



SUPREME COURT OF CANADA

CITATION: Auer v. Auer, 2024
SCC 36

APPEAL HEARD: April 25, 2024
JUDGMENT RENDERED:
November 8, 2024
DOCKET: 40582

BETWEEN:

Roland Nikolaus Auer
Appellant

and

Aysel Igorevna Auer and
Attorney General of Canada
Respondents

- and -

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Trial Lawyers Association of British Columbia,
HIV & AIDS Legal Clinic Ontario, Health Justice Program,
Canadian Council for Refugees, City of Calgary,
Chicken Farmers of Canada, Egg Farmers of Canada,
Turkey Farmers of Canada, Canadian Hatching Egg Producers,
National Association of Pharmacy Regulatory Authorities,
Association québécoise des avocats et avocates en droit de l'immigration,
Workers' Compensation Board of British Columbia,
Canadian Association of Refugee Lawyers,
Advocates for the Rule of Law and Ecojustice Canada Society
Intervenors

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin,
JUDGMENT: Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)
(paras. 1 to 117)

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Roland Nikolaus Auer

Appellant

v.

**Aysel Igorevna Auer and
Attorney General of Canada**

Respondents

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Trial Lawyers Association of British Columbia,
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Workers' Compensation Board of British Columbia,
Canadian Association of Refugee Lawyers,
Advocates for the Rule of Law and
Ecojustice Canada Society**

Interveners

Indexed as: Auer v. Auer

2024 SCC 36

File No.: 40582.

2024: April 25; 2024: November 8.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Judicial review — Standard of review — Subordinate legislation — Vires — Federal child support guidelines challenged as ultra vires Governor in Council — Standard of review applicable to review of vires of subordinate legislation — Whether child support guidelines within scope of authority delegated to Governor in Council by enabling statute — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 26.1 — Federal Child Support Guidelines, SOR/97-175.

The father and the mother were married in 2004, had one child together, and divorced in 2008. Their child resides with the mother. The father paid child support to the mother, but brought an application for judicial review challenging the *vires* of the *Federal Child Support Guidelines* (“*Guidelines*”), which determine the amount of child support to be paid in case of divorce. The father argued that the Governor in Council (“GIC”) exceeded its authority under s. 26.1(1) and (2) of the *Divorce Act* when enacting the *Guidelines* because they require a payer parent to pay a greater share of the child-related costs than the recipient parent.

The chambers judge held that following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, reasonableness is the presumptive standard of review for assessing the *vires* of subordinate legislation, but

that reasonableness review should be informed by the principles outlined in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64. The chambers judge concluded that the *Guidelines* are *intra vires* and dismissed the father's application for judicial review.

The Court of Appeal unanimously dismissed the father's appeal but was divided on the applicable standard of review. The majority held that *Vavilov* did not overtake *Katz Group* and that to be *ultra vires* for being inconsistent with the purpose of the enabling statute, true regulations such as those established by the GIC must be irrelevant, extraneous, or completely unrelated to that purpose. A concurring judge held that the reasonableness standard applies when reviewing the *vires* of the *Guidelines*, and that the criteria set out in *Katz Group* inform reasonableness review.

Held: The appeal should be dismissed.

Vavilov's robust reasonableness standard is the presumptive standard for reviewing the *vires* of subordinate legislation. In the instant case, the *Guidelines* fall reasonably within the GIC's scope of authority under the *Divorce Act*, having regard to the relevant constraints. Under s. 26.1(1), the GIC is granted extremely broad authority to establish guidelines respecting child support. Section 26.1(2) constrains this authority by requiring that the guidelines 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. The *Guidelines* respect this constraint.

In *Vavilov*, the Court set out a comprehensive framework for determining the standard of review that applies to any substantive review of an administrative decision and, in doing so, contemplated questions involving challenges to the *vires* of subordinate legislation. *Vavilov*'s framework established a presumption of reasonableness review, subject to limited exceptions where the legislature has indicated that it intends a different standard to apply or where the rule of law requires that the correctness standard be applied. This framework applies to determining the standard for reviewing the *vires* of subordinate legislation. Subordinate legislation derives its validity from the statute which creates the power, and not from the executive body by which it is made. Accordingly, the identity of the decision maker who enacted it does not determine the standard of review. Unless the legislature has indicated otherwise, or the rule of law requires otherwise, the *vires* of subordinate legislation are to be reviewed on the reasonableness standard regardless of the delegate who enacted it, their proximity to the legislative branch or the process by which the subordinate legislation was enacted. In the instant case, the legislature has not indicated that the GIC's decision to establish the *Guidelines* must be reviewed on a standard other than reasonableness, nor does the rule of law require that questions of *vires*, in themselves, be reviewed for correctness. Accordingly, the presumptive standard of reasonableness applies.

In conducting a reasonableness review, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision. Many of the principles from the Court's decision

in *Katz Group* continue to inform reasonableness review of the *vires* of subordinate legislation and remain good law. Specifically: (1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; (2) subordinate legislation benefits from a presumption of validity; (3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and (4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

All of the above principles from *Katz Group*, including the principle that subordinate legislation benefits from a presumption of validity, have been repeatedly affirmed by the Court's jurisprudence. The presumption of validity has two aspects: (1) it places the burden on challengers to demonstrate the invalidity of subordinate legislation; and (2) it favours an interpretive approach that reconciles the subordinate legislation with its enabling statute so that, where possible, the subordinate legislation is construed in a manner which renders it *intra vires*. When the reasonableness standard applies, challengers must demonstrate that the subordinate legislation does not fall within a reasonable interpretation of the delegate's statutory authority to overcome the presumption of validity. For subordinate legislation to be found *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute, it no longer needs to be irrelevant, extraneous or completely unrelated to that statutory purpose — maintaining this threshold from *Katz Group* in the face of the significant sea change brought about by *Vavilov* would perpetuate uncertainty in the law, would be inconsistent with the

robust reasonableness review detailed in *Vavilov*, and would undermine *Vavilov*'s promise of simplicity, predictability and coherence. As such, there is a sound basis for a narrow departure from *Katz Group*.

Reasonableness review is possible in the absence of formal reasons. Most of the time, formal reasons are not provided for the enactment of subordinate legislation; however, *Vavilov* contemplated reasonableness review in the absence of formal reasons, including in the context of a *vires* review of subordinate legislation. The reasoning process can often be deduced from various sources. Furthermore, reasonableness review is not an examination of policy merits. A court's role is to review the legality or validity of the subordinate legislation, not to review whether it is necessary, wise, or effective in practice. Potential or actual consequences of the subordinate legislation are relevant only insofar as a reviewing court must determine whether the statutory delegate was reasonably authorized to enact subordinate legislation that would have such consequences. The reasonableness standard does not assess the reasonableness of the rules promulgated by the relevant authority nor is it an inquiry into its underlying political, economic, social, or partisan considerations; rather reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute. The governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are relevant constraints when reviewing the *vires* of subordinate legislation. The language chosen by the legislature in an enabling statute describes the limits and contours of a delegate's

authority. The legislature may use precise and narrow language to delineate the power in detail, thereby tightly constraining the delegate's authority, or may use broad, open-ended or highly qualitative language, thereby conferring broad authority on the delegate. Statutory delegates must respect the legislature's choice in this regard. The scope of a statutory delegate's authority may also be constrained by other statutory or common law. Unless the enabling statute provides otherwise, when enacting subordinate legislation, statutory delegates must adopt an interpretation of their authority that is consistent with other legislation and applicable common law principles.

In addition, statutory delegates are empowered to interpret the scope of their authority when enacting subordinate legislation, but their interpretation must be consistent with the text, context, and purpose of the enabling statute. The words of the enabling statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, in accordance with the modern principle of statutory interpretation. In conducting a *vires* review, a court does not undertake a *de novo* analysis to determine the correct interpretation of the enabling statute and then ask whether, on that interpretation, the delegate had the authority to enact the subordinate legislation. Rather, the court ensures that the delegate's exercise of authority falls within a reasonable interpretation of the enabling statute, having regard to the relevant constraints.

Applying the reasonableness standard to review the *vires* of the *Guidelines*, the conclusion is that they are within the GIC's scope of authority and are therefore *intra vires*. The GIC's statutory grant of authority is extremely broad. The GIC was entitled to choose an approach to calculating child support that (1) does not take into account the recipient parent's income; (2) assumes that parents spend the same linear percentage of income on their children regardless of the parents' levels of income and the children's ages; (3) does not take into account government child benefits paid to recipient parents; (4) does not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) risks double counting certain special or extraordinary expenses. Each of these decisions fell squarely within the scope of the authority delegated to the GIC under the *Divorce Act*.

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Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **explained:** *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; **referred to:** *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *United Taxi Drivers' Fellowship of Southern*

Alberta v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485; *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106; *Terrigno v. Calgary (City)*, 2021 ABQB 41, 1 Admin. L.R. (7th) 134; *Canada (Attorney General) v. Power*, 2024 SCC 26; *R. v. Kirkpatrick*, 2022 SCC 33; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Reference re Impact Assessment Act*, 2023 SCC 23; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340; *Portnov v. Canada (Attorney General)*, 2021 FCA 171, [2021] 4 F.C.R. 501; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210, 8 Admin. L.R. (7th) 44; *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1; *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763; *Childs v. Childs* (1990), 107 N.B.R. (2d) 176; *Francis v. Baker*, [1999] 3 S.C.R. 250; *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217.

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William W. Shores, K.C., and Annabritt N. Chisholm, for the intervener the National Association of Pharmacy Regulatory Authorities.

Lawrence David and Gjergji Hasa, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

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The judgment of the Court was delivered by

CÔTÉ J. —

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I. <u>Overview</u>	

[1] The *Federal Child Support Guidelines*, SOR/97-175 (“*Child Support Guidelines*”), established by the Governor in Council (“GIC”) under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), determine the amount of child support to be paid in case of divorce, except in the province of Quebec. The appellant, Roland Nikolaus Auer, challenges the *vires* of the *Child Support Guidelines*. This challenge requires our Court to determine whether the GIC acted within the scope of its delegated authority in establishing the *Child Support Guidelines*.

[2] To answer this question, our Court has to determine the standard of review that applies when reviewing the *vires* of subordinate legislation. Doing so requires the Court to resolve debates about the continued relevance of *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, in light of our Court’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[3] I conclude that the reasonableness standard as set out in *Vavilov* presumptively applies when reviewing the *vires* of subordinate legislation. I also conclude that some of the principles from *Katz Group* continue to inform such reasonableness review: (1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; (2) subordinate legislation benefits from a presumption of validity; (3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and (4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

[4] However, for subordinate legislation to be found *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute, it no longer needs to be “irrelevant”, “extraneous” or “completely unrelated” to that statutory purpose. Continuing to maintain this threshold from *Katz Group* would be inconsistent with the

robust reasonableness review detailed in *Vavilov* and would undermine *Vavilov*'s promise of simplicity, predictability and coherence.

[5] The *Child Support Guidelines* are *intra vires* the GIC. They fall within a reasonable interpretation of the scope of the GIC's authority under s. 26.1 of the *Divorce Act*, having regard to the relevant constraints. Section 26.1(1) of the *Divorce Act* grants the GIC extremely broad authority to establish guidelines respecting child support. This authority is constrained by s. 26.1(2) of the *Divorce Act*, which requires that the guidelines 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. The *Child Support Guidelines* respect this constraint.

[6] Contrary to Mr. Auer's submissions, in selecting an approach to calculating child support, the GIC was authorized to: (1) not take into account the recipient parent's income; (2) assume that parents spend the same linear percentage of income on their children regardless of the parents' levels of income and the children's ages; (3) not take into account government child benefits paid to recipient parents; (4) not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) risk the double counting of certain special or extraordinary expenses. Each of these decisions falls squarely within the scope of the authority delegated to the GIC under the *Divorce Act*. Accordingly, I would dismiss Mr. Auer's appeal.

II. Facts

[7] Roland Auer and the respondent Aysel Igorevna Auer were married in 2004. They had one child together in 2005 and divorced in 2008. Their child resides with Ms. Auer. Mr. Auer has paid both child and spousal support to Ms. Auer. Mr. Auer also has children from other marriages to whom he owes, or has owed, support.

[8] Mr. Auer brought an application for judicial review challenging the *vires* of the *Child Support Guidelines*. He argued that the GIC exceeded its authority under s. 26.1(1) and (2) of the *Divorce Act* when enacting the *Child Support Guidelines* because they require a payer parent to pay a greater share of the child-related costs than the recipient parent. Ms. Auer did not participate in the application before the Court of Queen's Bench of Alberta, and the Attorney General of Canada was granted leave to intervene with broad rights, such that he is now a respondent in this matter.

[9] Mr. Auer and Ms. Auer have ongoing applications before the Court of King's Bench of Alberta concerning child and spousal support issues. Those applications have been heard and are subject to the outcome of this appeal.

III. Judicial History

A. *Court of Queen's Bench of Alberta, 2021 ABQB 370, 32 Alta. L.R. (7th) 250*

[10] The chambers judge dismissed Mr. Auer's application for judicial review. He held that, following *Vavilov*, the presumptive standard of review for assessing the

vires of subordinate legislation is reasonableness, but that reasonableness review should be informed by the principles outlined in *Katz Group*.

[11] The chambers judge held that s. 26.1(1) of the *Divorce Act*, which authorizes the GIC to establish guidelines respecting orders for child support, confers the GIC an “extremely broad grant of authority”, and that the *Child Support Guidelines*’ provisions were not irrelevant, extraneous or unrelated to the purpose of child support (para. 52; see also paras. 76 and 78).

[12] Mr. Auer argued that the *Child Support Guidelines* are *ultra vires* because they require the payer parent to pay a greater share of the child-related costs than the recipient parent. He relied heavily on s. 26.1(2) of the *Divorce Act*, which he said imposes a specific constraint on the GIC’s regulation-making authority. Section 26.1(2) provides that the *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”. Mr. Auer argued that specific aspects of the *Child Support Guidelines* violate the constraint imposed in s. 26.1(2) of the *Divorce Act* by requiring the payer parent to bear a greater share of the child-related costs than the recipient parent. These aspects include the presumption that both parents earn the same income, a court’s authority to award special or extraordinary expenses under s. 7 of the *Child Support Guidelines* and the decision not to include child tax benefits as part of the recipient parent’s income.

[13] The chambers judge accepted that s. 26.1(2) “informs, and to a degree, constrains” the GIC’s grant of authority, but held that this constraint must be weighed against the GIC’s extremely broad grant of authority under s. 26.1(1) (para. 52). In his view, most of the issues Mr. Auer raised fell outside of a *vires* review because they sought to impugn the GIC’s policy decisions and ignored the GIC’s broad discretion under the *Divorce Act*. The chambers judge ultimately concluded that the *Child Support Guidelines* are *intra vires*.

B. *Court of Appeal of Alberta, 2022 ABCA 375, 52 Alta. L.R. (7th) 8*

[14] The Court of Appeal unanimously dismissed Mr. Auer’s appeal. However, the court was divided on the standard of review applicable to a review of the *vires* of subordinate legislation.

[15] Writing for the majority, Pentelchuk J.A. held that *Vavilov* did not overtake *Katz Group*. In her view, to be *ultra vires* for being inconsistent with the purpose of the enabling statute, “true regulations” (para. 34), such as those established by the GIC, which create law through the exercise of a legislative function, must be “irrelevant”, “extraneous” or “completely unrelated” to that purpose (*Katz Group*, at para. 28). However, the reasonableness standard applies when reviewing “bylaws, rules, and regulations made by administrative tribunals or municipal governments” (C.A. reasons, at para. 34; see also para. 20).

[16] Like the chambers judge, Pentelchuk J.A. concluded that the *Child Support Guidelines* are not “irrelevant”, “extraneous” or “completely unrelated” to the *Divorce Act*’s purpose. She noted that “[w]hile the *Guidelines* may not be perfect, time has demonstrated that they have achieved the stated intent of predictability and ease of use” (para. 113). She found that the chambers judge’s analysis was thorough and properly alive to the limitations of reviewing subordinate legislation and to the fact that Mr. Auer’s arguments were inextricably woven with policy disputes. Thus, she dismissed Mr. Auer’s appeal.

[17] Justice Feehan concurred in the result but held that the reasonableness standard under the *Vavilov* framework applies when reviewing the *vires* of the *Child Support Guidelines*. In his view, the criteria set out in *Katz Group* inform reasonableness review.

IV. Issues

[18] The issues on appeal are as follows:

1. What is the applicable standard of review when reviewing the *vires* of subordinate legislation?
2. Are the *Child Support Guidelines* *ultra vires* the GIC under the *Divorce Act*?

V. Standard of Review

A. *Vavilov Is the Starting Point for Determining the Appropriate Standard of Review*

[19] *Vavilov* represented a “recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard” (para. 143). It “set out a holistic revision of the framework for determining the applicable standard of review” when conducting a substantive review of an administrative decision (*ibid.*). Our Court explained that *Vavilov* is the starting point: “A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case” (*ibid.*).

[20] That said, *Vavilov* was not itself a case about the *vires* of subordinate legislation. It involved the judicial review of a decision by the Canadian Registrar of Citizenship to cancel Mr. Vavilov’s certificate of citizenship on the basis that he was not a Canadian citizen under s. 3(1)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, because he fell within the ambit of an exception set out at s. 3(2)(a). Thus, in *Vavilov*, our Court did not explicitly settle the standard of review that applies when reviewing the *vires* of subordinate legislation (J. M. Keyes, “Judicial Review of Delegated Legislation — The Road Beyond *Vavilov*” (2022), 35 *C.J.A.L.P.* 69, at p. 100). However, as I explain below, *Vavilov* provides the appropriate framework for

determining the standard of review in this context. Under that framework, I conclude that the reasonableness standard applies to the *vires* challenge in this case.

B. *The Vavilov Framework Applies When Reviewing the Vires of Subordinate Legislation*

[21] In *Vavilov*, our Court set out a comprehensive framework for determining the standard of review that applies to any substantive review of an administrative decision (para. 17). In doing so, this Court brought “greater coherence and predictability to this area of law” and eliminated the need for courts to engage in a contextual inquiry to determine the appropriate standard of review (paras. 10 and 17). Our Court recognized that “the sheer variety of decisions and decision makers” posed a challenge to developing a coherent and unified approach to judicial review (para. 88). We ensured that the revised framework “accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy” (para. 11). These include decisions of “specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more . . . vary[ing] in complexity and importance, ranging from the routine to the life-altering . . . includ[ing] matters of ‘high policy’ on the one hand and ‘pure law’ on the other” (para. 88).

[22] In setting out *Vavilov*’s comprehensive framework, our Court expressly contemplated questions of *vires*. Specifically, this Court ceased to recognize

jurisdictional questions — also referred to as “true questions of jurisdiction or *vires*” — as a distinct category of questions attracting correctness review (paras. 65-67 and 200). In doing so, we expressly referred to cases involving challenges to the *vires* of subordinate legislation, including *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, and *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635 (*Vavilov*, at para. 66). This Court explained that “it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute”, especially where, as in *Green* and *West Fraser Mills*, “the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute” (*Vavilov*, at para. 66, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at para. 111, per Brown J., concurring).

[23] *Vavilov*’s framework applies to determining the standard for reviewing the *vires* of subordinate legislation. *Vavilov* set out a comprehensive framework for determining the applicable standard of review and, in doing so, contemplated questions of *vires*.

C. *Reasonableness Is the Presumptive Standard for Reviewing the Vires of Subordinate Legislation*

[24] *Vavilov*'s framework established a presumption of reasonableness review. It set out limited exceptions where the legislature has indicated that it intends a different standard to apply or where the rule of law requires that the correctness standard be applied (para. 17). The questions for which the rule of law requires that the correctness standard be applied include: (1) constitutional questions that require a final and determinate answer from the courts; (2) general questions of law of central importance to the legal system as a whole; and (3) questions related to the jurisdictional boundaries between two or more administrative bodies (para. 53).

[25] No exception to the presumption of reasonableness review applies in this case. The legislature has not indicated that the GIC's decision to establish the *Child Support Guidelines* must be reviewed on a standard other than reasonableness, nor does the rule of law require that the correctness standard be applied to a *vires* review of the *Child Support Guidelines*.

[26] In *Vavilov*, our Court explained that the rule of law does not require that questions of *vires*, in themselves, be reviewed for correctness (paras. 67-69 and 109; see also J. M. Keyes, *Executive Legislation* (3rd ed. 2021), at pp. 171-72). A robust reasonableness review is sufficient to ensure that statutory delegates act within the scope of their lawful authority (*Vavilov*, at paras. 67-69 and 109). Further, when explaining that reasonableness review can be conducted even in the absence of reasons, our Court cited *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012]

1 S.C.R. 5, and *Green*, both of which involved a review of the *vires* of subordinate legislation (*Vavilov*, at para. 137).

[27] All of this indicates that *Vavilov*'s robust reasonableness standard is the default standard when reviewing the *vires* of subordinate legislation (Keyes (2021), at p. 171; see also Keyes (2022); P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at pp. 146-47; M. P. Mancini, "One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review" (2024), 55 *Ottawa L. Rev.* 245). However, in exceptional cases, a *vires* review may engage a question that the rule of law requires be reviewed for correctness. In such cases, the presumption of reasonableness review may be rebutted. For example, a challenge to the validity of subordinate legislation on the basis that it fails to respect the division of powers between Parliament and provincial legislatures would require that the correctness standard be applied.

[28] Reviewing the *vires* of the *Child Support Guidelines* does not engage a question that the rule of law requires be reviewed for correctness. Accordingly, the presumptive standard of reasonableness applies in this case.

D. *What Is the Role of Katz Group?*

- (1) Many of the Principles From *Katz Group* Continue To Apply

[29] In *Katz Group*, our Court upheld the validity of Ontario regulations adopted by the Lieutenant Governor in Council that aimed to control the price of prescription drugs. Justice Abella, writing for our Court, did not discuss the applicable standard of review. However, she outlined the following principles for assessing the *vires* of subordinate legislation:

- “A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate” (para. 24);
- “Regulations benefit from a presumption of validity This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations . . . and it favours an interpretive approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*” (para. 25 (emphasis deleted));
- “Both the challenged regulation and the enabling statute should be interpreted using a ‘broad and purposive approach . . . consistent with the Court’s approach to statutory interpretation generally’” (para. 26, quoting *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8);

- “This inquiry does not involve assessing the policy merits of the regulations to determine whether they are ‘necessary, wise, or effective in practice’” (para. 27, quoting *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595 (C.A.), at p. 604). “It is not an inquiry into the underlying ‘political, economic, social or partisan considerations’” or an assessment of whether the regulations “will actually succeed at achieving the statutory objectives” (para. 28, quoting *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13);
- The regulations “must be ‘irrelevant’, ‘extraneous’ or ‘completely unrelated’ to the statutory purpose to be found *ultra vires* on the basis of inconsistency with statutory purpose” (para. 28).

[30] For convenience, I will refer to the final principle as the “irrelevant”, “extraneous” or “completely unrelated” threshold.

[31] In setting out *Vavilov*’s comprehensive framework for determining the applicable standard of review, our Court did not entirely discard prior jurisprudence. Rather, the Court explicitly stated that “past precedents will often continue to provide helpful guidance” (para. 143). This remains true even when considering cases involving “true questions of jurisdiction or *vires*”, though they “will necessarily have less precedential force” because *Vavilov* ceased to recognize such questions as a

distinct category attracting correctness review (paras. 65 and 143). As Paul Daly explains, “past jurisprudence has not been ‘ousted’” by *Vavilov* ((2023), at pp. 148-49, citing *Terrigno v. Calgary (City)*, 2021 ABQB 41, 1 Admin. L.R. (7th) 134, at para. 62). Since *Katz Group* involved a true question of jurisdiction or *vires*, the Court must carefully examine the role of that case going forward.

[32] In my view, all of the above-mentioned principles in *Katz Group*, except for the “irrelevant”, “extraneous” or “completely unrelated” threshold, remain good law and continue to inform the review of the *vires* of subordinate legislation. As I will explain, the significant sea change brought about by *Vavilov* in favour of a presumption of reasonableness as a basis for review erodes the rationale for the “irrelevant”, “extraneous” or “completely unrelated” threshold, and maintaining this threshold would perpetuate uncertainty in the law. Accordingly, there is sound basis for a narrow departure from *Katz Group* (see *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 98 and 209; *R. v. Kirkpatrick*, 2022 SCC 33, at para. 202, per Côté, Brown and Rowe JJ., concurring). Otherwise, *Katz Group* continues to “provide valuable guidance on the application of the reasonableness standard” (Daly (2023), at p. 148). To the extent that the principles in *Katz Group* do not conflict with *Vavilov*, they “are to form part of the application of the reasonableness standard” (p. 149).

[33] For greater clarity, the principle that subordinate legislation “must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object” continues to apply when conducting a *vires* review (*References re*

Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 87; see also *Vavilov*, at paras. 108 and 110; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 283, per Karakatsanis and Jamal JJ., dissenting in part, but not on this point). The principle that subordinate legislation benefits from a presumption of validity also continues to apply (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 54). Further, the challenged subordinate legislation and the enabling statute should continue to be interpreted using a broad and purposive approach (*Green*, at para. 28; *West Fraser Mills*, at para. 12). Finally, a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is “necessary, wise, or effective in practice”. Courts are to review only the legality or validity of subordinate legislation (*West Fraser Mills*, at para. 59, per Côté J., dissenting, but not on this point; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340, at para. 26; see also Mancini, at p. 276).

[34] These well-established principles are consistent with *Vavilov*, and they should continue to be applied in accordance with the foundational common law principle of *stare decisis*.

[35] As explained, *Vavilov* recognized the continued relevance and application of prior jurisprudence insofar as that jurisprudence is consistent with *Vavilov*’s framework for determining the appropriate standard of review and its principles governing robust reasonableness review. Nothing in *Vavilov* contradicts the principles that: (1) subordinate legislation “must be consistent both with specific provisions of the

enabling statute and with its overriding purpose or object”, (2) the challenged subordinate legislation and the enabling statute are to be interpreted using a broad and purposive approach to statutory interpretation and (3) a review of the *vires* of subordinate legislation does not involve assessing policy merits.

[36] The principle that subordinate legislation benefits from a presumption of validity has been criticized by some for being inconsistent with *Vavilov* (see *Portnov v. Canada (Attorney General)*, 2021 FCA 171, [2021] 4 F.C.R. 501, at paras. 20-22; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210, 8 Admin. L.R. (7th) 44, at para. 30). However, this criticism is mistaken.

[37] In *Katz Group*, our Court explained that this presumption has two aspects: (1) “it places the burden on challengers to demonstrate the invalidity of [subordinate legislation]”; and (2) “it favours an interpretive approach that reconciles the [subordinate legislation] with its enabling statute so that, *where possible*, the [subordinate legislation] is construed in a manner which renders it *intra vires*” (para. 25 (emphasis in original)).

[38] The first aspect — that the burden is on challengers to demonstrate the invalidity of subordinate legislation — is uncontroversial. Indeed, in *Vavilov*, our Court explained that where an administrative decision is reviewed for reasonableness, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (para. 100).

[39] The second aspect — that, *where possible*, subordinate legislation should be construed in a manner that renders it *intra vires* — is also consistent with *Vavilov*. This aspect does not heighten the burden that challengers would otherwise face pursuant to *Vavilov*. The burden on challengers depends on the applicable standard of review. If the reasonableness standard applies, to overcome the presumption of validity, challengers must demonstrate that the subordinate legislation does not fall within a *reasonable* interpretation of the delegate’s statutory authority. If the correctness standard applies, challengers can overcome the presumption of validity by demonstrating that the subordinate legislation does not fall within the *correct* interpretation of the delegate’s statutory authority.

[40] All of these principles from *Katz Group*, including the principle that subordinate legislation benefits from a presumption of validity, have been repeatedly affirmed by our Court (see *Vavilov*, at paras. 108 and 110; *References re Greenhouse Gas Pollution Pricing Act*, at para. 87; *Reference re Impact Assessment Act*, at para. 283; *Canadian Council for Refugees*, at para. 54; *Green*, at para. 28; *West Fraser Mills*, at paras. 12 and 59). In these circumstances, it would be inconsistent with the common law tradition and the principle of *stare decisis* to discard *Katz Group* and the continued application of these principles.

(2) The “Irrelevant”, “Extraneous” or “Completely Unrelated” Threshold Is No Longer Relevant

[41] Writing for a majority of the Court of Appeal, Pentelechuk J.A. held that the *vires* of the *Child Support Guidelines* was to be reviewed on the basis of the “irrelevant”, “extraneous” or “completely unrelated” threshold, instead of on the reasonableness standard in accordance with *Vavilov*. I disagree. As I explain in this section, the conceptual basis for the “irrelevant”, “extraneous” or “completely unrelated” threshold does not hold in a legal landscape now organized by the principles set out in *Vavilov*, which centre around reasonableness review. This threshold from *Katz Group* is now out of step with these principles; maintaining it would perpetuate uncertainty in the law. Accordingly, the “irrelevant”, “extraneous” or “completely unrelated” threshold does not provide a standalone rule for a *vires* review.

[42] Justice Pentelechuk distinguished between “true regulations”, which create law through the exercise of a legislative function, such as those passed by the GIC, and “bylaws, rules, and regulations made by administrative tribunals or municipal governments” (paras. 20 and 34). She held that the *vires* of “true regulations” are not to be reviewed on the reasonableness standard; rather, the appropriate test is whether they are “irrelevant”, “extraneous” or “completely unrelated” to the purpose of their enabling statute, as outlined in *Katz Group*. By contrast, the *vires* of bylaws, rules and regulations made by administrative tribunals or municipal governments are to be reviewed for reasonableness (para. 82). In making this distinction, Pentelechuk J.A. relied on the fact that “true regulations” are subject to a “consultation process culminating in parliamentary review” while “bylaws, rules, and regulations made by administrative tribunals or municipal governments” are not (para. 34).

[43] According to Pentelechuk J.A., the appropriate standard for reviewing the *vires* of subordinate legislation depends on the identity of the decision maker who enacted it. I disagree. The identity of the decision maker does not determine the standard of review. “Regulations ‘derive their validity from the statute which creates the power, and not from the executive body by which they are made’” (*Canadian Council for Refugees*, at para. 51, citing *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1, at p. 13). In *Vavilov*, our Court noted the “sheer variety of [administrative] decisions and decision makers” and yet confirmed that reasonableness is a single standard that takes account of this diversity (para. 88).

[44] To summarize, unless the legislature has indicated otherwise or if a matter invokes an issue pertaining to the rule of law which would require a review on the basis of correctness, the *vires* of subordinate legislation are to be reviewed on the reasonableness standard regardless of the delegate who enacted it, their proximity to the legislative branch or the process by which the subordinate legislation was enacted. Introducing these distinctions into the standard of review framework would be “contrary to the *Vavilovian* purposes of simplification and clarity” (P. 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, November 24 2022 (online); Daly (2023), at p. 147).

[45] In concurring reasons, Feehan J.A. held that while the *vires* of subordinate legislation are to be reviewed for reasonableness pursuant to *Vavilov*, the “irrelevant”,

“extraneous” or “completely unrelated” threshold informs that analysis. He explained that the presumption that subordinate legislation is valid may “be overcome if the regulation is ‘irrelevant’, ‘extraneous’ or ‘completely unrelated’ to the objectives of governing statutes” (para. 123(b)). The chambers judge was of a similar view (see paras. 17 and 78). I reject this approach. The “irrelevant”, “extraneous” or “completely unrelated” threshold should not inform reasonableness review under the *Vavilov* framework. This is because that threshold is inconsistent with robust reasonableness review under that framework and because maintaining it would undermine *Vavilov*’s promise of simplicity, predictability and coherence.

[46] Reasonableness review ensures that courts intervene in administrative matters where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process (*Vavilov*, at para. 13). While reasonableness review “finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers”, “[i]t remains a robust form of review” (*ibid.*). By contrast, the “irrelevant”, “extraneous” or “completely unrelated” threshold connotes a very high degree of deference, one that is inconsistent with the degree of scrutiny required under a reasonableness review (see *British Columbia (Attorney General) v. Le*, 2023 BCCA 200, 482 D.L.R. (4th) 20, at para. 94).

[47] This inconsistency is of particular importance when considering “the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended” (*Vavilov*, at para. 109; see also

para. 68). In *Vavilov*, our Court explained that robust reasonableness review is “capable of allaying [this] concern” and allows “courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority” (paras. 67 and 109). By contrast, the very high degree of deference that the “irrelevant”, “extraneous” or “completely unrelated” threshold accords statutory delegates in interpreting their authority under their enabling statute does not adequately address this concern. This is demonstrated by Abella J.’s comment that it would take an “egregious case” to strike down subordinate legislation on the basis that it is “irrelevant”, “extraneous” or “completely unrelated” to the purpose of its enabling statute (*Katz Group*, at para. 28, citing *Thorne’s Hardware*, at p. 111).

[48] Further, *Vavilov* sought to bring simplicity, predictability and coherence to the analysis for determining the appropriate standard of review. Our Court noted that reasonableness is a single standard that applies in different contexts (para. 89). *Vavilov*’s objective of providing simplicity, predictability and coherence would be undermined if different tests, such as the “irrelevant”, “extraneous” or “completely unrelated” threshold, applied as part of the reasonableness standard. Even if different tests were sufficiently robust, the mere fact of applying them would create undue complexity and fragmentation (Keyes (2022), at pp. 75-76; see also *Innovative Medicines Canada*, at para. 35).

[49] Ultimately, we should depart from the “irrelevant”, “extraneous” or “completely unrelated” threshold established in *Katz Group* because its rationale was

eroded by *Vavilov* and because continuing to maintain it would “create or perpetuate uncertainty in the law” (*Vavilov*, at para. 20; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528).

E. *How To Conduct a Reasonableness Review of the Vires of Subordinate Legislation Under the Vavilov Framework*

[50] In conducting a reasonableness review, “the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99). Subordinate legislation benefits from a presumption of validity (*Katz Group*, at para. 25). The burden is on the party challenging the subordinate legislation to show that it is not reasonably within the scope of the delegate’s authority (*Vavilov*, at paras. 100 and 109).

[51] *Vavilov* recognized two types of fundamental flaws that would make an administrative decision unreasonable: (1) there is a failure of rationality internal to the reasoning process; or (2) the decision is untenable in light of the factual and legal constraints that bear on it (para. 101). In what follows, I will explain how the principles outlined in *Vavilov* for conducting reasonableness review apply to a review of the *vires* of subordinate legislation.

(1) Reasonableness Review Is Possible in the Absence of Formal Reasons

[52] Most of the time formal reasons are not provided for the enactment of subordinate legislation (*Vavilov*, at para. 137). However, *Vavilov* contemplated reasonableness review in the absence of formal reasons, including in the context of a *vires* review of subordinate legislation (*ibid.*, referring to *Catalyst Paper* and *Green*). “[E]ven in such circumstances, the reasoning process that underlies the decision will not usually be opaque” (*Vavilov*, at para. 137). The reasoning process can often be deduced from various sources.

[53] In *Catalyst Paper*, our Court reviewed the validity of municipal taxation bylaws. Chief Justice McLachlin noted that “[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw” (para. 29). Courts can also look to regulatory impact analysis statements if they are available. As Mancini explains:

... something akin to a form of justification — whether a record of submissions, an accompanying statement of purpose, or specific recitals — may sometimes accompany regulatory action. Specifically — especially in the modern era — the problem of having neither a record nor reasons is less likely to arise. As [John Mark] Keyes noted, the sources for the “reasoning process” of executive legislation “have become increasingly rich as the processes for making it have become more transparent in the latter part of the 20th century and into the 21st.” At the federal level, statutory instruments, like regulations, “are accompanied by Regulatory Impact Analysis Statements outlining the reasons for regulations and their anticipated impact.” Courts can use Regulatory Impact Analysis Statements to assess the reasonableness of executive legislation by providing insight into the interlocking purposes of the enabling statute and regulatory instrument.

(pp. 278-79, citing J. M. Keyes, “Judicial Review of Delegated Legislation: The Long and Winding Road to *Vavilov*”, in University of

Ottawa Faculty of Law, Working Paper No. 2020-14 (June 18, 2020), at p. 11, and J. M. Keyes, *Executive Legislation* (2nd ed. 2010), at ch. 4.)

[54] Even where such sources are not available, “it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli [v. Duplessis]*, [1959] S.C.R. 121]” (*Vavilov*, at para. 137). However, importantly, as I explain below, the issue of whether the regulations is a reasonable decision depends on whether the regulations are justifiably (or reasonably) within the scope of the authority delegated by the enabling legislation.

(2) Reasonableness Review Is Not an Examination of Policy Merits

[55] Justice Pentelchuk was of the view that applying *Vavilov*’s reasonableness standard when reviewing the *vires* of subordinate legislation would violate the principle of separation of powers because the court would be examining the policy merits of the subordinate legislation (paras. 58-59 and 63; see also S. Blake, *Clarity on the standard of review of regulations*, December 20, 2022 (online)).

[56] With respect, this concern is misplaced. As Paul Salembier explains, “[t]he reasonableness standard does not assess the reasonableness of the rules promulgated by the regulation-making authority; rather, it addresses the reasonableness of the regulation-making authority’s interpretation of its statutory regulation-making power” (*Regulatory Law and Practice* (3rd ed. 2021), at p. 159). A court’s role is to review the

legality or validity of the subordinate legislation, not to review whether it is “necessary, wise, or effective in practice” (*Katz Group*, at para. 27, citing *Jafari*, at p. 604; see also Keyes (2021), at pp. 186-88). “It is not an inquiry into the underlying ‘political, economic, social or partisan considerations’” (*Katz Group*, at para. 28, citing *Thorne’s Hardware*, at pp. 112-13).

[57] A court must be mindful of its proper role when reviewing the *vires* of subordinate legislation, especially when it relies on the record, other sources or the context to ascertain the delegate’s reasoning process. Mancini explains:

Importantly courts must organize these various sources properly to preserve the focus on the limiting statutory language. Again, the reasonableness review should not focus on the content of the inputs into the process or the policy merits of those inputs. Rather, courts must key these sources to the analysis of whether the subordinate instrument is consistent with the enabling statute’s text, context, and purpose. For example, Regulatory Impact Analysis Statements can inform a court as to the link between an enabling statute’s purpose and a regulatory aim, much like Hansard evidence. These analyses can help show how the effects of a regulation which, at first blush appear unreasonable, are enabled by the primary legislation. [p. 279]

[58] The potential or actual consequences of the subordinate legislation are relevant only insofar as a reviewing court must determine whether the statutory delegate was reasonably authorized to enact subordinate legislation that would have such consequences. Whether those consequences are in themselves necessary, desirable or wise is not the appropriate inquiry.

(3) The Relevant Constraints

[59] In *Vavilov*, our Court explained that “[e]lements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers” (para. 105). Reviewing the *vires* of subordinate legislation is fundamentally an exercise of statutory interpretation to ensure that the delegate has acted within the scope of their lawful authority under the enabling statute (para. 108; Mancini, at pp. 274-75; see, e.g., *West Fraser Mills*, at para. 23).

[60] Accordingly, the governing statutory scheme, other applicable statutory or common law and the principles of statutory interpretation are particularly relevant constraints when reviewing the *vires* of subordinate legislation (Keyes (2021), at p. 175).

(a) *Governing Statutory Scheme*

[61] “Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision” (*Vavilov*, at paras. 108-9; Mancini, at p. 275).

[62] The language chosen by the legislature in an enabling statute describes the limits and contours of a delegate’s authority (*Vavilov*, at para. 110). The legislature may use precise and narrow language to delineate the power in detail, thereby tightly constraining the delegate’s authority. Alternatively, the legislature may use broad, open-ended or highly qualitative language, thereby conferring broad authority on the delegate (*ibid.*; see also Keyes (2021), at pp. 195-96). Statutory delegates must respect

the legislature's choice in this regard. They "must ultimately comply 'with the rationale and purview'" of their enabling statutory scheme in accordance with its text, context and purpose (*Vavilov*, at para. 108, citing *Catalyst Paper*, at paras. 15 and 25-28, and *Green*, at para. 44).

(b) *Other Statutory or Common Law*

[63] The scope of a statutory delegate's authority may also be constrained by other statutory or common law. Unless the enabling statute provides otherwise, when enacting subordinate legislation, statutory delegates must adopt an interpretation of their authority that is consistent with other legislation and applicable common law principles (*Vavilov*, at para. 111, referring to *Katz Group*, at paras. 45-48; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at para. 40; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 74; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98; *Keyes* (2021), at pp. 205-6).

(c) *Principles of Statutory Interpretation*

[64] Statutory delegates are empowered to interpret the scope of their authority when enacting subordinate legislation. Their interpretation must, however, be consistent with the text, context and purpose of the enabling statute (*Vavilov*, at paras. 120-21; *Keyes* (2021), at p. 193). They must interpret the scope of their authority in accordance with the modern principle of statutory interpretation. The words of the

enabling statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[65] In conducting a *vires* review, a court does not undertake a *de novo* analysis to determine the correct interpretation of the enabling statute and then ask whether, on that interpretation, the delegate had the authority to enact the subordinate legislation. Rather, the court ensures that the delegate’s exercise of authority falls within a reasonable interpretation of the enabling statute, having regard to the relevant constraints.

[66] In what follows, I apply the reasonableness standard to review the *vires* of the *Child Support Guidelines*.

VI. Analysis

A. *Overview of the Child Support Guidelines*

[67] In Canada, child support has been legislated since 1855. Early statutory schemes vested judges with discretion to determine child support amounts based on need. Judges were thus required to decide upon a reasonable amount of child support for the care of the child (*Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 46). This discretionary approach was heavily criticized for being “uncertain,

inconsistent, and often resulting in unfair awards” (para. 48; J. D. Payne and M. A. Payne, *Child Support Guidelines in Canada, 2020* (2020), at p. 1). This was in part because “judges, counsel, or parties underestimat[ed] the cost of raising a child” and because courts would insist on proof of the child’s expenses (*Michel*, at para. 48). This placed the burden of proof on the recipient parent, and where such evidence was not adduced, there was concern that the award would be “subjective and somewhat arbitrary” (*ibid.*, citing *Childs v. Childs* (1990), 107 N.B.R. (2d) 176 (C.A.), at para. 6).

[68] As Martin J. explained in her concurring reasons in *Michel*, the objective of the *Child Support Guidelines* “was to remedy this situation by maintaining the principles core to child support while providing much-needed certainty, consistency, predictability, and efficiency” (para. 49, citing *Francis v. Baker*, [1999] 3 S.C.R. 250, at paras. 39-40). The federal, provincial and territorial governments formed a Family Law Committee (“Committee”) to undertake major research studies on child support in Canada (Payne and Payne, at p. 1). The Committee “recommended the application of a child support formula under the *Divorce Act*, ‘guided by the principle that both parents have a responsibility to meet the financial needs of the children according to their income’” (*Michel*, at para. 49, citing Federal/Provincial/Territorial Family Law Committee, *Report and Recommendations on Child Support* (1995), at p. i). In 1996, following the Committee’s recommendation, Parliament introduced Bill C-41, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, 2nd Sess., 35th Parl., 1996-97 (as passed by the House of Commons on

November 18, 1996). Bill C-41 amended the *Divorce Act* to expressly authorize the GIC to establish guidelines respecting orders for child support (*Divorce Act*, s. 26.1(1)).

[69] On May 1, 1997, the GIC established the *Child Support Guidelines*, which introduced a “radical change” to child support rights and obligations under the *Divorce Act* (Payne and Payne, at p. 1). Our Court has described the purpose of the *Child Support Guidelines* as being to “establish fair levels of support for children from both parents upon marriage breakdown, in a predictable and consistent manner” (*Francis*, at para. 39; see also *Child Support Guidelines*, s. 1). While the *Child Support Guidelines* depart from the discretionary model that preceded them, they continue to reflect the following core principles: (1) child support is the right of the child; (2) the right to support survives the breakdown of the child’s parents’ marriage; (3) child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and (4) the specific amounts of child support owed will vary based upon the income of the payer parent (*D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, at para. 38).

[70] Section 3 of the *Child Support Guidelines* “creates a presumptive rule whereby, unless otherwise provided by the *Divorce Act* or under the Guidelines, the amount of a child support order for children under the age of majority is (a) the amount set out in the applicable table . . . and (b) the amount, if any, determined under section 7 of the Guidelines for special or extraordinary expenses” (Payne and Payne, at p. 12). The table amount “is a function of the income of the paying parent and the number of

children the award is to cover” (*Francis*, at para. 1). The table “focus[es] on a system of ‘average’ justice and move[s] away from creating individual justice on a case-by-case basis” (N. Fera, “New Child-Support Guidelines — A Brief Overview” (1997), 25 R.F.L. (4th) 356, at p. 356). The use of the table is “intended to bring about an objective and predictable determination of child support, and bring an end to the subjective, ad hoc [pre-*Child Support Guidelines*] case decisions” (F. Hudani, ed., *Wilson on Children and the Law* (loose-leaf), at § 4.10). Judges may deviate from the table amount in cases involving children over the age of majority (*Child Support Guidelines*, s. 3(2)), payer parents with an income over \$150,000 (s. 4), special or extraordinary expenses (s. 7), shared parenting time (s. 9(b)) or undue hardship (s. 10).

[71] A proper construction of a provision of the *Child Support Guidelines* “requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual ‘condition[s], means, needs and other circumstances of the children’ on the other” (*Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 33, citing *Francis*, at para. 40).

B. *Mr. Auer’s Challenge*

[72] Mr. Auer bears the burden of proving that the *Child Support Guidelines* are *ultra vires* (*Katz Group*, at para. 25). He submits that the *Child Support Guidelines* are *ultra vires* because they violate two constraints on the GIC’s authority. First, the amounts transferred can only be in respect of “direct child costs” and cannot more

broadly redistribute income between parents (A.F., at para. 57). Mr. Auer submits that this constraint applies because support awards under the *Child Support Guidelines* compensate only for “direct child costs”; “indirect [child] costs” are left to the law of spousal support (para. 56). Second, under s. 26.1(2) of the *Divorce Act*, child-related costs are to be shared according to the parents’ relative abilities to contribute (para. 58).

[73] According to Mr. Auer, the *Child Support Guidelines* violate these two constraints by requiring the payer parent to bear more than their fair share of direct child-related costs. This is because the *Child Support Guidelines* (1) do not take into account the recipient parent’s income; (2) incorrectly assume that parents spend the same linear percentage of income on their children regardless of the parents’ levels of income and the children’s ages; (3) do not take into account government child benefits paid to the recipient parent; (4) do not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) double count the payer parent’s obligations with respect to special or extraordinary expenses.

[74] Below, I will review each of Mr. Auer’s submissions, having regard to the GIC’s authority under the *Divorce Act*. I conclude that the *Child Support Guidelines* are *intra vires* the GIC.

C. *The Child Support Guidelines Are Within the GIC’s Scope of Authority*

(1) The GIC’s Statutory Grant of Authority Is Extremely Broad

[75] Section 26.1(1) of the *Divorce Act* grants the GIC extremely broad authority to establish guidelines respecting orders for child support:

26.1 (1) The Governor in Council may establish guidelines respecting orders for child support, including, but without limiting the generality of the foregoing, guidelines

(a) respecting the way in which the amount of an order for child support is to be determined;

(b) respecting the circumstances in which discretion may be exercised in the making of an order for child support;

(c) authorizing a court to require that the amount payable under an order for child support be paid in periodic payments, in a lump sum or in a lump sum and periodic payments;

(d) authorizing a court to require that the amount payable under an order for child support be paid or secured, or paid and secured, in the manner specified in the order;

(e) respecting the circumstances that give rise to the making of a variation order in respect of a child support order;

(f) respecting the determination of income for the purposes of the application of the guidelines;

(g) authorizing a court to impute income for the purposes of the application of the guidelines; and

(h) respecting the production of information relevant to an order for child support and providing for sanctions and other consequences when that information is not provided.

[76] The use of the language “without limiting the generality of the foregoing” confirms that this plenary power is not limited by anything that follows in s. 26.1(1) (see *Vavilov*, at para. 110; *West Fraser Mills*, at para. 10).

[77] However, this power is not unrestricted. Section 26.1(2) provides as follows:

(2) The 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.

[78] Mr. Auer interprets “the principle that spouses have a joint financial obligation to maintain the children of the marriage” to mean that both parents must contribute equally to child-related costs. I acknowledge that the principle under s. 26.1(2) is mandatory; this is made clear by Parliament’s use of the word “shall” (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 4.05). However, a plain reading of s. 26.1(2) does not support Mr. Auer’s interpretation.

[79] Section 26.1(2) does not require that each parent make an equal financial contribution to maintaining their children. Rather, it states that each parent has 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”. While a “joint financial obligation” means that the parents have a *shared* financial obligation to support their children, it does not necessarily mean that this obligation must be *equal* (see C.A. reasons, at para. 112). The constraint under s. 26.1(2) is expressed in broad terms. For example, it does not prescribe a particular method of estimating child-related costs or state the percentage of child-related costs that each parent must cover. Given

this, while s. 26.1(2) constrains the GIC's extremely broad grant of authority under s. 26.1(1), it does not restrict it as narrowly as Mr. Auer submits.

(2) The GIC Was Authorized Not To Take Into Account the Recipient Parent's Income in Calculating the Table Amounts

[80] Mr. Auer submits that the presumptive table amounts in the *Child Support Guidelines* violate the requirement in s. 26.1(2) that support awards be based on the parents' "relative abilities to contribute" by ignoring the recipient parent's income. In his view, the table amounts cannot be based on the parents' "relative abilities to contribute" if they are based solely on the payer parent's income.

[81] The formula on which the table amounts are based assumes that the payer parent and recipient parent have the same income (chambers judge's reasons, at para. 86). It only considers the payer parent's income and seeks to determine the amount that must be transferred from the payer parent to the recipient parent in order to make both households equally well off (Department of Justice Canada, Child Support Team, *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report* (1997) ("DOJ Report"), at p. 2). As our Court explained in *D.B.S.*, the *Child Support Guidelines* move away from pure need-based criteria towards an approach based on the payer parent's income (para. 47). This approach shapes each parent's free-standing obligation to support their children commensurate with their income, "with the result that the total amount of child support

is determined — and not merely divided — according to the income of the payor parent” (para. 48).

[82] Adopting a formula for calculating the table amounts that does not expressly consider the recipient parent’s income falls within a reasonable interpretation of the authority granted to the GIC. It is reasonable to interpret this authority as being conferred as part of the broad grant under s. 26.1(1), which includes the authority to establish guidelines “respecting the way in which the amount of an order for child support is to be determined” and “respecting the determination of income for the purposes of the application of the guidelines”.

[83] The formula selected by the GIC for calculating the table amounts was recommended by the Committee after extensive research and consultation. In its report, the Committee justified the decision regarding the recipient parent’s income in calculating the table amounts as follows:

Although the formula appears to be based solely on the non-custodial parent’s income, this does not imply that the custodial parent does not contribute to the financial needs of the child. On the contrary — because the child lives with the custodial parent and shares the same living standard as this parent, the custodial parent will continue to pay for the remaining expenses in proportion to his/her income. [p. i]

[84] The Committee considered different options for the formula and how the awards should change with the recipient parent’s income:

With some other formulas the award rises; with others it falls; while with still others it does not change at all. Thus, there is considerable disagreement over how awards should change with the custodial parent's income. The Revised Fixed Percentage formula [which was recommended by the Committee] retains the principle common to all fixed percentage systems: the award does not vary with the income of the custodial parent. [p. ii]

[85] The Committee explained that its recommended approach “is essentially child-centred: the child benefits from the standard of living of the non-custodial parent before the separation/divorce and should retain this benefit after the separation/divorce” (p. ii).

[86] During the debates on Bill C-41, the then Minister of Justice, Allan Rock, reiterated the Committee's justifications. He explained that it is fair to assume that the recipient parent is supporting their child in a manner that is proportionate to their income, because the child lives with the recipient parent and their standards of living are inseparable (House of Commons Standing Committee on Justice and Legal Affairs, *Evidence*, No. 54, 2nd Sess., 35th Parl., October 21, 1996, at 17:10 to 17:15; Standing Senate Committee on Social Affairs, Science and Technology, *Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology*, No. 17, 2nd Sess., 35th Parl., December 11 and 12, 1996).

[87] As these justifications make clear, the formula for calculating the table amounts takes into account the ways in which the recipient parent contributes to the financial needs of the child, as required by s. 26.1(2). It does so by assuming that, because the child resides with the recipient parent, that parent will support the child in

a manner that is proportionate to their income. This assumption is consistent with the objectives of the *Child Support Guidelines*, which include establishing a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation (s. 1).

[88] The parties do not dispute that recipient parents contribute to child-related costs by virtue of living with the children. While some recipient parents may contribute a larger proportion of their income towards child-related costs than others, it was open to the GIC, in establishing a nationwide regime for child support, to assume that recipient parents contribute to child-related costs in proportion to their income. In reviewing the *vires* of the *Child Support Guidelines*, our Court must not assess the policy merits of that assumption to determine whether it is “necessary, wise, or effective in practice” (*Katz Group*, at para. 27, citing *Jafari*, at p. 604).

[89] For these reasons, I conclude that an interpretation of the GIC’s broad authority to establish guidelines “respecting the way in which the amount of an order for child support is to be determined” and “respecting the determination of income for the purposes of the application of the guidelines” as including the authority to adopt a formula for calculating the table amounts based solely on the payer parent’s income, is reasonable.

- (3) The GIC Was Authorized To Assume That Parents Spend the Same Linear Percentage of Their Income on Their Children

[90] Mr. Auer submits that the *Child Support Guidelines* unreasonably assume that parents spend the same linear percentage of income on their children regardless of the parents' income levels and the children's ages. In his view, as income rises, the overall amount spent on children increases but the percentage of income spent on children decreases (A.F., at para. 138). He submits that this assumption results in payer parents paying a disproportionate share of child-related costs.

[91] The table amounts assume that parents spend the same linear percentage of income on their children. The table establishes a fixed monetary amount of support for payer parents whose annual income does not exceed \$150,000. Where the payer parent's annual income exceeds that amount, the amount payable is increased by a designated percentage of the payer parent's income over \$150,000 (Payne and Payne, at p. 382). However, s. 4(b)(ii) of the *Child Support Guidelines* authorizes a court to depart from the table amount in respect of the payer parent's income above \$150,000 if it considers the table amount to be "inappropriate" having regard to the "condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children".

[92] Mr. Auer submits that courts are unlikely to depart from a linear application of the table amounts despite having the discretion to do so (A.F., at para. 139). He asks our Court to consider this reality in assessing the validity of the *Child Support Guidelines*.

[93] Under s. 26.1(1)(b) of the *Divorce Act*, the GIC is authorized to establish guidelines “respecting the circumstances in which discretion may be exercised in the making of an order for child support”. Thus, it was plainly open to the GIC to give courts the discretion to depart from the table amounts for annual payer parent incomes exceeding \$150,000 if they consider those amounts to be “inappropriate”. Courts have the discretion to decide whether to depart from a linear application of the table amounts. How this discretion is exercised has no bearing on the legality or validity of the *Child Support Guidelines*.

[94] Mr. Auer argues that the *Child Support Guidelines* fail to reflect the fact that parents spend different percentages of their income on children at different ages. The *Child Support Guidelines* do not consider the ages of the children, except when they are over the age of majority. However, the GIC’s authority under s. 26.1(1) of the *Divorce Act*, which includes the authority to establish guidelines “respecting the way in which the amount of an order for child support is to be determined”, can reasonably be interpreted as authorizing guidelines which do not take children’s specific ages into account when calculating child support awards. Mr. Auer has not met the burden of proving that the *Child Support Guidelines* are invalid on this basis (*Katz Group*, at para. 25).

- (4) The GIC Was Authorized Not To Take Into Account Government Child Benefits Paid to the Recipient Parent in Calculating Child Support Awards

[95] The formula used to calculate the table amounts does not include the federal Canada Child Benefit and the GST/HST rebate for children paid to the recipient parent (DOJ Report, at p. 5; Payne and Payne, at p. 121). Mr. Auer argues that these benefits increase the recipient parent's standard of living and decrease the income needs created by the child (A.F., at para. 97). He submits that failing to consider them in calculating the table amounts causes the payer parent to overcontribute, contrary to the principle under s. 26.1(2) of the *Divorce Act*.

[96] The *Child Support Guidelines* represent a move away from a purely needs-based approach towards one that seeks to maximize the amount available to be spent on children while ensuring that payer parents can adequately support themselves (*D.B.S.*, at para. 54; DOJ Report, at p. 1). Government benefits improve children's welfare by increasing the ability of recipient parents to spend more on them than would otherwise be possible. These benefits "are deemed to be the government's contribution to children and [are] not available as income to the receiving parent" (DOJ Report, at p. 5).

[97] Section 26.1(1)(f) of the *Divorce Act* authorizes the GIC to establish guidelines "respecting the determination of income for the purposes of the application of the guidelines". The GIC elected not to include government benefits paid to the recipient parent when determining income for the purposes of calculating the table amounts. That decision falls reasonably within the scope of the GIC's broad authority.

Again, it is not for our Court to assess the policy merits of that decision (*Katz Group*, at paras. 27-28).

(5) The GIC Was Authorized Not To Take Into Account the Payer Parent's Direct Spending When That Parent Exercises Less Than 40 Percent of Annual Parenting Time

[98] The table amounts do not take into account the payer parent's direct spending on the child; they "do not assume that the payor parent pays for the housing, food, or any other expense for the child" (*Contino*, at para. 52). However, s. 9 of the *Child Support Guidelines* provides that if each spouse exercises at least 40 percent of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account: (a) the amounts set out in the applicable tables for each of the spouses; (b) the increased costs of shared parenting time arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[99] Once it is established that a payer parent exercises 40 percent or more of annual parenting time, a court may consider the payer parent's direct spending on the child under s. 9(b). Section 9(b) "recognizes that the *total cost* of raising children in shared custody situations may be greater than in situations where there is sole custody" (*Contino*, at para. 52 (emphasis in original)). It requires courts "to examine the budgets and actual child care expenses of each parent. These expenses will be apportioned between the parents in accordance with their respective incomes" (para. 53).

[100] Mr. Auer submits that it is unreasonable for the table amounts to assume that payer parents do not spend directly on their children in addition to making support payments. In his view, failing to recognize that payer parents may spend directly on their children when they exercise between 0 and 39 percent of annual parenting time violates the principle under s. 26.1(2) of the *Divorce Act* that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities. He submits that the *Child Support Guidelines* are *ultra vires* on this basis.

[101] The GIC is authorized under s. 26.1(1) of the *Divorce Act* to establish guidelines “respecting the way in which the amount of an order for child support is to be determined” and “respecting the circumstances in which discretion may be exercised in the making of an order for child support”. In my view, this authority permits the GIC to allow courts to consider payer parents’ direct spending on their children only when the payer parent exercises at least 40 percent of annual parenting time. Section 26.1(2) states only that parents have a “joint financial obligation” to maintain their children in accordance with their relative abilities to contribute. It does not require that each parent make an equal financial contribution to child-related costs. Thus, the principle in s. 26.1(2) is not violated even if setting the threshold for considering payer parents’ direct spending on their children at 40 percent of annual parenting time results in some payer parents paying more than half of the child-related costs.

[102] I do not mean to suggest that payer parents overcontribute. However, it is important to keep in mind, as counsel for Ms. Auer explained during the hearing, that recipient parents bear many financial responsibilities that are an inherent part of providing primary care for a child (transcript, at pp. 45-47). Because the child lives primarily with the recipient parent, the payer parent may not always share in these responsibilities.

[103] Furthermore, s. 10(1) of the *Child Support Guidelines* provides that a court may, on either spouse's application, award an amount of child support that is different from the amount determined under ss. 3 to 5, 8 or 9 if the court finds that the spouse making the request would otherwise suffer undue hardship. Section 10(2) sets out circumstances that may cause a spouse to suffer undue hardship. One such circumstance is that "the spouse has unusually high expenses in relation to exercising parenting time with a child". Courts therefore retain the discretion to ensure that payer parents contribute to child-related costs in accordance with their ability to do so without suffering undue hardship, including as a result of having unusually high expenses in relation to exercising parenting time.

[104] Interpreting the enabling statute as authorizing the making of guidelines which set the threshold percentage for when a court may consider the increased costs of shared parenting time arrangements is reasonable, as it falls squarely within the GIC's broad grant of authority and Mr. Auer has not demonstrated that it violates the principle in s. 26.1(2). As mentioned, whether the GIC's decision was "necessary, wise,

or effective in practice” is irrelevant in the context of a *vires* review (*Katz Group*, at para. 27, citing *Jafari*, at p. 604).

(6) The GIC Was Authorized To Establish a Separate Category of Special or Extraordinary Expenses

[105] Section 3(1) of the *Child Support Guidelines* sets out the presumptive rule regarding child support awards: unless otherwise provided, the amount of a child support order for children under the age of majority is (a) the amount set in the applicable table and (b) the amount, if any, determined under s. 7 (special or extraordinary expenses).

[106] Mr. Auer submits that adding s. 7 expenses to the table amounts in accordance with the presumptive rule results in the “double counting” of child expenses for which the payer parent is responsible because “[a]ll conceivable average costs are reflected in the table amount” (A.F., at paras. 121 and 128). He adds that the scale chosen by the GIC to calculate the table amounts “produced high child cost estimates and, therefore, the highest child support awards” (para. 123). Thus, Mr. Auer submits that the *Child Support Guidelines* result in the payer parent overcontributing to child-related costs, contrary to s. 26.1(2) of the *Divorce Act*.

[107] I reject Mr. Auer’s submission.

[108] Mr. Auer’s submission is rooted in a purely needs-based approach to child support. The underlying theory of a purely needs-based regime is that “both parents should provide enough support to their children to meet their needs, and that they should share this obligation proportionate to their incomes” (*D.B.S.*, at para. 45). A purely needs-based approach begins by calculating the child-related costs. It then apportions those costs between the parents. If the amount of child support were to be determined solely on the basis of the child’s needs, it would be problematic for the presumptive rule to result in the “double counting” of certain special or extraordinary expenses.

[109] However, the *Child Support Guidelines* have eschewed a purely needs-based approach to child support (*D.B.S.*, at para. 54). The *Child Support Guidelines* seek to ensure that the child benefits as much as possible from the income of both parents, in accordance with their relative abilities to contribute. Support awards recognize that the child benefitted from the standard of living of the payer parent pre-separation and should continue to retain this benefit post-separation (Committee, at p. ii; R. Finnie, C. Giliberti and D. Stripinis, *An Overview of the Research Program to Develop a Canadian Child Support Formula* (1995), at p. 28). As the DOJ Report explains at p. 1:

The concept of “cost of raising children” is an illusory theoretical construct. Spending on children is not fixed; it changes as the income of either parent changes. Families with higher incomes spend more on their children than do families of lower income. In the post separation arrangement, the Federal Child Support Guidelines aim to approximate, as

closely as possible, the spending on the children that occurred in the pre-separation family.

[110] In short, the *Child Support Guidelines* begin with the payer parent's income and determine the amount of support that that parent must pay to ensure that the child continues to benefit from their income post-separation. The *Child Support Guidelines* do not determine the child's costs up front and then ask the payer parent to cover a portion of them. It is assumed that "any financial contribution from the [payer] parent will typically be used to improve the child's circumstances" (Payne and Payne, at p. 7).

[111] The parent applying for s. 7 expenses must demonstrate that the expenses are necessary in relation to the child's best interests and are reasonable in relation to the means of the spouses and the child as well as the family's spending pattern prior to the separation. Where the recipient parent has applied for s. 7 expenses, the payer parent may challenge the necessity or reasonableness of those expenses. A payer parent could argue that the alleged s. 7 expenses are already covered by the table amount. However, it is ultimately up to the court to determine whether the applying parent has established that the s. 7 expenses they seek are necessary and reasonable.

[112] The GIC's broad authority under s. 26.1(1) of the *Divorce Act* to establish guidelines "respecting the way in which the amount of an order for child support is to be determined" clearly entitled the GIC to adopt guidelines that do not focus purely on the child's needs but instead seek to ensure that the child continues to benefit from the payer parent's income in accordance with that parent's ability to contribute. Further,

the GIC’s authority to establish guidelines “respecting the circumstances in which discretion may be exercised in the making of an order for child support” entitled the GIC to grant courts the discretion to determine whether to include certain special or extraordinary expenses in a child support award.

[113] Thus, contrary to Mr. Auer’s assertion, it is not problematic if there is some overlap between the expenses contemplated in the table amounts and “special or extraordinary” expenses under s. 7. The child continues to benefit from the payer parent’s income in accordance with that parent’s ability to contribute. Mr. Auer has not demonstrated that the potential for “double counting” s. 7 expenses arises from an unreasonable interpretation of the authority granted to the GIC in light of the relevant constraints, and has not met the burden of proving that the *Child Support Guidelines* are *ultra vires*.

VII. Conclusion

[114] The reasonableness standard under the *Vavilov* framework presumptively applies when reviewing the *vires* of subordinate legislation. *Katz Group* continues to provide helpful guidance. However, for subordinate legislation to be *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute, it no longer needs to be “irrelevant”, “extraneous” or “completely unrelated” to that statutory purpose. Continuing to maintain this threshold from *Katz Group* would be inconsistent with robust reasonableness review and would undermine *Vavilov*’s promise of simplicity, predictability and coherence.

[115] The *Child Support Guidelines* fall reasonably within the GIC's scope of authority under s. 26.1 of the *Divorce Act*, having regard to the relevant constraints. Under s. 26.1(1), the GIC is granted extremely broad authority to establish guidelines respecting child support. Section 26.1(2) constrains this authority by requiring that the guidelines 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. The *Child Support Guidelines* respect this constraint.

[116] The GIC was entitled to choose an approach to calculating child support that (1) does not take into account the recipient parent's income; (2) assumes that parents spend the same linear percentage of income on their children regardless of the parents' levels of income and the children's ages; (3) does not take into account government child benefits paid to recipient parents; (4) does not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) risks double counting certain special or extraordinary expenses. Each of these decisions fell squarely within the scope of the authority delegated to the GIC under the *Divorce Act*.

[117] The appeal is dismissed with costs to the respondent Aysel Igoevna Auer.

Appeal dismissed with costs.

Solicitors for the appellant: Jensen Shawa Solomon Duguid Hawkes, Calgary; Ronald Robinson Barrister & Solicitor, Calgary; Paul Daly Law Professional Corporation, Ottawa.

Solicitors for the respondent Aysel Igorevna Auer: Huizinga Di Toppa Coles & Layton, Edmonton.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Department of Justice, National Litigation Sector — Ontario Regional Office, Toronto; Attorney General of Canada, Department of Justice, National Litigation Sector — Prairie Regional Office, Edmonton.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Crown Law Office — Civil, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General of British Columbia, Legal Services Branch, Vancouver.

Solicitor for the intervener the Attorney General of Saskatchewan: Saskatchewan Ministry of Justice and Attorney General, Regina.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario and the Health Justice Program: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Canadian Council for Refugees: Jamie Liew, Ottawa; Lehal Law Corporation, Delta (B.C.).

Solicitor for the intervener the City of Calgary: City of Calgary, Law/Legal Services and Security, Calgary.

Solicitors for the interveners the Chicken Farmers of Canada, the Egg Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers: Conway Baxter Wilson, Ottawa.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Hasa Avocats Inc., Montréal.

Solicitor for the intervener the Workers' Compensation Board of British Columbia: Workers' Compensation Board of British Columbia, Richmond.

*Solicitors for the intervener the Canadian Association of Refugee
Lawyers: Refugee Law Office, Toronto; Landings, Toronto.*

*Solicitors for the intervener the Advocates for the Rule of Law: Henein
Hutchison Robitaille, Toronto.*

*Solicitor for the intervener the Ecojustice Canada Society: Ecojustice
Canada Society, Toronto.*