COURT OF APPEAL OF YUKON

Citation: *Rogers v. Director of Maintenance Enforcement Program*, 2025 YKCA 12

Date: 20250905
Docket: 24-YU913

Between:

Carl Eugene (Gene) Rogers

Appellant
(Petitioner)

And

Director of Maintenance Enforcement Program and Minister of Justice

Respondents
(Respondents)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Smallwood
The Honourable Justice Voith*

On appeal from: An order of the Supreme Court of Yukon, dated December 21, 2023 (*Rogers v. Director of Maintenance Enforcement Program,* 2023 YKSC 69, Whitehorse Docket 23-A0074).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondents:	L. Banton
Place and Date of Hearing:	Whitehorse, Yukon June 19, 2024
Supplemental Written Submissions Received:	July 25 and August 20, 2025
Place and Date of Judgment:	Whitehorse, Yukon September 5, 2025

Written Reasons of the Court:

Summary:

Section 22(1) of the Maintenance Enforcement Act, R.S.Y. 2002, c. 145 [Act], contemplates the Maintenance Enforcement Program (MEP) allowing payors to retain a minimum income "prescribed by the Commissioner in Executive Council". However, no regulation establishing a prescribed minimum has been enacted. The appellant was concerned the MEP would retain the entirety of his income and sought an order requiring the Commissioner to enact regulations. The chambers judge dismissed the appellant's petition, concluding that she could not make such an order and that the decision whether to enact regulations was purely political. Held: Appeal allowed. The issue concerning the Commissioner's inaction under s. 22(1) is justiciable. Action taken by the executive under statutorily granted powers are reviewable to ensure they have not transgressed the purpose of the statute and intent of the legislature. Section 22(1) compelled the Commissioner to prescribe a minimum income to be retained by payors. The provision aims to protect payors by ensuring they can retain enough income to meet their basic needs while still fulfilling their maintenance obligations. By failing to prescribe a minimum, the Commissioner has thwarted the intention of the Legislature, leaving the protections in s. 22 without legal effect. The Commissioner's failure to enact regulations under s. 22(1) of the Act was, and remains, unlawful.

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Reasons for Judgment of the Court:

Introduction

[1] The appellant, Carl Eugene ("Gene") Rogers, was ordered to pay child support and spousal support in 2003 by the Ontario Superior Court of Justice. The initial order has since been varied and Mr. Rogers is no longer required to pay child support. He continues to owe spousal support and had accumulated $461,295 in arrears as of November 2023. The support orders were registered with the Yukon Maintenance Enforcement Program ("MEP") when Mr. Rogers moved to the Yukon. The MEP has since taken enforcement proceedings against Mr. Rogers.

[2] Mr. Rogers was on social assistance, but MEP had a policy that it would not garnish social assistance income. As a result, MEP was not garnishing any of Mr. Rogers' social assistance income to put towards his support payments or arrears.

[3] Mr. Rogers was turning 65 years old in 2024 and was told by Yukon Social Assistance he was required to apply for Canada Pension Plan ("CPP") and Old Age Security ("OAS") benefits. The MEP does not have a policy against garnishing federal payments like CPP or OAS. In those situations, it undertakes a case-by-case assessment.

[4] Section 22(1) of the *Maintenance Enforcement Act*, R.S.Y. 2002, c. 145 [*MEA* or *Act*], contemplates the MEP allowing payors to retain a minimum income "prescribed by the Commissioner in Executive Council". However, no regulation establishing a prescribed minimum has been enacted. Mr. Rogers was therefore concerned that once he began receiving CPP and OAS, the MEP would retain the entirety of his income.

[5] Mr. Rogers filed a petition seeking a stay of enforcement actions by MEP until such time as the Commissioner in Executive Council ("Commissioner") enacted regulations under s. 22(1), an order of *mandamus* requiring the Commissioner to

enact regulations, and an assessment of the support orders based on actual earnings, including those of his former spouse.

[6] In reasons indexed as 2023 YKSC 69 [*RFJ*], the chambers judge dismissed Mr. Rogers' petition. She did not consider Mr. Rogers' petition on the merits. The chambers judge concluded: (1) she could not make an order requiring the Commissioner to enact a regulation; (2) she could not stay enforcement of the proceedings against Mr. Rogers (and his request to do so was premature); and (3) a variation of the support order required Mr. Rogers to apply through the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp), and could not be achieved through the MEP.

[7] Mr. Rogers appeals the dismissal of his petition. He does not dispute the conclusions of the chambers judge relating to his request for a stay or variation of support. His central claim on appeal is that the chambers judge erred in concluding she could not make an order requiring the Commissioner to enact a regulation.

[8] Mr. Rogers raises several tangential issues, all of which the respondents say were not raised below and therefore should not be considered by this Court on appeal. As we see it, however, the appeal turns on the central issue of whether the court may intervene where the Commissioner failed to enact regulations contemplated by the *Act*.

[9] For the reasons that follow, we allow the appeal. In our respectful view, the chambers judge erred in finding the court had no supervisory role to play in relation to the Commissioner's failure to enact regulations.

[10] The *Act* compelled the Commissioner to prescribe a minimum income to be retained by payors. In the circumstances, the appropriate remedy is to declare the Commissioner's failure to enact regulations under s. 22(1) of the *Act* to be unlawful.

Decision of the chambers judge

[11] On the central issue, the chambers judge noted the roles of the legislative branch and the court are distinct. The legislative branch's role is to make policy choices and enact laws while the role of the court is to interpret and apply the laws.

She concluded the court did not have the authority to direct the legislative branch to set policy or enact legislation except in circumstances involving constitutional violations. She cited *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 118 in support of this proposition: *RFJ* at paras. 9–10.

[12] The judge further stated the decision to enact regulations was a purely political decision. In her view, it was not the court's role to order the Commissioner to enact a regulation prescribing a minimum income that a payor could retain: *RFJ* at para. 11.

The parties' positions on appeal

[13] Mr. Rogers submits the judge's reasons betray a misunderstanding of the court's ability to order the Commissioner to enact regulations. He claims the judge wrongly conflated the Commissioner with the legislative branch when she concluded the court could not direct the legislative branch as to how it should set policy or enact legislation. He argues the court is not being asked to intrude on the law-making role of the legislature. Rather, the Commissioner, in failing to exercise its prescribing authority under s. 22(1) of the *Act*, has thwarted the object of the *Act* and the legislature's policy choice to prevent garnishment from causing poverty. He submits it is this executive inaction the court is being asked to address.

[14] Mr. Rogers recognizes courts usually decline to order the making of regulations. However, he submits the court can, in limited circumstances, conclude the failure to exercise a delegated rule-making authority is unreasonable and remedy the situation by way of *mandamus* or other appropriate relief. Mr. Rogers argues court intervention is permissible where the statutory language is mandatory, the failure to exercise rulemaking powers thwarts the intention of the Legislature, and/or the inaction on the part of the executive was unreasonable "in *Vavilov* terms". He submits all three qualities characterize the present case.

[15] The respondents claim there was no such error. They claim the judge was correct to conclude the enactment of regulations is primarily a political duty which is

not judicially enforceable. They say the court should not direct the legislative branch in the setting of policy except in circumstances involving Constitutional violations. They further submit the language of s. 22(1) is permissive, not mandatory. Finally, they reject the assertion that the failure to enact regulations has frustrated the intent of the Legislature, noting the purpose of the *Act* is to assist claimants with the enforcement of court orders. On their submissions, the definition of a minimum income, or lack thereof, does not thwart the *Act*.

Discussion

Standard of review

[16] The issue of whether the chambers judge erred in finding she did not have the power to order the Commissioner to make regulations is a question of law, reviewable on the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

The Maintenance Enforcement Program

[17] The MEP is responsible for the enforcement of maintenance orders that are filed with the program. The director of maintenance enforcement (“director”), who is appointed by the Commissioner, has a duty to enforce maintenance orders in any manner that appears practicable. This includes the power to decide not to enforce an order if the director is satisfied on reasonable grounds that certain circumstances set out in the *Act* are applicable: *Act*, ss. 2–4.

[18] The MEP collects payments from payors who are required to pay maintenance or who have arrears. Section 14 of the *Act* permits the director to garnish income by requiring one or more of a payor’s sources of income to remit a specified amount to the director, who then distributes the funds to the recipient.

[19] However, s. 22 exempts some remuneration from garnishment by the director. It states:

22 Some remuneration exempt from garnishment

> (1) If satisfied on reasonable grounds that the amount of remuneration paid to the director in response to a garnishment order would reduce the respondent's income from all sources to less than the minimum prescribed by the Commissioner in Executive Council, the director shall pay out to the claimant only the amount of remuneration in excess of that prescribed minimum and shall pay out the balance to the respondent.
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> (2) The director or respondent may apply to the court for a determination of the respondent's total income from all sources, and the court may
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> > (a) summarily determine the respondent's total income from all sources; or
> >
> > (b) order a further hearing or trial of an issue or question necessary to determine the respondent's total income from all sources.
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> [Emphasis added.]

[20] Section 45 also permits the Commissioner to make regulations respecting the procedures and prescribing forms to be used in proceedings under the *Act.* The Commissioner enacted regulations under a previous version of the *Act* prescribing forms and requiring MEP proceedings to occur in accordance with the Supreme Court Rules: *Maintenance and Custody Orders Enforcement Regulations*, Y.O.I.C. 1987/034. But the regulations do not prescribe the minimum amount of income to be retained by a payor, as contemplated by s. 22(1) of the *Act*.

[21] In the absence of regulations with respect to the minimum amount of income to be retained by a payor, the MEP has adopted policies that appear to be directed at keeping payors out of poverty. These policies are set out in practice notes on social assistance and federal garnishment orders.

[22] For payors who receive social assistance, the *Social Assistance Practice Note* states:

> When a person required to pay maintenance is dependent on income assistance through Social Assistance as his or her primary source of income, that person is living in poverty without the capacity to meet any but the most basic needs. This has implications for MEP, both in law and in policy. We do not want to prevent the respondent from meeting personal minimal requirements for survival or needs of a current family. However, we also know that claimants are often collecting income assistance and/or living in poverty.

[23] According to the policy, if a payor is on social assistance, there is no ongoing enforcement other than a federal intercept. The case status on the MEP system will be inactive if social assistance is a payor's only source of income.

[24] By contrast, the *Federal Garnishment Order Practice Note* states that a federal garnishment will be issued for 100% of income tax returns (up to a maximum of the total arrears) and 50% of unemployment insurance, CPP and OAS.

[25] Neither of the practice notes refers to a minimum income below which garnishment of the payor's income would not occur.

Legal principles governing when, and how, the court may intervene where the executive has not enacted regulations prescribed by statute

[26] The issue of whether a court has the power to order the executive to enact regulations is complex. Authorities from across Canada and other common law jurisdictions indicate a shifting focus as to the proper approach.

Authorities emphasizing the non-justiciability of the decision not to enact regulations

[27] Historically, courts have been reluctant to recognize an obligation to make regulations. The regulation-making function of the executive branch has typically been understood as being discretionary: see e.g., *Alexander Band No. 134 v. Canada (Minister of Indian Affairs and Northern Development) (T.D.),* [1991] 2 F.C. 3, 1990 CanLII 13045. The discretionary nature of the power is often explicitly indicated in the statute by the word "may": see e.g., *Re Pim and Minister of the Environment,* 94 D.L.R. (3d) 254, 1978 CanLII 1678 (O.N.S.C.).

[28] The question on the *Re Pim* and *Alexander Band* line of authorities has been framed as one of "justiciability", i.e. whether the court has the authority to intervene when there has been a failure to exercise regulatory powers. As the Federal Court put it in *Alexander Band*, "the enactment of regulations must be seen as primarily the performance of a political duty which is not enforceable in the courts": at 17.

[29] In *La Rose v. Canada,* 2023 FCA 241, the Federal Court of Appeal provides a helpful summary of what is meant by justiciability:

> [24] Justiciability distinguishes claims suitable for judicial determination from those that are not. When assessing justiciability, "[t]he court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter" (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 [*Highwood*] at para. 34, citing Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012) at 7 and 294) [Sossin, *Boundaries of Judicial Review*]). The question of institutional capacity asks what the court can do; the legitimacy question asks what the court should do. Courts decline to adjudicate issues that ask that they act beyond their institutional capacity or legitimacy.
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> [25] Two considerations motivate the justiciability analysis. The first is constitutional, the second, more pragmatic.
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> [26] The constitutional consideration is the court's respect for its role in a Westminster parliamentary democracy… Courts do not second-guess the wisdom of Parliament's choice; rather, they assess the validity of the resulting law and its application and must be mindful of the boundaries between the two. The justiciability inquiry involves a weighing of the appropriateness, as a matter of constitutional judicial policy, of the courts deciding a given issue or instead deferring to the other branches of government (*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604 at 90-91).
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> [27] The pragmatic consideration arises from the limitations on a court's ability to fashion and implement remedies. This is a component of the institutional limitation.
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> [28] No firm criteria for assessing justiciability exist, and the boundaries between justiciable and non-justiciable matters are not always clear. The issue often distills to a single question as to whether the claim has a sufficient legal component upon which a court can adjudicate.
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> [Emphasis added.]

[30] In *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183, aff'd 2009 FCA 297*,* leave to appeal to SCC ref'd, 33469 (25 March 2010), the Federal Court considered an application for judicial review seeking declaratory and mandatory relief. The applicants alleged the federal government had breached its duties under the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 [*Kyoto Act*], including by failing to make environmental regulations.

[31] The environmental regulations were mandated by the *Kyoto Act*:

> 7. (1) Within 180 days after this Act comes into force, the Governor in Council shall ensure that Canada fully meets its obligations under Article 3, paragraph

> 1, of the Kyoto Protocol by making, amending or repealing the necessary regulations under this or any other Act.
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> [Emphasis added.]

[32] However, the presence of seemingly mandatory language did not end the analysis. Instead, the court considered whether the failure to enact such regulations was justiciable:

> [31] The justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties imposed upon the Minister and upon the [Governor in Council] by the [*Kyoto Act*] be subjected to judicial scrutiny and remediation.

[33] The judge dismissed the judicial review application, concluding the court had no role in reviewing the reasonableness of the government's response to the commitments in the *Kyoto Act*. In coming to this conclusion, the judge (relying on both *Re Pim* and *Alexander Band*) stated:

> [40] … Indeed, I question whether, outside of the constitutional context, the Court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions. This was the view of Justice Barry Strayer in *Alexander Band No. 134 v Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 FC 3 (TD), where he observed that the enactment of regulations must be seen as primarily the performance of a political duty which is not judicially enforceable.

[34] Understandably, the judge below relied on *Friends of the Earth* in concluding the "decision about whether to make regulations is a purely political duty" that is not (except for constitutional issues) judicially enforceable: *RFJ* at para. 11.

[35] However, this is not, in our respectful view, the complete picture.

[36] Turning first to consider *Friends of the Earth*, we note the above passage is *obiter*. The judge's decision did not rest on any absolute rule of law that the court shall not play any role in reviewing the failure to enact regulations. Rather, it rested on a careful analysis of the *Kyoto Act.*

[37] The judge noted s. 7, although it included the word "shall", created an obligation to "ensure compliance" with certain provisions of the Kyoto Protocol on an

ongoing basis. Such compliance was based on a continuously changing scientific and political environment that was not within the government's sole control, and that was therefore not amenable to judicial review. The judge concluded a mandatory construction of s. 7(1) would be incompatible with the practical realities of making such regulations: *Friends of the Earth* at paras. 37–38. He also found the use of the word "ensure" is not commonly used to indicate an imperative: *Friends of the Earth* at para. 34.

[38] Moreover, the judge concluded s. 7 had to be read alongside s. 6(1), which delineates the broad regulatory powers available to the Governor in Council and uses the permissive "may make regulations". He concluded the language of s. 7 was not sufficiently clear to override the explicitly permissive language of s. 6(1). In his estimation, "without clear statutory language the courts have no role to play in requiring legislation to be implemented": *Friends of the Earth* at para. 38.

[39] Another issue was that of remedy. From a practical standpoint, the court could not dictate what the Governor in Council had to do to comply with the *Kyoto Act*. The judge concluded ordering the Governor in Council to "make some sort of regulatory adjustment within 180 days" had little appeal and was concerned about "the judicial enforcement of a duty that was 'substantially empty of content' and where the Minister's substantive decision involved consideration of a 'wide range of circumstances'": *Friends of the Earth* at para. 39.

[40] Finally, the judge concluded the *Kyoto Act* clearly contemplated Parliamentary and public accountability, rather than judicial accountability. It created a scheme for "ensuring" compliance through scientific review and reporting to the public and Parliament, political mechanisms that are not amenable to judicial scrutiny and, in effect, exclude judicial review of substantive compliance with the *Kyoto Act*: *Friends of the Earth* at paras. 42–44.

[41] The Federal Court adopted a similar analytical approach, and reached the same conclusion, in *Canadian Union of Public Employees v. Canada (Minister of Health)*, 2004 FC 1334.

[42] However, in other contexts, courts have found the failure to enact bylaws mandated by legislation to be justiciable: see e.g., *Jakobs v. City of Winnipeg,* [1974] 2 W.W.R. 577, 1974 CanLII 1684 (M.B.C.A.); *O.N.A., Local 94 v. Wellesley Hospital* (1990), 71 O.R. (2d) 501, 1989 CanLII 4050 (S.C.). Both *Jakobs* and *O.N.A, Local 94* concerned legislation with mandatory language requiring that certain by-laws be passed. And in both, the failure to take the necessary action led to court intervention.

[43] Because Mr. Rogers was self-represented below, the judge was not made aware of these authorities and the potential implications they may have for the issue before us. But they demonstrate that, even historically, courts have not uniformly adopted a hands-off approach when dealing with a failure to enact subordinate legislation required by statute.

The failure of the executive to enact regulations that are necessary for a statutory provision to be given legal effect

[44] The present appeal concerns a particular interplay between statute and regulation. What should the court do when considering instances where a regulation is necessary to give meaning to a particular statutory provision, but no regulation has been passed? Here, too, courts have found the issue justiciable, at least in so far as it is necessary to clarify what legal effect results from such a scenario.

[45] As J. Paul Salembier, in *Regulatory Law and Practice*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2021), Ch. 12, Part II, explains:

> While the courts have been traditionally reluctant to order regulations to be made, that does not mean that the courts will always consider a failure to make regulations to have no legal impact.
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> Statutes often require that something be done “in accordance with” the regulations, “as prescribed” by regulations or “in the prescribed manner”. Such expressions are normally taken to require that the thing be done follow[ing] certain procedures that are set out in the regulations. The courts have on several occasions been called upon to determine what, if any, effect is to be given to the statutory requirement if no such regulations exist.
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> In many cases, the courts have refused to give effect to a statutory provision that contemplated the making of regulations if those regulations have not been made.
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> …

> The courts' reluctance to give effect to statutes requiring that an act be done "in accordance with" the regulations, "as prescribed" or "in the prescribed manner", where no regulations have in fact been made, is not surprising. In such cases, a statute usually imposes a duty and then provides for regulations to regulate the manner in which the duty is to be performed. This changes the duty from a bare duty to perform the act in question to a qualified duty to perform it in a certain manner: *i.e.*, in the manner set out in the regulations. If the contemplated regulations are not made, it is impossible for the person on whom the qualified duty is imposed to know how to fulfil the duty, since the requisite qualifications are unknown. The practical effect of provisions drafted in this manner is to render the making of regulations a condition precedent to the imposition of the duty.

[46] Salembier references several cases, both from Canada and other common law jurisdictions. These indicate a deferential approach, where courts have limited themselves to finding the provision in question is without effect but have not issued any direction that regulations be passed.

[47] For example, in *Attorney General of Canada v. Giguere*, [1979] 1 F.C. 823, 1978 CanLII 3611 (C.A.), an applicant claimed he was entitled to unemployment insurance under the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, s. 48. He claimed a reduction in his work hours and wages qualified as an interruption of earnings entitling him to unemployment insurance benefits.

[48] Under the *Unemployment Insurance Act*, "interruption in earnings" included situations where someone had a reduction in his hours of work "resulting in a prescribed reduction in earnings" (emphasis added). No regulation prescribing such a reduction had been made.

[49] At p. 826, the Federal Court of Appeal concluded the failure to prescribe an amount rendered the relevant section devoid of effect, depriving the applicant of his ability to rely on it:

> By amending paragraph 2(1)(*n*) as it did, Parliament indicated its intention that not all reductions in working hours should be considered as constituting an "interruption in earnings", only those which resulted in a reduction in wages as prescribed by the Regulations of the Commission. This being the case, I feel it is clear that the effect of the new definition was subordinated by Parliament itself to the adoption of appropriate regulations. In the absence of such regulations, I consider that the definition is devoid of any effect.
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> …

> For these reasons, I would allow the application, quash the decision of the Umpire and refer the case back for decision on the assumption that, in the circumstances, there was no interruption of earnings from the employment of respondent.

[50] In *Campbell v. British Columbia*, 7 D.L.R. (4th) 560, 1984 CanLII 670 (B.C.S.C.), the issue was the validity of a regulation under the *Residential Tenancy Act*, R.S.B.C. 1979, c. 365 [*RTA*], that was purported to remove rent controls and deregulate the housing market in British Columbia. The judge ultimately concluded the regulation was valid. Relevant to this appeal is the judge's discussion of s. 64(2) of the *RTA*.

[51] Section 64(2) provided, in essence, that a landlord cannot increase rent "more than a prescribed amount" (emphasis added). The judge concluded the Legislature, in s. 64(2), had delegated to Cabinet not only the extent to which rental controls should be imposed, but whether to impose them at all. In other words, "if no amount is prescribed, no limitations arise". He therefore reached much the same conclusion as the Court in *Giguere*, finding the protections in s. 64(2) would only be applicable when a prescribed amount was enacted by regulation. In the absence of a regulation, landlords would be free to raise rents without limitation: *Campbell* at 563–564.

[52] In reaching this conclusion, the judge was cognizant of the fact the power to make regulations must be interpreted so that it empowers the executive to regulate only in a manner consistent with the intention of the statute: *Campbell* at 562–563. However, he concluded the overarching purpose of the *RTA* (to give tenants greater security of tenure) was irrelevant to the question before him. Rather, the narrow question was whether the Legislature had delegated the ultimate decision to impose rent controls to the Cabinet. He found it did: *Campbell* at 564.

[53] The Federal Court reached a similar conclusion in *Tsawwassen Indian Band v. Canada (Minister of Finance)*, 145 F.T.R. 1, 1998 CanLII 7586 (F.C.). The statute in question mandated that an environmental assessment be conducted "in accordance with any regulations made for that purpose under paragraph 59(j)" (emphasis added). But no regulations had been passed.

[54] Having found an environmental assessment was only to be conducted in accordance with regulations under para. 59(j), the judge concluded the concerned party was exempt from the environmental assessment requirement. The judge found this was consistent with the statute as a whole. As the judge concluded, “Where a statute provides that something is to be done in accordance with regulations, and there are no regulations in place, it is not the function of the Court to create regulations”: *Tsawwassen* at para. 75.

[55] However, Mr. Rogers cites *RM (AP) v. The Scottish Ministers*, 2012 UKSC 58, where the UK Supreme Court reached a somewhat different conclusion. The Court considered the failure of Ministers to enact regulations under the *Mental Health (Care and Treatment) (Scotland) Act 2003*. That legislation granted a right of review of compulsory treatment orders to “qualifying patients”, who were defined as patients “of a description specified in the regulations” (emphasis added). The Ministers had not enacted regulations in this area, so it was impossible to determine who was a qualifying patient with the right to challenge the conditions of their detention.

[56] The Court found that although the relevant sections of the legislation had technically been in force for nine years, they had no practical effect.

[57] But the Court went further and concluded the Ministers’ failure to enact the required regulations had thwarted the intention of Parliament. Even though the statute conferred a discretionary power to enact regulations, the Court (relying on earlier authorities) noted the failure to exercise that power was unlawful if it was contrary to Parliament’s intention. The *Act* intended to create legal rights which could only properly function through the enactment of the regulations. The Court therefore declared the failure to enact the regulations unlawful: *RM* at paras. 42–47.

[58] These cases highlight several considerations relevant to the present case. First, where—as here—a statutory provision requires a duty be carried out “as prescribed”, but no prescription has been made, the issue is typically justiciable, at the very least to determine the legal effect of the failure to regulate.

[59] Second, the provision is typically found to be without effect. The making of the regulation is a "condition precedent" to imposing the duty. Without it, no duty arises.

[60] Third and finally, however, is that—at least as far as the UK Supreme Court is concerned—the discretion whether to make such regulations, albeit wide, is not absolute. It cannot be exercised in such a way as to frustrate the intent of the legislature. Determining whether this is the case is a matter of statutory interpretation.

Vavilov, Auer, and the implications for court review of the decision not to enact regulations

[61] Administrative law is different in Canada than in the UK. Mr. Rogers, however, points to developments in Canadian administrative law as indicative of an increased willingness of courts to oversee regulatory powers of the executive. He proposes it would be consistent with the modern framework of administrative law put forward in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, for the court to find the failure to make necessary regulations in this case was unreasonable.

[62] The recent SCC decision in *Auer v. Auer*, 2024 SCC 36, which was not available to the chambers judge, lends support to this position. In *Auer*, the Supreme Court determined the reasonableness standard set out in *Vavilov* applies when reviewing the *vires* of subordinate legislation such as regulations: at para. 3.

[63] Obviously, the present case differs in that there is no subordinate legislation presently available for review as to its reasonableness. But the Court in *Auer* emphasized that *Vavilov* is to have broad application in the field of administrative law:

> [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.*).

[64] The Court reaffirmed *Vavilov* was intended to bring "greater coherence and predictability to this area of the law", is meant to accommodate "all types of administrative decision making", and applies to issues "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": *Auer* at para. 21 (internal citations to *Vavilov* removed).

[65] The Court recognized that assessing the reasonableness of subordinate legislation would naturally engage different considerations than other administrative actions. The Court also found that many of the principles outlined in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, still apply to determining whether subordinate legislation is *ultra vires*. These include:

a) A successful challenge must demonstrate the regulations are inconsistent with the objective of the enabling statute or the scope of the statutory mandate.

b) Subordinate legislation must be consistent with both the specific provisions of the enabling statute and its overriding purpose.

c) Both the challenged regulation and the enabling statute should be interpreted using a broad and purposive approach consistent with the Court's general approach to statutory interpretation.

d) Courts should not assess the policy merits of subordinate legislation to determine whether it is wise, necessary or effective. Rather, they should consider only its legality and validity.

Auer at paras. 29, 33.

[66] As the Court concluded, applying a reasonableness standard to all administrative decisions "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": *Auer* at para. 46. Where an administrative decision maker interprets the statute in a way that transgresses what the legislature intended, the court can step in to ensure the decision maker acts within the scope of its lawful authority: *Auer* at para. 47. Importantly, *Auer* makes clear the standard of review for reviewing the vires of subordinate legislation does not depend on the identity of the decision maker who enacted it. Regulations derive their validity from the statute that creates the power, and not from the executive body that exercises the power: *Auer* at para. 43.

[67] Reasonableness review of regulation-making therefore rests on statutory interpretation. Where the legislature uses broad or open-ended language, it is delegating discretionary authority to the administrative actor in question. Where, by contrast, the legislature has used precise and narrow language to delineate the power in detail, it is meant to tightly constrain the delegate's authority: *Auer* at para. 62. Although the delegate is empowered to interpret the scope of their authority under the statute, their interpretation must be consistent with its text, context, and purpose: *Auer* at para. 64; see also *Vavilov* at paras. 108, 110.

[68] Finally, the Court in *Auer* advised:

> [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.

[69] Given the Court's intention that *Vavilov* be applied broadly to the review of executive regulation-making <u>action</u>, the corollary is that *Vavilov* must also apply to the review of executive regulation-making <u>inaction</u>. In our view, the courts have a role to play where an executive decision <u>not</u> to enact regulations is alleged to be contrary to the purpose of the enabling statute.

[70] The application of the reasonableness standard to a discretionary decision not to enact regulations is supported by the Ontario Court of Appeal's recent decision in *Canada Christian College and School of Graduate Theological Studies v.*

Post-Secondary Education Quality Assessment Board, 2023 ONCA 544. There, the Canada Christian College brought an application for judicial review challenging, in part, the Minister of Training, Colleges and Universities' decision not to proclaim into force legislation that would allow the college to refer to itself as a university. The legislation in question provided it would come into force on a day to be named by the Lieutenant Governor. However, the Minister had recommended against proclaiming the amendments in force at the time.

[71] A preliminary issue was whether the Minister's decision not to proclaim the legislation was justiciable and reviewable on a reasonableness standard. It is worth noting the Court concluded the Minister's decision was justiciable, stating:

> [29] … There is no question that the Minister's decisions under review are justiciable and that the Divisional Court treated them as such in the decision below. Whether those decisions are characterized as legislative, administrative or adjudicative in nature may be relevant to the substance of the judicial review analysis, as discussed below, but such characterization does not affect their justiciability.

[72] The Ontario Court of Appeal dismissed the appeal, concluding the Minister's decision was reasonable, fair and within the discretion provided by the statute. Despite this, the Court also stated a Minister's discretion was not unlimited and the Minister could not decide to never proclaim an enacted statute. In coming to this conclusion, the Court commented on the Minster's discretion:

> [53] The discretion to exercise the authority conferred by this commencement provision is subject to the same constraints that apply to all exercises of ministerial discretion. The exercise of a discretion "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration: *Roncarelli v. Duplessis,* [1959] S.C.R. 121, at p. 140; See also *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, at para. 94.
>
> [54] Here, the "perspective within which a statute is intended to operate" is to fulfil the purpose of the legislation by operationalizing the will of the Legislature. The legitimate grounds for delaying proclamation must be related to the conditions necessary for implementing legislation. In this case, the appellants have not alleged the Minister acted for improper purposes or on the basis of irrelevant considerations.
>
> [Emphasis added.]

[73] We understand this to mean a decision not to carry out a regulatory function called for in legislation must be justified in relation to the enabling statute. Where regulatory inaction undermines (rather than fulfils) the purpose of the legislation and, in the words of *RM*, frustrates (rather than operationalizes) the will of the legislature, the decision is unreasonable. This is so even if the power is itself discretionary. On our understanding, this is consistent with the Supreme Court's directions in both *Vavilov* and *Auer*.

Is the issue before us justiciable?

[74] The chambers judge concluded the issue as to whether the Court could order the Commissioner to enact regulations was non-justiciable. As she put it:

> [10] The Legislature and the Commissioner in Executive Council, which are called the "legislative branch", and the court have distinct roles. The legislative branch makes policy choices and enacts laws. The court interprets and applies the laws. The court does not have the authority to direct the legislative branch as to how it should set policy or enact legislation, except in circumstances involving Constitutional violations (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para. 118).

[75] Respectfully, the judge erred in characterizing the Commissioner in Executive Council as part of the legislative branch. The Legislature of Yukon (previously known as the Commissioner in Council) consists of the Commissioner and the Legislative Assembly: *Yukon Act*, S.C. 2002, c. 7, s. 17. The Commissioner in Executive Council, however, means the Commissioner acting by and with the advice and consent of the Executive Council: *Interpretation Act*, R.S.Y. 2002, c. 125, s. 21(1). The Executive Council, appointed by the Commissioner, includes the Premier and those other persons appointed by the Commissioner on the advice of the Premier: *Government Organisation Act*, R.S.Y. 2002, c. 105, s. 2.

[76] Cabinet may in some contexts play a legislative role, such as in the formulation of policy that leads to the introduction of a bill in the legislature. However, that is not what this case is about. In responding to the direction in s. 22(1), the Commissioner in Executive Council is implementing the will of the legislature and therefore acting in an executive capacity.

[77] The judge's reliance on *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, was therefore misplaced. That case dealt with legislative, not executive, action. It also resulted in four separate reasons. Although *obiter*, Justice Karakatsanis (writing for Chief Justice Wagner and Justice Gascon, with Justices Abella and Martin concurring in part) made clear her conclusions regarding the non-justiciability of the law-making process "do[es] not apply to the process by which subordinate legislation (such as regulations or rules) is adopted, as such conduct is clearly executive rather than parliamentary": *Mikisew Cree* at para. 51.

[78] The discussion of *Auer* and *Canada Christian College* above leads us to conclude the issue concerning the Commissioner's inaction under s. 22(1) is justiciable. Action taken by the executive under statutorily granted powers are reviewable to ensure they have not transgressed the purpose of the statute and intent of the legislature. We see no reason why the decision not to prescribe an amount under s. 22(1) should be exempt from such scrutiny, particularly given the Supreme Court's repeated direction that *Vavilov* is to be applied broadly to all administrative action.

[79] We recognize that in many (perhaps most) instances of inaction, the court will be reticent to intervene where regulations called for in legislation have not been enacted. The decision to exercise restraint, however, will be based not on a lack of justiciability *per se*, but will instead be based on the type of powers delegated under the statute. Where those powers are framed in broad terms, engage complex matters of public policy not susceptible to court remedy, or otherwise signal a desire of the legislature to exempt executive action from scrutiny, the court's oversight will be limited.

Was the Commissioner's decision not to prescribe an amount under s. 22(1) inconsistent with the *MEA*?

[80] The overall purpose of the *Act*, although not expressly stated, is easy to discern. It is to provide a mechanism for those with a maintenance order to enforce payments. It focuses on ensuring payors fulfill their maintenance obligations,

reducing the burden on recipients to enforce these payments on their own, and providing state-supported mechanisms for enforcement: see e.g., *MEA*, s. 2(2).

[81] However, in attempting to achieve its overall purpose, the *Act* also attempts to balance the need to enforce a payor's obligation to comply with maintenance orders with the economic realities faced by payors. It aims to protect payors by ensuring they can retain enough income to meet their basic needs while still fulfilling their maintenance obligations.

[82] The mechanism for striking this balance is set out in s. 22 of the *Act*, which we repeat here for convenience:

> **22 Some remuneration exempt from garnishment**
>
> (1) If satisfied on reasonable grounds that the amount of remuneration paid to the director in response to a garnishment order would reduce the respondent's income from all sources to less than the minimum prescribed by the Commissioner in Executive Council, the director shall pay out to the claimant only the amount of remuneration in excess of that prescribed minimum and shall pay out the balance to the respondent.
>
> (2) The director or respondent may apply to the court for a determination of the respondent's total income from all sources, and the court may
>
> (a) summarily determine the respondent's total income from all sources; or
>
> (b) order a further hearing or trial of an issue or question necessary to determine the respondent's total income from all sources.
>
> [Emphasis added.]

[83] The director is mandated by s. 22(1) to refrain from garnishing more than the prescribed minimum from the respondent. This power is not discretionary. As stated in Yukon's *Interpretation Act*, s. 5(3), "the expression 'shall' shall be read as imperative".

[84] The language in s. 22(1) is, however, meaningless unless the Commissioner actually prescribes a minimum income. Without it, the director has no standard against which to assess the amounts to be garnished by MEP and paid out to the recipient. The provision is without legal effect.

[85] Despite the clear mandatory language directed towards the director by the Legislature, the respondents maintain the Commissioner is permitted, but not required, to prescribe a minimum. The respondents provide little in the way of support for this proposition.

[86] In our view, there is nothing in the *Act* to displace the clear intent of the Legislature that the director refrain from garnishing income in excess of the prescribed amount. If anything, the scheme and context of the *Act* only add further support to the mandatory nature of s. 22(1).

[87] For example, the regulation-making power in s. 22(1) can be contrasted with the regulation-making power in s. 45. Only s. 45 uses the permissive “may” in relation to the Commissioner’s regulation-making power.

[88] Further, the Commissioner’s discretion to make regulations under s. 45 is limited to regulations “respecting the procedure for taking proceedings under this Act” and “prescribing forms for use in proceedings under this Act”. Section 45 plays no role in the setting of a minimum payor income. Unlike *Friends of the Earth* and *Canadian Union of Public Employees*, there is no broad and discretionary power delegated to the Commissioner to make regulations as needed.

[89] The setting of a minimum payor income is instead mandated by s. 22(1) directly. This is a case in which the Legislature has used precise and narrow language to delineate that power in detail, signalling a tightly constrained delegation of authority.

[90] In addition, the *MEA* can be distinguished from the Federal Court’s consideration of the *Kyoto Act* in *Friends of the Earth*. The regulations at issue in that case necessitated broad policy considerations, ongoing changes in the political and scientific environment, and indeterminate results.

[91] Here, the issue of remedy is less of a concern. Admittedly, the setting of a minimum income under s. 22(1) involves policy considerations. But, unlike the

circumstances in *Friends of the Earth*, directing the Commissioner to prescribe a minimum would not be "substantially empty of content".

[92] Rather, it would provide the content necessary for effective judicial oversight of the *MEA*. Once a minimum income is set, an individual subject to garnishment under the *Act* can challenge the *vires* of the regulation. If the Commissioner's prescription was reasonable, that challenge would fail. But if the Commissioner prescribed, for example, an income of $1, then it would be open to the court to scrutinize that decision to determine whether it undermined the purpose of the provision.

[93] This points to yet another critical difference between the *Kyoto Act* and the *MEA*. The court in *Friends of the Earth* emphasized the *Kyoto Act* contemplates Parliamentary and public, rather than judicial, accountability. Judicial deference to the executive was therefore warranted.

[94] The *MEA*, by contrast, concerns the duties and powers of the MEP vis-à-vis private citizens, including the power to garnish an individual's income in the process of enforcing maintenance orders. In laying out these duties, the *Act* expressly calls for judicial oversight of enforcement: see e.g., ss. 13, 27, 28. In addition, a payor may apply to the courts for a stay of proceedings where the enforcement of a maintenance order would cause unjustifiable hardship to them: s. 32.

[95] Section 22(2) also explicitly contemplates recourse to the courts. It provides that either the director or a payor may apply to the court to determine the payor's income from all sources. Yet this function, too, is rendered meaningless if there is no prescribed minimum against which the payor's income can be compared.

[96] The judge's and respondents' reliance on *Friends of the Earth* is therefore misplaced.

[97] As a final consideration, we note the respondents, in place of prescribed minimums, rely on policies established by the director. The respondents also note

the director can enter into voluntary payment arrangements with payors to pay down support arrears.

[98] On the respondents' understanding of the *MEA*, it is the director, not the Commissioner, who exercises the discretion to determine minimum income levels for payors. But such an interpretation runs contrary to the plain wording in s. 22(1). According to the *Act*, the Commissioner is to prescribe the minimum payor income by regulation. It is not the director who does so by policy.

[99] As the Court said in *Vavilov*, "[an administrative decision maker] cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to 'reverse-engineer' a desired outcome": at para. 121.

[100] Ultimately, we see no principled distinction between the present circumstances and those that were before the United Kingdom Supreme Court in *RM*. The *Act* was passed over 20 years ago, and the Commissioner has never prescribed a minimum income. The respondents have not provided any reasonable grounds for the Commissioner's failure to do so. Clearly, the Commissioner has made a deliberate choice to not prescribe the minimum income required for the *Act* to function as intended. As such, the Commissioner has thwarted the intention of the Legislature leaving the protections in s. 22 without legal effect. Instead of a clear limit set by regulation by the Commissioner, payors (and recipients) are subject to policy choices made by the Director.

[101] Court intervention is therefore warranted.

What is the appropriate remedy?

[102] Mr. Rogers seeks an order that the Commissioner prescribe a minimum amount under subsection 22(1) of the *MEA*.

[103] In the alternative, he seeks a declaration that the failure of the Commissioner to prescribe a minimum amount under subsection 22(1) is unlawful and that it must

comply with the law within 30 days. He also seeks an order that the MEP exempt from garnishment 100% of social assistance benefits and federal pension benefits until such time as the Commissioner prescribes a minimum amount under subsection 22(1).

[104] The respondents claim the latter relief sought—that of a declaration and the exemption of certain income from garnishment—is not properly before this Court. They claim that Mr. Rogers failed to provide a clear statement of the relief sought below, that he stated multiple times throughout the hearing the only order he was requesting was a stay of enforcement, and that his claim was properly characterized by the judge as consisting of (as relevant here): (1) a stay and (2) an order of *mandamus* compelling the Commissioner to enact regulations.

[105] Respectfully, we disagree. First, the issue, in essence, was whether the court had any supervisory role to play in relation to the Commissioner's failure to enact regulations. The precise framing of the remedy—whether it be *mandamus* or declaratory relief—while important, did not change the legal issue facing the respondents: whether the Commissioner was justified in failing to enact regulations under s. 22(1).

[106] Second, having reviewed Mr. Rogers' affidavits in the court below, we are satisfied the issue of remedy was sufficiently raised. In his affidavit of July 28, 2023, he stated:

> 44. I further ask the Court to encourage those responsible for the determination of the "prescribed minimum" to do so.
>
> 45. I ask the courts direction in the necessity to bring an Application for Judicial Review under Rule 54(1). "Applications for judicial review of administrative decisions seeking relief in the nature of declaration, injunction, mandamus, prohibition, certiorari or habeas corpus must be brought under this rule, except by leave of the court.
>
> [Emphasis added.]

[107] And again, in his second affidavit dated October 31, 2023:

> 21. After receiving a clear message that there would be no efforts made to define the Statue 22(1), in addition to my need for an Order to stay maintenance enforcement proceedings for the relief I seek, I ask the court to

> encourage the parties responsible for defining Statute 22(1) to do so. If YTG continues to not acknowledge the disconnect between the effect of Policy over Statute outcomes and refuse to take responsibility for defining their own Statute, I ask the court for an ancillary Order of Mandamus or Judicial review or what ever is required to correct this disparaging attitude.

[108] Declaratory relief is but one means available to encourage those responsible to correct the alleged error. Although not stated with the legal precision expected of counsel, it should have been clear to the respondents Mr. Rogers was challenging the Commissioner's failure to enact regulations under s. 22(1) and seeking court relief to remedy the situation.

[109] The failure to enact regulations has rendered s. 22(1) without legal effect, depriving those subject to the *MEA* from its protections. In so doing, the Commissioner has frustrated the legislature's intention of protecting payors from poverty. Court intervention is necessary to ensure the Commissioner acts within the scope of their lawful authority.

[110] Typically, the remedy in administrative law is to remit the matter to the administrative decision-maker for reconsideration, with the benefit of the court's reasons: *Vavilov* at para. 141.

[111] However, this is not always the case. As *Vavilov* makes clear, "Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": at para. 142.

[112] The present appeal is also not typical of administrative law proceedings. We are not considering the individual decision of an administrative decision-maker, which is highly susceptible to reconsideration. Rather, we are dealing with the failure to enact a regulation mandated by legislation.

[113] That said, Mr. Rogers did not provide detailed submissions regarding his preferred remedy of relief in the nature of *mandamus* and we are not satisfied we should make such an order. *Mandamus* is generally considered a remedy of last resort and will not issue unless no other adequate remedy is available: *Apotex Inc. v.*

Canada (Attorney General), [1994] 1 F.C. 742 at 766–769, 1993 CanLII 3004 (C.A.), aff'd [1994] 3 S.C.R. 1100. That is not the case here.

[114] In our respectful view, it is sufficient to declare the Commissioner's continued failure to enact regulations under s. 22(1) of the *Act* to be unlawful. As the Commissioner is obliged to act lawfully, the Court—and more importantly Mr. Rogers—can expect the Commissioner to promptly remedy the unlawfulness.

Disposition

[115] For all these reasons, the appeal is allowed. The chambers judge erred by finding she did not have the power to intervene given the Commissioner's failure to enact regulations under s. 22(1).

[116] The Commissioner's failure to enact regulations under s. 22(1) of the Act was, and remains, unlawful.

"The Honourable Chief Justice Marchand"

"The Honourable Madam Justice Smallwood"

*****Voith J.A. did not participate in the final disposition of the judgment. The judgment is pronounced pursuant to s. 1 of the *Yukon Court of Appeal Act* and s. 21(5) of the 1971 *British Columbia Court of Appeal Act*.