SCC 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 -

AYSEL IGOREVNA AUER

Respondent
(Respondent)

- and-

THE ATTORNEY GENERAL OF CANADA

Respondent
(Intervenor)

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PART I OVERVIEW OF APPEAL AND STATEMENT OF FACTS

A. Overview of Appellant's Position

1. The *Federal Child Support Guidelines*[1] determine the amount of child support paid in every case of divorce and in respect of all common law separations, except in Quebec. Like any piece of delegated legislation, the *Guidelines* must be consistent with their enabling statute—in this case, the *Divorce Act*.[2] As this case demonstrates, the *Guidelines* fail that test.

2. Whether the *Guidelines* are within the scope of the *Act* is quintessentially a question of law, to be answered definitively by the courts. The fundamental question is whether the Governor-in-Council (**GIC**) acted within the scope of its delegated authority.

3. As explained below, Parliament did not give the GIC carte blanche to pass any child support guidelines. Rather, based on the scheme of the *Act* and the specific constraints imposed by Parliament, the GIC could only promulgate guidelines which: relate to child costs, and call for the parents to share those costs per their relative abilities to contribute (the **Constraints**).

4. The *Guidelines* violate those Constraints as they call for the non-custodial parent (**NCP**) to cover a disproportionate share of child costs and, indeed, to frequently transfer all the child costs, plus something more. They are unreasonable.

5. That conclusion flows from applying the correct legal test. This appeal requires this Court to clarify that *Vavilov*[3] applies to the review of delegated legislation. The Court below—unlike every other appellate court to consider the point post-*Vavilov*—applied a hyper-deferential standard of review. This was an error: the *Vavilov* framework applies to the universe of decision-makers acting under statutory authority, as the GIC was in promulgating the *Guidelines*. The consistency of the *Guidelines* with the legal Constraints imposed in the *Act* fits neatly into the *Vavilov* framework. The GIC is not above the fundamental principles of administrative law.

6. Rather than focusing on whether the *Guidelines* are within the scope of the delegated authority, the Courts below accepted the position of the Attorney General of Canada (**AGC**) that

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[1] SOR/97-175 [***Guidelines***].
[2] RSC 1985, c 3 (2nd Supp) [***Act***].
[3] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [***Vavilov***].

judges cannot evaluate whether the *Guidelines* comply with the Constraints because there is no one way to define child costs. That is a remarkable position. The Courts below only endorsed this position by adopting a hyper-deferential version of review that subverts the rule of law.

7. The GIC calculated child costs by using something called the 40/30 Scale. The Appellant demonstrated that these *Guidelines* call for the NCP to cover most of those costs, and sometimes more. It is no answer to that evidence to say that, under a different understanding of child costs, the *Guidelines* might be *intra vires*. The correct answer is to confirm that these *Guidelines* are unreasonable and require that the GIC promulgate new ones, which respect the Constraints.

8. This Court should not hesitate to reach that conclusion. An important trend that has underlined Canada's economic, political, and social development is the growth and ubiquity of delegated legislation. Nearly all bills introduced in the federal Parliament and provincial Legislatures delegate rule-making power to the executive outside of the public parliamentary process. Delegated legislation is made at a rate of 5-to-1 as compared to primary legislation.[4] This has prompted serious concern in Canada and elsewhere about the quality, transparency, and accountability of a lawmaking process that is carried out mostly behind closed doors.[5] This environment creates the risk that important public policy choices could be made covertly through delegated legislation, allowing the government to avoid accountability, a key aspect of legality.[6] To fulfill the judiciary's role, courts must supervise the exercise of delegated lawmaking powers

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[4] L Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41:2 Dal LJ 519 at 520–521 [**Neudorf**].

[5] Gabrielle Appleby, "Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation" (2016), 69 *Parliamentary Affairs* 269 at 273, 276–277 [**BOA, Tab 7 at 197–201**]; Kenny Chng, "Re-examining judicial review of delegated legislation", [2023] *Legal Studies* 1 at 2–5 [**BOA, Tab 12 at 311–314**]; Fiona de Londras et al, "Delegated Legislation in the Pandemic: Further Limits of a Constitutional Bargain Revealed" (2023), 43 Legal Studies 695 [**BOA, Tab 6**]; JD Hayhurst and Peter Wallington, "The Parliamentary scrutiny of delegated legislation", [1988] *Public Law* 547 at 575–576 [**BOA, Tab 8 at 224–225**]; John Mark Keyes, "Judicial Review of Delegated Legislation--The Road Beyond Vavilov" (2022), 35 CJALP 69 at 101–102 [**Keyes, "Road Beyond"**] [**BOA, Tab 11 at 298**]; Aileen McHarg, "What is delegated legislation?", [2006] *Public Law* 539 at 555–556 [**BOA, Tab 2 at 34–35**]; Stephanie Pywell, "Something old, something new: busting some myths about statutory instruments and Brexit", [2019] *Public Law* 102 at 109 [**BOA, Tab 22 at 565**].

[6] Neudorf, 522. See also: Alyn James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019), 52 UBC L Rev 817 [**BOA, Tab 3**].

effectively. By confirming that delegated legislation is subject to robust reasonableness review, this Court will better protect the principal lawmaking role of Parliament and ensure the proper constitutional balance.[7]

9. In promulgating the *Guidelines*, the GIC faced a difficult task. But administrative decision makers face similarly difficult tasks every day. When they do so, they must respect the relevant legal and factual constraints on their delegated authority. If they do not, then their decisions should be declared unreasonable by the courts and the decision makers must return to the drawing board. This Court should confirm that this is the fate of the *Guidelines*.

B. Statement of Facts

(i) Facts

10. The Appellant Roland Auer (**Roland**) was first married in 1985 to Iwona Auer-Grzesiak. They had three children: Michael, Mark, and Philip. This first marriage ended in 2003 and the issues surrounding their children were amicably resolved without litigation.[8]

11. Roland married the Respondent, Aysel Auer (**Aysel**) in 2004. They had one child, Nikolaus. Shortly after Nikolaus was born, Aysel and Roland separated. Aysel and Roland were divorced in 2008. Nikolaus resides with Aysel in Edmonton.[9]

12. In 2008, after his divorce from Aysel, Roland married Victoria Auer. They had one son, Vladmir. Victoria also had a son, Alex, from her previous marriage. The support orders with respect to Aysel resulted in a disproportionate amount of Roland's income being directed to support Nikolaus, with very little left for Roland to cover his obligations to his three sons from his first marriage, and his new family.[10]

13. On December 13, 2010, an Order was made that Roland pay Aysel $1,250.00 per month for the section 3 *Guidelines* support of Nikolaus. This Order was made without prejudice to this

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[7] Neudorf, 523.
[8] Affidavit of Roland Auer, sworn July 11, 2014 at para 3 [**2014 Auer Affidavit #2**] [**Appellant's Record, Vol. VII, Tab 24 at 344**]; Affidavit of Roland Auer, sworn October 1, 2013, Exhibit "A" at paras 2–4 [**2013 Auer Affidavit**] [**AR, Vol. VII, Tab 21 at 198**].
[9] 2013 Auer Affidavit, Exhibit "A" at paras 5–6 [**AR, Vol. VII, Tab 21 at 199**].
[10] 2013 Auer Affidavit, Exhibit "A" at paras 12–13 [**AR, Vol. VII, Tab 21 at 200**].

vires challenge.[11] On June 1, 2012, section 3 support was set at $2,351.00 per month based on a guideline income of $266,485.25.[12]

14. In 2020, Aysel claimed for retroactive s. 3 child support and s. 7 expenses, going back to 2010. Notwithstanding that Roland was never consulted about particular s. 7 expenses, such as a private driver to and from school, on July 21, 2021, Aysel was awarded her claimed s. 3 support ($67,392) and s. 7 expenses ($77,875.52), retroactive to 2010.[13]

15. On August 18, 2022, an Order was made that Roland pay Aysel $3,466 in ongoing s. 3 child support based on a guideline income of $431,357 for 2021.[14] This is an interim Order; Roland disputes this guideline income amount, and the action has been directed to a trial.

16. As this background shows, the *Guidelines* do not create "winners" and "losers" based on gender. Rather, they do so based on membership in a custodial or non-custodial household.[15] The *Guidelines* ignore other families and create classes of parents and children.[16]

17. Although, statistically, more men are the NCP, and therefore the payor under the *Guidelines*, a woman is often on the losing end if she is part of or related to a family unit with a NCP. In this instance, for example, Roland's first wife and current wife, and his children with them, are all worse off relative to Aysel and Nikolaus.[17] On the other hand, a man is often a

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[11] Order of Jeffrey J., pronounced December 13, 2010 at para 11 [**AR, Vol. II, Tab 6 at 3**].
[12] 2014 Auer Affidavit #2 at para 25 [**AR, Vol. VII, Tab 24 at 347**]; Order of Gates J., pronounced June 1, 2012 [**AR, Vol. II, Tab 7**].
[13] Affidavit of Roland Auer, sworn July 9, 2020 at para 17 [**2020 Auer Affidavit**] [**AR, Vol. XV, Tab 28 at 272**]; *Auer v Auer*, 2021 ABQB 584 at para 40; Order of Sulyma J., pronounced July 21, 2021 [**AR, Vol. II, Tab 12**].
[14] Order of Sulyma J., pronounced August 18, 2022 [**AR, Vol. II, Tab 13**].
[15] Affidavit of Chris Sarlo, sworn July 8, 2013 [**Sarlo Affidavit**], Vol. 1, at Exhibit "B" at 37–38 [**Sarlo Report**] [**AR, Vol. III, Tab 17 at 56–57**].
[16] Transcript from Cross-Examination of Rollie Thompson, held August 6, 2020 at 149:4–150:1 [**Thompson Transcript**] [**AR, Vol. XVI, Tab 29 at 150**]. See also: R. Thompson, "The Second Family Conundrum in Child Support" (2001) 18:2 Can J Fam L 227 [**BOA, Tab 16**]; Exhibit "A" to the Affidavit attached as Exhibit "A" to the Affidavit of Douglas Allen, sworn June 7, 2013 at paras 53–59 and Tables 3 and 4 [**Allen Report**] [**AR, Vol. II, Tab 15 at 172–176**].
[17] Affidavit of Iwona Auer-Grzesiak, sworn September 17, 2013 at paras 6–10 [**AR, Vol. VII, Tab 19 at 188**]; Affidavit of Mark Auer, sworn September 23, 2013 at paras 5–7 [**Mark Affidavit**] [**AR, Vol. VII, Tab 20 at 194**]; 2014 Auer Affidavit #2 at paras 42–45 [**AR, Vol. VII, Tab 24 at 351**].

"winner" under the *Guidelines* if he is part of a new circle with a CP. The question of the *vires* of the *Guidelines* is not a battle of the sexes, even if some may jump to that conclusion.

(ii) Procedural Background and Relief Sought

18. Roland first applied to challenge the *Guidelines* through an Application in Federal Court. However, this Court held that the provincial superior courts were the proper forum.[18] Roland then filed an Amended Family Application to challenge the *vires* of the *Guidelines* in the Court of King's Bench of Alberta.[19] Aysel took no position in respect of the *vires* challenge, did not file evidence or argument, and did not participate in the hearings before the Courts below. The AGC was granted robust intervenor status.[20]

19. The Amended Family Application requests a determination that the *Guidelines* are *ultra vires* the *Act*, are of no force and effect, and do not apply to Roland.[21] If successful before this Court, the quantum of Nikolaus' child support would be determined by the ABKB without reference to the *Guidelines*, based on pre-*Guidelines* jurisprudence. As noted, per the December 13, 2010 Jeffery Order, if Roland is successful in this challenge to the *Guidelines*, Nikolaus' support is reviewable back to the date of that Order.

20. The *vires* challenge is supported by evidence about Roland's own circumstances,[22] and other evidence including reports from economics experts.[23] The AGC adduced responding evidence from Professor Rollie Thompson.[24]

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[18] *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 9.
[19] Amended Family Application by Roland Auer, filed August 31, 2016 [**AR, Vol. II, Tab 8**]. See also: *Auer v Auer*, 2018 ABQB 510 at para 10 [***Auer 2018***].
[20] *Auer 2018* at paras 12, 129, aff'd 2018 ABCA 409.
[21] Amended Family Application by Roland Auer, filed August 31, 2016 at para 1 [**AR, Vol. II, Tab 8 at 8**].
[22] 2013 Auer Affidavit, Exhibit "A" at paras 2–4 [**AR, Vol. VII, Tab 21 at 198**]; Affidavit of Roland Auer, sworn July 11, 2014 [**AR, Vol. VII, Tab 23**]; 2014 Auer Affidavit #2 [**AR, Vol. VII, Tab 24**]; 2020 Auer Affidavit at para 19 [**AR, Vol. XV, Tab 28 at 273**]; Mark Affidavit [**AR, Vol. VII, Tab 20**].
[23] Sarlo Report [**AR, Vol. III, Tab 17 at 16**]; Affidavit of Chris Sarlo, sworn February 13, 2020 [**Sarlo Update Affidavit**] [**AR, Vol. VIII, Tab 25**]; Allen Report [**AR, Vol. II, Tab 15**]; Affidavit of Lucien Khodeir, affirmed October 2, 2013 [**Khodeir Affidavit**] [**AR, Vol. VII, Tab 22**].

(iii) Decisions Below

21. Rothwell J. held that *Vavilov* governs, and the standard of review is reasonableness; however, he concluded that because the GIC acted in a "legislative capacity", it enjoyed "the broadest of discretion". He "tempered" his analysis accordingly and dismissed the Application.[25]

22. A majority of the Court of Appeal of Alberta (**Majority**) held that the *Guidelines* are not an example of "administrative decision-making" as contemplated in *Vavilov* and applied the hyper-deferential *Katz*[26] test to uphold the *Guidelines*. Feehan J.A. concurred in the result but held that the applicable standard of review was set out in *Vavilov*.[27]

PART II STATEMENT OF QUESTIONS IN ISSUE

23. These proceedings raise the following issues: (i) what is the standard of review; (ii) are the *Guidelines* consistent with the *Act*; and (iii) should any special rules apply to delegated legislation promulgated by the GIC?

PART III ARGUMENT

A. Standard of Review is Reasonableness Under *Vavilov*

(i) The standard of review on this appeal

24. On this appeal, this Court steps into the shoes of the reviewing court and reviews the legality of the *Guidelines*.[28] The applicable standard of review has been the subject of debate but the Appellant sides with the vast majority of Canadian courts[29] (and most commentators): the

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[24] Affidavit of Rollie Thompson sworn June 11, 2020 [**Thompson Affidavit**] at Exhibit "B": *Rebuttal Report: Federal Child Support Guidelines* [**Thompson Report**] [**AR, Vol. XV, Tab 27 at 238**].
[25] See, *e.g.*: *Auer v Auer*, 2021 ABQB 370 at paras 11, 13, 57, 122, 159, 160 [***Auer ABQB***].
[26] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24–28 [***Katz***].
[27] *Auer v Auer*, 2022 ABCA 375 at paras 117–122 [***ABCA Decision***].
[28] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 36 [***Mason***].
[29] *1120732 BC Ltd v Whistler (Resort Municipality)*, 2020 BCCA 101 at paras 33–46; *Pacific Wild Alliance v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 904 at paras 68–76; *British Columbia (Attorney General) v Le*, 2023 BCCA 200 at paras 77–97; *Colchester County (Municipality) v Colchester Containers Limited*, 2021 NSCA 53 at paras 30–37; *Portnov v Canada (Attorney General)*, 2021 FCA 171 [***Portnov***];

reasonableness standard set out in *Vavilov* applies. Applying this standard allows the judicial branch to serve its core constitutional function in protecting the rule of law by meaningfully enforcing the limits on statutory authority, including the authority to make delegated legislation.

(ii) *Vavilov* is a Comprehensive Framework

25. In *Vavilov*, this Court emphasized the importance of simplicity and clarity in the law of judicial review and set out a revised comprehensive framework.[30] Whenever a court reviews the substance of an administrative decision, the starting point is *Vavilov*. The general rule is reasonableness review, which presumption is only rebutted where the legislature intends a different standard, or the rule of law requires one.[31] There is no exception for *vires* review.

26. The presumption of reasonableness review and the limited circumstances in which it is rebutted provide a comprehensive framework which creates simplicity, coherence, and predictability.[32] *Vavilov* is a law-settling case intended to resolve debate, including whether there were once different levels of deference depending on the decision maker and type of decision.

27. The Majority decision below reverses the comprehensive and predictable course set by *Vavilov*, effectively reintroducing a contextual approach and reviving that which *Vavilov* eliminated.[33] The Majority did not have the benefit of the recent repudiation of a contextual approach in *Mason*, where this Court explained that "rejecting context on the selection of the standard of review was an important part of the simplification and clarification exercise".[34] As stated in *Vavilov*, the framework "conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the

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Innovative Medicines Canada v Canada (Attorney General), 2022 FCA 210 at para 30 [***Innovative Medicines***]; *Responsible Plastic Use Coalition v Canada (Environment and Climate Change)*, 2023 FC 1511 [***Responsible Plastic***]; *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at paras 191–297, 370–372 [***Frontline Nurses***].

[30] Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (UBC Press, 2023) at 95, 119, 152–153 [**Daly, *Culture of Justification***] [**BOA, Tab 14**].

[31] *Vavilov* at paras 16, 17, 25, 69. *Mason* at paras 39–44.

[32] *Mason* at para 44, citing *Vavilov* at paras 7, 17.

[33] *Mason* at para 53.

[34] Paul Daly, "Context, Reasonableness Review and Statutory Interpretation: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21", *Administrative Law Matters*, 28 September 2023.

standard of review framework".[35]

28. The Majority creates a carve-out for regulations enacted by the GIC—one that is "unique in all of administrative law"[36] and irreconcilable with the objectives and categorical directions of *Vavilov*. The Majority engages in a contextual analysis and treats the power delegated to the GIC differently than all other delegated authority, based on a distinction between "true" regulations passed by the GIC, and bylaws, rules, and regulations made by other administrative bodies.[37]

29. A plain reading of *Vavilov* indicates there should be no such distinction, because "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review".[38] Authority is not broken down into different compartments, for rule-making or for individual decisions. The revised framework "accommodates all types of administrative decision making", regardless of the form it takes.[39] Elements of a decision's context do not modulate the degree of scrutiny.[40] The development of additional categorical distinctions—something that plagued the pre-*Vavilov* law of judicial review—would undermine the pursuit of simplicity and clarity in the law of judicial review. As the Federal Court of Appeal has correctly observed, "[j]ust as the methodology in *Vavilov* applies to a whole range of administrative decisions, it applies to administrative decisions to make regulations".[41]

30. Regulations "derive their validity from the statute which creates the power, and not from the executive body by which they are made"; the limits imposed by the enabling statute are therefore fundamental to determining a regulation's lawfulness.[42]

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[35] *Vavilov* at para 47.
[36] *Innovative Medicines* at para 30, citing Paul Daly, "Regulations and Reasonableness Review", in *Administrative Law Matters*.
[37] *ABCA Decision* at para 34.
[38] *Vavilov* at para 30 [original emphasis].
[39] *Vavilov* at para 11.
[40] *Vavilov* at para 89.
[41] *Innovative Medicines* at para 33. See also: *Portnov*; Paul Daly, "Resisting which Siren's Call? *Auer v Auer*, 2022 ABCA 375 and *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381", *Administrative Law Matters*, 24 November 2022 [**Daly, "Siren's Call"**].
[42] *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 51 [***CCR***], citing *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943]

31. In this case, like all other administrative decision makers, the GIC receives its power by statute, and the governing statutory scheme is the most salient aspect of the legal context. Therefore, the GIC's exercise of discretion "must accord with the purposes for which it was given" and "must comport with any more specific constraints imposed by the governing legislative scheme".[43]

(iii) The *Vavilov* Framework Applies

32. As stated above, the fundamental question for this Court is whether the *Guidelines* are within the scope of the authority delegated to the GIC by the *Act*. This question fits neatly into the *Vavilov* framework.[44] Under this framework, administrative action must be internally coherent and respect the applicable legal and factual constraints.

33. In part, this appeal is about whether the GIC followed an internally coherent approach in promulgating the *Guidelines*. *Vavilov* provides a straightforward framework for assessing the logic of the GIC's approach. In addition, this appeal is about statutory interpretation: whether the *Guidelines* are consistent with the text, purpose and context of the *Act*. *Vavilov* makes clear that this is a legal constraint on the GIC.[45] Indeed, it is well established in Canada and elsewhere that a power to make delegated legislation "must be interpreted having regard to the purpose of the Act and the purpose of the particular provision that grants the power".[46]

34. Whether an interpretation of the governing statutory scheme is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the delegated authority. In some cases, the language might be broad and contemplate greater flexibility. In others, the language might be narrow and precise, thereby tightly

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SCR 1 [***Re Chemicals Regulations***] at 13, per Duff CJ, quoting *The Zamora*, [1916] 2 AC 77 (PC) at 90 and JM Keyes, *Executive Legislation*, 3rd ed (Markham: LexisNexis Canada, 2021) at 165 [**Keyes, *Executive Legislation***] [**BOA, Tab 9 at 243**].

[43] *Vavilov* at para 108.

[44] Daly, *Culture of Justification* at 145–149 [**BOA, Tab 14**]; Keyes, "Road Beyond" [**BOA, Tab 11**].

[45] *Vavilov* at para 120.

[46] *Canada v Société des alcools du Québec*, 2002 FCA 69 at para 33 [***Société des alcools***]. See *e.g.*, *R (The Public Law Project) v Lord Chancellor*, [2016] UKSC 39; *R (Rights of Women) v The Lord Chancellor and Secretary of State for Justice*, [2016] EWCA Civ 91 at paras 41–46; *Reeves (A Minor) v Disabled Drivers Medical Board of Appeals*, [2020] IESC 31 at paras 46, 68.

constraining the delegate's ability to interpret the provision.[47] Many provisions give the GIC significant discretion, for instance by providing that it may act when "satisfied" that a certain state of affairs exists. In this case, as discussed below, the GIC was constrained by mandatory and prescriptive statutory language.

35. Common law principles are also relevant.[48] For example, a delegate cannot discriminate between different categories of person without express statutory authority.[49]

36. The fact that formal reasons will generally not be given in support of delegated legislation is no reason not to apply *Vavilov*. Contrary to the view of the Majority,[50] this Court expressly contemplated that robust review can take place in the absence of formal reasons.[51]

37. Notably, the Federal Court and Federal Court of Appeal understand how to apply *Vavilov* to the review of delegated legislation. Decisions in cases like *Responsible Plastic*, *Portnov*, *Innovative Medicines*, and recently, *Frontline Nurses*[52] provide excellent examples of the proper application of the legal test (and a compelling contrast to the confusion created by the Majority).

B. Applying the Legal Test in this Context

(i) The *Guidelines*

38. The *Guidelines* have never been meaningfully reviewed, which is concerning, given their broad impact.

39. At the time of promulgation, the Senate lamented that the use of guidelines removed Parliament and open, public discussion from the process. The Senate was forced to study the

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[47] *Vavilov* at para 110. *Mason* at para 67. Daly, "Siren's Call": "the relevant constellation of facts and law will vary according to circumstance".

[48] *Vavilov* at para 111.
[49] *Montréal v Arcade Amusements Inc*, [1985] 1 SCR 368 at 404–414 [***Arcade Amusements***].
[50] *ABCA Decision* at para 72.
[51] *Vavilov* at paras 106, 137–138.
[52] *Frontline Nurses* at paras 191–297, 370–372.

Guidelines "under extreme time pressure"[53] and without an adequate explanation of the underlying formula. The explanatory Technical Report[54] was published post-promulgation.

40. When the *Guidelines* were first tabled, legislators were provided only high-level and inaccurate explanations. For example, the Regulatory Impact Analysis Statement stated that the formula underlying the *Guidelines* "incorporates… a method of determining the costs of raising a child used by Statistics Canada".[55] The promotional package that accompanied the *Guidelines* stated that "[t]he Schedule amounts are fixed by a formula that calculates the appropriate amount of support in light of economic data on average expenditures on children across different income levels".[56] As the AGC's own expert admits, both statements are incorrect and, in fact, to this day, lawyers and judges do not understand how the *Guidelines* are constructed.[57]

41. To review the *Guidelines*, we must first understand them.

42. Before the *Guidelines* were passed, child support awards were determined on a case-by-case basis. In 1990, the "Child Support Project" was announced and the Federal/Provincial/Territorial Family Law Committee (**FLC**) was created to determine a way to standardize child support payments under the *Act*.[58] The Department of Justice (**DOJ**) funded research to facilitate that work, primarily undertaken by the consultants Stripinis and Finnie (the **DOJ Consultants**).

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[53] Affidavit of Charlotte Harper, sworn June 10, 2020 [**Harper Affidavit**] at Exhibit 39: Senate Debates (related to Bill to Amend – Report to Committee, February 12, 1997) at 33–34 [**AR, Vol. XV, Tab 26 at 125–126**].

[54] Sarlo Affidavit, Vol. 1 at Exhibit "F" [**AR, Vol. IV, Tab 17 at 202**].

[55] Harper Affidavit at Exhibit 1: Regulatory Impact Analysis Statement at 1121 [**AR, Vol. VIII, Tab 26 at 41**].

[56] Harper Affidavit at Exhibit 11: "The New Child Support Package (March 1996), Budget 1996" at 12 [**AR, Vol. XI, Tab 26 at 13**].

[57] Thompson Transcript at 92:20–96:5 [**AR, Vol. XVI, Tab 29 at 93–97**]. The numbers in the *Guidelines* do not reflect expenditures on children. They are based on *estimates* of spending and are not child-specific (Sarlo Affidavit, Vol. 1, Exhibit "E" at 11 [**AR, Vol. IV, Tab 17 at 55**]). In fact, the numbers are arbitrary (Sarlo Report at 15–17 [**AR, Vol. III, Tab 17 at 34–36**]; Harper Affidavit, Exhibit 9: StatsCan 1993 Report at 3–4 [**AR, Vol. X, Tab 26 at 170**]).

[58] Sarlo Affidavit, Vol. 1, Exhibit "C" at 1 [**AR, Vol. III, Tab 17 at 108**].

43. Child support formulas consist of two components: an expenditure model for estimating child costs and an apportioning method for dividing those costs between the parents. The DOJ Consultants studied dozens of possible formulae and published detailed papers summarizing their findings in 1993 and 1995.[59]

44. Based on the DOJ Consultants' recommendations, the expenditure model selected by the GIC was the 40/30 equivalence scale.[60] Using that scale, child costs are calculated by isolating the amount by which total family income must rise to bring the custodial household up to the same standard of living that household would have in the absence of children.[61] Under this scale, the first child is deemed to increase income needs by 40%, and two children increase income needs by 70%.[62] The corresponding child cost is 28.6% (.4/1.4) of household resources for one child and 41.1% (.7/1.7) of household resources for two children, and so on.[63]

45. The child costs established under the 40/30 Scale are shared by the parents according to the "Revised Fixed Percentage Formula" (**RFP Formula**). According to the stated rationale, under the RFP Formula, assuming the parents have equal gross incomes, they should contribute equally to child costs and be left at equal standards of living.[64] The NCP's contribution is the dollar value required to equalize the NCP household standard of living with the CP household standard of living. Although there was no analysis of whether it made sense to do so, the award

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[59] Sarlo Affidavit, Vol. 1, Exhibits "G" (1993) [**AR, Vol. IV, Tab 17 at 224**] and "D" (1995) [**AR, Vol. III, Tab 17 at 234**]. The DOJ published a 1995 sister report: Sarlo Affidavit, Vol. 1, Exhibit "E" [**AR, Vol. IV, Tab 17 at 34**].

[60] Sarlo Affidavit, Vol. 1, Exhibit "G" at 86–93 [**AR, Vol. IV, Tab 17 at 317–324**]; Sarlo Affidavit, Vol. 1, Exhibit "E" at 59–61 [**AR, Vol. IV, Tab 17 at 103–105**].

[61] Sarlo Affidavit, Vol. 1, Exhibit "G" at 4–5 [**AR, Vol. IV, Tab 17 at 237–238**].

[62] This is true even if the NCP re-marries, which is illogical as, in a two-adult household, the child only adds 30%, not 40%: Sarlo Report at 37 [**AR, Vol. III, Tab 17 at 56**].

[63] Sarlo Affidavit, Vol. 1, Exhibit "D" at 12 [**AR, Vol. III, Tab 17 at 253**]; Exhibit "E" at i, 9, FN 3, and p 11 [**AR, Vol. IV, Tab 17 at 39, 63, 55**]; and Exhibit "F" at 3 [**AR, Vol. IV, Tab 17 at 208**].

[64] Sarlo Affidavit, Vol. 1, Exhibit "E" at 67 [**AR, Vol. IV, Tab 17 at 111**].

applies to all NCPs who earn a given level of income, regardless of the CP's resources. The NCP is subject to disclosure obligations; the CP is not.[65]

46. The formula is expressed mathematically as follows:

$$\frac{\text{NCP gross income minus taxes}}{\text{Needs of NCP (equivalence scale for one)}} = \frac{\text{CP gross income minus taxes}}{\text{Needs of CP plus child (equivalence scale for CP + child)}}$$

47. As to the numerator, "income" under the *Guidelines* is determined only for the NCP. It is generally the amount on the NCP's income tax return but may be adjusted to consider deductions and inclusions, all aimed at ensuring the highest income for the NCP.[66]

48. Taxes were originally meant to include all applicable federal and provincial taxes at a particular level of income.[67] That was eventually changed to exclude certain child benefits that are paid by the government to the CP household (the **Ignored Benefits**).[68]

49. As to the denominator, the equivalence derives from the 40/30 Scale. Professor Sarlo offered the following example:

> … consider an Ontario situation in 2010 of a CP with $40,000 income and one pre-school child and a NCP with $40,000 income. The after-tax income for the NCP is $31,580… the after-tax income… for the CP is $33,836 due largely to [certain tax credits provided in respect of children]. In this case, the table amount of child support is $4,404…
>
> $31,580 - $4,404 / 1.0 = $33,836 + 4,404 / 1.4
>
> … [In other words]
>
> $27,176 / 1.0 = $38,240 / 1.4[69]

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[65] *Guidelines*, s 25.

[66] Sarlo Affidavit, Vol. 1, Exhibit "F" at 5 [**AR, Vol. IV, Tab 17 at 210**]. *I.e.*, the Court may disregard expenses of earning income, even if the relevant tax regime allows them to be deducted and NCPs, but not CPs, can be deemed to be under-employed.

[67] Sarlo Affidavit, Vol. 1, Exhibit "E" at A-11 to A-13 [**AR, Vol. IV, Tab 17 at 146–148**].

[68] Sarlo Affidavit, Vol. 1, Exhibit "F" at 2 [**AR, Vol. IV, Tab 17 at 207**].

50. The RFP formula generates these amounts through a computer algorithm,[70] which is not in evidence. We can infer that it is designed to equalize household standards of living at equal incomes using the 40/30 Scale. Specifically, it iterates until the NCP standard of living/1.0 = the CP standard of living/1.4 (in the case of one child).

51. The *Guidelines* came into effect on May 1, 1997.[71] The awards are presented as a set of tables. This is an excerpt of the current presumptive award for a NCP in Ontario with one child:

Income ($)		Monthly Award ($)		
From	To	Basic Amount	Plus (%)	Of Income Over
61000	61999	566	1.02	61000
62000	62999	576	0.94	62000
63000	63999	585	0.98	63000
64000	64999	595	1	64000
65000	65999	605	1.02	65000
66000	66999	615	0.94	66000

52. Under Section 3 of the *Guidelines*, these are the "presumptive amounts" based only on: (i) NCP annual income, (ii) province of residence and (iii) number of children.[72] Under other sections, the presumptive amounts can be increased quite easily but can be decreased only rarely.

(ii) The Constraints

53. The question is whether that formula and those amounts are consistent with the Constraints on the GIC's authority. That inquiry turns on a purposive understanding of the *Act*.

54. The scheme of the *Act* distinguishes between child and spousal support—two regimes that are governed by different principles and serve different purposes.[73]

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[69] Sarlo Report at 9 [**AR, Vol. III, Tab 17 at 28**]. The small difference is likely related to minor tax changes.

[70] Harper Affidavit, Exhibit 32 at 15 of 48 [**AR, Vol. XIV, Tab 26 at 260**].

[71] Harper Affidavit, Exhibit 1 [**AR, Vol. VIII, Tab 26 at 41**] and Exhibit 11 [**AR, Vol. XI, Tab 26 at 1**]; *Guidelines*, s 27.

[72] There are different tables depending on number of children and on the province.

55. Child support orders are those that require "a spouse to pay **for the support of any or all children of the marriage**".[74] Spousal support orders are those that require a spouse to pay such sum "as the court thinks reasonable **for the support of the other spouse**".[75]

56. The legislative history of the *Act* underscores this fundamental distinction. Previously, the *Act* addressed child and spousal support together. That regime was then replaced with one where child and spousal support are distinct and determined according to their own criteria.[76] As the AGC's expert put it, the *Guidelines* compensate for direct costs of children and "the indirect costs of children are now left to the law of spousal support".[77] That is, spousal support is the separate vehicle through which the NCP compensates the custodial parent (**CP**) for foregone careers and missed opportunities.[78] The spousal support guidelines were constructed on this express understanding. This Court confirmed this distinction:

> … [T]he *Act* […] clearly dictates that maintenance of the children, rather than household equalization or spousal support, is the objective of child support payments.[79]

57. Therefore, the GIC was constrained in passing the *Guidelines* in that the amounts transferred could only be in respect of direct child costs and cannot more broadly redistribute income.[80] This bears emphasis. To the extent that child support awards transfer amounts for direct child costs, plus something more, they entail the GIC exceeding its scope of authority.

58. This inherent limit on the GIC's authority is not the only relevant constraint. As noted, the *Guidelines* must comply with the overall statutory scheme and must also "comport with any

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[73] To the extent that child support orders exceed child costs and divide assets, that would encroach on provincial jurisdiction over division of property: *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5 [***Constitution Act, 1867***].

[74] *Act*, s 15.1(1).
[75] *Act*, s 15.2(1).
[76] Harper Affidavit, Exhibit 28: Standing Senate Committee on Social Affairs, Science and Technology at 3 of 52 [**AR, Vol. XIII, Tab 26 at 162**].
[77] Thompson Report at para 34 [**AR, Vol. XV, Tab 27 at 246**]. See also: Sarlo Affidavit, Vol. 3, Exhibit "K" at 73 [**AR, Vol. VI, Tab 18 at 291**].
[78] Sarlo Affidavit, Vol. 1, Exhibit "E" at 46–47 [**AR, Vol. IV, Tab 17 at 90–91**].
[79] *Francis v Baker*, [1999] 3 SCR 250 at para 41 [***Baker***].
[80] *FJN v JK*, 2019 ABCA 305 at paras 70, 81–82, 91, 101–106.

more specific constraints".[81] Here, the GIC was specifically constrained by s. 26.1(2) of the *Act*:

> (2) [Child support] guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

59. The prescriptive language in s. 26.1(2) is mandatory and clear: child costs are to be shared according to the parents' relative abilities to contribute.

60. The context is also relevant. Section 26.1(1) of the *Act* gives the GIC the discretion ("may") to establish child support guidelines; s. 26.1(2) limits and prescribes ("shall") the exercise of **that** discretion. These prescriptive limits must be taken seriously.[82]

61. The purpose of the provision is illuminated by its legislative history. The Constraints were initially going to be removed from the *Act* and replaced by a statement of objective in the *Guidelines* themselves. However, when the draft guidelines were tabled, Senators doubted whether the *Guidelines* complied with the principle of contribution to child costs based on relative ability.[83] The Senate therefore insisted that the Constraints be re-inserted in the *Act* itself:

> Through some strenuous and arduous negotiation, we were able to persuade the government to agree to add [section 26.1(2)]. As a result, the courts will have to be satisfied now that the guidelines themselves and the award table attached thereto are in fact based on this principle.[84]

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[81] *Vavilov* at para 108.
[82] *Vavilov* paras 65–68; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 73 [***Re GGPPA***].
[83] See, *e.g.*, Harper Affidavit, Exhibit 25: Commons Debates (November 6, 1996) per Sharon Hayes at 6206 [**AR, Vol. XII, Tab 26 at 378**].
[84] Harper Affidavit, Exhibit 40: Bill to Amend the *Act* – Third Reading in the Senate (February 13, 1997) per Senator Jessiman at 30 of 54 [**AR, Vol. XV, Tab 26 at 165**]. See also: 32 of 54, where Senator Jessiman confirmed that, "having got the bill amended to provide for joint responsibility", it may be that someone would have to delve into the issue to confirm whether the *Guidelines* do indeed comply with those limiting principles. He noted Ross Finnie's doubts on the subject and observed that Mr. Finnie had lost his job for making those observations public [**AR, Vol. XV, Tab 26 at 167**].

62. This also bears emphasis. An **objective** in the **subordinate regulation** is much different from a **mandatory principle** in the **enabling legislation**. Put simply, it is the difference between the delegated decision maker offering an aspirational statement that its regulation strives to achieve something versus the delegating authority mandating that the regulation must do that very thing. The whole point of including s. 26.1(2) in the *Act* was to constrain the scope of the GIC's authority and allow the courts to properly scrutinize whether the *Guidelines* complied with those limits. As confirmed in *Vavilov*, those constraints must "be taken seriously and applied rigorously".[85] The Courts below did not do that.

(iii) Evaluating the Rationale Underlying the *Guidelines*

63. Judicial review is concerned both with outcomes and with the reasoning process that led to those outcomes.

64. As to the reasoning process, administrative decision makers must demonstrate that their decisions can be explained.[86] Delegates must transparently and rationally show their work.[87]

65. This Court can glean the GIC's reasoning process from the entire available record.[88] The FLC and DOJ published reports during the development process,[89] the *Guidelines* were accompanied by the RIAS,[90] and further context can be gleaned from draft versions of the Technical Report,[91] through Senate Standing Committee transcripts and the like.[92]

66. Using these resources, this Court can determine whether the reasoning process underlying the *Guidelines* is internally coherent and reflects a rational chain of analysis.

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[85] *Vavilov* at paras 68 and 110, citing *City of Arlington, Texas v Federal Communications Commission*, 569 US 290 (2013), p 307.
[86] *Vavilov* at paras 2, 14.
[87] *Vavilov* at paras 85, 99–104.
[88] *Vavilov* at para 137.
[89] Most notably: Sarlo Affidavit, Vol. 1, Exhibits "G" (1993 DOJ Consultant Report) [**AR, Vol. IV, Tab 17 at 224**], "D" (1995 DOJ Consultants' Report) [**AR, Vol. III, Tab 17 at 234**], and "E" (1995 companion DOJ report) [**AR, Vol. IV, Tab 17 at 34**].
[90] Harper Affidavit, Exhibit 1 [**AR, Vol. VIII, Tab 26 at 41**].
[91] Affidavit of the Honourable Roger Gallaway, PC, sworn June 2, 2011 at para 1 [**Gallaway Affidavit**] [**AR, Vol. II, Tab 14 at 31**].
[92] Harper Affidavit at Exhibits 9, 11, 13, 25, 28, 32, 39, 40 [**AR, Vols. X–XV, Tab 26**].

(iv) Evaluating the Outcome of the *Guidelines*

67. As to outcomes, every delegated decision must be tenable considering the factual and legal constraints that bear on it.[93] Here, as noted, the GIC could only prescribe transfers for child costs and had to cause parents to share those costs according to their relative abilities to contribute. Child costs are therefore at the heart of this exercise in judicial review.

68. Here, the GIC selected the 40/30 Scale, which estimates that child costs are 28.6% of household resources for one child, 41.1% for two children, and so on.[94] If the application of the 40/30 Scale to any given case provides an estimate of child costs of $30K per year and the prescribed table amount is $60K per year, that extra $30K is necessarily being transferred for something other than child costs, contrary to the Constraints. The AGC suggests it is not feasible or proper to evaluate the *Guidelines* in this way. It is wrong on both fronts.

69. Every piece of delegated legislation is unique. This one is in the form of child support guidelines, which are expressed in the language of numbers. Just looking at the table amounts, how is this Court to know whether those comply with the Constraints?

70. In developing the *Guidelines*, the DOJ provided a helpful demonstration of how to do that. Specifically, the DOJ evaluated prospective guidelines by determining the percentage of child costs paid by each parent.[95] That empirical analysis showed that some of the prospective formulae required the NCP to pay 100% or more of the estimated child costs.[96] The DOJ Consultants rightly rejected those models.[97]

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[93] *Vavilov* at paras 68, 90, 101, 105–124.

[94] Again, always assuming only one adult, which is inaccurate (and materially so) when the NCP re-marries: Sarlo Report at 37 [**AR, Vol. III, Tab 17 at 56**].

[95] Sarlo Affidavit, Vol. 1, Exhibit "G" at 65–66 [**AR, Vol. IV, Tab 17 at 297–298**]. See also: Exhibits "D" at 31–51 [**AR, Vol. III, Tab 17 at 270–290**] and "E" at 52–77 [**AR, Vol. IV, Tab 17 at 96–121**].

[96] Sarlo Affidavit, Vol. 1, Exhibit "G" at 68 (bullet #7), 69 (second last bullet), 70–83, (far right hand column—in each case where the number is over 100) [**AR, Vol. IV, Tab 17 at 299–314**].

[97] *E.g.*, Sarlo Affidavit, Vol. 1, Exhibit "G" at 84, 86 [**AR, Vol. IV, Tab 17 at 315, 317**]: the Blackorby/Donaldson expenditure model caused the NCP to pay "a much larger portion of the costs of the child" than the CP. The DOJ rejected those poor results.

71. Conspicuously, while the drafters scrutinized all **prospective** formulae against the Constraints, they did not (publicly) do so for the **chosen** formula.

72. The original RFP formula recommended by the DOJ Consultants was arguably a rational starting point for child support guidelines, provided it retained the flexibility to address certain challenges (described below). It did not. Instead, the DOJ changed core aspects of that formula, but did not evaluate how those changes affected the awards, relative to the Constraints.

73. The only evidence of how the final RFP formula stacks up against the Constraints comes from early drafts of the Technical Report. Those examples were deleted from the published Report and were only obtained under an access to information request.[98] We do not know why they were deleted; however, the reasonable inference is that it was because they empirically show that the presumptive awards in the *Guidelines* violate the Constraints.

74. Those deleted examples evaluated a scenario from Newfoundland in 1996 where the NCP and CP have income of $25,000 and the CP has the couple's two children (the **Newfoundland Illustration**).

75. Just as the DOJ did throughout the development of the *Guidelines*, Dr. Sarlo empirically evaluated the presumptive awards against the Constraints.[99] He began by explaining the Newfoundland Illustration and how it demonstrates that the RFP formula (and therefore the presumptive awards) offend the Constraints.

76. Then, using logical, supported assumptions, he replicated and expanded that analysis to other situations, including where the spouses have different incomes. As discussed below, Dr. Sarlo's empirical analyses are compelling evidence in helping this Court to understand that the *Guidelines* are not tenable in light of the relevant legal and factual constraints.

77. In example after example, using the same logic the DOJ did in evaluating its prospective

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[98] Sarlo Report at 6, FN 4 [**AR, Vol. III, Tab 17 at 25**]; Sarlo Affidavit, Vol. 3, Exhibit "L" [**AR, Vol. VII, Tab 17 at 1**]; Gallaway Affidavit, Exhibit "A": see, "Draft #6 Nov 15" at 89–112, representing the draft Technical Report as of November 1996 [**AR, Vol. II, Tab 14 at 118–140**].

[99] Sarlo Report at 51–72 and Attachments #1 and #2 [**AR, Vol. III, Tab 17 at 70–91, 96–97**].

formulae, Dr. Sarlo empirically demonstrates that the presumptive awards cause the NCP to cover a materially disproportionate share of child costs (often more than 100%).

78. The AGC's answer to this is revealing: it asked the Courts below to disregard the Newfoundland Illustration because it was a draft, which was later deleted from the Technical Report. It says the approach is not reliable, but does not suggest an allegedly more appropriate way to review the *Guidelines* against the Constraints. Its silence on this topic is deafening.

C. The *Guidelines* are Unreasonable

79. There are several core aspects of the *Guidelines* which are the product of unreasonable breaks in logic, and which render the outcome of the *Guidelines* untenable in light of the Constraints. Specifically, the *Guidelines*: exclude the Ignored Benefits; ignore NCP direct spending on their children; double count s. 7 add-on expenses; unreasonably assume that all parents spend the same linear percentage of income on their children at all income levels and all ages; and reflect an interpretation of "according to their relative abilities to contribute" that is inconsistent with existing jurisprudence and with the Quebec Guidelines (which are passed under the same enabling statute). Further, there is no meaningful mechanism for courts to depart from awards that demonstrably violate the Constraints.

(i) Ignored Benefits: Break in Logic

80. The decision to exclude the Ignored Benefits is the product of two irreconcilable theories.

81. When the RFP Formula was first conceived, the drafters explained the rational approach to government benefits as follows:

> [t]he government… provides tax credits to parents for the children… this money goes toward raising the standard of living of the parent, or goes towards the child expenditures… The parents only have to split that part of the cost which the government is not paying for.[100]

82. That approach is logical. Under the 40/30 Scale, child costs are 28.6% or 41.1% of household resources. Child-specific benefits address a certain portion of those child costs and, on the GIC's own logic, the child support transfer is designed to cover the remaining portion.

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[100] Sarlo Affidavit, Vol. 1, Exhibit "G" at 96 [**AR, Vol. IV, Tab 17 at 326**].

83. How can we know that the CP is covering their proportionate share of those amounts if the presumptive awards are based on only one parent's (the NCP's) income?

84. The drafters' answer was that the CP will automatically make a proportionate contribution because the CP and children **inextricably** share the same standard of living[101] and households engage in **joint** consumption.[102] There are two problems with this justification. First, even if children and parents generally share the same standard of living within one household, it does not logically follow that the CP automatically contributes to child costs according to their relative means. That suggestion is an empty statement.

85. Further, and fundamentally, the decision to exclude the Ignored Benefits contradicts that justification. The original formula acknowledged child benefits as resources within the custodial household. The resulting awards were presented in tables in the 1995 DOJ Report.[103] Later, the awards published in the *Guidelines* tabled with the 1996 budget were higher, and there was no explanation as to why. In the background, the GIC had decided to exclude the Ignored Benefits but did not transparently acknowledge that decision or the impact it had *vis-à-vis* the Constraints. This caused confusion. Finnie noticed the discrepancy between the original and final awards and implored Senators to get an explanation:

> You should ask the Department of Justice how to factor in the current tax credits and about all the advantages which go toward the parent with custody of the child. For example, are [the tax credits] just ignored? In the public record, there is a comparison of the standard of living if they were to have the same income level. Does that same income level take into account the tax credits which are now quite sizeable which go toward the custodial parent? Or do they make those calculations without taking those credits into account? Would it then be simply a windfall sort of income gain to custodial parents?[104]

86. The decision to exclude the Ignored Benefits was only explained post-promulgation, in two short sentences in the Technical Report. There, the DOJ stated:

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[101] Sarlo Affidavit, Vol. 1, Exhibit "G" at 25–29 [**AR, Vol. IV, Tab 17 at 257–261**]; Sarlo Affidavit, Vol. 1, Exhibit "F" at 1 [**AR, Vol. IV, Tab 17 at 206**].
[102] Sarlo Affidavit, Vol. 1, Exhibit "G" at 26–27 [**AR, Vol. IV, Tab 17 at 258–256**]. See also: Thompson Transcript at 121:2–123:4 [**AR, Vol. XVI, Tab 29 at 122–124**]; Sarlo Affidavit, Vol. 1, Exhibit "F" at 1 [**AR, Vol. IV, Tab 17 at 206**].
[103] Sarlo Affidavit, Vol. 1, Exhibit "D" at 117 and following [**AR, Vol. III, Tab 17 at 349**].
[104] Harper Affidavit, Exhibit 32 at 37 of 50 [**AR, Vol. XIV, Tab 26 at 232**].

> Not included in the calculation of the receiving parent's taxes are the federal Child Tax Benefit and the GST rebate for children. **These are deemed to be** the government's contribution to children and **not available as income to the receiving parent**.[105] [emphasis added]

87. However, child benefits are plainly available as resources within the custodial household. The assertion to the contrary defies common sense and is also the product of the type of internal incoherence that, per *Vavilov*, renders a decision unlawful.

88. On the one hand, the *Guidelines* assume that members of a household inextricably share resources.[106] Yet, directly contrary to that core presumption, the later explanation that government benefits are deemed to be "not available as income" to the CP requires that we fictionally extricate resources that are otherwise said to be inextricable.

89. A reasonable decision is one that is based on an internally coherent and rational chain of analysis.[107] The justification underlying the Ignored Benefits fails that test.

(ii) Ignored Benefits: Unreasonable Outcome

90. As noted, in the RFP Formula, the parents are assumed to start at the same income, and the algorithm iterates until the NCP resources, minus taxes and the child support award equals the CP resources, minus taxes plus the award, divided by 1.4 (for one child), and so on. Late in the game, the algorithm was altered to exclude the Ignored Benefits.[108] The equation is solved for the transfer required to make the households equal, as if the Ignored Benefits do not exist, but of course they do exist and end up being extra resources for the CP.

91. The Newfoundland Illustration shows that, under that revised formula, the parents do not share child costs equally or end up at equal living standards. Instead, in the original example where both parents start at $25K, the CP contributes $2,825 to child costs, while the NCP contributes $4,435 (57% more), and the NCP ends up at an 11.1% lower standard of living.

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[105] Sarlo Affidavit, Vol. 1, Exhibit "F" at 5, 9 (Appendix 1) [**AR, Vol. IV, Tab 17 at 210, 214**].
[106] Sarlo Affidavit, Vol. 1, Exhibit "F" at 1 [**AR, Vol. IV, Tab 17 at 206**]; *Auer ABQB* at paras 87–93, 102–104.
[107] *Vavilov* at para 85.
[108] Sarlo Affidavit, Exhibit "F" at 2 [**AR, Vol. IV, Tab 17 at 207**].

92. Because that lopsided result flows from excluding the Ignored Benefits, it is not static. Rather, it became more lopsided over time, as the amount of the Ignored Benefits has increased.

93. For example, when the illustration is updated using 2010 tax numbers, post-award, the CP household standard of living is $36,414/1.7 ($21,420), which is 30% higher than the NCP's $16,415/1.0 ($16,415), and the NCP contributes more than 100% of child costs.[109]

94. When it is further updated using 2019 tax numbers, post-award, the CP household standard of living is $43,361/1.7 ($25,506), which is 45% higher than the NCP's $17,542/1.0 ($17,542), and the NCP continues to contribute more than 100% of child costs.[110]

95. This same result occurs in other scenarios. For example, where NCP income is $75K and CP income is $25K, the NCP pays 172% of child costs and the CP receives a transfer beyond child costs of $5,097.[111]

96. These material deviations from the Constraints occur in multiple scenarios. In Dr. Sarlo's Attachments #1 and #2,[112] the far-left column demonstrates the lopsided results that flow from the straight application of the basic RFP formula.

97. In summary, child benefits are only available to the CP because the child is in that household. They are meant to be spent on the child and the *Guidelines* assume that they are. As such (and, in truth, whether they are spent on the child or not), those resources increase the custodial standard of living and decrease the income needs created by the child. As the AGC's own expert put it,[113] you must include those benefits to get a clear picture of the resources within the custodial household. They are included in calculating spousal support, as they should be,[114]

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[109] Sarlo Report at 57 [**AR, Vol. III, Tab 17 at 76**].
[110] Sarlo Update Affidavit at para 13, Exhibits "B" and "C" [**AR, Vol. VIII, Tab 25 at 14, 25, 28**].
[111] Sarlo Report at 61 (Internal Exhibit 10) [**AR, Vol. III, Tab 17 at 80**].
[112] Sarlo Report at 77–78 [**AR, Vol. III, Tab 17 at 96–97**].
[113] In defending the *Spousal Support Advisory Guidelines*, which are passed under the same enabling statute (the *Act*): Sarlo Affidavit, Vol. 3, Exhibit "K" at 47–48 [**AR, Vol. VI, Tab 18 at 265–266**]; Sarlo Report at 40–42 [**AR, Vol. III, Tab 17 at 59–61**].
[114] Sarlo Report at 40–41 [**AR, Vol. III, Tab 17 at 59–60**].

which is yet another break in logic.

98. The Ignored Benefits are sizeable, particularly at lower incomes. Ignoring them causes the NCP to over-contribute and the CP to under-contribute, contrary to the Constraints. As Finnie put it after he stopped working on the project,[115] the decision to exclude the Ignored Benefits means that "non-custodial parents will, **by the basic formula**, pay greater shares of their children's costs than will the custodial parent".[116]

99. Again, and fundamentally, the AGC does not dispute that statement. Nor should it. That result is empirically verifiable and is the outcome of the broken logic. The Courts below only got around that fact by endorsing a demonstrably false presumption that the CP makes a proportional contribution to child costs.[117] That hyper-deferential review is inconsistent with *Vavilov*.

(iii) Ignoring NCP Direct Spending: Break in Logic

100. Another unreasonable aspect of the formula is the assumption that the CP pays 100% of the direct child costs, while the NCP's financial responsibilities are fulfilled wholly through child support payments (and not also by paying for things while the child is with them).

101. In reality, NCPs often spend time with their children and incur related direct expenses.[118] However, the *Guidelines* make no adjustment for such spending between 0–39%, although the CP's child costs go down as the NCP's go up.[119]

102. When the DOJ Consultants originally proposed the RFP, they called for recognition of direct NCP spending on the children:

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[115] Mr. Finnie had grave concerns about the ways that the GIC evolved the RFP formula after the DOJ Consultants initially recommended it. He lost his job for voicing those concerns: Harper Affidavit, Exhibit 40 at 30, 32 of 54 [**AR, Vol. XV, Tab 26 at 165, 167**].

[116] Ross Finnie, "The Government's Child Support Package" (1997) 15 CFLQ 79 at 93 [**Finnie, "Child Support Package"**] [**BOA, Tab 21 at 550**]; Harper Affidavit, Exhibit 32 at 38 of 50 [**AR, Vol. XIV, Tab 26 at 233**].

[117] *Auer ABQB* at paras 87–97, 117; *ABCA Decision* at paras 89–90.

[118] Sarlo Report at 31 [**AR, Vol. III, Tab 17 at 50**].

[119] *Guidelines*, s 9.

> All costs borne by the parents should be considered. The principle underlying this approach is to not just compensate the custodial parent for the expenses of the child, but to ensure that every family member lives at a similar standard of living. Consequently, if the non-custodial parent required a larger residence to accommodate the child, those costs would be included… they could be integrated… by changing the "needs" of the non-custodial parent, and then completing the calculations for the equalization of the standard of living.[120]

103. The GIC did not follow that logic. Rather, the *Guidelines* are based on the different notion that "the non-custodial parent is expected to be able to afford… costs of access".[121]

104. There is good reason to doubt that ability to pay at low-income levels. NCP disproportionate spending on child costs is most pronounced at low-income levels because of the impact of the Ignored Benefits.

105. Of course, this Court's task is not to question the wisdom of ignoring NCP direct spending *per se*. Rather, its task is to review that decision against the Constraints.

106. The assumption that **all** child costs are borne by the custodial household is reflected mathematically in the formula, as the NCP's denominator is set at 1.0 and the CP's denominator is set at 1.4 or 1.7 (and so on), depending on the number of children. The CP receives a presumptive award that covers 100% of child costs. Therefore, the Constraints are violated for every dollar that the NCP spends directly on their child as they are paying more than their relative means and the CP is paying correspondingly less.

107. Taking the Constraints seriously would require an adjustment to reflect non-trivial NCP direct spending on the child. Such adjustments could be kept relatively simple and certain standard adjustments could easily be established.[122]

108. The Quebec guidelines, which are passed under the same enabling statute, do that by adjusting awards to reflect NCP direct spending.[123] This has a "dramatic" effect in lowering child support where the NCP spends time with the children.[124]

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[120] Sarlo Affidavit, Vol. 2, Exhibit "G" at 91, FN 4 [**AR, Vol. IV, Tab 17 at 322**].
[121] Sarlo Affidavit, Vol. 2, Exhibit "E" at 30 [**AR, Vol. IV, Tab 17 at 74**].
[122] Finnie, "Child Support Package" at 89 [**BOA, Tab 21 at 548**].

109. As Finnie put it, the *Guidelines*' distortion in direct spending on the child results in many awards which are inequitable "not just according to common sense notions of fairness" but also with respect to the principle that child costs are to be equally divided between parents.[125] This significant over-payment occurs in most cases. Typically, NCPs exercise access and most spend directly on their children during their time together.[126]

110. Post-promulgation, the DOJ has tried to explain the decision to ignore NCP direct spending as counter-balanced by CP indirect costs of caring for the child.[127]

111. That is not a coherent explanation. In fact, at the time of development and promulgation, the DOJ confirmed that the CP's non-financial contribution is addressed through the separate spousal support regime.[128] The AGC's expert agrees, noting that "indirect costs of children are left to the law of spousal support".[129]

112. Those amounts are the justification for ignoring NCP direct spending, yet they are being addressed by both the child support transfer under the *Guidelines* and spousal support. This constitutes another fundamental break in logic in the formula underlying the *Guidelines.*

(iv) Ignoring NCP Direct Spending: Unreasonable Outcome

113. Once again, this break in logic raises the question of whether the resulting deviation from the Constraints is within the margin of appreciation.

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[123] Each province other than Quebec adopted the *Guidelines* to apply to common law couples. Quebec adopted its own more reasonable set of guidelines, which apply to both married and non-married couples: Sarlo Report at 44–47 [**AR, Vol. III, Tab 17 at 63–66**];

[124] Thompson Report at para 73, FN 54 [**AR, Vol. XV, Tab 27 at 256**].
[125] Finnie, "Child Support Package" at 88 [**BOA, Tab 21 at 548**].
[126] Thompson Transcript at 49:16–51:24, 104:3–104:24 [**AR, Vol. XVI, Tab 29 at 50–52, 105**]; Sarlo Affidavit, Vol. 3, Exhibit "K" at 78 [**AR, Vol. VI, Tab 18 at 296**]; Rollie Thompson, "The Chemistry of Support: The Interaction of Child and Spousal Support" (2006) 25 CFLQ 252 at 262 [**BOA, Tab 18 at 479**].
[127] Affidavit of Alar Soever, sworn June 12, 2013, Exhibit "A" [**AR, Vol. II, Tab 16 at 196**]; Harper Affidavit, Exhibit 13 at 81 [**AR, Vol. XI, Tab 26 at 224**].
[128] Sarlo Affidavit, Vol. 1, Exhibit "E" at 47 [**AR, Vol. IV, Tab 17 at 91**].
[129] Thompson Report at para 34 [**AR, Vol. XV, Tab 27 at 246**]; Sarlo Affidavit, Vol. 3, Exhibit "K" at 32, 72–74 [**AR, Vol. VI, Tab 18 at 250, 290–292**].

114. Dr. Sarlo explained the empirical impact of ignoring NCP direct spending.[130] For example, in a scenario from Ontario in 2011 where both spouses earn $30K, the presumptive table award calls for the NCP to cover $5,328 of the child costs and the CP to cover $148 of the child costs. That empirically violates the Constraints. The spouses have equal resources and should share child costs equally. That is not what happens. Rather, the NCP covers nearly 100% of the child costs (because of the Ignored Benefits).

115. That outcome is exacerbated when we consider NCP direct spending. Dr. Sarlo used the reasonable assumption that at 20–35% of custody time, NCP costs equal 30% of assumed full custody costs and the CP's costs are correspondingly reduced to 90%.[131] Applying that assumption, the NCP pays $10,498 and the CP receives a transfer of $1,575 beyond child costs.

116. In the scenario where the NCP earns $120K and the CP earns $60K, the presumptive table award calls for the NCP to cover $19,728 of the child costs and the CP to cover $3,763. That disproportionate result is exacerbated when we factor in NCP direct spending. Applying Dr. Sarlo's reasonable assumptions of spending,[132] the NCP pays $28,375 and the CP pays $880.

117. This is a representative sample of material deviations from the Constraints. Attachments #1 and #2 of the Sarlo Report provide multiple other examples of similarly material deviations, considering the failure to acknowledge NCP direct spending.

(v) Section 7 Add-ons: Break in Logic

118. A third example of incoherence is the Section 7 add-on regime.

119. When the DOJ Consultants chose the 40/30 Scale as the measure of child costs, they expressly understood that the scale "includes childcare costs and extraordinary medical expenses",[133] so it would be inappropriate to include those costs as add-ons. The costs that an

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[130] Sarlo Report at 67 (Internal Exhibit 13, 4th column) and Attachments #1 and #2 [**AR, Vol. III, Tab 17 at 86, 96–97**].

[131] Sarlo Report at 30–31, 66 [**AR, Vol. III, Tab 17 at 49–50, 85**]. This reasonable estimate reflects that only variable costs—not fixed—go down.

[132] Sarlo Report at 30–31, 66 [**AR, Vol. III, Tab 17 at 49–50, 85**].

[133] Sarlo Affidavit, Vol. 1, Exhibit "G" at 18 [**AR, Vol. IV, Tab 17 at 251**].

equivalence scale generates at different income levels are **all-inclusive**.[134] Indeed, the fact that the 40/30 Scale included childcare costs made it simpler, which was described as an upside.[135]

120. Childcare costs are baked into the scale according to averages.[136] The DOJ Consultants therefore understood that child support awards would be high for CPs that did not incur such expenses. As they put it, a downside of the 40/30 Scale is that it "includes a child care amount even when no child care costs are being incurred".[137]

121. This is fundamental. All conceivable average costs are reflected in the table amount, whether the custodial household incurs them or not. A custodial household with no childcare costs still receives a child support amount that incorporates those costs. This was a known consequence of relying on average overall household expenditures as a proxy for child costs.[138]

122. The DOJ Consultants also understood that, conversely, the estimates might prove low in instances where individual expenditures were above average. Those trade-offs acknowledged, the DOJ Consultants nonetheless recommended the 40/30 Scale and said it was preferable to a formula that would allow the separate calculation of childcare costs.[139]

123. Among other things, the other potential scales were lower. The all-inclusive 40/30 Scale produced high child cost estimates and, therefore, the highest child support awards.[140]

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[134] Sarlo Report at 32 [**AR, Vol. III, Tab 17 at 51**]; Sarlo Affidavit, Vol. 1, Exhibit "E" at 10 [**AR, Vol. IV, Tab 17 at 710**].
[135] Sarlo Report at 31–32 [**AR, Vol. III, Tab 17 at 50–51**]; Sarlo Affidavit, Vol. 1, Exhibit "E" at 10–12 [**AR, Vol. IV, Tab 17 at 54–56**], Exhibit "G" at 97 [**AR, Vol. IV, Tab 17 at 327**].
[136] Sarlo Affidavit, Vol. 1, Exhibit "E" at 31 [**AR, Vol. IV, Tab 17 at 75**].
[137] Sarlo Affidavit, Vol. 1, Exhibit "E" at 11 [**AR, Vol. IV, Tab 17 at 55**].
[138] Sarlo Affidavit, Vol. 1, Exhibit "E" at 10–11, 31 [**AR, Vol. IV, Tab 17 at 54–55, 75**].
[139] Sarlo Affidavit, Vol. 1, Exhibit "E" at 11 [**AR, Vol. IV, Tab 17 at 55**].
[140] Sarlo Report at 18–19 [**AR, Vol. III, Tab 17 at 37–38**]; Sarlo Affidavit, Vol. 1, Exhibit "G" at 21–23 [**AR, Vol. IV, Tab 17 at 254–256**]; Sarlo Affidavit, Vol. 1, Exhibit "D" at 13 [**AR, Vol. III, Tab 17 at 254**]: "The 40/30 scale [generates] higher estimates of children's income needs… [which] results in higher child support awards".

124. Yet, when the *Guidelines* were tabled in 1996, they included an add-on regime.[141] Specifically, Section 7 provides discretion to increase child support awards to cover all or any portion of specifically listed expenses.[142] This is another break in logic.

125. The rationale for the add-on regime is that those expenses do not lend themselves to averages.[143] Yet those same expenses are included in every base award **on an average basis**. Again, the underlying reasoning contains two irreconcilable views: these categories of expenses both lend themselves to averages (for purposes of inclusion in the base amount) and do not lend themselves to averages (for purposes of isolation as add-on amounts).

126. Internal consistency would have been possible through a (known) simple fix:

> [I]t would not be unreasonable to separate out certain "extraordinary" expenses on the grounds that some kinds of expenses do not lend themselves to averages. However, to **eliminate the double-counting, base awards should first be generally adjusted downward to net out the average costs associated with the identified special categories of spending, with the required amounts then - and only then - added to awards on a case-by-case basis**.[144] [Emphasis added]

127. Further, under s 7(3), the amount of the add-on must consider relevant government subsidies. That is logical but is another example of inconsistency: government benefits are ignored for purposes of increasing the presumptive award, but those same benefits are considered in calculating add-ons. Finally, add-on expenses are shared based on pre-tax income ratios, which is remarkable. Pre-tax amounts do not reflect reality and distort the NCP's share of these expenses upward. The whole regime, other than this, is based on after-tax amounts.

128. Section 7 expenses are added to the table amount in roughly 30% of cases.[145] Every Section 7 add-on entails known double counting that flows from broken logic.

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[141] Harper Affidavit, Exhibit 1 at 1121–1124 [**AR, Vol. VIII, Tab 26 at 1938–1941**].
[142] *Guidelines*, s 7. Expenses ought to be shared by the parents in proportion to their respective incomes: *Guidelines*, s 7(2).
[143] Harper Affidavit, Exhibit 1 at 1121–1124 [**AR, Vol. VIII, Tab 26 at 41–44**].
[144] Finnie, "Child Support Package" at 91 [**BOA, Tab 21 at 549**].
[145] Thompson Transcript at 87:24–88:14 [**AR, Vol. XVI, Tab 29 at 88–89**].

(vi) Section 7 Add-Ons: Unreasonable Outcome

129. The break in logic with Section 7 add-ons also results in an unreasonable outcome. The impact is material. The 40/30 Scale is already at the high end of child cost estimates.[146] With the add-on expenses, the scale becomes something even higher.[147]

130. Dr. Sarlo explained the impact of double-counting Section 7 add-ons.[148] Using the same two examples from above (Ontario in 2011, spouses earn $30K/$30K and $120K/$60K), the NCP's disproportionate contribution becomes more material when we factor in assumed Section 7 expenses of 20% of the table award:[149]

	Base Case	Including NCP Direct Spending	Including Section 7 Awards
NCP Earnings = $30K CP Earnings = $30K	NCP pays $5,328 CP pays $148	NCP pays $10,498 CP pays ($1,575)	NCP pays $11,696 CP pays ($2,246)
NCP Earnings = $120K CP Earnings = $60K	NCP pays $19,728 CP pays $3,763	NCP pays $28,375 CP pays $880	NCP pays $32,808 CP pays ($1,603)

131. This is a representative sample of material deviations from the Constraints. Attachments #1 and #2 at pages 77 and following of the Sarlo Report provide multiple other examples of similar material deviations, considering Section 7 add-ons.

(vii) Other Issues Which Cause Loss of Confidence

(a) Undue Hardship

132. The AGC defended these empirical violations of the Constraints, in part, by claiming that

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[146] Sarlo Report at 18–19 [**AR, Vol. III, Tab 17 at 37–38**]; Sarlo Affidavit, Vol. 1, Exhibit "G" at 21–23 [**AR, Vol. IV, Tab 17 at 254–256**] and Exhibit "D" at 13 [**AR, Vol. III, Tab 17 at 254**].
[147] Sarlo Report at 32 [**AR, Vol. III, Tab 17 at 51**].
[148] Sarlo Report at 59 and 67 (Internal Exhibit 13, 5th column) and Attachments #1 and #2 [**AR, Vol. III, Tab 17 at 78, 86, 96–97**].
[149] Sarlo Report at 67 (Internal Exhibit 13) [**AR, Vol. III, Tab 17 at 86**].

the undue hardship provision[150] allows the courts to decrease disproportionate awards.

133. Of course, the presumptive table awards apply in most cases. One of the main objectives and effects of these *Guidelines* was to standardize child support. The *Guidelines* should not be upheld on the basis that rare exceptions may fall within the Constraints.

134. In any event, the undue hardship regime is a part of the problem, not the solution.

135. Based on the Constraints, courts *should* have discretion to decrease awards which require the NCP to cover a disproportionate amount of child costs. That is not how the undue hardship test works. First, the NCP must prove specific facts establishing the undue hardship. The focus is entirely on the NCP; the financial situation of the CP is irrelevant. If, and only if, the NCP satisfies this threshold requirement is there a comparative analysis of whether the NCP household would have a lower standard of living than the CP household.[151]

136. This is another example of result-oriented internal inconsistency. One of the apportioning approaches that has been written about academically is the standards of living method. This theory focuses not on the NCP's proportional contribution to child costs but rather on a specific target for relative standards of living, post-award. The drafters rightly rejected that apportionment method. Among other things, it requires a fusion of child and spousal support.[152] Yet, the GIC inconsistently adopted that very approach to make it more difficult for courts to decrease presumptive awards for undue hardship.[153] As Finnie put it, "… that which the Committee so forthrightly rejects as a basic principle, it drags in through the back door when recommending adjustments to the basic guideline."[154] As the AGC's expert acknowledged, the

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[150] *Guidelines*, s 10. There is no mechanism for the CP to pay the NCP, regardless of disparity.
[151] *Guidelines*, s 10, and Schedule II – Comparison of Household Standards of Living Test. See: *Auer v Auer*, 2015 ABQB 67 at paras 17, 18, 20.
[152] Sarlo Affidavit, Vol. 1, Exhibit "G" at 34–35 [**AR, Vol. IV, Tab 17 at 266–267**]; Finnie, "Child Support Package" at 89–90 [**BOA, Tab 21 at 548**].
[153] Sarlo Affidavit, Vol. 1, Exhibit "E" at 28–29 [**AR, Vol. IV, Tab 17 at 72–73**].
[154] Ross Finnie, "Child-Support Guidelines: An Evaluation of Recent Government Proposals" (1995), 11 RFL-ART 317 at 3 [**BOA, Tab 20 at 539**].

cynical view is that this is a result-oriented attempt to prevent reductions under s. 10.[155] He went so far as to suggest that it is easier for a camel to go through the eye of a needle than for an NCP to obtain an appropriate reduction for undue hardship.[156]

137. In short, the undue hardship test is not grounded in the *Act* or the Constraints and offers no meaningful answer to the evidence establishing the breaks in logic underlying the *Guidelines* and the associated unreasonable outcomes.

(b) Linearity

138. Both the 40/30 Scale and the fixed percentage apportioning method were designed for low-income contexts.[157] As the AGC's expert acknowledged,[158] as income rises, the overall amount spent on children increases but the percentage of that income spent on children decreases. The *Guidelines* ignore that fact and unreasonably assume that parents spend the same linear percentage of income on their children at all income levels and all ages.[159]

139. Under s. 4 of the *Guidelines*, courts may vary the award if the NCP earns over $150K, as Roland does. However, the Court's application of s. 4 indicates six figure incomes like Roland's are unlikely to see anything but a linear application of the table amounts. Indeed, in many cases, NCPs earning up to and over $1 million have the table amount applied.[160]

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[155] Rollie Thompson, "Of Camels and Rich Men: Undue Hardship, Part II" (February 1999) in *Federal Child Support Guidelines Reference Manual* (Ottawa, 1997) at H-48 [**Thompson, "Undue Hardship Part II"**] [**BOA, Tab 17 at 457**].
[156] Rollie Thompson, "Undue Hardship" (June 1997) in *Federal Child Support guidelines Reference Manual* (Ottawa, 1997) [**BOA, Tab 19**]; Thompson, "Undue Hardship Part II" [**BOA, Tab 17**].
[157] R. Mark Rogers, "Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation", FLQ 1999 at 10–14 [**BOA, Tab 15 at 377–381**]; Douglas W. Allen, "The Effect of Divorce on Legislated Net-Wealth Transfers", (2007) 23:3 JLEO 580 at 5 [**BOA, Tab 5 at 138**]; Allen Report at paras 19–20 [**AR, Vol. II, Tab 15 at 159**].
[158] Thompson Transcript at 70:10–70:24, 72:8–73:15 [**AR, Vol. XVI, Tab 29 at 71, 73–74**]; Thompson Report at para 64 [**AR, Vol. XV, Tab 27 at 254**]; Sarlo Affidavit, Vol. 3, Exhibit "K" at 110 [**AR, Vol. VI, Tab 18 at 328**].
[159] Sarlo Report at 60–65 (and at 36–37 regarding the lower cost of younger children) [**AR, Vol. III, Tab 17 at 79–84 and 55–56**].
[160] *Baker* at paras 41–43; *Hollenbach v Hollenbach*, 2000 BCCA 620 ($711,544); *Loesch v Walji*, 2008 BCCA 214 ($1.6 million); *Selleck v Selleck*, 2011 ABCA 374 ($1.5 million);

(c) Unreasonable Interpretation of Ability to Contribute

140. Finally, at the heart of the Constraints is the concept that both parents must contribute to child costs according to their relative abilities to do so.

141. The wording of s. 26.1(2) mirrors the language in the pre-Guidelines *Divorce Act*.[161] Under those prior provisions, both spouses' incomes were a key factor in assessing the parties' relative abilities to contribute to child costs.[162] Similarly, courts considered: (1) NCPs' direct spending;[163] (2) increases in CPs' means upon re-marriage;[164] and (3) balancing the interests of a payor's other families so that children were treated equally.[165]

142. Considering that the language in the pre- and post-*Guidelines Divorce Act* is the same, it is anomalous and a further break in logic for the *Guidelines* to deviate so materially from established interpretation of the Constraints.

143. Notably, the Quebec Guidelines are passed under the same enabling statute, and they account for both spouses' incomes, NCP direct spending, and subsequent relationships in interpreting the parents' relative abilities to contribute to child costs.[166] The differences in resulting child support awards are astounding.[167]

144. Taking the Constraints seriously, it is hard to understand how these two drastically different interpretations could both be reasonable. That is particularly so, given that the GIC was also constrained by the common law rule that the power to pass subordinate legislation does not

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Hathaway v Hathaway, 2014 BCCA 310 ($1 million); *Potzus v Potzus*, 2017 SKCA 15 ($1.4 million); *Elgahwas v Ghremida*, 2023 SKCA 23 ($1.1 million).

[161] See: *DBS v SRG*, 2005 ABCA 2 at paras 16–17.

[162] *Richardson v Richardson*, [1987] 1 SCR 857 at para 14; *Paras v Paras*, [1971] OR 130 (CA) at paras 17, 19; *Levesque v Levesque* (1994), 155 AR 26 (CA) at paras 10, 17–18, 61 [***Levesque***]; *Willick v Willick*, [1994] 3 SCR 670 at paras 61–63 (per L'Heureux-Dubé J. concurring) [***Willick***].

[163] *Levesque* at paras 48–52.

[164] *Wright v Wright* (1996), 141 Sask R 44 (CA) at paras 27–32.

[165] *Syvitski v Syvitski* (1988), 86 NSR (2d) 248 (NS Fam Ct) at para 24, cited by L'Heureux-Dubé J. in *Willick* at para 63; *McKenna v McKenna* (1974), 2 OR (2d) 571 (Ct Just).

[166] Sarlo Report at 44–45 [**AR, Vol. III, Tab 17 at 63–64**]; Khodeir Affidavit, Exhibit "B" [**AR, Vol. VII, Tab 22 at 258**].

[167] Sarlo Report at 45–47, Exhibit 5 in particular [**AR, Vol. III, Tab 17 at 64–66**].

entail drawing arbitrary or discriminatory distinctions between classes or members of a class, unless expressly authorized by the enabling statute; subordinate legislation must apply to everyone who falls under its ambit in the same way.[168]

145. The Quebec Guidelines honour that constraint by providing the courts with meaningful discretion to ensure that NCPs with obligations to children from other families can provide similar support to all their children. The Federal *Guidelines* violate that rule. By ignoring other families, the *Guidelines* discriminate between and create different classes of NCPs (those with and without other families) and their children. This is inconsistent with a purposive and contextual interpretation of the *Act*, in which courts seek the "interpretation that will best serve children".[169] Given that the whole tenor of the *Act* and the objective of child support is the maintenance of children,[170] it makes little sense for the *Guidelines* to ignore the children of other families. Treating children differently depending on whether they reside with a NCP is an arbitrary distinction; it is unfair and unreasonable. This is the case between Roland's children: Nikolaus (who does not reside with Roland), and Vladmir and Alex (who do).

146. As family status is a prohibited ground of discrimination,[171] such discrimination would "require very clear enabling authority".[172] There is nothing in s. 26.1 of the *Act* which suggests that Parliament intended the GIC to be able to distinguish between different classes of NCPs and their children. As the Appellant has shown, that distinction does not conform to the rationale of the *Act*, and that justifies striking down the regulation.[173]

D. No Special Rules Apply to GIC Decision-Making

147. The decisions to exclude the Ignored Benefits, disregard NCP direct spending, and double count Section 7 add-ons were all made after the DOJ Consultants initially recommended

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[168] *Arcade Amusements* at 404–406; *R v Sharma*, [1993] 1 SCR 650 at paras 25–30; *Grace v British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923 at paras 49–51, 71–72, 103; *Way v Covert* (1997), 147 DLR (4th) 505 (NL CA).
[169] *Michel v Graydon*, 2020 SCC 24 at para 72, citing *Chartier v Chartier*, [1999] 1 SCR 242 at para 32.
[170] *Baker* at para 41.
[171] *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1).
[172] Keyes, *Executive Legislation* at 377 [**BOA, Tab 9 at 245**].
[173] *British Columbia Ferry Corp v MNR*, 2001 FCA 146 at paras 19–29.

the RFP. Each decision demonstrably violates the Constraints, causing the NCP to disproportionally cover child costs. The linear application for the RFP formula at all incomes and ages only exacerbates that problem, and sections 4 and 10 of the *Guidelines* are no answer.

148. Why would this Court overlook these material problems and endorse this regime?

149. The Courts below did so on an incorrect understanding of the legal test for reviewing subordinate legislation. The Chambers Justice "tempered" his review based on the "legislative nature of the decision."[174] The Majority took this a step further by finding that regulations passed by the GIC are subject to a different form of judicial review than any other type of administrative action known to Canadian law, again based on the perceived law-making role of the GIC. These approaches run against Canada's constitutional separation of powers and, in practice, equate the powers of the Executive branch with those held exclusively by Parliament.

(i) Separation of Powers Requires Robust Review

150. The executive, legislative, and judicial branches of government are the three constituent elements, and backbone, of the Canadian state.[175] The distinct roles of these three branches, while historically well-understood,[176] have occasionally been blurred, including by the Majority in the Court below.

(a) Delegated Legislation is Administrative Action

151. The Legislative branch (Parliament)[177] is supreme. Subject to the *Constitution Act, 1867* and the *Charter*, Parliament has "the right to make or unmake any law whatever."[178] This includes the power "to delegate to some other person or body certain administrative or regulatory

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[174] See for example: *Auer ABQB* at paras 11, 13, 57, 122, 159, 160.
[175] *Re GGPPA* at paras 274, 279 (Côté J. dissenting, but not on this point).
[176] *CCR* at para 51, citing *Re Chemicals Regulations* at 13, per Duff CJ, quoting *The Zamora*, [1916] 2 AC 77 (PC) at 90, and Keyes, *Executive Legislation* at 165 [**BOA, Tab 9 at 243**].
[177] The King, the Governor General, the Senate, and the House of Commons: *Constitution Act, 1867*, s 17.
[178] *Re GGPPA* at para 264 (Côté J.) citing A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 39–40.

powers, including the power to make binding but subordinate rules and regulations", and, by extension, the complete authority to revoke any such delegated power. [179]

152. The Executive branch[180] implements and enforces the laws passed by Parliament, including by exercising powers delegated to it by Parliament.[181]

153. In Canada, the same individuals control both the Executive and Legislative branches. The Constitution nonetheless insists on a separation of powers based on a separation of **function**.[182] The Majority's reliance upon the GIC acting in a "legislative role"[183] is therefore misguided:

> … [R]egulations are executive action, not legislative action. Indeed, [the Majority] acknowledges as much: "Regulations, on the other hand, are generated internally by the executive branch of government… The regulations are therefore generated by the government to flesh out the policy set by the statute" (at para. 67). Exactly! Regulations are executive (i.e. administrative) action… They flesh legislation out but they are not legislation. The same is true of all types of administrative action.[184]

154. The Executive's "subordinate law-making power" is a product of delegation by Parliament—a common feature of the administrative state.[185] This power exists only to the extent it is granted by Parliament and is explicitly subject to the limits imposed by Parliament.[186]

(b) Reviewing Delegated Action is a Core Judicial Function

155. The Judiciary maintains the rule of law.[187] In the context of subordinate legislation, that

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[179] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 73–74 [***Re Securities Regulation***].
[180] The King, the Governor General (acting as the GIC), and the King's Privy Council for Canada (which itself is comprised of Ministers of the Crown including the Prime Minister): *Constitution Act, 1867*, ss 9–13. See also: *Interpretation Act*, RSC 1985, c I-21, s 35(1).
[181] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 28 [***CLAO***].
[182] *Re GGPPA* at para 281 (Côté J. dissenting, but not on this point).
[183] See: *ABCA Decision* at paras 7, 20, 56–62, 79.
[184] Daly, "Siren's Call"; See also *ABCA Decision* at paras 58–62. See *Institute of Patent Agents v Lockwood*, [1894] AC 347 (UK HL) at 360–361 [**BOA, Tab 1 at 15–16**].
[185] *Re Securities Regulation* at para 73.
[186] *CCR* at para 51, citing *Re Chemicals Regulations* at 13, per Duff CJ, quoting *The Zamora*, [1916] 2 AC 77 (PC) at 90, and Keyes, *Executive Legislation* at 165 [**BOA, Tab 9 at 243**].
[187] *CLAO* at para 28.

means policing the Executive's exercise of delegated authority. As the United Kingdom Supreme Court has explained:

> Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned...[188]

156. *Vavilov* settles the contemporary Canadian approach: by ensuring that an exercise of discretion accords with "the purposes for which it was given" and "with any more specific constraints imposed by the governing legislative scheme;[189] and by ensuring that the exercise as a whole is "based on an internally coherent and rational chain of analysis" in relation to those constraints.[190] From a principled perspective, subordinate legislation is subject to scrutiny by both: (1) the delegator (Parliament), with its retained authority to revoke delegated powers; and (2) the Judiciary, with its constitutionally established function of determining legal questions.

157. While not a problem for this Court to solve, the practical effectiveness of Parliament in performing its role has been questioned, leading to accountability concerns over Executive action.[191] What is important here, however, is understanding that Parliament's entitlement to review or disallow subordinate legislation, or to revoke the delegated authority entirely, does not displace the Judiciary's role in determining the **legality** of subordinate legislation—contrary to

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[188] *R (The Public Law Project) v Lord Chancellor*, [2016] UKSC 39 at para 23. See similarly Andrew Edgar, *Regulation-Making in the United Kingdom and Australia* (Hart Publishing, 2024), at 92, 96–97 [**BOA, Tab 4 at 127**]. In Canada, pre-*Vavilov,* see *e.g., Gach v Brandon (Welfare)* (1973), 35 DLR (3d) 152 (Man CA); *Alaska Trainship Corporation et al v Pacific Pilotage Authority*, [1981] 1 SCR 261; *Société des alcools*; *Ogilvie v Minister of Community Services*, 2004 NSSC 102.

[189] *Vavilov* at para 108.

[190] *Vavilov* at para 85.

[191] JM Keyes, "Parliamentary Scrutiny and Judicial Review of Executive Legislation—Is it Working in Canada?" (March 2023), 17 J Parl & Pol L 191 [**BOA, Tab 10**]; P Bernhardt, "Parliamentary Scrutiny of Delegated Legislation in Canada: Too Little Too Late?" 2014-3 The Loophole 73 [**BOA, Tab 13**].

the Majority's view.[192] As concisely explained by Lord Phillips, MR:

> Subordinate legislation derives its validity from the primary legislation under which it is made. Primary legislation that requires subordinate legislation to be approved by each House of Parliament does not thereby transfer from the Courts to the two Houses of Parliament, the role of determining the validity of the subordinate legislation.[193]

158. Policing the boundaries of Executive action is essential to the administration of justice and the maintenance of the rule of law; it is a core function of the Judiciary.[194]

(ii) *Katz* Does not Apply

159. The Majority found that *Vavilov* does not apply because it did not expressly overrule, and made "only passing reference", to this Court's decision in *Katz*. The Majority identified the applicable standard in the observation made in *Katz* that regulations must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose.[195]

160. However, *Vavilov* did not purport to provide an exhaustive list of every administrative exercise of delegated power subject to the framework. Nor could it, given the breadth of the subject matter that it addressed, and the "inescapable challenge" posed by the sheer variety of decisions and decision makers for which such an approach must account.[196] This Court was clear, however, that *Vavilov* is the starting point for the judicial review of administrative action. The conclusion follows that the standard of review is reasonableness.

161. In fact, this Court has already restated *Katz* along these lines. The Majority relied on this Court's decision in *Re GGPPA* to find that *Katz*, not *Vavilov*, applies to *vires* review.[197] However, *Re GGPPA* refers to the guidance in *Vavilov* about the governing statutory scheme, and applies both *Vavilov* and *Katz* in stating that any decision of the GIC "would be open to

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[192] *ABCA Decision* at para 34.
[193] *Secretary of State for the Home Department v Javed*, [2001] EWCA Civ 789 at para 33.
[194] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 38; *Re GGPPA* at para 285.
[195] *ABCA Decision* at paras 42, 105; *Katz* at para 28.
[196] *Vavilov* at para 88.
[197] *Re GGPPA* at paras 73, 87, per Wagner CJC (Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ concurring); *ABCA Decision* at para 45.

judicial review to ensure that it is consistent with the purpose of the *GGPPA* **and** with the specific constraints set out [in the *GGPPA*]".[198] To the extent that *Katz* remains good law, it must be reconciled with *Vavilov*. This is what the majority did in *Re GGPPA*, applying *Katz* in light of *Vavilov*.

(iii) This Appeal is About Legality, Not Policy

162. While there are valid concerns about avoiding perceptions of judicial second-guessing of government policy, testing the *vires* of a regulation is properly within the function of the Judiciary. The court's role is to consider the regulation made (including both the underlying logic and its outcomes) against the constraints imposed by the text and purpose of the statutory grant of authority. This exercise is not equivalent to the court independently imposing merits-based review of the Executive. On the contrary, it entails the Judiciary fulfilling its important function of ensuring that the Executive does not exceed its authority, whether deliberately or not.

163. The Chambers Justice rejected the Newfoundland Illustration (and Professor Sarlo's expanded analogous examples), concluding that those were an exercise in testing the effectiveness, or wisdom, of the *Guidelines*.[199] The Majority had similar critiques, characterizing every aspect of the *Guidelines* as a "policy choice" not subject to judicial review.[200] This approach is superficial and fails to uphold the Judiciary's role in maintaining the separation of powers. As this Court noted in *Catalyst*, outdated attempts to maintain a clear distinction between policy and legality have not prevailed. In passing subordinate legislation, the delegate must "make policy choices that fall reasonably within the scope of the [granted] authority".[201]

164. The exercise in statutory interpretation conducted above demonstrates that, under the *Act*, child support awards may only be in respect of child costs and must cause the parents to share those costs proportionally, according to their relative abilities to contribute. Choices made by the GIC and, ultimately, the awards generated by the *Guidelines*, demonstrably violate those Constraints. Evidence and argument to that effect does not undermine the wisdom of the regime—they undermine its legality.

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[198] *Re GGPPA* at para 73 [emphasis added], citing *Vavilov* at para 108.
[199] *Auer ABQB* at paras 74, 104, 120, 132–138, 159.
[200] *ABCA Decision* at paras 97–104.
[201] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 14.

PART IV SUBMISSIONS CONCERNING COSTS

165. The Appellant seeks his costs in this Court, and in the Courts below.[202] This application raises issues of how courts review delegated legislation and the legality of a regulation with enormous reach. The implications of these issues go far beyond this case.

PART V ORDER SOUGHT

166. The Appellant seeks an Order allowing this Appeal, with costs throughout.

PART VI SUBMISSIONS ON CASE SENSITIVITY

167. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2024.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: 

Laura Warner, Ryan Phillips, Matthew Scott, Paul Daly, Ronald Robinson
Counsel for the Appellant

[202] Based on *McAllister v Calgary (City)*, 2021 ABCA 25.

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