23 ["***Tennant***"].
[34] *Tennant* ¶ 23 [emphasis added].

review is not probing or adequate. The law restricts the courts to a point where they may be compelled to accept justifications that are not rational or reasonable since any tenuous link between the subordinate legislation and the Act can suffice.

29. In other words, the rule of law is about "individuals hav[ing] meaningful remedies to protect themselves from unlawful executive action."[35] "Meaningful remedies" surely means courts have a genuine opportunity to provide the requested relief and that people have a fair chance of getting it. *Katz* does not align with this basic principle of the rule of law.

30. If the Court abandons the *Katz* threshold, the Health Coalition submits that reviewing the legality of subordinate legislation should be rooted in a "reasonable" or "rational connection" approach. Insofar as there is a reasonable or rational connection between the challenged subordinate legislation and its enabling Act, the subordinate legislation may be lawful. Doing this analysis does not require "new" law. This Court in *Vavilov* explained how courts may conduct review in the absence of reasons.[36] Reviewing the totality of the legislative context with an eye to the statutory purpose, the governing scheme, and the principles of statutory interpretation will allow a reviewing court to analyze the legality of a subordinate legislation.[37] In so doing, *Katz*'s doctrinal flaws and its undue burden on marginalized communities can be resolved.

4. Meaningful Review Does not Undermine the Separation of Powers

31. Meaningfully reviewing subordinate legislation does not undermine the separation of powers. In *Auer*, the Court of Appeal appeared to suggest that the separation of powers may be undermined because the Governor in Council's subordinate legislation "are part of the primary legislative process"[38] and that such subordinate legislation "comes after a consultation process culminating in parliamentary review."[39] As such, the Court held the Governor in Council to be acting in a "legislative role" when promulgating subordinate legislation.[40]

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[35] Yan Campagnolo, "Cabinet Immunity in Canada: The Legal Black Hole", (2018) 63-2 McGill LJ at 365 [emphasis added]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 ¶ 70.
[36] *Vavilov* ¶ 136-138.
[37] *Vavilov* ¶ 106, 108, 110.
[38] *Auer v Auer,* 2022 ABCA 375 ¶ 49-56, 62-63 ["***Auer***"].
[39] *Auer* ¶ 34.
[40] *Auer* ¶ 34, 47, 49-50, 53-62.

32. Such characterization of the "legislative" process is incomplete for the following reasons:

(a) the Parliamentary scrutiny of a subordinate legislation typically only occurs post-enactment, if at all.[41] When it does, the efficiency and effectiveness of the scrutiny process in Canada has been criticized due to significant delays;[42]

(b) Not all provinces have similar scrutiny committees and those that do exist operate under differing mandates and are typically only intermittent in their operation.[43] The result is limited and uneven scrutiny of subordinate legislation; and,

(c) The level of pre-enactment oversight of subordinate legislation varies amongst jurisdictions and is based on the context in which the subordinate legislation is enacted, ranging from comprehensive review to, in some cases, no review at all.[44]

33. Relatedly, conducting meaningful review does not entail assessing the wisdom of policy. Assessing the relationship between a subordinate legislation and the statutory framework under which it is enacted is a necessary element of "polic[ing] the boundaries of the administrative state according to the concepts of legality, reasonableness, and fairness."[45]

PART IV. COSTS | PART V. ORDER SOUGHT

34. The Health Coalition seeks no costs and asks that no costs be awarded against them. The Health Coalition takes no position on the outcome of these appeals.

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[41] Shaun Fluker, "Judicial Review on the *Vires* of Subordinate Legislation: Full *Vavilov,* Partial *Vavilov* or No *Vavilov*?" (6 February 2023) at 2, online: *CanLII Connects*; *Statutory Instruments Act,* RSC 1985, c S-22, s 19.

[42] Peter Bernhardt, "Parliamentary Scrutiny of Delegated Legislation in Canada: Too Late and Too Little?" (2014) 3 *The Loophole* 73 at 76-77 ("**Bernhardt**") [HCBOA, Tab 2].

[43] Berhnardt at 75 [HCBOA, Tab 2].

[44] David Phillip Jones, QC and Anne S de Villars, QC, *Principles of Administrative Law,* 6th ed (United States: Thomson Reuters Canada Limited, 2014) at 114-115, 120-124 [HCBOA, Tab 3]; Paul Daly, "Resisting which Siren's Call?" (24 November 2022), online (blog): *Administrative Law Matters*; *Regulations Act,* CQLR c R-18.1, ss 4-7; Joshua Ginsberg, "Reasonable Regulation" (2 February 2024), online: *The Canadian Bar Association.*

[45] John Mark Keyes, "Judicial Review of Delegated Legislation: The Long and Winding Road to Vavilov", 2020 CanLIIDocs 3697.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 5, 2024

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