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)

- and –

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

Interveners

APPELLANTS' FACTUM IN REPLY TO THE INTERVENERS

(Pursuant to the Order of Justice Martin dated March 20, 2024)

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A. Introduction

1. The submissions of the various interveners all underscore why this case is fundamentally about the rule of law.

2. The Attorneys General and various regulatory agencies argue that statutory delegates must be able to create regulations and other delegated legislation in secret, with only the most cursory inquiry into whether the resulting rules might have something to do with the purpose of the enabling legislation. They contend that requiring them to show why they have the power they claim to be exercising would result in all sorts of undesirable consequences. They accordingly urge this Court to create a kind of justification-free zone unique in the Canadian legal order—an exemption from the culture of justification that this Court in *Vavilov* said needs to be developed and strengthened.[1] Like the respondent Minister of Municipal Affairs in this case, they all say, in effect, "trust us, we got it right"[2]—but "don't make us explain why."

3. But if a regulator has satisfied itself of its legal authority to enact a regulation before doing so—something these interveners surely must do—why is it asking too much of that regulator to take the next step and cogently put that rationale forward either at the time of making regulations or, at the very least, when the regulations are challenged? This is a question these interveners do not answer.

4. The intervener submissions also underscore that the problem raised by this appeal will not be resolved by addressing only the standard of review. None of the interveners address the real issue in this case—unauthorized administrative discrimination. Some of them point to concerns about reviewing the merits, wisdom or policy choices behind regulations (something these appellants are not advocating for), but they do not engage at all with the law that clearly says unauthorized discrimination is fatal to an exercise of regulatory power,[3] and that

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[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"], at paras. 2, 14.
[2] *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, at para. 23.
[3] *Montréal v. Arcade Amusements Inc.*, 1985 CanLII 97 (SCC), [1985] 1 SCR 368, at paras. 413-414; *Forget v. Quebec (Attorney General)*, 1988 CanLII 51 (SCC), [1988] 2 SCR 90, at para. 30; *British Columbia Ferry Corp. v. M.N.R.* (C.A.), 2001 FCA 146 (CanLII), [2001] 4 FC 3, at para. 24.

discrimination in the property tax context in particular requires express statutory authorization.[4]

5. Finally, the submissions of the Health Coalition, the Canadian Association of Refugee Lawyers, and AQAADI powerfully illustrate that this case isn't about some abstract legal theory that matters only to some judges and a handful of law professors. Whether and to what extent our governments and statutory bodies must demonstrate their compliance with the principle of legality[5] and justify their exercise of delegated power[6] matters to real people—often most to those who have the least and who are most vulnerable in the face of state power. Pairing that reality with the issue at the heart of this case—unauthorized discrimination—amplifies why it is so important that courts play their constitutional role to "say what the law is"[7] and not cede that role to those charged with making the very rules under review.

B. The AGs and regulators seek a culture of non-justification for regulations

6. The Attorneys General of British Columbia, Ontario, Quebec and Saskatchewan, and several rule-making regulatory bodies (NAPRA, the Workers' Compensation Board of British Columbia, and the SM-4) point to principles that they say limit judicial review of regulations to the extremely narrow zone suggested by the Court of Appeal in this case. The key principles, in themselves, are uncontroversial, established doctrines of administrative law:

- The proper ground of review is legality (*vires*)—whether the regulation is consistent with the statutory purpose and within the scope of the statutory regulation-making power; and

- Judicial review of regulations should not inquire into the wisdom or efficacy of the regulation, or the policy choices behind it.

7. The appellants take no issue with these propositions. But what these interveners ignore is

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[4] *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 SCR 23, at para. 60 (per McLachlin J., in dissent, but not on this point).

[5] The principle of legality is "the idea that state action must conform to the Constitution and must not be immunized from judicial review": *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 at para. 22.

[6] *Vavilov* at para. 14.

[7] *Marbury v. Madison* (1803), 1 Cranch 137 at p. 177 (USSC).

how these principles interact with the other cornerstones of administrative law, reaffirmed by this Court in *Vavilov*: the crucial role of meaningful judicial review in upholding the rule of law, and the need to develop and strengthen a culture of justification in administrative action.

8. The well-established principles cited by the interveners can and do co-exist with the rule of law and a culture of justification. But the implications of some intervener arguments (and of the Court of Appeal's approach in this case) can't, because the way in which they urge these principles to be applied results in:

- The requirement of legality being met if it is *possible* to find even the most tenuous link between the regulation and the purpose of the enabling statute, however vaguely that purpose is defined;

- The presumption of validity being not an ordinary presumption, but rather one that is irrebuttable in almost every case, the only exception being "egregious" cases (whatever that means); and

- A Minister or a statutory delegate being able to immunize its regulation-making acts from judicial review entirely by calling them "policy," even when they involve re-writing the statutory constraints on the rule-maker's own power.

9. This is a dismal view of the Canadian legal culture of regulation-making. If it was true, regulation making—the most pervasive form of lawmaking in Canada—would reside in a unique zone of unaccountability different from all other administrative action.

10. Several of the interveners strongly oppose any requirement to justify their decisions with reasons, citing the need for secrecy and the loss of efficiency if they should be called on to explain why their own actions are legally authorized. The Attorney General of Ontario pronounces that "Reasons or justification for regulation-making are not required."[8] NAPRA says: "To impose an obligation to require reasons or to demonstrate justification, transparency and intelligibility would judicialize and ossify the process of making delegated legislation."[9] The Attorney General of British Columbia argues that the reasons supporting the legality of Cabinet

[8] AGO Factum, at para. 36.
[9] NAPRA Factum, at para. 26.

decisions to make regulations must be kept secret, and should only be made available in the narrowest of circumstances.[10]

11. These interveners propose that their perceived necessity for expediency, efficiency and secrecy require for regulations a culture of *non*-justification, trading away the deepest values of our legal system for the comfort and convenience of rule-makers.

C. These views have no place in a post-*Vavilov* world

12. What would we think if the police started saying they could do things because it is "possible" that what they are doing may have some remote connection to the purpose of some statute? Regulators might answer that they should be subject to a different standard than the police because they are acting in the public interest. But that explanation would be cold comfort to someone who is told they can't sell eggs, pursue their chosen livelihood, adopt a child, stay in Canada, or obtain medical care or welfare assistance, because of what some regulation says.

13. To the regulation-maker, all its rules look like they serve the public good. To the regulated, those same rules often feel like the state stopping them from doing something *they* believe is good, or saying they can't have something they believe they need. Those facing the burden of regulation should at least know that, like it or not, the regulations that affect them were made in conformity with democratically-enacted laws.

14. Sir Robert Megarry reminds us that "Justice in full takes time, but it is often time well spent."[11] He made that statement after observing that "One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process."[12] This same principle should apply equally to those subject to regulations. "Because I said so" is far less likely to engender respect for legal rules we don't like than "Because your elected representatives have said I can make these rules, and here is how and where they said so." That is the whole point of the culture of justification, and why it needs to apply equally to regulation-making as it does to other administrative action.

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[10] AGBC Factum, at para. 31.
[11] Megarry, *Temptations of the Bench* (1978), 16 Alberta Law Review 406 at 411.
[12] *Ibid.*, at 410.

1. Regulators who care about legality don't need or want hyperdeference

15. If a regulation-maker can't justify the legality of its actions unless a reviewing court takes a "highly deferential approach,"[13] what does that say about the legality of the actions? Isn't this a bit like saying I don't speed as long as the police apply a 20km/h margin of error when reading their radar guns? How will *lowering* the bar for what constitutes a lawful exercise of power encourage the culture of justification called for in *Vavilov*?

16. A regulator that knows it is on solid legal ground in taking action doesn't need a highly deferential review—it can articulate with clarity and precision exactly where its power comes from, and why. It is only where the regulator is on shaky ground, and is stretching its power to (or past) the limits, that it needs a highly deferential review, so that it can (hopefully) just squeak past whatever lax standard it can convince the Court to apply.

17. Regulators who are serious about acting within the law—as all these interveners surely are—don't need, and shouldn't want, any favours from a reviewing Court. By insisting on hyperdeference these interveners sell themselves short. Canadian regulators aren't so unsure about whether what they are doing is actually legal that they can't rationally explain to a judge why they have the power to do what they do.

18. Hyperdeference at best promotes unaccountability. At worst, it breeds institutional laxity about legality. Why bother to ensure you are on solid legal footing before passing a regulation if nobody is checking your work? Why bother to tick the box of legal authority if you are doing what you believe is good, right, and necessary? If a rigorous analysis of enabling statutory power just goes in the drawer at the end of the day, never to be seen again, why take the time to do it at all?

19. And this is no mere hypothetical. NARPA asserts that a robust review of regulations on the normal *Vavilov* standards would "ossify" and "judicialize" regulation-making.[14] If what this means is that it takes too long to write down a justification for regulatory lawmaking, shouldn't this justification already be in existence before the regulation is made? And, if so, why would spelling out what already exists be too burdensome? (Sometimes justification "simply requires

[13] NARPA Factum, at para. 28(c).
[14] NARPA Factum, at para. 26.

adding the word ‘because’ at the end of the sentence stating the decision and then carrying on to complete the sentence.”[15]) Canadians should be entitled to an explanation of where the state’s power to take action comes from—whether or not that action is subjected to judicial review.

20. If, however, what NAPRA is saying is that it is too much trouble to *formulate* the justification before enacting regulations, that is a much more serious problem. No regulation should be made unless a regulation-maker is first satisfied that it has the legal authority to act. Governing a nation in accordance with the rule of law isn’t always easy or convenient. That is not a reason to retreat from compliance with it. It certainly isn’t a reason for this Court to immunize regulation-making from the culture of justification.

2. Providing justification is not difficult for a conscientious regulator

21. Although the Attorneys General and rule-making interveners say that they could not do their job properly if required to justify the legality of their actions on the *Vavilov* standard, none really explain why. This is a hard submission to understand when one considers that many Canadian regulators *already* do this as part of their normal practice.

22. Take the intervener Workers’ Compensation Board of British Columbia, for example. It is currently “proposing amendments to policy … concerning activity-related soft tissue disorders.”[16] It has published a lengthy policy document summarizing the proposed amendments (backed up by two research papers), identifying the legal authority for them, and providing a detailed explanation of why the amendments are being made. This is the culture of justification in action, and it is already being done.

23. The Record in this appeal includes another type of document that explains the rationale for making the regulations in issue here.[17]

24. That makes these interveners’ argument not about whether they *can* produce a justification—clearly they are doing just that—but rather whether the Court (and Canadians)

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[15] *Eloufy v. The Association of Professional Engineers and Geoscientists of Saskatchewan*, 2024 SKKB 45 at para. 92.

[16].WorkSafe BC Discussion Paper — Activity-Related Soft Tissue Disorders of the Limbs (January 25, 2024)

[17] Advice to Minister for Decision, December 4, 2017 Appellants’ Record Tab 16 p. 111, with relevant extracts quoted at Appellants’ factum para. 36.

should be allowed to look carefully at their explanation. Of course nobody likes to have to defend their work. That is hardly a reason not to do it. Especially when what is at stake is the rule of law.

3. Requiring justification will not undermine public interest immunity

25. Although the respondent in this case has not invoked public interest immunity, the Attorneys General of BC and Ontario argue that requiring justification for Cabinet regulations would erode or infringe on cabinet confidentiality. There are two simple reasons this is not so—one practical and one theoretical.

26. The practical reason is that Cabinet's justification can be set out in a separate document that is not subject to cabinet confidence once the final decision to promulgate regulations has been made. Cabinet confidence protects high level policy discussions around the cabinet table—actually and notionally (through the type of mandate letters at issue in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*,[18] or other high-level cabinet communications). But it doesn't protect a public statement about why and on what legal basis the government has done something. Requiring one does not automatically lead to disclosure of the other.

27. Judges have complete and absolute deliberative secrecy, but they still have to explain the basis for their decisions once they have been made. Nobody suggests that requiring them to do so intrudes on deliberative secrecy. Judges' reasons are public, but everything else they create (or that is created for them) in coming to their decision is not. It is far from clear why requiring some form of justification for regulation-making would have any different result. The existing law of public interest immunity—including the law about whether and when the immunity must give way—could continue to apply to cabinet records and would not be altered by whatever reasons-like document is created.

28. The theoretical reason that requiring reasons doesn't undermine public interest immunity is that public interest immunity itself exists to protect the public, not governments. It exists to promote the effective functioning of government for the benefit of the governed. Surely acting within the law is part of the effective functioning of government—it certainly should be. If that is

[18] 2024 SCC 4 (CanLII).

so, then it makes little sense to assert public interest immunity to shield meaningful review of the legality of government action.

29. The AGBC's suggestion that a *Bodner*-type review apply on judicial review of cabinet regulations makes no sense when one considers why that unique type of review was created and is limited to a review of judicial compensation decisions. "Special considerations arise" in judicial review of judicial compensation because "a *Bodner* review usually opposes two different branches of the state—the judiciary and the executive—as parties in the application."[19] That is not the case in judicial review of regulations that do not relate to judicial compensation—there the court is playing its constitutional role of impartial umpire without the awkward reality of also being directly affected by the decision. No reason to impose a *Bodner*-like review exists.

4. Calling something a policy decision does not immunize it from meaningful review

30. The distinction that several interveners draw between a regulation and the policy that informs it is not entirely helpful.[20] A decision by the Minister of National Defence to re-institute conscription by regulation would undoubtedly be a policy decision (and an important one), but labelling it as such would have no relevance to whether or not the Minister actually had the legal authority to make the regulation. Whether he has or hasn't been given the power by Parliament is a pure question of statutory interpretation.[21] And to answer it the Court would not have to consider at all the wisdom or desirability of that policy choice—only whether the Minister was empowered to make it.

31. While the separation of powers is of course an important component of the rule of law, a court that too readily shies away from a rigorous review of the legality of government action out of fear of treading into policy-making actually undermines the separation of powers, by ceding to a regulation-maker the court's proper role of judicial review.

32. The reality is that all lawmaking is the expression and embodiment of policy. A policy is simply the reason for doing something. And who would make regulations for no reason? If simply calling something a policy decision was enough to insulate it from judicial review, there

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[19] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (CanLII), [2020] 2 SCR 506 at paras. 47, 51, and 62- 63 (emphasis added).
[20] A point made by the Court in *Catalyst Paper* at para. 14.
[21] Paul Daly, *Against ATCO: Text, Purpose & Context, Not "Implied" and "Express" Powers* (2024), 54 Advoc. Q. 315 (Appellants' Book of Authorities for Reply Factum, Tab 1).

would be no judicial review, and no effective way of ensuring the legality of government action.

33. This case provides a good example of the dangers of too readily heeding a government's cry of "hands off our policy". Subjecting the parties to the off-coal agreements to a different tax regime than all other taxpayers might be very sound policy. It might be a terrible idea. But answering whether it is or isn't either of these things doesn't help at all with the question of whether the legislature intended to empower the Minister to make such a transformative policy decision, or whether it is a change that would require statutory amendment.

D. Conclusion

34. The cry for a highly deferential review of the legality of regulations is really a statement that what Canadian regulation-makers do is legal as long as you don't look too closely. Canadian regulators, ministers, cabinets and other statutory delegates are better than this. They must be satisfied that their conduct is legal *before* using the power of the state to affect the lives of Canadians by regulation. Most probably do just that. For them, then, the requirement to justify their regulations in a meaningful review is not onerous all. And, conversely, the lack of an explanation may weigh heavily on those who are subject to the rules—all the more so when regulations take away vested rights, apply retroactively, or (as in this case) single out a small group for disadvantageous treatment.

35. As for regulation-makers that don't know why or whether they really can take the action they are taking, *Vavilov's* culture of justification is the only solution. This case provides the paradigmatic example of why a regulator's belief that something is a good idea isn't the same thing as it being legal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 10, 2024

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