SUPREME COURT OF CANADA

CITATION: TransAlta Generation Partnership *v.* Alberta, 2024 SCC 37

APPEAL HEARD: April 25, 2024
JUDGMENT RENDERED: November 8, 2024
DOCKET: 40570

BETWEEN:

TransAlta Generation Partnership and
TransAlta Generation (Keephills 3)
Appellants

and

His Majesty The King in Right of the Province of Alberta and
Minister of Municipal Affairs for the Province of Alberta
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,
Chicken Farmers of Canada, Egg Farmers of Canada,
Turkey Farmers of Canada, Canadian Hatching Egg Producers,
Workers' Compensation Board of British Columbia,
Canadian Association of Refugee Lawyers,
Association québécoise des avocats et avocates en droit de l'immigration,
Advocates for the Rule of Law and
National Association of Pharmacy Regulatory Authorities
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 65)	Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

TransAlta Generation Partnership and
TransAlta Generation (Keephills 3) *Appellants*

v.

His Majesty The King in Right of the Province of Alberta and
Minister of Municipal Affairs for the Province of Alberta *Respondents*

and

Attorney General of Ontario,
Attorney General of Quebec,
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Indexed as: TransAlta Generation Partnership *v.* Alberta

2024 SCC 37

File No.: 40570.

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 — Administrative discrimination — Property assessment guidelines challenged as ultra vires provincial minister — Standard of review applicable to review of vires of subordinate legislation — Whether guidelines within scope of authority delegated to minister by enabling statute — Whether guidelines violate common law rule against administrative discrimination — Municipal Government Act, R.S.A. 2000, c. M-26, ss. 322, 322.1 — 2017 Alberta Linear Property Assessment Minister's Guidelines, ss. 1.003, 2.003.

TransAlta owns coal-fired electric power generation facilities in Alberta. In 2016, TransAlta entered into an off-coal agreement with Alberta. Under that agreement, TransAlta agreed to cease coal-fired emissions on or before December 31, 2030, in exchange for substantial transition payments from Alberta for 14 years to compensate TransAlta for the loss resulting from the reduced life of its coal-fired facilities. TransAlta's coal-fired facilities are assessed as linear property for municipal taxation purposes. Sections 322 and 322.1 of Alberta's *Municipal Government Act* ("*MGA*") authorize the province's Minister of Municipal Affairs to establish guidelines for assessing the value of linear property.

In 2017, the Minister established the *2017 Alberta Linear Property Assessment Minister's Guidelines* ("*Linear Guidelines*") under the *MGA*. Sections 1.003 and 2.003 of the *Linear Guidelines* deprive TransAlta of the ability to claim additional depreciation on the basis of the reduction in its facilities' lifespan arising from the off-coal agreement. TransAlta challenged the *vires* of the *Linear Guidelines* on two bases: (1) they violate the common law rule against administrative discrimination; and (2) they are inconsistent with the purposes of the *MGA*.

The chambers judge upheld the validity of the *Linear Guidelines* and found that the *Linear Guidelines* did not discriminate against TransAlta. The Court of Appeal determined that the *Linear Guidelines* did not discriminate against TransAlta and held that the chambers judge did not err in finding that they were within the Minister's authority.

Held: The appeal should be dismissed.

As set out in the companion case *Auer v. Auer*, 2024 SCC 36, the reasonableness standard under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, presumptively applies when reviewing the *vires* of subordinate legislation. In addition, certain principles from *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, continue to inform reasonableness review, but the threshold from *Katz Group* used to determine whether subordinate legislation is *ultra vires* on the basis that it is inconsistent with the purpose of the enabling statute — that it be irrelevant, extraneous

or completely unrelated to that statutory purpose — is no longer applicable to this analysis. As well, the governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when determining whether subordinate legislation falls reasonably within the scope of the delegate's authority. In the instant case, no exception to the presumption of reasonableness review applies and thus the reasonableness standard applies when reviewing the *vires* of the *Linear Guidelines*. Having regard to the governing statutory scheme, the principles of statutory interpretation, and the common law rule against administrative discrimination, the *Linear Guidelines* are *intra vires* the Minister.

Administrative discrimination arises when subordinate legislation expressly distinguishes among the persons to whom its enabling legislation applies. Administrative discrimination is different than discrimination in the context of the *Canadian Charter of Rights and Freedoms* or human rights legislation. It relates to the drawing of distinctions between persons or classes that are discriminatory in a non-pejorative sense, in that they simply do not apply equally to all those engaged in the activity that is the subject of the enactment. The common law rule against administrative discrimination provides that subordinate legislation that discriminates in the administrative law sense is invalid unless the discrimination is authorized — either expressly or by necessary implication — by the enabling statute. It is concerned with ensuring that statutory delegates act within the scope of their authority when they distinguish between the persons to whom the enabling legislation applies. The question

of statutory authorization to discriminate falls within the reasonableness review to be conducted in a *vires* challenge to subordinate legislation, unless the legislature has indicated otherwise or a question relating to the rule of law arises which should be reviewed for correctness.

In the instant case, the *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by singling them out as being ineligible to claim additional depreciation on the basis of the off-coal agreements. The fact that the *Linear Guidelines* treat all parties to off-coal agreements in the same way does not mean that they are not discriminatory; they treat all parties to off-coal agreements in the same discriminatory way, as compared with owners of linear property who are not parties to off-coal agreements and expressly distinguish between owners of linear property who are parties to off-coal agreements and those who are not parties to such agreements, though both are subject to the *MGA*.

The *MGA* does not expressly authorize the Minister to discriminate against TransAlta; however, that discrimination is statutorily authorized by necessary implication. To ensure that the assessment of TransAlta's coal-fired facilities was current, correct, fair and equitable in accordance with the purpose of the *MGA*, it falls within a reasonable interpretation of the Minister's statutory grant of power to conclude that he was authorized to deprive TransAlta of the ability to claim additional depreciation. Transition payments under the off-coal agreement account for some loss of value to TransAlta's coal-fired facilities due to their reduced life and the existence

of the off-coal agreement is a specification or characteristic of TransAlta's coal-fired facilities that the Minister was authorized to consider in establishing valuation standards for those facilities. The *Linear Guidelines* are consistent with the purposes of the *MGA* and do not violate the common law rule against administrative discrimination; they are therefore *intra vires* the Minister.

Cases Cited

Applied: *Auer v. Auer*, 2024 SCC 36; **referred to:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *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; *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; *La Rose v. Canada*, 2023 FCA 241, 488 D.L.R. (4th) 340; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Fédération des producteurs de fruits et légumes du Québec v. Conserverie canadienne Ltée*, [1990] R.J.Q. 2866; *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90; *Shell Canada Products Ltd. v. Vancouver*

(City), [1994] 1 S.C.R. 231; *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126 (QL).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms.

Matters Relating to Assessment and Taxation Regulation, Alta. Reg. 220/2004, s. 8(2).

Ministerial Order No. MAG:021/17, December 19, 2017.

Municipal Government Act, R.S.A. 2000, c. M-26, ss. 1(1)(n), 284(1)(c), (f.01), (k), 292(1), (2), 322, 322.1.

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APPEAL from a judgment of the Alberta Court of Appeal (Martin, Hughes and Kirker JJ.A.), 2022 ABCA 381, [2022] A.J. No. 1393 (Lexis), 2022 CarswellAlta 3387 (WL), affirming a decision of Price J., 2021 ABQB 37, [2021] A.J. No. 115 (Lexis), 2021 CarswellAlta 174 (WL). Appeal dismissed.

Michael J. Donaldson, K.C., *Michael Sobkin*, *Andrea Sam* and *Katie Sykes*, for the appellants.

Greg G. Plester, *Rebecca L. Kos* and *Alvin R. Kosak*, for the respondent.

Judie Im and *Michele Valentini*, for the intervener the Attorney General of Ontario.

Stéphane Rochette and *Francesca Boucher*, for the intervener the Attorney General of Quebec.

Emily Lapper and *Christine Bant*, for the intervener the Attorney General of British Columbia.

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Aubin P. Calvert and *Devin Eeg*, for the intervener the Trial Lawyers Association of British Columbia.

Mannu Chowdhury, for the intervener HIV & AIDS Legal Clinic Ontario and the Health Justice Program.

Alyssa Holland, *David Wilson* and *Julie Mouris*, for the interveners the Chicken Farmers of Canada, the Egg Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers.

Johanna Goosen, for the intervener the Workers' Compensation Board of British Columbia.

Andrew J. Brouwer and *Erin V. Simpson*, for the intervener the Canadian Association of Refugee Lawyers.

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

Ewa Krajewska, *Peter Henein* and *Brandon Chung*, for the intervener the Advocates for the Rule of Law.

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

The judgment of the Court was delivered by

CÔTÉ J. —

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I. Overview

[1] TransAlta Generation Partnership and TransAlta Generation (Keephills 3) (collectively, "TransAlta") own coal-fired electric power generation facilities in Alberta. In 2016, TransAlta entered into an agreement with the Crown in Right of Alberta entitled "Off-Coal Agreement". Under that agreement, TransAlta agreed to cease coal-fired emissions by December 31, 2030, in exchange for substantial

"transition payments" from Alberta for 14 years to compensate TransAlta for the loss resulting from the reduced life of its coal-fired facilities.

[2] TransAlta challenges the *vires* of the *2017 Alberta Linear Property Assessment Minister's Guidelines* (2018) ("*Linear Guidelines*") issued by the Minister of Municipal Affairs under the *Municipal Government Act*, R.S.A. 2000, c. M-26 ("*MGA*"). The *Linear Guidelines* set out the procedures for assessing all "linear property" for municipal taxation purposes. TransAlta's coal-fired facilities are considered "linear property". The *Linear Guidelines* provide that TransAlta and other parties to off-coal agreements are ineligible to claim additional depreciation to account for the reduced life of their coal-fired facilities.

[3] TransAlta submits that the *Linear Guidelines* are *ultra vires* the Minister on two bases: (1) they violate the common law rule against administrative discrimination by discriminating, without statutory authorization, against parties who have entered into off-coal agreements with Alberta; and (2) they are inconsistent with the purposes of the *MGA*.

[4] In the companion case, *Auer v. Auer*, 2024 SCC 36, our Court holds that, as established in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the reasonableness standard presumptively applies when reviewing the *vires* of subordinate legislation. Given that no exception to that presumption applies here, this appeal provides our Court with an opportunity to illustrate how the reasonableness standard of review applies to a *vires* review of

subordinate legislation when the challenger invokes the common law rule against administrative discrimination.

[5] As I will explain, the *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by depriving them of the ability to claim additional depreciation reflecting the reduced lifespan of their coal-fired facilities. However, that discrimination is statutorily authorized by necessary implication. To ensure that the assessment of TransAlta's coal-fired facilities was "current, correct, fair and equitable" in accordance with the purposes of the *MGA* (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 46), it falls within a reasonable interpretation of the Minister's statutory grant of power to conclude that he was authorized to deprive TransAlta of the ability to claim additional depreciation. This is because the transition payments from Alberta to TransAlta under the Off-Coal Agreement already account for at least some loss of value to TransAlta's coal-fired facilities due to their reduced life. Further, the existence of the Off-Coal Agreement is a "specification" or "characteristic" of TransAlta's coal-fired facilities that the Minister was authorized to consider in establishing valuation standards for those facilities.

[6] Given my conclusion that it is a reasonable interpretation of the Minister's statutory grant of power to conclude that discrimination is statutorily authorized by necessary implication, it follows that the *Linear Guidelines* are consistent with the purposes of the *MGA*. To reiterate, the *Linear Guidelines* serve to ensure that tax

assessments are “current, correct, fair and equitable” in accordance with the purposes of the *MGA*.

[7] Thus, having regard to the governing statutory scheme, the principles of statutory interpretation, and the common law rule against administrative discrimination, I conclude that the *Linear Guidelines* are *intra vires* the Minister.

II. Facts

[8] TransAlta’s coal-fired facilities are assessed as “linear property” for municipal taxation purposes. Section 284(1)(k) of the *MGA* defines “linear property”, and ss. 322 and 322.1 authorize the Minister of Municipal Affairs to establish guidelines for assessing the value of linear property. In 2017, the Minister established the *Linear Guidelines*, which provide that “[t]here will be no recognition [of] or adjustment [to depreciation] in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation” (s. 1.003(d)). TransAlta brought an application for judicial review challenging the *vires* of the *Linear Guidelines* on several bases, including that they discriminate against TransAlta by depriving it, without statutory authorization, of the right to claim a form of depreciation that is available to linear property that is not subject to an off-coal agreement.

III. Judicial History

A. *Court of Queen's Bench of Alberta, 2021 ABQB 37*

[9] The chambers judge upheld the validity of the *Linear Guidelines*. She noted that, following *Vavilov*, the reasonableness standard applies when assessing the *vires* of subordinate legislation. However, her application of the reasonableness standard was largely informed by *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810. In her view, the *Linear Guidelines* were not "irrelevant", "extraneous" or "completely unrelated" to the purposes of the *MGA* (para. 57, referring to *Katz Group*, at para. 28). The *MGA* granted the Minister broad authority to establish valuation standards for regulated property, such as TransAlta's coal-fired facilities. The Minister was not limited to adopting the market value standard.

[10] The chambers judge found that the *Linear Guidelines* did not discriminate against TransAlta for two reasons. First, they did not deprive TransAlta of a form of depreciation to which it was previously entitled. Second, they did not deprive TransAlta of a form of depreciation applicable to other types of linear property. However, she explained that even if the *Linear Guidelines* were discriminatory, the Minister was authorized by the *MGA* to discriminate against TransAlta because "the creation and implementation of an assessment regime necessarily includes drawing distinctions among various types of properties" (para. 73).

B. *Court of Appeal of Alberta, 2022 ABCA 381*

[11] The Court of Appeal unanimously dismissed TransAlta's appeal. Regarding the standard of review, the court held that the principles articulated in *Katz Group* were not overtaken or modified by *Vavilov*. Applying *Katz Group*, the court held that the chambers judge did not err in finding that the *Linear Guidelines* were within the Minister's authority.

[12] The court determined that the *Linear Guidelines* did not discriminate against TransAlta since the impugned provisions applied to all coal-fired facilities subject to off-coal agreements, not just to those owned by TransAlta. In the court's view, the Minister was authorized to distinguish between coal-fired facilities and other types of electric power generation properties because the Minister was generally authorized to make regulations respecting "any . . . matter considered necessary to carry out the intent of" the *MGA*, and drawing distinctions between different classes of properties was a "necessary incident" of the authority to establish a property valuation regime (paras. 84-85).

IV. Issues

[13] 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 *Linear Guidelines ultra vires* the Minister under the *MGA*?

V. Standard of Review

[14] As set out in the companion case, *Auer*, the reasonableness standard under *Vavilov* presumptively applies when reviewing the *vires* of subordinate legislation. No exception to the presumption of reasonableness review applies in this case. Indeed, the legislature has not indicated that the *Linear Guidelines* must be reviewed on a different standard, and the rule of law does not require that the correctness standard apply. Thus, the reasonableness standard applies when reviewing the *vires* of the *Linear Guidelines*.

[15] As explained in *Auer*, *Katz Group* continues to provide helpful guidance and inform reasonableness review. In particular, the following principles from *Katz Group* continue to apply:

- Subordinate legislation "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175 ("*GGPPA*"), 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).

- Subordinate legislation continues to benefit from a presumption of validity (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 54).

- The challenged subordinate legislation and the enabling statute are to be interpreted using a broad and purposive approach to statutory interpretation (see *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 28; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635, at para. 12).

- A review of the *vires* of subordinate legislation does not involve assessing policy merits. 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. 28).

[16] At the same time, 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 (see *Auer*, at paras. 4, 41 and 49; see also *Katz Group*, at para. 28). Continuing to maintain this threshold from *Katz Group* would be inconsistent with the robust reasonableness review introduced by *Vavilov* and would undermine *Vavilov*'s promise of simplicity, coherence and predictability.

[17] 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 (*Vavilov*, at para. 108; M. P. Mancini, "One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review" (2024), 55 *Ottawa L. Rev.* 245, at pp. 274-75; see, e.g., *West Fraser Mills*, at para. 23). This exercise must be carried out in accordance with the modern principle of statutory interpretation (*Vavilov*, at paras. 120-21; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). The governing statutory scheme, other applicable statutory or common law, and the principles of statutory interpretation are particularly relevant constraints when determining whether the subordinate legislation at issue falls reasonably within the scope of the delegate's authority (J. M. Keyes, *Executive Legislation* (3rd ed. 2021), at p. 175).

[18] Before I begin this analysis, I provide an overview of the Off-Coal Agreement and the relevant legislation.

VI. Overview of the Off-Coal Agreement, the *MGA* and the *Linear Guidelines*

A. *The Off-Coal Agreement*

[19] TransAlta entered into the Off-Coal Agreement with Alberta on November 24, 2016. TransAlta agreed to cease coal-fired emissions on or before December 31, 2030 (Off-Coal Agreement, s. 2, reproduced in A.R., at p. 151). In exchange, Alberta agreed to make 14 annual transition payments of $39,851,704.60 to TransAlta (s. 3(a)).

[20] The Off-Coal Agreement does not expressly refer to property taxes or depreciation. However, the amount of the transition payments was calculated by taking the net book value of the coal-fired facilities as provided by TransAlta, "[p]ro-rated by percentage of life remaining after 2030 to give proxy for 2030 [net book value]: divided by remaining years under federal end-of-life as of November 2016, then multiplied by years stranded" (Sch. A). This formula demonstrates that the transition payments account for at least some loss of value to TransAlta's coal-fired facilities arising from their reduced lifespan under the Off-Coal Agreement. As the Court of Appeal noted, "[i]t is evident on the face of the Off-Coal Agreements that the Province sought to address some loss of value arising from the reduced life of the appellants' coal-fired electricity generation plants and to treat affected companies equivalently" (para. 23).

[21] Further, it is noteworthy that the Off-Coal Agreement provides that it runs with the facilities. Indeed, TransAlta may transfer title to or ownership interest in its facilities with Alberta's consent, but only if any new owner agrees to be bound by the terms of the Off-Coal Agreement (s. 11(n)).

B. *The Municipal Government Act*

[22] The *MGA* regulates property assessment and taxation in Alberta (*Capilano,* at para. 9; Alberta Municipal Affairs, *Guide to Property Assessment and Taxation in Alberta* (2018) ("*Guide*"), at p. 2). Property assessment is the process of estimating a property's dollar value for taxation purposes (*Guide*, at p. 3). Under the *MGA,* "assessment" means "a value of property determined in accordance with this Part [(i.e.,

Part 9 ‘Assessment of Property’)] and the regulations” (s. 284(1)(c)). Property taxation is the process of applying a tax rate to a property’s assessed value to determine the tax payable (*Guide*, at p. 3).

[23] The *MGA* sets out two types of valuation standards: the market value standard and the regulated standard (*Guide*, at p. 3). Most properties are assessed using the market value standard. The market value of a property is “the price a property might reasonably be expected to sell for if sold by a willing seller to a willing buyer after appropriate time and exposure in an open market” (p. 5; see also *MGA*, s. 1(1)(n)).

[24] There are three approaches to determining the market value of a property: the sales comparison approach, the cost approach, and the income approach (*Guide*, at p. 6). Under the sales comparison approach, the market value of a property is determined by considering the sale price of similar properties. Under the cost approach, the market value of a property is determined by aggregating the market value of the land and the net cost of improvements. This approach assumes that a buyer would not pay more to purchase a property than what it would cost to buy the land and rebuild the same improvements. Under the income approach, the market value of a property is determined on the basis of its income-earning potential. This approach is used to assess the value of rental properties (p. 7).

[25] The regulated standard is a property assessment standard based on rates and procedures prescribed by the Ministry of Municipal Affairs (*Guide*, at p. 29). It is used to assess properties that are difficult to assess under the market value standard

because they seldom trade in the marketplace, they cross municipalities and municipal boundaries or they are of a unique nature (p. 7).

[26] Under s. 284(1)(k) of the *MGA*, TransAlta's coal-fired facilities are considered "linear property", which is a subset of "designated industrial property" under s. 284(1)(f.01). Sections 322 and 322.1 of the *MGA* authorize the Minister to establish guidelines for assessing the value of linear property. TransAlta's facilities are thus assessed using the regulated standard. As noted by the Court of Appeal, "market value is not intended to be the standard for determining the value of [TransAlta's] linear properties. . . . [T]here is no mention of 'market value' in any of the linear property assessment provisions of the *MGA*" (para. 59).

[27] Assessments of linear property must be prepared by the provincial assessor (*MGA*, s. 292(1)). Each assessment must reflect the valuation standard as well as the specifications and characteristics of the linear property as specified in the regulations (s. 292(2)). In preparing an assessment of linear property, the assessor must follow the procedures set out in the Minister's guidelines (*Matters Relating to Assessment and Taxation Regulation*, Alta. Reg. 220/2004, s. 8(2)).

[28] Section 322(1) of the *MGA* delegates regulation-making power to the Minister. More specifically, it authorizes the Minister to make regulations "establishing valuation standards for property", "respecting the assessment of linear property", "respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property",

"respecting processes and procedures for preparing assessments", and "respecting any other matter considered necessary to carry out the intent of [the *MGA*]". Under s. 322(2), the Minister may make an order establishing guidelines respecting any matter for which the Minister may make a regulation under s. 322(1). The *Linear Guidelines* are deemed to be guidelines established under s. 322(2) (s. 322.1(1) and (3)).

[29] As the Court of Appeal recognized, "[t]he language used in s. 322(1) to describe the Minister's regulation-making power in relation to property assessment is indisputably broad" (para. 57). The question is whether ss. 1.003 and 2.003 of the *Linear Guidelines* are reasonably within the scope of the Minister's authority.

C. *The Linear Guidelines*

[30] On December 19, 2017, the Minister made Ministerial Order No. MAG:021/17 establishing the *Linear Guidelines*. They became effective for taxation in 2018 and subsequent years.

[31] The *Linear Guidelines* set out the procedures for calculating all linear property assessments. They require assessors to multiply the values determined under four schedules. TransAlta's challenge focuses on ss. 1.003 and 2.003 of the *Linear Guidelines*.

[32] Section 1.003 of the *Linear Guidelines* describes the schedules used in the assessment of linear property. Schedules C and D are the schedules relevant to this appeal.

[33] Schedule C provides the process for determining depreciation or lists the applicable depreciation factors. Section 1.003(c) states that "[t]he depreciation factors prescribed in Schedule C are fixed and certain and must be applied as listed in the applicable Schedule C depreciation table, without adjustment or modification" (emphasis deleted).

[34] Schedule D provides the process for determining additional depreciation or lists the applicable additional depreciation factors. Under Sch. D, "the assessor may allow additional depreciation (Schedule D) on a case-by-case basis and only if the operator provides acceptable evidence to the assessor" (s. 2.004(e)). However, the *Linear Guidelines* specify that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation" (s. 1.003(d)).

[35] Section 2.003 of the *Linear Guidelines* addresses Schs. C and D depreciation as it applies to TransAlta. It too provides that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions on or before December 31, 2030 arising from an Off-Coal Agreement or Provincial or Federal legislation."

[36] The practical effect of these provisions is that an assessor cannot allow TransAlta additional depreciation for its coal-fired facilities on the basis that those facilities are subject to the Off-Coal Agreement (see *Linear Guidelines*, ss. 1.003(d) and 2.004(e)).

VII. Analysis

[37] TransAlta challenges the validity of the *Linear Guidelines* on two bases. First, it invokes the common law principle that a statutory delegate has no authority to make discriminatory distinctions unless the statute either expressly, or by necessary implication, grants them such authority. TransAlta argues that the *Linear Guidelines* discriminate against it by denying it the ability to seek additional depreciation for its coal-fired facilities and that the Minister did not have the statutory authority to establish guidelines that discriminate in this manner. Second, it asserts that the *Linear Guidelines* are inconsistent with the overarching purposes of the assessment and taxation regime under the *MGA*.

[38] In what follows, I will assess whether the *Linear Guidelines* fall reasonably within the scope of the Minister's authority under the *MGA*, having regard to the relevant constraints: (1) the common law rule against administrative discrimination; (2) the *MGA*, which is the governing statutory scheme; and (3) the principles of statutory interpretation. I will begin by outlining the common law rule against administrative discrimination. I will then consider whether the *Linear Guidelines* violate this rule.

[39] As I will explain, the *Linear Guidelines* do not violate the common law rule against administrative discrimination. This is because the *MGA* authorizes the Minister, by necessary implication, to discriminate against TransAlta and other parties to off-coal agreements by depriving them of the ability to claim additional depreciation. It follows that the *Linear Guidelines* are consistent with the purposes of the *MGA*. As will become clear, the *Linear Guidelines* serve to ensure that tax assessments are "current, correct, fair and equitable" in accordance with the purposes of the *MGA*.

A. *The Common Law Rule Against Administrative Discrimination*

[40] Administrative discrimination "arises when [subordinate] legislation expressly distinguishes among the persons to whom its enabling legislation applies" (Keyes, at pp. 370-71, citing L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at p. 42; *Fédération des producteurs de fruits et légumes du Québec v. Conserverie canadienne Ltée*, [1990] R.J.Q. 2866 (Sup. Ct.), at p. 2871; *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600, at para. 13).

[41] Administrative discrimination is different than discrimination in the context of the *Canadian Charter of Rights and Freedoms* or human rights legislation: "When we speak of administrative discrimination, we are not speaking of discrimination based on personal characteristics, such as sex, race or religion, that is proscribed by many human rights statutes" (P. Salembier, *Regulatory Law and Practice* (3rd ed. 2021), at p. 303). Rather, administrative discrimination "relates to the drawing of distinctions between persons or classes that are discriminatory in a

'non-pejorative but most neutral sense of the word', in that they simply 'do not apply equally to all those engaged in the activity that is the subject of the enactment'" (p. 303, quoting *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 406, and *Sunshine Village Corp.*, at para. 13, citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at para. 15:3212).

[42] The common law rule against administrative discrimination provides that subordinate legislation that discriminates in the administrative law sense is invalid unless the discrimination is authorized by the enabling statute (*Arcade Amusements*, at p. 404; *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, at pp. 105-6; *Katz Group*, at para. 47; Keyes, at p. 371; Salembier, at pp. 307-8). The enabling statute may authorize administrative discrimination, either expressly or by necessary implication (*Arcade Amusements*, at p. 413; *Forget*, at pp. 105-6; *Katz Group*, at para. 47).

[43] As McLachlin J. (as she then was), dissenting, but not on this point, explained when reviewing the validity of a municipal bylaw in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 259, the rule against administrative discrimination is concerned with ensuring that statutory delegates act within the scope of their authority when they distinguish between the persons to whom the enabling legislation applies:

> The rule pertaining to municipal discrimination is essentially concerned with the municipality's power. Municipalities must operate within the powers conferred on them under the statutes which create and empower them. Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality's powers as defined by its

> empowering statute. Discrimination in this municipal sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.

[44] With this in mind, I turn to the question of whether the *Linear Guidelines* discriminate against TransAlta.

B. *The Linear Guidelines Discriminate Against Parties to Off-Coal Agreements*

[45] The chambers judge found that the *Linear Guidelines* did not discriminate against TransAlta because they did not deprive TransAlta of a form of depreciation to which it was previously entitled or which applied to other types of linear property (para. 72). The Court of Appeal also held that the *Linear Guidelines* did not discriminate against TransAlta. It held so on the basis that the impugned provisions apply to all coal-fired facilities subject to off-coal agreements, not just to those owned by TransAlta (para. 86).

[46] I disagree with the courts below. The *Linear Guidelines* discriminate against TransAlta and other parties to off-coal agreements by singling them out as being ineligible to claim additional depreciation on the basis of the off-coal agreements and to have the assessor consider that claim (see ss. 1.003(d) and 2.004(e)). Owners of linear property who are not parties to off-coal agreements are eligible to make claims for additional depreciation and to have those claims considered by the assessor without exclusion.

[47] The chambers judge was correct in stating that TransAlta was not entitled to additional depreciation. However, but for the impugned provisions of the *Linear Guidelines*, TransAlta would have been eligible to claim additional depreciation and to have that claim considered by the assessor. Section 2.004(e) of the *Linear Guidelines* provides that "[s]ubject to section 1.003(d) and section 2.003(b), the assessor may allow additional depreciation (Schedule D) on a case-by-case basis and only if the operator provides acceptable evidence to the assessor." TransAlta is not eligible to advance a claim for additional depreciation for consideration by the assessor on the basis of the reduction in its facilities' lifespan arising from the Off-Coal Agreement because s. 1.003(d) states that "[t]here will be no recognition or adjustment in Schedule C or Schedule D as a result of the cessation or reduction of coal-fired emissions . . . arising from an Off-Coal Agreement".

[48] The fact that the *Linear Guidelines* treat all parties to off-coal agreements in the same way does not mean that they are not discriminatory. The *Linear Guidelines* treat all parties to off-coal agreements in the same *discriminatory* way, as compared with owners of linear property who are not parties to off-coal agreements. As explained, administrative discrimination arises when subordinate legislation expressly distinguishes among the persons to whom its enabling legislation applies (Keyes, at pp. 370-71). The *Linear Guidelines* expressly distinguish between owners of linear property who are parties to off-coal agreements and those who are not parties to such agreements, though both are subject to the *MGA*.

[49] The next question is whether the *MGA* authorizes the Minister to discriminate against TransAlta on the basis of the Off-Coal Agreement, having regard to the purposes of the *MGA* and the principles of statutory interpretation. If the *MGA* does so, either expressly or by necessary implication, the *Linear Guidelines* will not be invalid for being discriminatory.

C. *The Minister Is Statutorily Authorized To Discriminate Against Parties to Off-Coal Agreements*

[50] The question of statutory authorization to discriminate falls within the reasonableness review to be conducted in a *vires* challenge to subordinate legislation, unless the legislature has indicated otherwise or a question relating to the rule of law arises which should be reviewed for correctness (*Vavilov*, at para. 53).

[51] The *MGA* does not expressly authorize the Minister to discriminate against TransAlta by distinguishing between parties who have entered into off-coal agreements with Alberta and those who have not. However, the *MGA*, by necessary implication, authorizes the Minister to draw this distinction.

[52] When a court reviews the *vires* of subordinate legislation, the challenged legislation and the enabling statute must be interpreted using a broad and purposive approach (*Katz Group*, at para. 26). TransAlta's coal-fired facilities are deemed to be linear property (*MGA*, s. 284(1)(k)). The Minister has broad authority to make regulations establishing valuation standards for linear property, respecting the

assessment of linear property, respecting the processes and procedures for preparing assessments and respecting any matter considered necessary to carry out the intent of the *MGA* (s. 322(1)(c.1), (d), (e) and (i)). The legislation is clear: the valuation standard for linear property is the one established by the Minister (ss. 322 and 322.1; *Matters Relating to Assessment and Taxation Regulation*, s. 8(2)).

[53] In establishing a valuation standard for linear property, the Minister is authorized to make regulations "respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property" (*MGA*, s. 322(1)(d.3)). The "specifications and characteristics" that the Minister sets out must be taken into account by the assessor when assessing the value of the property for taxation purposes (s. 292(2)(b)). This grant of authority is articulated in very broad terms — "without limitation" — and specifically empowers the Minister to identify and make regulations respecting the "specifications and characteristics" of industrial property. It is not possible to construe s. 322(1)(d.3) without contemplating the drawing of distinctions between types of properties on the basis of their specifications and characteristics.

[54] Additionally, it follows from the *MGA*'s purpose of ensuring "that assessments are 'current, correct, fair and equitable'" (*Capilano*, at para. 46, quoting *Edmonton (City) v. Army & Navy Department Stores Ltd.*, [2002] A.M.G.B.O. No. 126 (QL), at para. 114) that the Minister has the authority to draw distinctions on the basis of the specifications and characteristics of properties where ignoring them would create

a risk of inappropriate assessments. The inverse is also true: where appropriate, the Minister must have authority to pronounce that certain specifications and characteristics are *not* relevant to an assessment, as he did in this case. The statute, by necessary implication, grants the Minister the authority to discriminate in the manner that he did.

D. *The Linear Guidelines Are Consistent With the Scheme and Purposes of the MGA*

[55] Since I have found that the Minister had the authority to discriminate between different types of property, the next question is whether he exercised that authority in a manner that is consistent with the scheme and purposes of the *MGA*. The *MGA* has two purposes: (1) "to establish and maintain a property assessment system that fairly and equitably distributes taxes, and promotes transparency, predictability and stability for municipalities and taxpayers" (*Guide*, at p. 2); and (2) "to ensure that assessments are 'current, correct, fair and equitable'" (*Capilano*, at para. 46, quoting *Army & Navy*, at para. 114).

[56] TransAlta submits that the discrimination against it resulted in a valuation of its coal-fired facilities that was both incorrect and unfair (A.F., at paras. 49, 68, 77 and 85; transcript, at pp. 57, 67, 70-71 and 159). It submits that the Off-Coal Agreement does not account for depreciation, which is essential to an accurate valuation of its property. In its view, the transition payments compensate it purely for loss of profits (transcript, at p. 57). TransAlta also submits that the Minister was not entitled to distinguish between parties to off-coal agreements and others because being a party to

an off-coal agreement is a characteristic of the owner, not of the property itself. In other words, it is not a "specification" or "characteristic" of the linear property as contemplated in ss. 292(2)(b) and 322(1)(d.3) of the *MGA* (A.F., at para. 68).

[57] I disagree. As I will explain, ss. 1.003 and 2.003 of the *Linear Guidelines*, which deprive TransAlta of the ability to claim additional depreciation on the basis of the reduction in its facilities' lifespan arising from the Off-Coal Agreement, are consistent with the purpose of ensuring "current, correct, fair and equitable" assessments and accord with the language in ss. 292(2)(b) and 322(1)(d.3) of the *MGA*.

[58] The formula used to calculate the transition payments in the Off-Coal Agreement accounts for at least some loss of value arising from the reduced life of TransAlta's coal-fired facilities. It does so by prorating the net book value of the facilities by the percentage of life remaining after 2030 (Off-Coal Agreement, Sch. A). Even if the payments are characterized as compensation for loss of profits, because the payments promise additional revenues that run with the assets, their effect is to offset the decrease in value caused by the facilities' reduced lifespan. To be current and correct, an assessment of TransAlta's coal-fired facilities must consider the fact that the transition payments mitigate at least some depreciation that would otherwise result from the early retirement of the facilities. Therefore, in light of the *MGA*'s purpose of ensuring that assessments are current and correct, it was reasonable for the Minister to interpret his statutory grant of power as authorizing him to deprive TransAlta of the ability to claim additional depreciation under the *Linear Guidelines*.

[59] To deprive TransAlta of the ability to claim additional depreciation is also consistent with the *MGA*'s purpose of ensuring that assessments are fair and equitable. Since the transition payments already account for at least some loss of value resulting from the reduced life of TransAlta's coal-fired facilities, there would be a real risk of "double dipping" if TransAlta were able to receive additional depreciation for that same loss of value under the *Linear Guidelines*. That would not be fair or equitable.

[60] TransAlta's assertion that the existence of the Off-Coal Agreement is a characteristic of the owner — not of the property itself — is inaccurate. The Off-Coal Agreement runs with the facilities. A transfer of title to or ownership interest in the facilities requires Alberta's consent and requires the new owner to agree to be bound by the terms of the Off-Coal Agreement:

> Transfer of Ownership of Plants. The Company or the Plant Owners may transfer title to or ownership interest in all the Plants with the consent of the Province, not to be unreasonably withheld, provided that the new owner agrees to be bound by the terms of this Agreement, in which case the Company and the Plant Owners shall be released from their obligations hereunder. [s. 11(n)]

[61] While TransAlta, as the owner, entered into the Off-Coal Agreement, being subject to the Off-Coal Agreement is not merely a "characteristic" of TransAlta. Rather, because any subsequent owner of TransAlta's coal-fired facilities must agree to be bound by the terms of the Off-Coal Agreement, being subject to the Off-Coal Agreement is also properly considered a "specification" or "characteristic" of those facilities. Under s. 322(1)(d.3) of the *MGA*, the Minister may make regulations

"respecting designated industrial property, including, without limitation, regulations respecting the specifications and characteristics of designated industrial property". Since TransAlta's coal-fired facilities are deemed "designated industrial property" under s. 284(1)(f.01)(ii) of the *MGA*, the Minister was authorized to make regulations designating an off-coal agreement as a "specification" or "characteristic" of those facilities to ensure that assessments thereof would be "current, correct, fair and equitable".

VIII. Conclusion

[62] TransAlta has not met its burden of proving that the *Linear Guidelines* are *ultra vires* the Minister (*Vavilov*, at para. 100; *Katz Group*, at para. 25; *Canadian Council for Refugees*, at para. 54).

[63] The Minister is authorized under the *MGA*, by necessary implication, to discriminate against TransAlta. The Minister has indisputably broad authority to establish valuation standards for linear property under s. 322(1) of the *MGA*. This includes the authority to determine the "specifications and characteristics" of the property that an assessment must reflect in order to be "current, correct, fair and equitable" (*Capilano*, at para. 46). To properly make regulations respecting "specifications and characteristics", the Minister must therefore have the authority to contemplate the drawing of distinctions as between types of properties.

[64] Accordingly, the *Linear Guidelines* fall within a reasonable interpretation of the enabling statute having regard to the relevant constraints, and are *intra vires* the Minister. They are "consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (*GGPPA*, at para. 87). They also do not contravene the common law rule against administrative discrimination.

[65] The appeal is dismissed with costs.

Appeal dismissed with costs.

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