

**S.C.C. Court File No. 40582**

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

BETWEEN:

**ROLAND NIKOLAUS AUER**

Appellant (Appellant)

-and-

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Respondent (Respondent)

-and-

**THE ATTORNEY GENERAL OF CANADA**

Respondent (Intervenor)

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Intervenors

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**S.C.C. Court File No. 40570**

AND BETWEEN:

**TRANSALTA GENERATION PARTNERSHIP**

Appellant (Appellant)

-and-

**TRANSALTA GENERATION (KEEPHILLS 3)**

Appellant (Appellant)

-and-

**HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA**

Respondent (Respondent)

-and-

**MINISTER OF MUNICIPAL AFFAIRS FOR THE PROVINCE OF ALBERTA**

Respondent (Respondent)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The appeals in *TransAlta* (40570) and *Auer* (40582) concern the validity of a Ministerial regulation under a provincial statute and a Cabinet rule made under federal legislation. These appeals provide the Court with the opportunity to consider the nature and scope of judicial oversight of exercises of delegated legislative authority.<sup>1</sup>

2. The members of the National Association of Pharmacy Regulatory Authorities/ Association nationale des organismes de réglementation de la pharmacie (“NAPRA”) are statutory delegates that regulate the practice of pharmacy in their respective jurisdictions across Canada. They each have an overarching mandate to protect and serve the public interest. NAPRA’s members each have delegated legislative authority to make binding rules applicable to the practice of pharmacy. The types of delegated legislative authority exercised by NAPRA’s members include the power to make regulations, bylaws, standards of practice and codes of ethics.

3. NAPRA submits that the Court should:

- a. follow a consistent approach to judicial review of all delegated legislation, regardless of its form or the type of entity enacting it;
- b. continue to recognize that an overly intrusive judicial involvement in the judicial review of delegated legislation will undermine the flexibility required by those to whom Parliament or a Legislature has granted delegated legislative authority; and
- c. develop guidance for courts undertaking judicial review of delegated legislation to ensure that judicial involvement remains appropriately circumspect, having regard for the wide range of contextual factors that are engaged in, and the procedural flexibility required in, the making of delegated legislation.

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<sup>1</sup> For the purposes of this factum, “delegated legislation” refers to all binding instruments of general application made under an express statutory grant of authority. See Evans, J.M., “Reviewing Delegated Legislation after *Vavilov*: *Vires* or Reasonableness?” (2021) 34 CJALP 1 at 2 [*Evans*] [**Book of Authorities, Tab 1**].

4. NAPRA anticipates that the Court will use these appeals to continue the Court’s work in developing “an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers.”<sup>2</sup> If the Court finds the *Vavilov* framework applies to the judicial review of delegated legislation, NAPRA’s position is that the reasonableness standard of review must be applied. In that context, its application should be circumscribed to account for the necessary deference that has consistently been afforded to delegated legislation.

## **PART II – POINTS IN ISSUE**

5. NAPRA will address the following issues:
- a. should all delegated legislation be subject to the same approach to judicial review;
  - b. what approach to judicial review should apply to delegated legislation; and
  - c. what guidance should the Court give with respect to the conduct of the judicial review of delegated legislation?

## **PART III – STATEMENT OF ARGUMENT**

### **A. All delegated legislation be subject to the same approach to judicial review**

6. The approach to judicial review of delegated legislation should not differ based on the type of entity enacting delegated legislation or the form of delegated legislation in question. Cabinet does not have any inherent prerogative that enables it to make regulations or that warrants a unique approach to judicial review. Regulations made by Cabinet, like regulations made by Ministers, or bylaws, professional standards and codes of ethics made by professional regulatory authorities, are simply forms of delegated legislation made under statutory authority.

7. Contrary to the suggestion of the majority of the Alberta Court of Appeal in *Auer v Auer*,<sup>3</sup> the issue of the separation of powers and parliamentary sovereignty does not mandate a differing approach to the judicial review of Cabinet regulations than other forms of delegated legislation. As

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<sup>2</sup> *Dr. Q v College of Physicians and Surgeons of British Columbia*, [2003 SCC 19](#) at para [25](#).

<sup>3</sup> *Auer v Auer*, [2022 ABCA 375](#) at paras [34](#), [53-58](#) and [64](#) [*Auer*].

this Court noted in 1943<sup>4</sup> and reiterated in 2023 the source for all forms of delegated legislation is the statute that creates the power to make law:

[51] Regulations “derive their validity from the statute which creates the power, and not from the executive body by which they are made” (Reference as to the Validity of the Regulations in relation to Chemicals, [1943] S.C.R. 1, at p. 13, per Duff C.J., quoting *The Zamora*, [1916] 2 A.C. 77 (P.C.), at p. 90).<sup>5</sup>

8. The argument above that the same approach should be taken to the judicial review of Cabinet regulations as other forms of delegated legislation should not be seen as diminishing the central importance of courts giving effect to “the legislature’s institutional design choices to delegate authority through statute.”<sup>6</sup> In the case of delegated legislation, the legislature’s institutional design choice is that it is up to the statutory delegate to make the required policy choices behind the formulation of delegated legislation.<sup>7</sup> It is not for the Court to demand a justification for those policy choices or, too readily, to second guess those policy choices. Courts are not tasked with assessing the wisdom of policy, as policy is not a matter that courts are institutionally designed to evaluate.<sup>8</sup>

**B. The integration of the judicial review of delegated legislation into the *Vavilov* paradigm must avoid expanding the scope of the reviewing court beyond its traditional role and specifically, must avoid an approach that permits courts to review the wisdom or desirability of legislative policy choices**

9. In *Canada (Minister of Citizenship and Immigration) v Vavilov*<sup>9</sup> (*Vavilov*), the Court developed a comprehensive framework for the judicial review of administrative decisions. However, *Vavilov* did not conclusively resolve the approach that courts should take to the review

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<sup>4</sup> *Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto*, [1943] SCR 1 at page 13, [1943 CanLII 1](#).

<sup>5</sup> *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, [2023 SCC 17](#) at para 51 [*Canadian Council for Refugees*]. See also *Innovative Medicines Canada v Canada (Attorney General)*, [2022 FCA 210](#) at paras 34 and 35 [*Innovative Medicines*].

<sup>6</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at para 36 [*Vavilov*].

<sup>7</sup> *Auer* at para 48.

<sup>8</sup> *Canadian Council for Refugees* at para 4.

<sup>9</sup> *Vavilov* at para 46.

of delegated legislation.<sup>10</sup> There are two significant and divergent streams of jurisprudence since *Vavilov*:

- a. the *vires* analysis articulated in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care) (Katz)*,<sup>11</sup> which was applied by the Court of Appeal of Alberta in both cases under appeal;
- b. the standard of review analysis articulated in *Vavilov*<sup>12</sup> and applied by the Federal Court of Appeal in *Portnov v Canada (Attorney General)*<sup>13</sup> and *Innovative Medicines Canada v Canada (Attorney General)*.<sup>14</sup>

10. Given that *Vavilov* was intended as a “recalibration of the governing approach to the choice of standard of review analysis” and “a holistic revision of the framework for determining the applicable standard of review,”<sup>15</sup> NAPRA anticipates that the Court may use these appeals to replace the *vires* review applied in *Katz* within the comprehensive standard of review analysis established in *Vavilov*.

11. Bringing the judicial review of delegated legislation within the *Vavilov* framework of analysis should not be treated as an opportunity to diminish the deference necessary to allow statutory delegates who make delegated legislation to fulfill their function effectively.

12. The judicial review of delegated legislation is not an exception to the presumption of reasonableness review under *Vavilov* that warrants correctness review,<sup>16</sup> given the broad discretion generally granted to makers of delegated legislation, the wide range of factors that can

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<sup>10</sup> See e.g. *Evans* [Book of Authorities, Tab 1]; Keyes, J.M. “Judicial Review of Delegated Legislation: The Long and Winding Road to *Vavilov*,” Canadian Legal Information Institute, [2020 CanLII Docs 3679](#); Fluker, S., “Judicial Review on the *Vires* of Subordinate Legislation: Full *Vavilov*, Partial *Vavilov*, or No *Vavilov*?” (February 6, 2023), online: [ABlawg \[Fluker\]](#).

<sup>11</sup> *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, [2013 SCC 64](#) [*Katz*].

<sup>12</sup> *Vavilov*.

<sup>13</sup> *Portnov v Canada (Attorney General)*, [2021 FCA 171](#) at para 35 [*Portnov*].

<sup>14</sup> *Innovative Medicines*. See also *British Columbia (Attorney General) v Le*, [2023 BCCA 200](#) at para 96.

<sup>15</sup> *Vavilov* at para 143. *Portnov* at paras 25-26.

<sup>16</sup> *Innovative Medicines* at para 45.

be considered in the making of delegated legislation, and the balancing of interests inherent in the making of delegated legislation.<sup>17</sup>

13. As this Court has noted

Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.<sup>18</sup>

14. Delegated legislation should be reviewed on the standard of reasonableness, circumscribed to account for the wide range of contextual factors that are engaged in, and the procedural flexibility required in, the making of delegated legislation.

15. *Vavilov* recognizes that reasonableness “is a single standard that takes its colour from the context” and that “the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case.”<sup>19</sup>

16. The context for the making of delegated legislation involves competing interests and considerations and as a result, calls for solutions that balance benefits and costs among various constituencies.<sup>20</sup> It involves “an array of social, economic, political, and other non-legal considerations”<sup>21</sup> that lie outside of a court’s traditional role. Delegated legislation is not based only on objective considerations but requires value judgments in respect of which reasonable people can legitimately disagree.<sup>22</sup> In the case of NAPRA’s members, it includes health and public policy concerns, including concerns about the protection of the integrity of the drug distribution system in Canada and the value judgments made by the individuals who comprise the governing councils of NAPRA’s members, based on their wisdom, knowledge, experience, expertise and direct observations.

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<sup>17</sup> *Green v Law Society of Manitoba*, [2017 SCC 20](#), [2017] 1 S.C.R. 360 at paras [22](#), [24](#) and [25](#) [*Green*].

<sup>18</sup> *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, [1998 CanLII 778](#) at para [36](#) [*Pushpanathan*].

<sup>19</sup> *Vavilov* at para [89](#).

<sup>20</sup> *Pushpanathan* at para [36](#).

<sup>21</sup> *Green* at para [21](#).

<sup>22</sup> *Auer* at para [57](#), citing *Nelson (City) v Marchi*, [2021 SCC 41](#) at para [44](#).

17. Great deference was recognized as the appropriate standard for judicial oversight of a delegated legislative function as early as 1898, in *Kruse v Johnson*.<sup>23</sup> Deference has remained the appropriate standard of review in the modern era, with *Kruse v Johnson* continuing to guide contemporary law in respect of the scope of judicial oversight of a professional regulatory authority's delegated legislative functions.<sup>24</sup>

18. Professional regulatory authorities have expertise in regulating their professions at an institutional level, and particularly through the creation of delegated legislation necessary to govern the professions.<sup>25</sup> Self-governing professions are better positioned than a reviewing court to identify delegated legislation necessary to protect the public interest.

19. This Court circumscribed the reasonableness standard applicable to the exercise of a delegated legislative function in *Catalyst Paper Corp. v North Cowichan (District) (Catalyst)* and *Green v Law Society of Manitoba (Green)*, recognizing that there is “extensive latitude” in the factors that can be considered in the exercise of a delegated legislative function.<sup>26</sup> Today, a bylaw, code or standard enacted by a professional regulatory authority will be set aside only if it “is one no reasonable body informed by the relevant factors could have enacted” and it does not conform to the rationale of the statutory schemes set up by the legislature.<sup>27</sup> This degree of deference is sound judicial policy. It avoids undue court interference with professional regulatory authorities' discharge of their legislative function.<sup>28</sup>

20. In *Green*<sup>29</sup> this Court cited both *Catalyst*<sup>30</sup> and *Katz* in support of the proposition that wide deference is owed to delegated legislation so long as it conforms to the rationale of the statutory schemes set up by the legislature. In doing so, the Court recognized the concordance

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<sup>23</sup> *Kruse v Johnson*, [1898] 2 QB 91 at pp 99-100 [**Book of Authorities, Tab 2**].

<sup>24</sup> *Green* at para 66; *Sobeys West Inc. v College of Pharmacists of British Columbia*, [2016 BCCA 41](#) at paras 59-61, 63 and 68 (leave to appeal refused [2016 CanLII 41773](#)); *Ebert Howe and Assoc. v B.C. Optometric Assn.*, 21 DLR (4th) 421, [1985 CanLII 576 \(BC CA\)](#) at para 23; *Chiropractors' Association of Saskatchewan v Simpson*, [2001 SKCA 22](#) at paras 50-51.

<sup>25</sup> *Green* at para 25; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47](#) at para 33.

<sup>26</sup> *Catalyst Paper Corp. v North Cowichan (District)*, [2012 SCC 2](#) at para 30 [*Catalyst*]; *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#) at para. 53; *Green* at para 20; *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, [2018 SCC 22](#) at para 9 [*West Fraser Mills*].

<sup>27</sup> *Green* at paras 20 and 22.

<sup>28</sup> *Dunsmuir v New Brunswick*, [2008 SCC 9](#) at para 27.

<sup>29</sup> *Green* at paras 20 and 67.

<sup>30</sup> *Catalyst* at para 24.



between the approach in *Katz* and the circumscribed application of the reasonableness standard in *Catalyst*.

21. NAPRA urges the Court to continue to apply the reasonableness standard to delegated legislation as described and circumscribed in *Catalyst*,<sup>31</sup> *Green*<sup>32</sup> and *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*<sup>33</sup> (*West Fraser Mills*) while integrating important principles from *Katz*.

### **C. The guidance the Court should give with respect to the conduct of the judicial review of delegated legislation**

22. The Court in *Vavilov* provided useful and detailed guidance for the review of decisions produced through adjudicative and administrative processes.<sup>34</sup> However, delegated legislation does not fall easily within the framework for the conduct of judicial reviews articulated in *Vavilov*, which mandates an approach to reasonableness review that puts reasons first<sup>35</sup> and that insists on demonstrated “justification, transparency and intelligibility.”<sup>36</sup>

23. The majority in *Auer* pointed out that enacting a regulation is not a “decision” in the “*Vavilov*” sense. The majority trenchantly observed that “[t]ransposing the *Vavilov* reasonableness standard of review to the validity of Governor in Council regulations is neither seamless nor natural”<sup>37</sup> The majority noted that the making of a regulation is not based on an application, submissions or evidence, there is no specific or individualized factual context and there is no requirement for reasons.<sup>38</sup>

24. The making of delegated legislation does not and should not require reasons. To impose an obligation to require reasons or to demonstrate justification, transparency and intelligibility would judicialize and ossify the process of making delegated legislation.<sup>39</sup> The reasons behind delegated legislation made by collective bodies, like the governing councils of professional

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<sup>31</sup> *Catalyst* at paras 18-30.

<sup>32</sup> *Green* at paras 20-25.

<sup>33</sup> *West Fraser Mills* at para 12.

<sup>34</sup> *Vavilov* at paras 102-138.

<sup>35</sup> *Vavilov* at para 84.

<sup>36</sup> *Vavilov* at para 99.

<sup>37</sup> *Auer* at para 64-69.

<sup>38</sup> As summarized in *Fluker*.

<sup>39</sup> *Catalyst* at paras 29-30.

regulatory organizations, may be deduced in the context of supporting documents prepared in support of a piece of delegated legislation, if any, or from statements made in the course of debate or discussion leading to the promulgation of delegated legislation. However, these communications need to be treated with caution as the act of making delegated legislation reflects the purposes of collective membership of the enacting body and not necessarily the supporting documents or the comments of one or more members in debate.<sup>40</sup>

25. *Vavilov*'s brief discussion of the approach to take to judicial review in the absence of reasons<sup>41</sup> offers scant guidance and opens the door to overly intrusive judicial involvement in delegated legislation. The following paragraph highlights the invitation to intrusive judicial involvement:

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.<sup>34</sup> (Emphasis added)

26. There is a real risk that, unless restrained by clear guidance from this Court, the judicial review of delegated legislation under the *Vavilov* paradigm will, as feared by the majority in *Auer*: “1) inevitably descend into an examination of the policy choices behind the regulation, or 2) examine the effectiveness of the regulation.”<sup>42</sup>

27. The absence or reasons should not be a basis for a less deferential review. As a practical matter, the intensity of review will then become “primarily (and perhaps totally) conditioned by the breadth of the delegating power in the primary statute.”<sup>43</sup>

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<sup>40</sup> *R. v Sharma*, [2022 SCC 39](#) at para [89](#); *Pay2Day Inc. v City of Toronto*, [2023 ONSC 2654](#) at paras [54-55](#).

<sup>41</sup> *Vavilov* at paras [136-138](#).

<sup>42</sup> *Auer* at para [36](#).

<sup>43</sup> Mancini, M., “One Rule To Rule Them All: Subordinate Legislation and the Law of Judicial Review” (December 15, 2023), [Ottawa Law Review, Forthcoming](#).

28. The Court should offer guidance that applies the *Vavilov* framework but integrates the *Katz* line of authority and the *Catalyst, Green* and *West Fraser Mills* line of authority into it:<sup>44</sup>

*Assessment of conformity to the legislative mandate*

The delegated legislation must conform to the rationale of the statutory schemes set up by the legislature.<sup>45</sup> In assessing conformity:

- a. the challenged regulation bylaw, code or standard and its enabling statute must be interpreted using a “broad and purposive approach;”<sup>46</sup> and
- b. the presumption of validity applies--the onus to establish unreasonableness falls on the challenger<sup>47</sup> and the approach to interpretation must strive to reconcile the delegated legislation with its enabling statute.<sup>48</sup>

*Assessment of substantive reasonableness*

- c. The application of the reasonableness standard of review should reflect and integrate the highly deferential approach enunciated in *Katz* and in the *Catalyst, Green* and *West Fraser Mills* line of authority.<sup>49</sup> Therefore, the test for unreasonableness should capture the core principles from both lines of authority
  - i. the impugned delegated legislation must be one that no reasonable body informed by the relevant factors could have enacted (which is the test from *Catalyst, Green* and *West Fraser Mills*), or
  - ii. the motives behind the delegated legislation must be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose (which is the test from *Katz*).

<sup>44</sup> See Feehan JA’s dissent in *Auer* at para 123.

<sup>45</sup> *Vavilov* at para 108, citing inter alia, *Catalyst*, at paras 15 and 25-28; and *Green* at para 44. See also *Reference re Impact Assessment Act*, 2023 SCC 23 at para 283 citing *Katz* and *West Fraser Mills* (Karakatsanis and Jamal JJ dissenting in part).

<sup>46</sup> *Katz* at para 26.

<sup>47</sup> *Katz* at para 26; *Vavilov* at para 100; *Canadian Council for Refugees* at para 54.

<sup>48</sup> *Katz* at para 25; *West Fraser Mills* at para 12.

<sup>49</sup> See for example *Kikino Metis Settlement v Abtosway*, 2018 ABCA 199 at para 26 where this was done.

*Limit on scope of assessment*

- d. The application of the reasonableness standard should not involve assessing the policy merits of the delegated legislation to determine whether the delegated legislation is "necessary, wise, or effective in practice" and should not be an inquiry into the factors that underlie the delegated legislation (e.g. the practice, ethical, social, and policy issues that are at issue in professional self-governance).<sup>50</sup>

**PART IV – COSTS**

29. NAPRA does not seek costs, and asks that no costs be awarded against it.

**PART V – ORDER SOUGHT**

30. NAPRA takes no position on the resolution of the appeals in TransAlta (40570) and Auer (40582), nor does NAPRA take any position on the application of the standard of review to the facts of these appeals.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5<sup>th</sup> day of April, 2024.




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William W. Shores, Q.C.

**Counsel for the Intervener, NAPRA**

-and-




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**Counsel for the Intervener, NAPRA**

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<sup>50</sup> [Katz](#) at paras [27-28](#).

## PART VI – TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
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