**SCC File No. 40582**

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

BETWEEN:

**ROLAND NIKOLAUS AUER**

APPELLANT
(Appellant)

AND:

**AYSEL IGOREVNA AUER**

RESPONDENT
(Respondent)

AND:

**ATTORNEY GENERAL OF CANADA**

RESPONDENT
(Intervener)

*(continued)*

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**SCC File No. 40570**

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

BETWEEN:

**TRANSALTA GENERATION PARTNERSHIP and TRANSALTA GENERATION (KEEPHILLS 3)**

APPELLANT
(Appellant)

AND:

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

RESPONDENT
(Respondent)

*(continued)*

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# JOINT FACTUM OF THE INTERVENER WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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INTERVENERS

**SCC File No. 40570**

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## PARTS I AND II - OVERVIEW AND STATEMENT OF POSITION

[1] The Workers' Compensation Board of British Columbia (the "**WCBBC**") is an administrative body created by the *Workers Compensation Act*[1] and charged with, among other responsibilities, creating and maintaining an occupational health and safety ("**OHS**") regime in B.C.[2] To carry out this OHS mandate, the WCBBC relies heavily on the *Occupational Health and Safety Regulation*,[3] a piece of subordinate legislation promulgated by the WCBBC.

[2] The arguments made in *Roland Nikolaus Auer v. Aysel Igorevna Auer et al*.[4] and *TransAlta Generation Partnership, et al. v. His Majesty the King in Right of the Province of Alberta*[5] ask this Court to clarify what impact *Canada (Minister of Citizenship and Immigration) v. Vavilov*[6] has on the conduct of judicial review of subordinate legislation. As such, the outcome of these appeals has the potential to impact the WCBBC and other administrative bodies that are reliant on subordinate legislation.

[3] Prior to *Vavilov*, this Court set out the law on the conduct of judicial review of subordinate legislation in cases including *Catalyst Paper Corp. v. North Cowichan (District)*,[7] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*,[8] *Green v. Law Society of Manitoba*,[9] and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*.[10]

[4] The WCBBC submits that the arguments made by the appellants in these appeals would, if successful, create a substantive change to the law on judicial review of subordinate legislation as set out in *Catalyst, Katz, Green,* and *West Fraser* (together, the "**Pre-*Vavilov* Cases**").

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[1] RSBC 2019, c. 1 (the "***WCABC***")
[2] *WCABC*, s. 17
[3] B.C. Reg. 296/97 (the "**OHS Regulation**")
[4] Supreme Court of Canada Docket No. 40582 (the "**Auer Appeal**")
[5] Supreme Court of Canada Docket No. 40570 (the "**TransAlta Appeal**")
[6] 2019 SCC 65 [*Vavilov*]
[7] 2012 SCC 2 [*Catalyst*]
[8] 2013 SCC 64 [*Katz*]
[9] 2017 SCC 20 [*Green*]
[10] 2018 SCC 22 [*West Fraser*]

[5] Specifically, the WCBBC submits that the appellants' argument asks this Court to increase the scope of judicial review of subordinate legislation from the limited *vires* review set out in the Pre-*Vavilov* Cases to a substantive review of the merits of subordinate legislation.

[6] The WCBBC takes no position on the outcome of this case. However, the WCBBC asks that this Court consider the following:

1. Will this decision increase the scope of judicial review of subordinate legislation that was established in the Pre-*Vavilov* Cases; and
2. If so, what impact will this increase in scope have on administrative bodies like the WCBBC that rely heavily on subordinate legislation to carry out their mandate?

## PART III - STATEMENT OF ARGUMENT

### A. The Argument of the Appellants, if Successful, would Increase the Scope of Judicial Review of Subordinate Legislation

#### *i) The Arguments Before this Court*

[7] There are three positions before this Court on the appropriate standard of review in a judicial review of subordinate legislation and how that standard should be applied.

[8] The appellant TransAlta Generation Partnership and TransAlta Generation (Keephills 3) (the "**TransAlta Appellant**") and the appellant Roland Nikolaus Auer (the "**Auer Appellant**") argue that *Vavilov* has changed the law as set out in the Pre-*Vavilov* cases.[11] In the appellants' view, *Vavilov* both establishes the applicable standard of review and provides guidance to be followed in applying that standard.[12]

[9] The TransAlta Appellant argues that subordinate legislation issued by the Governor in Council attracts a standard of correctness,[13] but otherwise generally agrees with the Auer

[11] Factum of the TransAlta Appellant in the TransAlta Appeal (the "**TransAlta Factum**"), at paras 102-108; Factum of the Auer Appellant in the Auer Appeal (the "**Auer Appellant Factum**"), at paras 159-161
[12] Auer Appellant Factum, at paras 25-37; TransAlta Factum, at para 47
[13] TransAlta Factum, at paras 114-115

Appellant that *Vavilov* supplants the Pre-*Vavilov* Cases and establishes a new approach to the conduct of judicial review of subordinate legislation.[14]

[10] The respondent Attorney General of Canada (the "**AGC**") in the Auer Appeal and the respondents His Majesty the King in Right of the Province of Alberta and the Minister of Municipal Affairs for the Province of Alberta (the "**Alberta Respondent**") in the TransAlta Appeal argue that the Pre-*Vavilov* Cases – and *Katz* in particular – remain valid and binding and set out how the reasonableness standard should be applied to judicial review of subordinate legislation.[15]

[11] The decisions of the Alberta Court of Appeal in these cases found that *Vavilov* did not apply to the judicial review of subordinate legislation and that *Katz* alone applied as a unique *vires* test. [16]

[12] The analysis applied by the Alberta Court of Appeal in the Auer Appeal Decision and the TransAlta Appeal Decision do not materially change the status quo of the law on judicial review of subordinate legislation, as they directly rely on *Katz,* one of the Pre-*Vavilov* Cases.

[13] The position taken by the AGC and the Alberta Respondent – while it does not agree with the Alberta Court of Appeal – also proposes no material change to the status quo, as it holds that the Pre-*Vavilov* Cases are still good and binding law.

[14] However, the argument of the appellants proposes substantive change to the law on judicial review of subordinate legislation as set out in the Pre-*Vavilov* Cases.

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[14] TransAlta Factum, at paras 126-127

[15] Factum of the Respondent AGC in the Auer Appeal (the "**AGC Factum**"), at paras 31-34; Factum of the Alberta Respondent in the TransAlta Appeal (the "**Alberta Factum**"), at paras 45-50

[16] *Auer v. Auer*, 2022 ABCA 375, at para 7 (the "**Auer Appeal Decision**"); *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381, at para 46(the "**TransAlta Appeal Decision**")

[15] All parties, including the appellants, describe the judicial review of subordinate legislation as a question of *vires*, or whether the piece of subordinate legislation falls within the scope of the delegated authority of the administrative actor.[17]

[16] The appellants argue that their application of *Vavilov* as set out in their facta is still a form of *vires* analysis and is not a merit-based review.[18] However, when viewed practically, and particularly in comparison to the Pre-*Vavilov* Cases, it is difficult to find any meaningful difference between the analysis proposed by the appellants and a review of subordinate legislation on the merits.

***ii) Conduct of Judicial Review of Subordinate Legislation in the Pre-Vavilov Cases***

[17] *West Fraser*, decided only a year and half prior to *Vavilov*, relies on *Catalyst*, *Katz*, and *Green* finding that the appropriate standard of review for subordinate legislation is reasonableness and the application of that standard asks the reviewing court to determine:

> … whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulation authority. Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act?[19]

[18] By consolidating and relying on *Catalyst, Katz*, and *Green*, *West Fraser* suggests that there is only one standard to be applied to determining the *vires* of subordinate legislation, regardless of the nature of the body issuing that subordinate legislation. That standard is reasonableness.

[19] This standard applies to the construction of the relevant statute and subordinate legislation and includes a presumption that the Legislature does not intend to give an administrative body the authority to act unreasonably.[20] Notably, what "unreasonable" means in this context has historically been seen as distinct from "unreasonable" in the context of judicial review of an adjudicative decision.[21]

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[17] Auer Appellant Factum, at para 162; TransAlta Factum, at para 118; AGC Factum, para 42. Note that the respondent Aysel Auer in the Auer Appeal takes no position on the standard of review.
[18] Auer Appellant Factum, at para 162; TransAlta Factum, at para 118
[19] *West Fraser*, at para 10
[20] *West Fraser*, at para 11
[21] *Catalyst*, at para 21

[20] According to the Pre-*Vavilov* Cases, subordinate legislation will be *ultra vires* – or an unreasonable exercise of delegated authority – where is it inconsistent with the objective of the enabling statute or outside the scope of the statutory mandate to the point where no reasonable administrative body could have passed it and/or where it is inconsistent to the point of being relevant, extraneous, or completely unrelated.[22]

[21] The Pre-*Vavilov* Cases indicate that the application of this standard is essentially an exercise of statutory interpretation, focusing on the text, context, and purpose of the legislation and subordinate legislation at issue.[23]

[22] In discussing what factors a reasonableness review of subordinate legislation should consider, this Court has emphasized that, unlike quasi-judicial decisions, subordinate legislation has a broad impact and is legislative rather than adjudicative in nature. As such, promulgation of subordinate legislation involves non-legal considerations such as social, economic, and political matters, justifying the deference described in the Pre-*Vavilov* Cases.[24]

[23] This Court has emphasized that, pre-*Vavilov*, a reasonableness review of subordinate legislation does not ask whether the subordinate legislation meets a test of demonstrable rationality in terms of process and outcome, but instead asks whether the subordinate legislation conforms with the statutory regime.[25]

### *iii) The Approach Suggested by the Appellants is Substantively Different that the Pre-Vavilov Approach*

[24] The Auer Appellant argues that the *Divorce Act*[26] requires that the *Federal Child Support Guidelines*[27] address only "childcare costs" and that these costs must be shared proportionately between the parents based on their income. The Auer Appellant says that the *Guidelines* violate this statutory requirement and so are *ultra vires*. [28]

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[22] *Catalyst*, at para 20; *Katz*, at para 28; *Green*, at para 20; *West Fraser*, at para 12
[23] *Catalyst*, at para 18; *Katz*, at paras 24-26; *Green*, at para 26; *West Fraser*, at para 12
[24] *Catalyst*, at para 19; *Katz*, at para 28; *Green*, at para 24; *West Fraser*, at paras 9-11
[25] *Catalyst*, at paras 22-25; *Katz*, at paras 27-28; *Green*, at paras 66-67; *West Fraser*, at para 12
[26] RSC 1985, c 3 (2nd Supp)
[27] SOR/97-175
[28] Auer Appellant Factum, at paras 3-4

[25] TransAlta argues that updates made to certain tax related guidelines[29] under the *Municipal Government Act*[30] target a small group with more onerous treatment and are therefor *ultra vires*, as this discrimination was not authorized by statute.[31]

[26] At a high level, these arguments are framed as a matter of statutory interpretation to determine the scope of the relevant statutory authority. However, in practice the argument made by the appellants is hard to distinguish from an argument as to whether the relevant subordinate legislation is demonstrably rational in terms of process and outcome.

[27] The Auer Appellant argues that this Court must consider the rationale and reasoning process used to arrive at the *Guidelines* and the outcome of the *Guidelines*. The substance of the appellant's argument is that the *Guidelines* are "unreasonable" because there are breaks in logic in the reasoning process and unreasonable outcomes that run contrary to the identified constraints.[32]

[28] As set out above, this Court has previously held that review of subordinate legislation does not engage in the reasoning process and outcome, but instead focuses on whether the subordinate legislation conforms with the statutory scheme.[33] This indicates that an analysis of whether subordinate legislation conforms with the statutory scheme does not include an analysis of the reasoning process and outcome beyond very limited contextual matters.[34]

[29] TransAlta argues, among other things, that the Linear Guidelines are constrained by the requirement that taxation under the *MGA* be "fair and equitable" and that this mandates a particular approach to taxation.[35]

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[29] *2017 Alberta Linear Property Assessment Minister's Guidelines*, Appeal Record of TransAlta in the TransAlta Appeal, Tab 15, p. 82 ("**Linear Guidelines**").
[30] RSA 2000, c. M-26
[31] TransAlta Factum, at para 7
[32] Auer Appellant Factum, at paras 63-78
[33] See para [22] above.
[34] *Catalyst*, at paras 29-31; *West Fraser*, at paras 19-21
[35] TransAlta Factum, at paras 79-82

[30] Both appellants argue that judicial review of subordinate legislation, like judicial review of adjudicative decisions, must both demonstrate an internally rational reasoning process and accord with the relevant factual and legal constraints.[36]

[31] In applying the process followed in *Vavilov* directly to the subordinate legislation at issue, it is difficult to see the approach of the appellants as anything other than a review of the subordinate legislation on its merits. Put another way, if the approach of the appellants is not a review of the merits of subordinate legislation, how would a review on the merits differ? The WCBBC says there would be no difference.

[32] The approach argued by the appellants – if accepted – would effectively mean that judicial review of subordinate legislation would become a review of the merits of that subordinate legislation as opposed to a more limited *vires* review as described in the Pre-*Vavilov* Cases.

[33] The hallmarks of this expanded scope of judicial review include a detailed analysis of the process followed by the administrative body in promulgating the subordinate legislation with a focus on a search for logical errors, a consideration of alternate available approaches, and a consideration of the outcome or effectiveness of the subordinate legislation. All of these are issues that were not within the scope of the judicial review of subordinate legislation pursuant to the Pre-*Vavilov* Cases.

## B. A Change in the Scope of Judicial Review of Subordinate Legislation could have Significant Impacts on Administrative Bodies Reliant on Subordinate Legislation

[34] The WCBBC takes no position on the outcome of this appeal. However, in considering whether *Vavilov* creates a change in the law on conducting judicial review of subordinate legislation, the WCBBC asks this Court to consider the practical impacts this approach could have on major promulgators of subordinate legislation, using the WCBBC as an example.

[35] As set out above, it is the approach suggested by the appellants would change the *status quo*. The appellants' approach would mean that judicial review of subordinate legislation

[36] Auer Appellant Factum, at paras 63-78; TransAlta Factum, at para 126

would require the full disclosure of a potentially extensive record of internal investigation and deliberation created in promulgating subordinate legislation.

[36] It would also mean that a challenging party could argue that a regulation was invalid as the logical reasoning shown in this record has flaws, even though this record would not necessarily reflect formal or final reasoning. A challenging party would also be able to provide evidence of the outcome of a particular regulation, including expert evidence, and argue that the regulation is not reasonable because of this outcome.

[37] This increased scope for challenges could create significant impacts on regulators like the WCBBC. Pursuant to s. 17 of the WCABC, the WCBBC:

> …has the mandate to be concerned with occupational health and safety generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in British Columbia and the occupational environment in which they work.

[38] The WCABC provides a structure to carry out that mandate by providing general duties applicable to various workplace parties – such as employers, workers, and owners – that include an obligation to adhere to the OHS Regulation.[37]

[39] The WCBBC promulgates regulations in relation to OHS under s. 110-112 of the WCABC. In doing so, the WCBBC is required to follow a process of public and industry specific consultation pursuant to s. 113 of the WCABC.

[40] The OHS Regulation is at the heart of the WCBBC's OHS mandate. It is composed of 34 parts and hundreds of sections. It incorporates various industry standards by reference.[38] It is also closely tied to binding policy issued under s. 319 of the WCABC in the form of the Prevention Manual. Changes to the OHS Regulation can therefore trigger related changes in the Prevention Manual.

[41] Pursuant to the Pre-*Vavilov* Cases, the ability of a party found in breach of a section of the OHS Regulation to challenge the *vires* of the regulation itself is relatively narrow. The appellants' argument would mean that, post-*Vavilov*, it would be open to any party

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[37] WCABC, ss. 21-27

[38] See for example, OHS Regulation, s.14.2(2)

impacted by an OHS Regulation to seek judicial review of the regulation itself on a much broader basis.

[42] In essence, it would open the WCBBC's internal regulation making process and the impact or effect of those regulations to judicial review on the merits when that has not historically been the case.

[43] This increased scope would mark a significant change in the nature of the deference historically shown to administrative bodies acting in a legislative capacity. As discussed above, legislative action necessarily includes consideration of factors beyond legal analysis. These factors engage the expertise of bodies like the WCBBC and are engaged in the Legislature's choice to delegate decision making within a particular scope to a body like the WCBBC.

[44] The Pre-*Vavilov* case law, in focusing on an analysis of the statutory scheme, appropriately limits judicial review of subordinate legislation to legal matters and the maintenance of the rule of law. The approach suggested by the appellants, however, engages the whole of the reasoning process and the impact of subordinate regulation, going beyond a focus on legal issues and stretching into a consideration of non-legal factors.

[45] Judicial review of subordinate legislation conducted in this manner would put courts in the position of assessing the merits of subordinate legislation that was delegated to an administrative body possessing specific expertise and experience – not only in its home statute, but also in the economic, political, social, and other aspects of the authority delegated to it.

[46] In the case of the WCBBC, the approach of the appellants would place a judge of the B.C. Supreme Court in the position of assessing the merits of an industry specific and potentially highly technical regulation, including the details of public and industry consultations as well as the outcomes, without any expertise or experience in the subject matter outside of the legal issues.

[47] One of the dangers of a judicial review of the OHS Regulations focused on the merits of the reasoning process and outcome of a specific regulation – as opposed to the Pre-

*Vavilov* approach focused on the statutory scheme as a whole – is that it risks undue focus on the merits of one regulation without full consideration of the larger impacts a successful challenge to that regulation might have.

[48] The required process of regulatory consultation means the WCBBC would be unable to swiftly replace an overturned regulation with a new regulation and would therefore have a gap in the OHS regulatory regime until a new regulation could be passed. This could risk the ability of the WCBBC to maintain safety in workplaces impacted by the relevant regulation even though the impugned regulation itself may not have been creating any safety concerns.

[49] In addition, any existing penalties or other enforcement measures relying on an overturned regulation would be called into question. Enforcement measures available to the WCBBC that rely on breached OHS Regulations include measures as significant as a statutory injunction barring an individual from working in a particular industry on a permanent basis.[39]

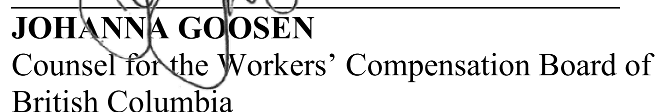
[50] The WCBBC, like all administrative bodies, relies on the stability provided by its enabling statute and related subordinate legislation to carry out its mandate. Expanding the scope of judicial review of subordinate legislation as suggested by the appellants would materially alter the nature of the deference historically granted to subordinate legislation and has the potential to create instability and uncertainty.

## PARTS IV AND V – COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

[51] WCBBC seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver, Province of British Columbia, this 5th day of April, 2024



**JOHANNA GOOSEN**
Counsel for the Workers' Compensation Board of British Columbia

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[39] WCABC, s. 97(1)(e)

## **PART VI – TABLE OF AUTHORITIES**

| Authority | Paragraph Reference(s) in Argument |
| --- | --- |
| Legislation | |
| *Divorce Act*, RSC 1985, c. 3 (2nd Supp)<br>*Loi sur le divorce*, LRC 1985, c 3 (2e suppl) | 23 |
| *Municipal Government Act*, RSA 2000, c. M-26 | 24 |
| *Workers Compensation Act*, RSBC 2019, c 1 | 1, 36-39, 48 |
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| *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 | 3-4 17-22, 27 |
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| *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 | 3-4, 17-22 |
| *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 | 11 |
| *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 | 3-4, 17-22, 27 |