**S.C.C. FILE NO. 40570**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

**TRANSALTA GENERATION PARTNERSHIP and TRANSALTA GENERATION (KEEPHILLS 3)**

**APPELLANTS**

- and –

**HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA and THE MINISTER OF MUNICIPAL AFFAIRS FOR THE PROVINCE OF ALBERTA**

**RESPONDENTS**

(continued)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## TABLE OF CONTENTS

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The *2017 Alberta Linear Property Assessment Minister's Guidelines* are *intra vires* the authority granted to the Alberta Minister of Municipal Affairs (the "**Minister**").[1] Consistent with the language of the *Municipal Government Act*, the valuation process established in the Linear Guidelines is aimed at:

- fairly and equitably distributing taxes; and
- promoting transparency, predictability and stability for municipalities and taxpayers.[2]

2. The Alberta Court of Appeal (the "**ABCA**") applied the correct analytical framework for judicial review of regulations established in *Katz Group Canada Inc v Ontario (Health and Long-Term Care*) and, like the Chambers Judge, appropriately upheld the Linear Guidelines as *intra vires*.[3] TransAlta Generation Partnership and TransAlta Generation (Keephills 3) (the "**Appellants**" or "**TransAlta**") question the stability of the *Katz* framework despite having taken "no issue" with that approach before the ABCA.[4]

3. This Honourable Court has never expressly or implicitly questioned the continued authority of *Katz* and has recently confirmed that the presumption of validity continues to apply to regulations.[5] *Katz* is grounded in longstanding principles that allow for judicial review on the issue of authority for a regulation, while precluding examination on the ground of reasonableness.[6] The focus is whether the regulation is consistent with the objectives of the

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[1] *2017 Alberta Linear Property Assessment Minister's Guidelines*, Ministerial Order No. MAG: 021/17 **[Linear Guidelines]** [**Appellants' Record ("AR"), Tab 15, p 82**].
[2] *Municipal Government Act,* RSA 2000, c M-26 [***MGA***] as it appeared on December 31, 2017; *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 at para 79 [**ABCA Decision**] [**AR, Tab 3, p 48**].
[3] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [***Katz***].
[4] ABCA Decision, *supra* note 2 at para 6 [**AR, Tab 3, p 26**].
[5] *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 54 [***Canadian Council***].
[6] *Thorne's Hardware Ltd. v The Queen*, [1983] 1 SCR 106 at p 111 – 113, 1983 CanLII 20 (SCC) [***Thorne's Hardware***]; *CKOY Ltd. v The Queen*, [1979] 1 SCR 2 at p 12, 1978 CanLII 40 (SCC) [***CKOY***]; *Jafari v Canada (Minister of Employment and Immigration)*, [1995] 2 FC 595 at pp 602 and 604, 1995 CanLII 3592 (FCA) [***Jafari***]; *Alaska Trainship Corporation et al. v*

enabling statute and the scope of the statutory mandate. [7] There is no inquiry into the "political, economic, social or partisan considerations"[8] and there is no consideration of whether the regulation will actually succeed at achieving the statutory objective.[9]

4. Here, the *MGA* intends for the Minister to decide: the circumstances relevant to the assessment process; the valuation standards that result in a fair and equitable distribution of taxes; and the specifications and characteristics of property to be considered when assessing property. Nothing in the *MGA* constrains the Minister's exercise of authority in the manner suggested by the Appellants.

5. The assessment of linear property is inherently difficult. Such properties rarely trade in the marketplace and, when they do, are priced on the basis of non-assessable items. This is why the *MGA* "give[s] the Minister space to depart from previously relied upon valuation methodologies [such as market value] and to decide how depreciation [is to] be measured to achieve the government's statutory and taxation objectives".[10] The ABCA was correct in concluding that the impugned provisions "simply make clear that consideration of off-coal agreements and any legislation requiring the reduction or cessation of coal-fired emissions is to remain separate from the assessment process".[11]

6. Much of the Appellants' appeal is not truly a challenge to the Minister's authority, but is instead a thinly veiled challenge of the *merits* of the Minister's exercise of that authority. The Appellants ask this Court to second guess the decisions made by the Minister in establishing a valuation standard. This would be contrary to the long-established principles that policy decisions within subordinate legislation are not subject to review by the courts.

7. The ABCA was, as directed by *Katz*, appropriately focused on the purposes and objects of the *MGA* read as a whole. Deliberate care was taken by the ABCA to respect its role within the constitutional separation of powers. The Court is neither permitted to examine the policy

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*Pacific Pilotage Authority*, [1981] 1 SCR 261 at 276, 1981 CanLII 15 (SCC) [***Alaska Trainship***]; *Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at para 27 [***Syncrude***].

[7] ABCA Decision, *supra* note 2 at para 51 [**AR, Tab 3, p 39**].

[8] *Katz*, *supra* note 3 at para 28.

[9] *Ibid*.

[10] ABCA Decision, *supra* note 2 at para 64 [**AR, Tab 3, p 45**].

[11] *Ibid* at para 79 [**AR, Tab 3, p 48**].

basis for the Linear Guidelines, nor to assess their wisdom or efficacy. The Minister is accountable to the legislature and, ultimately, the electors, on questions of policy.

8. Even if this Court considers it necessary to modify the *Katz* framework:

- there is no basis to conclude that the Linear Guidelines are discriminatory; and
- the legislature clearly intended that the Minister be given flexibility with respect to the circumstances relevant to the determination of depreciation for purposes of assessment.

9. This appeal should be dismissed.

## B. Court Decisions Below

10. The Appellants own and operate four coal-fired electric power systems that are, along with other facilities, subject to off-coal agreements (the "**Off-Coal Agreements**"). In exchange for 14 substantial annual payments, the Appellants, and other parties to Off-Coal Agreements, agreed to end coal-fired emissions by December 31, 2030.

11. The Minister passes regulations annually to establish the assessment process for linear property, including electric power systems. The Linear Guidelines do not recognize additional depreciation where an Off-Coal Agreement applies to a property. The Appellants seek a different policy choice, and ask this Honourable Court to second-guess the policy decision of the Minister.

12. The Chambers Judge dismissed the application for judicial review brought by TransAlta, together with Capital Power Corporation and Capital Power (G3) LP ("**Capital Power**").[12] That decision was upheld on appeal.[13]

### (i) Decision of the Chambers Judge

13. With respect to the *vires* of the Linear Guidelines, the Chambers Judge explained that the *MGA* authorizes the Minister to depart from market value standards entirely. Further, the Chambers Judge concluded that "the Minister was not restricted to defining depreciation to its

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[12] *TransAlta Generation Partnership v Regina*, 2021 ABQB 37 at para 114 [**Chambers Judge Decision**] [**AR, Tab 1, p 21**].
[13] ABCA Decision, *supra* note 2 at paras 79, 87 and 103 [**AR, Tab 3, pp 48, 49 and 53**].

dictionary meaning or to the meaning given to that term under prior legislation … it cannot be said that "any" loss in value must be taken into account".[14]

14. The Chambers Judge also concluded that the Linear Guidelines are not discriminatory as the impugned provisions do not deprive TransAlta or Capital Power of a form of depreciation to which they were previously entitled or applicable to other forms of linear property.[15] Relying on *Katz*, the Chambers Judge noted that even if the impugned provisions create a distinction, such a distinction is authorized.[16]

**(ii) Decision of the Alberta Court of Appeal**

15. The ABCA dismissed the appeal and found the impugned provisions of the Linear Guidelines *intra vires*.[17] The ABCA found that the legislature empowered the Minister to decide the valuation standards, as well as the property specifications and characteristics relevant to valuation. Further, the legislature intended to "give the Minister space to depart from previously relied upon valuation methodologies and to decide how depreciation [is to] be measured to achieve the government's statutory assessment and taxation objectives".[18]

16. Regarding the application of market value principles to regulated assessments, the ABCA found that the appellants "accept[ed] that market value is not intended to be the standard for determining the value of their linear properties".[19]

17. The ABCA found no discrimination on the facts since the impugned provisions apply to all coal-fired electrical power systems in Alberta that are subject to Off-Coal Agreements or legislation requiring the reduction or cessation of coal-fired emissions.[20] The ABCA also concluded that the *MGA* provides the Minister with authority to distinguish between coal-fired and other types of electric power generation properties.[21]

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[14] Chambers Judge Decision, *supra* note 12 at paras 54 and 56 [**AR, Tab 1, p 12**].
[15] *Ibid* at para 72 [**AR, Tab 1, p 15**].
[16] *Ibid* at para 73 [**AR, Tab 1, p 15**].
[17] ABCA Decision, *supra* note 2 at para 103 [**AR, Tab 3, p 53**].
[18] *Ibid* at para 64 [**AR, Tab 3, p 45**].
[19] *Ibid* at para 59 [**AR, Tab 3, p 43**].
[20] *Ibid* at para 86 [**AR, Tab 3, p 49**].
[21] *Ibid* at paras 84 – 85 [**AR, Tab 3, p 49**].

18. The ABCA went on to conclude that no procedural fairness requirements were owed given the "legislative" nature of the decision[22] and that there was no basis for the legitimate expectation arguments raised by the appellants.[23] The ABCA's decision respecting procedural fairness has not been appealed.

## C. Respondents' Position on Appellants' Summary of Facts

### (i) Assessment and Taxation of Linear Property

19. Electric power systems in Alberta (including the Appellants') are assessed for municipal taxation purposes as "linear property".[24] Section 292(2) of the *MGA* requires linear property assessments to reflect:

> (a) the valuation standard set out in the regulations for linear property, and
>
> (b) the specifications and characteristics of the linear property
>
> (i) as contained in the records of the Alberta Utilities Commission, the Energy Resources Conservation Board or the Alberta Energy Regulator on October 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the linear property, or
>
> (ii) on October 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the linear property, as contained in the report requested by the assessor under subsection (3).[25]

20. "Linear property" is one type of "regulated property" under the *MGA*. The others are machinery and equipment, farm land and railways.[26] Guidelines for the assessment of "regulated property" in Alberta are passed annually. [27]

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[22] *Ibid* at paras 88 – 101 [**AR, Tab 3, pp 49 – 52**].
[23] *Ibid* at para 102 [**AR, Tab 3, p 53**].
[24] *MGA*, *supra* note 2, s 284(1)(k); ABCA Decision, *supra* note 2 at para 10 [**AR, Tab 3, p 27**].
[25] *MGA*, *supra* note 2, s 292(2)(a); Since passage of the Linear Guidelines, there have been amendments to the *MGA* reflect the establishment of 'designated industrial property' referenced by the ABCA and in the Appellants' Factum. The amendments do not change the analysis.
[26] *Matters Relating to Assessment and Taxation Regulation*, Alta Reg 220/2004, s 1(n) (repealed) [***MRAT***]; See also *Matters Relating to Assessment and Taxation Regulation, 2018*, Alta Reg 203/2017, s 1 (k) [***MRAT, 2018***].
[27] *MGA*, *supra* note 2, s 322(2); *MRAT*, *ibid*, ss 5(1)(a), 6(4), 7, 8 and 9; See also *MRAT, 2018*, *ibid,* ss 7(2), 8(1)(a), 10, 11 and 12; For example, see: *2017 Alberta Farm Land Assessment*

21. One reason for implementing a regulated assessment regime is to address difficulties inherent in assessing certain types of properties. Some types of property are difficult to assess because: they are of a unique nature; they cross municipal boundaries; or they seldom trade in the marketplace, and when they do, the sale price often includes non-assessable items that are difficult to separate from the sale price.[28]

22. Additionally, the regulated assessment methodology is intended to serve the stated policy objective of creating a stable and predictable property assessment base for the purpose of raising municipal revenues.[29]

**(ii) Authority for the Minister's Guidelines**

23. The assessment value for linear property must be calculated in accordance with the process and procedures set out in the Linear Guidelines. The Minister is authorized by sections 322 and 322.1 of the *MGA* to establish these guidelines.[30]

24. Specifically, subsection 322(1) grants the Minister authority to make regulations, amongst other things: "respecting the assessment of linear property"; "establishing valuation standards for property"; "respecting processes and procedures for preparing assessments"; and "respecting any other matter considered necessary to carry out the intent of [the *MGA*]".[31]

25. A guideline established under subsection 322(2) is a regulation for the purposes of the *MGA*, but is exempt from the application of the *Regulations Act* which includes the rules for filing and publishing regulations.[32] Instead, section 322(4) of the *MGA* requires the Minister to:

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*Minister's Guidelines*, Ministerial Order No. MAG:021/17, *2017 Alberta Machinery and Equipment Assessment Minister's Guidelines*, Ministerial Order No. MAG:021/17; Linear Guidelines, *supra* note 1 **[AR, Tab 15, p 82]**; and *2017 Alberta Railway Assessment Minister's Guidelines*, Ministerial Order No. MAG:021/17.

[28] Alberta, Municipal Affairs, "Guide to Property Assessment and Taxation in Alberta" (January 1, 2010) at 13 [***2010 Guide***] [**Respondents' Book of Authorities ("RBOA"), Tab 1]**; Alberta, Municipal Affairs, "Guide to Property Assessment and Taxation in Alberta" (January 2018) at 7 [***2018 Guide***] **[Appellants' Book of Authorities ("ABOA"), Tab 12]**; ABCA Decision, *supra* note 2 at para 13 **[AR, Tab 3, p 27].**

[29] Alberta, Legislative Assembly, *Alberta Hansard*, 26th Leg, 3rd Sess, (May 16, 2007 - evening) at 1190 (Hon Raymond Danyluk) [**May 2007 Hansard**] [**RBOA, Tab 2**].

[30] ABCA Decision, *supra* note 2 at para 14 [**AR, Tab 3, p 28**].

[31] *MGA*, *supra* note 2, ss 322(1)(c.1), (d), (e) and (i) and 322(2).

[32] *Ibid*, ss 322(2), 322(3) and 322.1(3).

> (a) publish in The Alberta Gazette a notice of any guideline established … and information about where copies of the guideline may be obtained or are available to the public;
>
> (b) ensure that any guideline established … is published in a form and manner that the Minister considers appropriate.[33]

**(iii) The Off-Coal Agreements**

26. "Off-Coal Agreement" is defined in the Linear Guidelines as "an arrangement of transition payments from the Government of Alberta and owners of coal-fired units that were originally slated to operate beyond 2030 to discontinue using coal as a fuel source by December 31, 2030".[34]

27. TransAlta Generation Partnership, one of the Appellants, is a party to an Off-Coal Agreement with Alberta, dated November 24, 2016 (the "**TransAlta Off-Coal Agreement**"). TransAlta Corporation, TransAlta Cogeneration LP and Keephills 3 LP are also parties to the TransAlta Off-Coal Agreement. TransAlta Generation (Keephills 3) is not a named party to the agreement.

28. Four related Capital Power companies and ATCO also entered into off-coal agreements.[35] ATCO's Off-Coal Agreement does not form part of the Record due to a confidentiality agreement.[36] Capital Power was an applicant before the lower Courts but is not a party to this appeal.

29. While the Appellants opine on the reasons for Alberta's decision to enter into the Off-Coal Agreements, they cite no evidence to support their position.[37] The only basis for the Off-Coal Agreements that is evident from the Record is outlined in the preambles to the Off-Coal Agreements, which provide:

- Alberta determined that it is in the public interest to ensure that no more carbon dioxide and other air contaminants emanate from the combustion of coal after 2030;

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[33] *Ibid*, s 322(4).
[34] Linear Guidelines, *supra* note 1, s 1.001(w), [**AR, Tab 15, p 87**].
[35] Capital Power Off-Coal Agreement, [**AR, Tab 21, p 135**]; Record of Proceedings, para 2 [**AR, Tab 13, p 80**].
[36] Record of Proceedings, para 2 [**AR, Tab 13, p 80**].
[37] See the Appellants' Factum at paras 25 – 26.

- Alberta requires the cessation of operations that produce coal-fired emissions at the plants identified in the Off-Coal Agreements in accordance with the Alberta Climate Leadership Plan released by Alberta in November 2015;
- Alberta determined it is in the public interest to maintain a positive investment environment while ensuring that workers and communities affected by the coal phase out are supported.[38]

30. Parties to the Off-Coal Agreements voluntarily agreed to cease coal-fired emissions from the coal-powered electricity generation plants that they own and operate pursuant to their respective Off-Coal Agreements.[39]

31. Parties to the Off-Coal Agreements are paid substantial sums on an annual basis to cease coal-fired emissions by 2030.[40] For TransAlta, this includes 14 annual payments, each of $39,851,704.60.[41] As found by the ABCA, "[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".[42]

32. Each party to an Off-Coal Agreement acknowledged that Alberta "[was] under no legal obligation to compensate or otherwise pay any amount … as [a] result of the phase out of Coal-Fired Emissions".[43] The Appellants' characterization of the payments pursuant to the Agreements as "settlement funds" is unsupported by the Record.[44]

33. The Off-Coal Agreements run with the plants, such that on transfer of ownership of the plants, the new owner is bound by the terms of the Agreement.[45] Consent from Alberta is

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[38] TransAlta Off-Coal Agreement, Preamble, [**AR, Tab 22, p 150**]; Capital Power Off-Coal Agreement, Preamble [**AR, Tab 21, pp 135 and 136**].
[39] TransAlta Off-Coal Agreement, s 2 [**AR, Tab 22, p 151**]; Capital Power Off-Coal Agreement, s 2 [**AR, Tab 21, p 136**].
[40] TransAlta Off-Coal Agreement, s 3(a) [**AR, Tab 22, p 151**]; Capital Power Off-Coal Agreement, s 3(a) [**AR, Tab 21, p 136**].
[41] TransAlta Off-Coal Agreement, s 3(a) [**AR, Tab 22, p 151**].
[42] ABCA Decision, *supra* note 2 at para 23 [**AR, Tab 3, p 30**].
[43] TransAlta Off-Coal Agreement, s 4(a) [**AR, Tab 22, p 152**]; Capital Power Off-Coal Agreement, s 4(a) [**AR, Tab 21, p 137**].
[44] Appellants' Factum at para 123.
[45] TransAlta Off-Coal Agreement, s 11(n) [**AR, Tab 22, p 157**]; Capital Power Off-Coal Agreement, s 11(n) [**AR, Tab 21, p 142**].

required before ownership may be transferred, which consent is not to be unreasonably withheld, provided that the new owner agrees to be bound by the terms of the Off-Coal Agreement.[46] Any assignment of the Off-Coal Agreements is also subject to the requirement of written consent of the other parties (except where the assignment is to an affiliate controlled by a party to the agreement).[47]

**(iv) Regulated Assessments Pursuant to the Linear Guidelines**

34. Linear property assessments are determined based on the following calculation: Schedule A x Schedule B x Schedule C x Schedule D. Each Schedule varies between the different types of linear property. The schedules are described in s. 1.003 of the Linear Guidelines as follows:

> (a) **Schedule A** – provides the process for determining base cost. ...
>
> (b) **Schedule B** – lists the assessment year modifiers. …
>
> (c) **Schedule C** – provides the process for determining depreciation or lists the depreciation factor allowed by the *2017 Alberta Linear Property Assessment Minister's Guidelines*. ... **The 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.**
>
> (d) **Schedule D** – provides the process for determining additional depreciation or lists the additional depreciation factor allowed by the *2017 Alberta Linear Property Assessment Minister's Guidelines*. … **The additional depreciation factor for linear property described in Schedule D is exhaustive. No additional depreciation is allowed**. <u>There 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</u>.[48] [bolding in original, underlining added]

35. Section 2.003 of the Linear Guidelines addresses Schedule C and D depreciation for the GEN account electric power systems that are at issue in this appeal:

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[46] TransAlta Off-Coal Agreement, s 11(n) [**AR, Tab 22, p 157**]; Capital Power Off-Coal Agreement, s 11(n) [**AR, Tab 21, p 142**].
[47] TransAlta Off-Coal Agreement, s 11(m) [**AR, Tab 22, p 157**]; Capital Power Off-Coal Agreement, s 11(m) [**AR Tab 21, p 142**].
[48] Linear Guidelines, *supra* note 1, s 1.003 [**AR, Tab 15, p 88**].

**DEPRECIATION (Schedule C and Schedule D) FOR ACCS BEGINNING WITH GEN**

(a) The Schedule C depreciation tables for ACCs beginning with GEN reflect all physical, all functional, all economic and net salvage considerations. The factor within the Schedule C depreciation tables are fixed and certain, and shall be applied as listed in the applicable Schedule C depreciation table, without adjustment or modification.

(b) Schedule D depreciation for ACCs beginning with GEN is limited to highly unusual site-specific circumstances such as catastrophic physical failure, and is only allowed on a case by case basis when acceptable evidence is documented and provided to the assessor.

(c) The combined effect of Schedule C and Schedule D for ACCs beginning with GEN shall not exceed total depreciation of 80%. Accordingly, if a depreciation factor of 0.200 is achieved under Schedule C, no additional depreciation is allowed under Schedule D. There 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.[49] [emphasis added]

36. The originating application for judicial review seeks relief respecting sections 1.003(c) and (d) and 2.003(a), (b) and (c) of the Linear Guidelines. However, the Appellants have only raised arguments respecting section 1.003(d) and the Off-Coal Agreement language in section 2.003(c). No arguments have been raised with respect to the 80% cap on Schedule C and D depreciation included in section 2.003(c) and there is no basis for any relief to be granted in respect of that portion of the provisions.[50]

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[49] Linear Guidelines, *supra* note 1, s 2.003 [**AR, Tab 15, p 90**].

[50] See Originating Application, paras 6 and 7 [**AR, Tab 6, pp 59 – 60**]. The ABCA Decision, *supra* note 2 at para 27 also referred to the challenge of two provisions: section 1.001(w) (the definition of "Off-Coal Agreement") and section 2.004(e) (the language "Subject to section 1.003(d) and section 2.003(b)"). Again, these provisions are not captured in the originating application. That being said, any reference to Off-Coal Agreements in the Linear Guidelines is necessarily related to the application of sections 1.003 and 2.003.

**(v) Market Value Assessments**

37. For land and improvements that are not "regulated property," the valuation standard is "market value".[51] The "cost approach" described by the Appellants is one of three assessment methodologies utilized for determining "market value".[52] The direct comparison and income methods of valuation can also be used to determine market value.[53] The principles upon which those methodologies are based have developed entirely independently of the regulated regime of property assessment established by the Minister pursuant to the *MGA* and the various Minister's Guidelines. Where the market value approach applies (i.e. to property that is not "regulated property"), it is within the assessor's discretion to use whatever methodology he or she thinks best reflects the circumstances.[54]

38. The Appellants suggest the Linear Guidelines merely adopt the "cost approach," drawing on the definition of "depreciation" for *market value* assessments.[55] However, references to the Alberta Municipal Affairs *Guide to Property Assessment and Taxation in Alberta* in discussing the meaning of "depreciation" is misplaced.[56] As recognized by the ABCA, "[t]he *Guide* addresses properties assessed using *regulated* standards *separately* from properties assessed using market value methodologies like the cost approach".[57]

39. Any discussion respecting market value principles in the *Guide* is unrelated to the assessment of regulated properties. "[T]he *Guide* highlights that the *regulated* valuation standards applicable to the appellants' properties are wholly distinct from the various methodologies used to determine the value of other properties".[58]

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[51] *MRAT*, *supra* note 26, ss 5(1)(b) and 6(1); See also *MRAT, 2018*, *supra* note 26, ss 7(1)(a), 8(1)(b) and 9(1).
[52] Appellants' Factum at para 10.
[53] Appraisal Institute of Canada, *The Appraisal of Real Estate*, 3rd Canadian Ed. (Vancouver: Sauder School of Business, 2010) at 7.3 [**RBOA, Tab 3]**; see also *2010 Guide*, *supra* note 28 at pp 10 – 11 [**RBOA, Tab 1]**.
[54] *Canada Safeway Ltd v Calgary (City)*, 2016 ABQB 200 at para 83.
[55] Appellants' Factum at para 13.
[56] Appellants' Factum at paras 14 – 15.
[57] ABCA Decision, *supra* note 2 at para 65 [**AR, Tab 3, p 45**].
[58] *Ibid* [**AR, Tab 3, p 45**].

**(vi) Complaint Process**

40. The *MGA* delegates different types of authority:

- lawmaking powers are delegated to the Minister, who establishes regulations and guidelines; and
- adjudicative powers are delegated to administrative tribunals.

41. Meaning must be given to these separate delegations of authority – the legislature did not intend to give the same decision-making power to two different bodies. The Appellants' arguments ignore the higher-order lawmaking power given to the Minister, and suggest that the Minister is subject to the same constraints and justification requirements that apply to an administrative tribunal. Understanding the *MGA*'s assessment complaint process provides important context to better understand the scope of authority given to the Minister.

42. Once an assessment is issued, an assessed person or taxpayer may make a complaint respecting limited matters set out in section 460(5) of the *MGA*, including an assessment, an assessment class, an assessment sub-class or the type of property.[59] Complaints respecting linear property are heard by the Land and Property Rights Tribunal, formerly known as the Municipal Government Board (the "**Board**").[60] Proceedings before the Board are adjudicative in nature. Hearings are held with the complainant and assessor commonly producing disclosure (often including expert evidence); the presentation of witnesses; and a written decision by the Board.[61] The Board is bound by the *MGA* and its regulations, including the Linear Guidelines established by the Minister.[62]

## PART II – STATEMENT OF POSITION

43. The Respondents' position in respect of the questions posed by the Appellants is:

- **Question 1 – The Linear Guidelines are Not Discriminatory:** The impugned provisions apply to all coal-fired electric power systems that are subject to Off-Coal

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[59] *MGA*, *supra* note 2, s 460(5).
[60] *Ibid*, s 488(1)(a).
[61] *Matters Relating to Assessment Complaints Regulation*, Alta Reg 310/2009, ss 21, 25 and 26 (repealed); See also *Matters Relating to Assessment Complaints Regulation, 2018*, Alta Reg 201/2017, ss 24, 28 and 29.
[62] *MGA*, *supra* note 2, s 499(3)(a).

Agreements or provincial or federal legislation with the same effect. As such, there is no distinction on the facts. Even if there is a distinction, the Minister has broad authority to distinguish between properties that are obviously and objectively distinguishable.[63] The drawing of such distinctions is a key function of any assessment regime.[64]

- **Question 2 – The Linear Guidelines are *Intra Vires*:** The Linear Guidelines regulate the valuation standards for electric power systems and other types of linear property. Reading the *MGA* as a whole, the only available conclusion is that the legislature intended to allow the Minister to depart from market valuation methodologies and delineate what circumstances are and are not relevant to the calculation of depreciation.

- **Question 3 – *Katz* Framework for *Vires* Analysis Should Apply:** The *Canada (Minister of Citizenship ad Immigration) v Vavilov* standard of review analysis does not apply to the question of *vires*; *Katz* continues to apply.[65] Framing *Katz* as fundamentally at odds with *Vavilov* fails to appreciate that *Katz* did not address the question of deference, but instead provided a framework intended to properly focus the grounds of review.[66] When reviewing the *vires* of a regulation, the court is to determine whether the regulation is authorized by the enabling statute. Questions going to the ground of reasonableness that challenge the underlying policy rationale or the effectiveness of the regulation are not justiciable and never have been.[67]

## PART III – STATEMENT OF ARGUMENT

44. It is essential to first consider and clarify the analytical framework applicable to judicial review of a regulation (Question 3). The application of that framework (Questions 1 and 2) then follows.

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[63] *Ibid*, s 322(1)(i).
[64] ABCA Decision at para 84 [**AR, Tab 3, p 49**].
[65] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 105 [***Vavilov***]; *Canadian Council*, *supra* note 5 at para 54.
[66] See also *Thorne's Hardware*, *supra* note 6 at pp 111 – 113; *CKOY*, *supra* note 6 at p 12; *Jafari*, *supra* note 6 at pp 602 and 604; *Alaska Trainship*, *supra* note 6 at 275; *Syncrude*, *supra* note 6 at para 27.
[67] *Kruse v Johnson*, [1898] 2 QB 91 at p 99 – 100 [**ABOA, Tab 7**].

## A. *Katz* Framework for *Vires* Analysis Should Apply (Question 3)

### (i) The *Katz* Framework

45. When the validity of a regulation is at issue, the fundamental question before the court is whether the regulation is lawful in the sense of whether it is authorized by the enabling legislation. "Regulations 'derive their validity from the statute which creates the power, and not from the executive body by which they are made'".[68] Limits imposed by an enabling statute are fundamental to determining the *vires* issue.[69] "A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate".[70] That is:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.[71]

46. The governing statute is central to any interpretation of a regulation – the purpose of the enabling legislation "transcends and governs" the regulation.[72]

47. Within this framework, regulations benefit from a presumption of validity.[73] This:

- places the burden on challengers to demonstrate the invalidity; and

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[68] *Canadian Council*, *supra* note 5 at para 51, citing *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] SCR 1 at p 13, 1943 CanLII 1 (SCC) per Duff CJ, quoting *The Zamora*, [1916] 2 AC 77 (PC), at p 90.

[69] *Ibid*.

[70] *Katz*, *supra* note 3 at para 24; see also *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 87 – though this case concerned a *vires* challenge on constitutional grounds, this Court described this proposition as a "general rule" of administrative law.

[71] *Katz*, *ibid*, quoting *Waddell v Governor in Council (1983)*, 1983 CanLII 189 (BC SC), 8 Admin LR 266, at p 292.

[72] *Wood v Schaeffer*, 2013 SCC 71 at para 33, citing *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 38.

[73] *Katz*, *supra* note 3 at para 25.

- favors an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*.[74]

48. The challenged regulation and enabling statute are interpreted with a "broad and purposive approach," in accordance with the modern principles of statutory interpretation.[75] The *Interpretation Act* also requires every provincial enactment (including a regulation) to "be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects".[76]

49. Regulations must be "irrelevant," "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose.[77] "[A]lthough it is possible to strike down regulations as *ultra vires* on this basis … 'it would take an egregious case to warrant such action'".[78] There is no inquiry into the "political, economic, social or partisan considerations"[79] and there is no consideration of whether the regulation will actually succeed at achieving the statutory objective.[80]

**(ii) *Katz* Remains Good Law**

50. The presumption of validity in *Katz* is not an "artefact from a time long since passed".[81] In 2023, this Court continued to apply the presumption in determining the validity of provisions of a federal regulation in *Canadian Council for Refugees*.[82] There, because the appellants directed their argument at post-promulgation developments as opposed to the date of promulgation, "addressing other aspects of the appellants' administrative law claims [was] unnecessary, including the appropriate standard of review and how that standard would be

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[74] *Ibid*.
[75] *Ibid* at para 26; see also ABCA Decision, *supra* note 2 at para 54 [**AR, Tab 3, p 40**].
[76] *Interpretation Act*, RSA 2000, c I-8, s 10; see also ABCA Decision, *ibid* at para 55 [**AR, Tab 3, p 42**].
[77] *Katz*, *supra* note 3 at para 28.
[78] *Ibid*; see also ABCA Decision at para 54 [**AR, Tab 3, p 40**].
[79] *Katz*, *ibid*.
[80] *Ibid*.
[81] *Portnov v Canada (Attorney General)*, 2021 FCA 171 at paras 19 – 22 [***Portnov***].
[82] *Canadian Council*, *supra* note 5 at para 54.

applied in the circumstances of [the] case".[83] *Vavilov* was not considered in rejecting the claim that the subject regulation was *ultra vires*.[84]

**(iii) The Presumption of Validity is a Rule of Law and Evidence**

51. The Appellants have characterized the presumption of validity as a third "standard of review" for regulations – one of "hyperdeference".[85] This characterization misunderstands the basis for the presumption of validity. The presumption does not establish a separate standard of review.

52. The presumption of validity is a "much older device" than the standard of review and is "a rule of law and a rule of evidence".[86] This presumption was acknowledged in 1978 when it was concluded "any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted".[87]

53. The presumption of validity is an essential legal concept, "rooted in maintaining the stability of the legal system. This is conceptually distinct from the notion of deference at the heart of the reasonableness standard of review, which is based on the need to protect legislative choices about who should exercise power".[88]

54. As explained in the ABCA Decision:

> The presumption places the burden on the challenger to demonstrate invalidity and instructs a broad and purposive interpretation of the challenged regulation and enabling statute so that, where possible, the regulation is interpreted in a manner that renders it *intra vires*. In these ways, the approach is deferential. However, deference in the *Katz* sense is not to be confused with reviewing the "reasonableness" or merits of an authorized policy choice made by a delegated lawmaker.[89]

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[83] *Ibid* at para 55.
[84] *Ibid*.
[85] Appellants' Factum at paras 46 – 47.
[86] John Mark Keyes, *Executive Legislation*, 3rd ed (Markham: LexisNexis, 2021) at p 177 [**Keyes, "Executive Legislation 3rd ed"**] [**RBOA, Tab 6**]; Ruth Sullivan, *The Construction of Statutes* 7th ed (Markham: LexisNexis Canada, 2022) at 515 and 516 [**Sullivan, "Construction of Statutes"] [RBOA, Tab 7]**.
[87] *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662 at 688-689, 1978 CanLII 6 (SCC).
[88] Keyes, "Executive Education 3rd ed", *supra* note 86 at p 179 **[RBOA, Tab 6]**.
[89] ABCA Decision, *supra* note 2 at para 51 [**AR, Tab 3, p 39**].

55. The presumption of validity is about onus. It is concerned with the burden of proof that must be met by those who challenge it.[90] In the absence of clear evidence to the contrary, the courts must presume regulations have been validly enacted.[91] The onus is not on the body that adopts a provision to justify it.[92]

**(iv) No Basis for Reversal of Presumption of Validity**

56. The law will necessarily apply in ways that impose different results on different persons.[93] In order for discrimination to be established, consideration must be had for whether there is a distinction created by the legislation and whether that distinction is authorized by the enabling statute or not.[94]

57. It is unclear how the Appellants propose to reverse the presumption of validity. [95] Doing so would require a premature determination in respect to discrimination. In any event, the presumption can be applied even where allegations of discrimination are raised, just as was the case in *Katz*.[96]

**(v) Judicial Restraint and Respect for the Role of the Court**

58. By focusing its analysis on the *vires* of regulations, *Katz* confirmed that the door is closed on any challenge to a regulation on the *ground* of reasonableness. The *Katz* framework does not speak in terms of "standard of review"[97] because it is not a standard of review decision. Grounds of review have long been distinguished from standards of review.[98] Standards of review describe the *level of deference* to be applied by the court to the original decision maker. In contrast, grounds of review address the *type* of question put to the court.

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[90] Sullivan, "Construction of Statutes", *supra* note 86 at p 515 **[RBOA, Tab 7]**.
[91] *Kruger and al. v The Queen*, [1978] 1 SCR 104 at 112, 1977 CanLII 3 (SCC).
[92] *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 68.
[93] Keyes, "Executive Legislation 3rd ed", *supra* note 86 at p 369 **[RBOA, Tab 6]**.
[94] *Ibid* at pp 370 – 371[**RBOA, Tab 6**]; see also *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 259, 1994 CanLII 115 (SCC), per McLachlin J. (dissenting) [***Shell Canada***]; see also *Katz*, *supra* note 3 at para 47.
[95] Appellants' Factum at paras 96 – 101.
[96] *Katz*, *supra* note 3 at para 47.
[97] *Auer v Auer*, 2022 ABCA 375 at para 21 [***Auer***].
[98] See, for example, *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 44, 49 – 50 and 123 – 127.

59. Where adjudicative decisions are subject to review, the reasonableness standard in *Vavilov* is used to determine if "a litigant has established a ground of review: error of law or fact".[99] Where regulations are subject to review, "[t]o decide whether a valid regulation is, in outcome, "reasonable" is to judge the merits of the path chosen by the delegated lawmaker to achieve the objectives of the enabling statute".[100] This is not the role of the court.[101]

60. Policy-making is strictly within the purview of the legislative and executive branches of government.[102] Policy decisions "involve weighing competing economic, social and political factors and conducting contextualized analyses of information".[103] The judiciary "'interprets and applies the law, … acts as judicial arbiters' and ensures that laws and government action conform to constitutional norms".[104] The court's role is not to second-guess value judgments of democratically-elected government officials.[105]

61. In exercising its powers, the court must conform to the separation of powers, defer to the roles of the executive and legislative branches and refrain from undue interference with the institutional roles of each branch.[106]

62. In a recent UBC Law Review paper, The Honourable Malcom Rowe addresses the fundamental question: "how should the three principal institutions of the state – the legislature, the executive, and the courts – relate to one another"?[107] In discussing this issue, Justice Rowe explains:

> … this question is not about *what* gets decided. Rather, it is about *who* gets to decide what. Thus, it is not about the content of public policy. Rather, it is about the process by which that policy is decided. Restraint is not about the content of

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[99] John M Evans, "Reviewing Delegated Legislation After Vavilov: Vires or Reasonableness?" (2021) 34:1 C.J.A.L.P 22 at 24 [**Evans**] **[RBOA, Tab 5]**.
[100] ABCA Decision, *supra* note 2 at para 50 [**AR, Tab 3, p 39**].
[101] *Ibid* [**AR, Tab 3, p 39**]; see also *R v Chouhan*, 2021 SCC 26 at paras 129-133, per Rowe J. (concurring) [***Chouhan***] and *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 35 and 118, per Brown J. (concurring).
[102] *Nelson (City) v Marchi*, 2021 SCC 41 at para 44 [***Marchi***].
[103] *Ibid*.
[104] *Chouhan*, *supra* note 101 at para 130, per Rowe J. (concurring).
[105] *Marchi*, *supra* note 102 at para 44; *Jafari*, *supra* note 6 at p 602.
[106] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para 294.
[107] Honourable Justice Malcolm Rowe, "The Virtue of Judicial Restraint, or Who Guards the Guardians" (2022) UBC LR 55:1 at 311 [**Rowe J., "The Virtue of Judicial Restraint"**] **[RBOA, Tab 4]**.

> policy. Rather, it is about which institution of the state makes what policy decisions. Restraint is about institutional relationships.[108]

63. This is not to say that the mere fact that a regulation is informed by policy considerations will insulate it from *all* judicial oversight. Superior Courts retain the constitutional power and obligation to ensure government actions are lawful.[109] However, there are limits on the questions to be asked by the court. Here, the court is to only review whether a regulation is authorized; questions of the wisdom and effectiveness of a government's choices are left to the electorate.[110]

64. The analysis in *Katz* focuses the court's attention on the issue of authority for the regulation; "[t]he narrow ways in which the presumption of validity can be rebutted is a reflection of where the policy choice is intended to reside".[111] It prevents courts from weighing in on economics, policy, motives for passage of a regulation, the wisdom or efficacy of a regulation, or the regulation's impact on particular individuals – all matters within the legislative and executive branches.[112] A court cannot express an opinion on the wisdom of the executive's exercise of its powers.[113] This is not a question of degree of deference or reasonability; it is a question of justiciability.[114]

65. There may be more than one way to achieve a statutory objective in an enabling act. It is the delegated lawmaker's decision, not the court's, to determine how to achieve those objectives.[115] Reasonableness review of delegated legislation would inevitably lead to challenging why a delegated lawmaker chose one approach instead of another.

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[108] Rowe, J., "The Virtue of Judicial Restraint", *supra* note 107 at 311 [**RBOA, Tab 4**]; see also *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 471-472, 1985 CanLII 74 (SCC) [***Operation Dismantle***].
[109] *Crevier v A.G. (Québec) et al.*, [1981] 2 SCR 220 at 234-238, 1981 CanLII 30 (SCC).
[110] *Thorne's Hardware*, *supra* note 6 at 112; *Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources)*, 211 DLR (4th) 741, 2002 CanLII 41606 at para 49 (ONCA); see also *Hudson's Bay Company ULC v Ontario (Attorney General)*, 2020 ONSC 8046 at para 73.
[111] ABCA Decision, *supra* note 2 at para 52 [**AR, Tab 3, p 40**].
[112] *Auer*, *supra* note 97 at para 58.
[113] *Operation Dismantle*, *supra* note 108 at 471-472.
[114] See *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at paras 19, 24 – 26 and 45, aff'd, 2009 FCA 297, leave to appeal to SCC refused, 33469 (25 March 2010).
[115] ABCA Decision, *supra* note 2 at para 52 [**AR, Tab 3, p 40**].

66. The institutional capacity of the courts to review major policy decisions that rely on a broad base of supporting expertise is also relevant.[116] The court's limited role in relation to social or economic policy choice has been described as follows:

> This tends to be referred to as a deferential approach to the legislature and the executive. Deference is not a term that I would use. The courts have a role assigned to them under the Constitution Act, 1982 to review laws and policies for their conformity with the Constitution. I cannot defer to the legislature if that means failing to carry out my responsibilities as a judge. But, nonetheless, in carrying out those responsibilities I always bear in mind that my understanding of the complexities and trade-offs in any legislative scheme are inferior to those who adopt the laws. That is a function of institutional capacity. Thus, while I cannot defer, I do seek to proceed with some restraint, as I know enough to know how little I know.[117]

67. "Just as the government and legislatures must respect the courts' expertise as judicial bodies, so too must courts appreciate that they are not best placed to make determinations as to which specific social or economic policy choice is most appropriate".[118] Accountability for the "reasonableness" of legislative decisions is through the legislative and executive branches of government, and ultimately, the ballot box.

**(vi) *Vavilov* Analysis Not Suitable to Review of Regulations**

68. A 'decision' to adopt a regulation pursuant to a statutory grant of authority is inherently different from a 'decision' made pursuant to a regulatory or statutory framework. In both the ABCA Decision and *Auer*, the ABCA addressed the analytical approach applicable to the judicial review of the *vires* of a regulation and considered whether *Vavilov* changed the analytical approach from that set out in *Katz*.[119]

69. The ABCA Decision relied on the principle of *stare decisis* and the fact that nothing in *Vavilov* supports a conclusion that the court's fundamental role in reviewing regulations has

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[116] Rowe J., "The Virtue of Judicial Restraint", *supra* note 107 at 318 and 319 **[RBOA, Tab 4]**.
[117] *Ibid* at 320 **[RBOA, Tab 4]**.
[118] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 161, per Rothstein J. (dissenting).
[119] ABCA Decision, *supra* note 2 at paras 41 – 42 [**AR, Tab 3, p 37**].

changed as support for its conclusion that "a court reviewing regulations must take care to avoid examining the merits of an authorized policy choice".[120]

70. The majority in *Auer* went further in outlining several reasons *Vavilov* does not satisfactorily address the issue of the *vires* of a regulation, which reasons were, in part, referenced by the ABCA Decision.[121] Those reasons are examined further under sub-headings (a) through (d).

**(a) "There is a distinction between administrative decision-making and legislative action … applying the *Vavilov* reasonableness approach is not analytically sound".[122]**

71. Decisions of a legislative nature are commonly distinguished from decisions of an administrative nature. The *type* of decision will determine if an instrument is legislative in nature, as opposed to the medium used or the person or body exercising the power.[123]

72. An act is legislative when it concerns (1) matters of public convenience, and (2) general policy.[124] Legislative decisions "create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations".[125]

73. Accordingly, distinct legal approaches have developed to allow courts to focus on the true nature of a decision under review, rather than applying legal tests out of context. For instance:

- Requirements of procedural fairness are not applied to the exercise of delegated legislative powers. As a result, the legislative versus adjudicative distinction

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[120] *Ibid* at paras 47 – 50 [**AR, Tab 3, p 38**].
[121] *Ibid* at para 45 [**AR, Tab 3, p 38**].
[122] *Auer*, *supra* note 97 at para 7.
[123] Evans, *supra* note 99 at 4 **[RBOA, Tab 5]**; *Métis Nation of Alberta Association v Alberta (Indigenous Relations)*, 2024 ABCA 40 at para 34 [***Métis Nation***].
[124] *Thorne's Hardware*, *supra* note 6 at p 111; *Potter v Halifax Regional School Board*, 2002 NSCA 88 at para 40, leave to appeal to SCC refused, 29303 (27 March 2003); *Métis Nation*, *ibid* at para 35.
[125] *Tsuu T'ina Nation v Alberta (Minister of Environment)*, 2008 ABQB 547 at para 63, aff'd 2010 ABCA 137.

represents a threshold question that must be passed before procedural fairness analysis is even engaged.[126]

- Administrative decisions are reviewed for *Charter* compliance pursuant to a *Doré* analysis, not a section 1 *Oakes* analysis (applicable to a regulation).[127] A separate analysis is necessary, in part, because there are inherent differences between administrative decisions and legislative ones; administrative decisions are applied in relation to a particular set of facts, whereas a "law" deals with principles of general application.[128]
- Core policy decisions are shielded from liability in negligence in order to maintain the separation of powers.[129] "Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive".[130]

74. Similarly, the *vires* of regulations has never been determined through the writ of *certiorari* or the application of the standard of review analysis.[131] *Katz*, decided five years after *Dunsmuir*, makes no reference to standard of review. Instead, a separate line of authority has developed to specifically address this issue.

**(b) "[T]he reasoning in *Vavilov* is fundamentally unsuited to the review of regulations".[132]**

75. *Vavilov* provides guidance as to the degree of justification expected or required for an administrative decision. In the absence of reasons, as is the case in regulations, the question of

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[126] *Att. Gen. of Can. v Inuit Tapirisat et al.*, [1980] 2 SCR 735 at 752 – 758, 1980 CanLII 21 (SCC) [***Inuit Tapirisat***]; *Reference Re: Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at 558, 1991 CanLII 74 (SCC); *Wells v Newfoundland*, [1999] 3 SCR 199 at para 59, 1999 CanLII 657 (SCC) [***Wells***]; *Authorson v Canada (Attorney General)*, 2003 SCC 39 at paras 38-41.
[127] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55 – 57 [***Doré***]; *Rebel News Network Ltd v Canada (Elections)*, 2023 FC 1650 at paras 119 – 140, 177 and 186 – 202; *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134 at paras 88 – 134, leave to appeal to SCC refused, 40711 (10 August 2023).
[128] *Doré*, *ibid* at para 36.
[129] *Marchi*, *supra* note 102 at para 42.
[130] *Ibid*.
[131] *Auer*, *supra* note 97 at para 13.
[132] *Ibid*, at para 7.

"justification" presents challenges. The issues at play in judicial review of a regulation are not "substantially the same" as administrative decisions.[133] Administrative decisions address a specific set of facts within certain legal constraints, with the outcome affecting specific parties. Regulations focus on the implementation of policy, with broad application. Reasonableness in the context of an adjudicative decision maker encourages judicial restraint.[134] Were reasonableness to be applied to subordinate legislation in the manner proposed, the result would be an invasive expansion of the scope of *vires* review into questions that have never been justiciable.[135]

**(c) A minister is constrained by "the statute authorizing the regulation. This differs greatly from the 'constellation of law and facts that are relevant to the decision' that constrain administrative decision makers".[136]**

76. The only constraint on a minister passing a regulation is "the statute authorizing the regulation".[137] "[A] *vires* challenge must be laser focused on the objective or purpose of the enabling statute".[138] In this respect, judicial review of a regulation requires an exercise of "statutory interpretation guided by principles that preserve the separation of powers".[139]

77. A search for a "constellation of law and facts" to support a decision, as required by *Vavilov*[140] would be a substantial expansion of the type of scrutiny applied by a court in reviewing regulations. For example, in *British Columbia (Attorney General) v Le*, the dissenting Justice held, in part, that subordinate legislation may be unreasonable where the decision maker ignores or fails to take common law principles or precedents into account.[141]

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[133] Appellants' Factum at para 108(d); See also *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367 at para 37.
[134] Evans, "Reviewing Delegated Legislation", *supra* note 99 at 23 **[RBOA, Tab 5]**.
[135] *Ibid*, at 23 – 24 **[RBOA, Tab 5]**.
[136] *Auer*, *supra* note 97 at para 20.
[137] *Ibid*.
[138] *Ibid*.
[139] ABCA Decision, *supra* note 2 at para 40 [**AR, Tab 3, p 37**].
[140] *Vavilov*, *supra* note 65 at para 105.
[141] *British Columbia (Attorney General) v Le*, 2023 BCCA 200 at paras 103 - 104, per Newbury J. (dissenting) [***Le***]. The majority in *Le* disagreed with Newbury J.'s application of the reasonableness standard (at para 199).

**(d) Judicial review under *Vavilov* would: "1) inevitably descend into an examination of the policy choices behind the regulation, or 2) examine the effectiveness of the regulation. It also runs the risk of endless debate over which government documents properly constitute the record".[142]**

78. The *Vavilov* analysis focuses on the reasons provided for a decision.[143] *Vavilov* suggests that the justification for a decision given without reasons can be determined by a review of the record and context.[144] No process for examining a decision without reasons is provided in *Vavilov*. The recommendations in *Vavilov* do not address the unique nature of decisions to pass regulations, which are not subject to any requirements of procedural fairness.[145]

79. Applying *Vavilov* to subordinate legislation will result in attempts to expand the record producible in response to applications for judicial review.[146] It is unclear how these attempts to broaden the scope of the record on judicial review may impact cabinet confidence, which is necessary for the proper functioning of democracy.[147] Any requirement of justification for policy decisions embodied in subordinate legislation will force decision makers to choose between abandoning cabinet confidence or risking the regulation being overturned as unjustified.

80. Use of the *Vavilov* analysis by courts will lead to an examination of the policy choices behind the regulation and the effectiveness of the regulation. For example, in *Canada Mink Breeders Association v British Columbia*, the lower Court in *obiter* noted that, by application of the reasonableness standard described in *Vavilov* and *Portnov*, the petitioners may be entitled to make broader arguments than those supported by *Katz*. The broader arguments plead in that matter included that the regulation was unreasonable because it was based on unreliable, inaccurate or incomplete data, and that there were more responsive and less invasive measures

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[142] *Auer*, *supra* note 97 at para 74.
[143] *Vavilov*, *supra* note 65 at para 101.
[144] *Ibid*, at para 137.
[145] *Inuit Tapirisat*, *supra* note 126; *Wells*, *supra* note 126 at para 59; *Canadian Union of Public Employees v Canada (Attorney General)*, 2018 FC 518 at paras 125 – 134.
[146] *Portnov*, *supra* note 81 at paras 50 – 51.
[147] *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para 28.

available.[148] No decision was ultimately made on this issue. However, the reasoning shows that an application of *Vavilov* to the judicial review of regulations could broaden the grounds on which regulations may be challenged.

**(vii) No Basis for Application of Correctness Standard**

81. Even if *Vavilov* is applied, consideration of the reasoning in *Katz* cannot be abandoned.[149] Respect for the presumption of validity and the limits on the *grounds* of review available in judicial review of a regulation must be maintained. Abandonment of these principles would inevitably lead to a blurring of the separation of powers between the court and the legislative and executive branches of government. That would be a dramatic departure from long-established principles embedding judicial restraint in the review of regulations.[150]

82. If the Court ultimately does apply a *Vavilov* approach, the appropriate standard of review to be applied is reasonableness.[151] There is no basis to apply a correctness standard of review to regulations.[152] There can be no "correct" decision when it comes to the weighing of political, economic and social considerations. Application of the correctness standard would require the exceptional creation of a new category of correctness.[153]

83. The Minister has been given unambiguously broad authority to make regulations "respecting any other matter considered necessary to carry out the intent of [the *MGA*]".[154] Further, pursuant to section 322.1(2) of the *MGA*, "[t]he Minister's Guidelines are declared valid as of the dates on which they were established and no assessment prepared pursuant to the Minister's Guidelines shall be challenged on the basis of the validity of the Minister's

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[148] *Canada Mink Breeders Association v British Columbia*, 2022 BCSC 1731 at para 24, overturned in part, 2023 BCCA 310. Note the BCCA does not specifically address the scope of a potential judicial review in its decision; See also *Le*, *supra* note 141 at paras 98 – 107 per Newbury J. (dissenting).

[149] The Federal Court of Appeal has abandoned *Katz*, see *Portnov*, *supra* note 81 at paras 20, 26 and 28.

[150] See above at paragraphs 58 – 67.

[151] See, for example, *Portnov*, *supra* note 81 at paras 10 – 17; *Le*, *supra* note 141 at para 96.

[152] Appellants' Factum at paras 47 and 114 – 122.

[153] *Vavilov*, *supra* note 65 at para 70.

[154] *MGA*, *supra* note 2, s 322(1)(i).

Guidelines".[155] This language signals a clear intent that respect should be given to the legislature's choice of the Minister as the appropriate party to establish binding policies, contrary to the Appellants' submissions.[156] There is certainly no "strong and compelling" signal that deference is not to be applied.

## B. The Linear Guidelines are *Intra Vires* (Question 2)

### (i) Consistency with the *MGA*

84. The questions raised "require an interpretation of the assessment and taxation provisions of the *MGA* to determine whether the impugned provisions were established in conformity with the Minister's delegated regulation-making authority; nothing more".[157] The question is: are the Linear Guidelines consistent with the objectives of the *MGA* and the Minister's statutory mandate?[158]

85. Undoubtedly, the answer is yes – regardless of what analysis is adopted by this Court. As concluded by the ABCA, the impugned provisions in the Linear Guidelines "simply make clear that consideration of off-coal agreements and any legislation requiring the reduction or cessation of coal-fired emissions is to remain separate from the assessment process".[159] The ABCA was correct in concluding that this valuation process is consistent with the language of the *MGA* and the legislative scheme aimed at:

- fairly and equitably distributing taxes; and
- promoting transparency, predictability and stability for municipalities and taxpayers.[160]

86. If the Court is minded to proceed on the basis of *Vavilov*, the Minister's decision to create the Linear Guidelines should not be disturbed on either the reasonableness or correctness standards. Under a contextual approach, "the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision".[161] Applying a broad and

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[155] *Ibid*, s 322.1(2).
[156] Appellants' Factum at paras 119 – 122.
[157] ABCA Decision, *supra* note 2 at para 51 [**AR, Tab 3, p 39**].
[158] *Ibid* [**AR, Tab 3, p 39**].
[159] *Ibid* at para 79 [**AR, Tab 3, p 48**].
[160] *Ibid* [**AR, Tab 3, p 48**].
[161] *Vavilov*, *supra* note 65 at para 108.

purposive interpretation to section 322(1) of the *MGA*, and considering the *MGA* as a whole, there is nothing in the Linear Guidelines that runs contrary to the statutory purpose of the *MGA*.[162]

**(ii) Objective of the *MGA* and Scope of Statutory Mandate**

87. Section 322(1) of the *MGA* authorizes the Minister 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*]".[163] The authority granted to the Minister is indisputably broad[164] and there can be no question that this broad authority gives the Minister the ability to establish depreciation standards for the valuation of linear property.

88. Pursuant to *Katz*, an examination of the *vires* of a regulation also requires consistency between the regulation and the objective of the enabling statute or scope of the statutory mandate.[165]

89. At its highest level, "[t]he purpose of assessment and taxation legislation in Alberta is to establish and maintain a property assessment system that fairly and equitably distributes taxes, and provides transparency, predictability and stability for municipalities and taxpayers".[166]

90. As explained in the *Guide*:

> Some types of properties are difficult to assess using a market value assessment standard because:
>
> - They seldom trade in the marketplace. When they do trade, the sale price usually includes non-assessable items that are difficult to separate from the sale price.
> - They cross municipalities and municipal boundaries.
> - They are of a unique nature.[167]

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[162] *MGA*, *supra* note 2, s 322(1).
[163] *Ibid*, ss 322(1)(c.1), (d), (e) and (i).
[164] ABCA Decision, *supra* note 2 at para 57 [**AR, Tab 3, p 42**].
[165] *Katz*, *supra* note 3 at para 24.
[166] *2018 Guide*, *supra* note 28 at p 2 [**ABOA, Tab 12**]; see also May 2007 Hansard, *supra* note 29 **[RBOA, Tab 2**].
[167] *2018 Guide*, *ibid* at pp 7 and 8 [**ABOA, Tab 12**]; *2010 Guide*, *supra* note 28 at p 13 [**RBOA, Tab 1**].

91. The purpose and intent of the delegation of powers to the Minister are not restricted in the manners suggested by the Appellants. The ABCA was correct in concluding that the *MGA* empowers the Minister to address the difficulties inherent in assessing the value of linear properties and the statutory objective of a predictable and stable assessment system.[168] Consistent with this authority, the Minister is able to clarify that the Off-Coal Agreements are not a circumstance to be considered in calculating depreciation for electric power systems.

**(iii) No Requirement to Achieve Market Value**

92. The *MGA* and its associated regulations do not require that the regulated assessment regime take market value concepts into account.

93. No guideline is passed by the Minister in respect of market value assessments as suggested by the Appellants.[169] The principles used for preparation of market value assessments are developed independently of the regulated regime. This supports the conclusion that the regulated valuation standard is something different than market value, and deliberately designed to be so by the legislature. If the intent was for regulated property to be assessed on a market value standard, the Linear Guidelines, and supporting regulations such as the 2005 Construction Cost Reporting Guide,[170] would be unnecessary.

94. All assessments are to be based on property values.[171] "Assessment" under the *MGA* is defined by section 284(1)(c) to mean "a value of property determined in accordance with this Part [9 Assessment of Property] and the regulations".[172] There is no error in the ABCA rejecting the notion that "inconsistency with normal concepts of depreciation and valuation" means the impugned provisions are unrelated to the meaning and objects of the *MGA*.[173]

95. The *MGA* clearly authorizes the Minister to "depart from previously relied upon valuation methodologies".[174] Otherwise, authorizing the Minister to establish valuation standards

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[168] ABCA Decision, *supra* note 2 at para 67 [**AR, Tab 3, p 45**].
[169] The only guidelines established by the Minister are in respect of "regulated property."
[170] Alberta, Municipal Affairs, "2005 Alberta Construction Cost Reporting Guide" (2005) **[ABOA, Tab 11]**.
[171] ABCA Decision, *supra* note 2 at para 58 [**AR, Tab 3, p 43**]; see also *2010 Guide*, *supra* note 28 at p 2 [**RBOA, Tab 1**].
[172] *MGA*, *supra* note 2, s 284(1)(c) [*emphasis added*].
[173] ABCA Decision, *supra* note 2 at para 68 [**AR, Tab 3, p 45**].
[174] *Ibid* at para 64 [**AR, Tab 3, p 45**].

would be pointless. In fact, the ABCA found that the Appellants "accept[ed] that market value is not intended to be the standard for determining the value of their linear properties".[175] This admission is fundamentally at odds with the Appellants' central argument.

96. There are numerous examples of assessment-related provisions in the *MGA* that are either unrelated to market value or impose criteria that are directly contrary to typical concepts of market valuation.[176]

97. While "market value" is defined in section 1(1)(n) of the *MGA* and used in other parts of the statute (see, for example, section 70 (sales of land by a municipality at less than market value); sections 419, 425, 428.2, 436.1, 436.15 (recovery of taxes); section 546 (order to remedy dangers and unsightly property); section 664.2 (conservation reserve) and sections 666 and 667 (municipal and school reserves)), there is no mention of "market value" in any of the linear property assessment provisions.[177] "Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended".[178]

**(iv) Determination of Depreciation**

98. The concept of depreciation with respect to linear property is established solely in the Linear Guidelines – "depreciation" is not defined in the *MGA*. It is up to the Minister to determine what depreciation means and how that concept will be applied in "establishing valuation standards" for linear property; "respecting the assessment of linear property"; and respecting the "processes and procedures for preparing assessments".[179] In the case of the Off-Coal Agreements, it was within the Minister's authority to "treat those business arrangements as *irrelevant* for assessment purposes"[180] and clarify that those agreements are to "remain separate from the assessment process".[181]

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[175] *Ibid* at para 59 [**AR, Tab 3, p 43**].
[176] *MGA*, *supra* note 2, ss 289, 291(1) and (2).
[177] ABCA Decision, *supra* note 2 at para 59 [**AR, Tab 3, p 43**]; *MGA*, *supra* note 2, ss 70, 419, 425, 428.2, 436.1, 436.15, 546, 664.2, 666 and 667.
[178] ABCA Decision, *ibid* at para 59, citing Ruth Sullivan, *Sullivan on The Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 218 [**AR, Tab 3, p 43**].
[179] *MGA*, *supra* note 2, ss 322(1)(c.1), (d) and (e).
[180] ABCA Decision, *supra* note 2 at para 71 [**AR, Tab 3, p 46**].
[181] *Ibid* at para 79 [**AR, Tab 3, p 48**].

99. As part of their argument, the Appellants assert that the Linear Guidelines exclude "otherwise applicable depreciation" and state as a fact that in the absence of amendments to the Linear Guidelines, additional depreciation would have been applied.[182] The Appellants' argument relies on caselaw applying different valuation considerations than the Linear Guidelines. *BP Energy Canada v Woodlands (County)* considers a prior version of the Machinery and Equipment Guidelines (not linear), which did not limit Schedule D depreciation to highly unusual site-specific circumstances.[183] *Strathcona (County) v Alberta Assessment Appeal Board* considers a fair actual value standard.[184] Neither decision applies here. There is no evidence on the Record to support the assertion that the subject properties actually experienced depreciation on any existing valuation standard as a result of the Off-Coal Agreements:

- **Depreciation Pursuant to Prior Guidelines:** It is doubtful whether there would be an entitlement to depreciation even before the 2017 amendments. The Guidelines limit Schedule D depreciation "… to highly unusual site-specific circumstances such as catastrophic failure".[185] The Off-Coal Agreements are not site-specific, applying to several coal-fired electric generation facilities.[186] There was no "catastrophic failure" or any physical change to the properties – entry into the Off-Coal Agreements did not affect their productive capacity.
- **Market Value Depreciation:** Any decrease in value due to a reduction in age-life was immediately off-set by an increase in value due to the promise of additional revenues from the property through the annual off-coal payments. Any future owner was entitled to those payments. The payments were deliberately negotiated on the basis of the present value of the future book value reduction that would result from an

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[182] Appellants' Factum at paras 53, 54, 66 and 77.
[183] *BP Energy Canada v Woodlands (County)*, [2005] AMGBO No 207 at para 76 **[ABOA, Tab 1]**.
[184] *Strathcona (County) v Alberta Assessment Appeal Board*, 1995 ABCA 165 at para 8.
[185] See *2016 Alberta Linear Property Assessment Minister's Guidelines*, Ministerial Order No. MAG:028/16, s 2.003; see also: *2015 Alberta Linear Property Minister's Guidelines*, Ministerial Order No. MAG:017/15, s 2.003; *2014 Alberta Linear Property Minister's Guidelines*, Ministerial Order No. MAG:155/14, s 2.003.
[186] Capital Power Off-Coal Agreement [**AR, Tab 21**]; TransAlta Off-Coal Agreement [**AR, Tab 22**].

early retirement of the facility. [187] Even if market value considerations applied (which they do not), it is far from clear that the value of the properties was diminished.

100. The Appellants suggest that prior to the 2017 amendments, they would have had a "right to have the assessor consider the evidence and decide if additional depreciation is available in the circumstances".[188] While that may be the case, that does not undermine the legitimacy of the Linear Guidelines. The Minister's delegated authority *must* include the ability to circumscribe the necessary considerations of an assessor – what would be the purpose of the Minister's powers otherwise?

101. The Linear Guidelines are replete with examples where issues that might be considered by an assessor, or be litigated before an assessment tribunal, are instead answered by the Minister.

**(v) Fairness and Equity**

102. The Appellants refer to the requirements of fairness and equity in section 293 of the *MGA* and taxation case law as part of the "context" it alleges was overlooked by the ABCA.[189] This argument ignores that the statutory scheme intends for the Minister to make the policy level decisions regarding equity and fairness throughout the assessment regime.

103. In implementing its assessment regime, the *MGA* includes several distinct delegations:

- Firstly, the *MGA* delegates powers to the Minister to establish guidelines and regulations in respect to assessment. This is a lawmaking power.[190]
- Secondly, the *MGA* delegates powers to assessors (both provincially and municipally appointed) to prepare assessments of properties. Assessors established pursuant to the *MGA* are subordinate to the Minister and are required to prepare assessments "… in a fair and equitable manner …" in accordance with the valuation standards set out in the regulations and guidelines by the Minister.[191]

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[187] Capital Power Off-Coal Agreement, Schedule A [**AR, Tab 21, p 149**]; TransAlta Off-Coal Agreement, Schedule A [**AR, Tab 22, p 160**].
[188] Appellants' Factum at para 50.
[189] Appellants' Factum at paras 78 – 82.
[190] *MGA*, *supra* note 2, ss 322 and 322.1.
[191] *Ibid*, s 293.

- Thirdly, the *MGA* provides authority to the Board (as well as assessment review boards in respect of certain properties) to receive and consider assessment complaints and to alter assessments. The Board may not alter an assessment that "has been prepared correctly in accordance with the regulations." Therefore, equity for regulated properties is achieved by a consistent and accurate application of the regulations.[192] This is an adjudicative review power.

104. When considered in the context of the *MGA*, these three levels of delegation demonstrate that it is the Minister, through the lawmaking power, who defines the contours of a "fair and equitable" assessment regime. Fairness and equity is achieved through consistent application by assessors of the guidelines created by the Minister. The application by assessors, and not the guidelines themselves, are subject to the scrutiny of the Board.

105. That the *MGA* separately delegates lawmaking authority (to the Minister) and adjudicative decision-making authority (to the Board or an assessment review board) as distinct systems of delegation is meaningful. The Appellants ask this Court to ignore that legislative distinction by attempting to scrutinize the quality of the Minister's decision on the same basis that the Court would scrutinize the rationale of a Board in upholding or overturning a specific assessment.

**(vi) Specifications and Characteristics**

106. The statutory scheme clearly intends for the Minister to make the applicable policy level decisions respecting the specifications and characteristics of property through regulations.

107. As found by the ABCA, "[w]hen the enabling language of [section] 322(1) is read in its grammatical and ordinary sense, in the context of and harmoniously with these other provisions of the *MGA* and the objects of the legislation, it is clear the legislature empowered the Minister to decide … what property specifications and characteristics would be relevant for that [valuation] purpose".[193]

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[192] *Alberta (Minister of Municipal Affairs) v Ember Resources Inc.*, 2018 ABQB 971 at para 58; *MGA*, *supra* note 2, ss 467(3) and 499(3).
[193] ABCA Decision, *supra* note 2 at para 64 [**AR, Tab 3, p 45**].

108. Section 292(2)(b) of the *MGA* simply provides that an assessment must reflect:

> (b) the specifications and characteristics of the linear property
>
> (i) as contained in the records of the Alberta Utilities Commission … on October 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the linear property, or …[194]

109. The Appellants suggest that there is some type of conflict between the Linear Guidelines and the requirements of section 292(2)(b), arguing that changes in Alberta Utilities Commission ("**AUC**") records will not be reflected in assessments due to the challenged amendments.[195]

110. The *MGA* does not define or specify what "specifications and characteristics" are relevant to the preparation of the assessment or how those "specifications and characteristics" impact the valuation for purposes of the assessment. These details, which must address the many diverse types of linear property in Alberta, are addressed by the Minister by way of regulation. The above provisions of the *MGA* give the Minister authority to limit the impact of "unique, difficult to assess factors".[196] Therefore, the Minister is empowered to determine how the specifications and characteristics affect the valuation of electric power systems for purposes of assessment. The Minister was well within his authority to decide that the Off-Coal Agreements did not change the specifications and characteristics of the subject properties.

111. To the extent that the Appellants appear to be suggesting that assessments will be prepared for coal-related assets after they are retired, the Respondents readily acknowledge that, upon retirement, those linear property assets will no longer be subject to assessment *at all*, as the assets would no longer be part of a "system intended for or used in the generation, transmission, distribution or sale of electricity" and, therefore, not be "linear property".[197] It is only while the assets are in use that the Linear Guidelines establish that the existence of the Off-Coal Agreements are not relevant to the valuation of those assets.

112. The Appellants rely (for the first time) on decisions of the AUC that post-date the Linear Guidelines and, as such, do not form part of the Record before the Minister or the lower Courts. Post-promulgation evidence of this nature is not relevant to a determination of the *vires* of the

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[194] *MGA*, *supra* note 2, s 292(2)(b).
[195] Appellants' Factum at para 76, see also paras 34, 53, and 77.
[196] ABCA Decision, *supra* note 2 at para 66 [**AR, Tab 3, p 45**]; *MGA*, *supra* note 2, s 322(1).
[197] *MGA*, *ibid*, ss 284(1)(g) and (k)(i).

Linear Guidelines.[198] In describing the AUC decisions, the Appellants also refer to affidavit evidence that was admitted by the Chambers Judge for the "limited purposes" of determining a possible "breach of procedural fairness" and "reasonable expectations".[199] The procedural fairness issues were dismissed by both lower Courts do not form part of this appeal. There is no longer any basis for the Appellants' reliance on the affidavit evidence. The evidence in this appeal must be restricted to the records that were before the Minister.

**(vii) *MRAT* Valuation Standard**

113. The Appellants' emphasis on the references to "valuation standard" as opposed to "valuation standards" has no bearing on the *vires* of the Linear Guidelines. This appears to be an attack on the entire regulated assessment regime and well outside the scope of this judicial review. The Linear Guidelines are consistent with the *MGA* and powers separately exercised by the Minister through *MRAT*. *MRAT* provides a roadmap for assessors preparing assessments, it does not in any way contradict the Minister's exercise of authority through the guidelines. The ABCA's finding that "the legislature empowered the Minister to decide what the valuation standards" would be, is accurate.[200]

114. When assessing "linear property," section 8 of *MRAT* directs the assessor to calculate the valuation standard in accordance with the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines.

115. This is apparent when sections 8(1) and 8(2) of *MRAT* are read together:

> 8(1) The valuation standard for linear property is that calculated in accordance with the procedures referred to in subsection (2).
>
> (2) In preparing an assessment for linear property, the assessor must follow the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines.[201]

116. Clearly, these provisions refer to the calculation of a valuation standard in respect of one "linear property."

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[198] *Canadian Council*, *supra* note 5 at paras 52 – 55.
[199] Chambers Judge Decision, *supra* note 12 at paras 34 – 36 [**AR, Tab 1, p 8**].
[200] ABCA Decision, *supra* note 2 at para 64 [**AR, Tab 3, p 45**].
[201] *MRAT*, *supra* note 26, s 8; See also *MRAT, 2018*, *supra* note 26, s 13.

117. Further, the Appellants' description of the Linear Guidelines as a "cost-based approach" is a substantial oversimplification.[202] There is substantial variation as between the methodologies prescribed in the Guidelines, contrary to the Appellants' suggestion.[203] For example, the Schedule "A" input for some types of linear property is established through a codified process (as set out in the CCRG), while in others, it is an amount entirely prescribed by the Minister. The application of Schedule "D", which is at the heart of this appeal, varies significantly as between types of linear property, and is in no case equivalent to the broad definition of deprecation that might be applied in a market value definition.

118. The types of additional depreciation permitted by the Linear Guidelines is universally described as "exhaustive" and the Guidelines note that "no additional depreciation [beyond what is expressly permitted] is allowed". In some cases, allowable additional depreciation is expressly quantified in an amount set by the Minister.[204]

119. Even if the formula employed by the Linear Guidelines is similar (at the highest level) to the "cost-based approach" referenced by the Appellants, the variables employed, and, therefore, the whole methodology, differs substantially. The most important aspects of the two approaches – the inputs used for each variable and their product – are so entirely different that the only generalization that can properly be applied is to say that they are both methods for valuing property. They bear no meaningful relationship other than that.

**(viii) The Appellants Seek Review on the Ground of Reasonableness**

120. Much of the Appellants' appeal is not truly a challenge to the Minister's authority, but is instead a thinly veiled challenge of the *merits* of the Minister's exercise of that authority. That is, the Appellants' arguments go to the *reasonableness* of the Linear Guidelines, not the *vires*. The ABCA recognized the distinction and the limitations on grounds of review established by *Katz* concluding:

> Whether it was sensible or wise for the Minister to disallow consideration of the Off-Coal Agreements is not for the court to decide. Nor is it the court's role in reviewing the [Linear Guidelines] to decide whether the Off-Coal Agreements

[202] Appellants' Factum at para 71.
[203] Appellants' Factum at para 71.
[204] See Linear Guidelines, *supra* note 1, s 3.06.

> adequately compensate the appellants for losses arising from the reduced life of their coal-fired assets.[205]

121. Still, the Appellants attack the policies underlying the Linear Guidelines on the ground of reasonableness by:

- attacking the fairness and equity of the Linear Guidelines;[206]
- challenging whether the Off-Coal Agreements relate to the characteristics of the subject properties;[207] and
- arguing that the Linear Guidelines do not reflect the value of the subject properties in the absence of additional depreciation.[208]

122. Regardless of the approach taken by this Court, the principles of *Katz*, which are both longstanding and consistent with a breadth of law that underscores the importance of respect for the policy-making authority of the legislative and executive branches – must not be abandoned. The Appellants' attempts to challenge the underlying policy decisions of the Minister must be dismissed, and the analysis should instead focus on the Minister's authority to adopt the Linear Guidelines.

### C. The Linear Guidelines are Not Discriminatory (Question 3)

123. The ABCA was correct in finding that the Linear Guidelines "do not create an unauthorized class of property or unlawfully discriminate against the appellants".[209]

124. When seeking to invalidate delegated legislation on the basis of discrimination, it is not sufficient to point to some sort of unequal treatment. The law applies in ways that impose different results on different persons.[210] As such, the notion of equality must be qualified in some way.[211] In this respect, distinctions are permitted to the extent authorized, either explicitly or implicitly, by the enabling legislation.[212] Further, discrimination only "arises when [executive]

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[205] ABCA Decision, *supra* note 2 at para 82 [**AR, Tab 3, p 49**].
[206] Appellants' Factum at paras 78 – 82.
[207] Appellants' Factum at paras 83 – 86.
[208] Appellants' Factum at para 93.
[209] ABCA Decision, *supra* note 2 at para 87 [**AR, Tab 3, p 49**].
[210] Keyes, "Executive Legislation 3rd ed", *supra* note 86 at p 369 [**RBOA, Tab 6**].
[211] *Ibid* [**RBOA, Tab 6**].
[212] *Katz*, *supra* note 3 at para 47.

legislation expressly distinguishes among the persons to whom its enabling legislation applies" or creates unequal effects "as between persons who are similarly situated".[213]

125. Therefore, in order to succeed in their appeal, the Appellants must show: (1) the Linear Guidelines do, in fact, establish a distinction and the effects of the subordinate legislation are unequal as between persons similarly situated;[214] and (2) the distinction that is established is not authorized, either expressly or impliedly, by the *MGA*.[215]

**(i) The Linear Guidelines do not create any unlawful distinction**

126. The ABCA recognized that the impugned provisions "apply to all coal-fired electrical power generation facilities in the province that are subject to off-coal agreements or legislation requiring the reduction or cessation of coal-fired emissions".[216] The Appellants compare the properties subject to Off-Coal Agreements to other coal-fired electric generation facilities that are not subject to such an agreement.[217] Those properties, however, are not required to cease coal fired-emissions in exchange for ongoing, multi-million dollar annual payments that run with each property.

127. All properties subject to Off-Coal Agreements are still entitled to Schedule D depreciation where there are "highly unusual site-specific circumstances such as catastrophic physical failure, and … acceptable evidence is documented and provided". However, as directed by the Minister, entry into an Off-Coal Agreement is a circumstance irrelevant to this analysis. As such, all equally situated property in Alberta is treated in the same way. There is no unlawful distinction.

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[213] Keyes, "Executive Legislation 3rd ed", *supra* note 86 at pp 370 – 371 [**RBOA, Tab 6**]; see also *Katz*, *supra* note 3 at para 47.
[214] ABCA Decision, *supra* note 2 at para 86 [**AR, Tab 3, p 49**].
[215] *Ibid* at para 84 [**AR, Tab 3, p 49**].
[216] *Ibid* at para 86 [**AR, Tab 3, p 49**].
[217] Appellants' Factum at paras 48 - 51.

**(ii) If any distinctions exist in the Linear Guidelines, they are permitted by the *MGA***

128. If any distinctions do exist in the Linear Guidelines, such distinctions are, at a minimum, "a necessary incident to the exercise of the Minister's delegated regulation-making power," if not explicitly authorized by the *MGA*.[218]

129. In this respect, the Linear Guidelines are implemented pursuant to the broad powers given to the Minister under the *MGA*, which authorize the Minister to establish and implement an assessment regime.[219]

130. Even without this explicit authorization, such authority is necessarily incidental to the exercise of the Minister's power and to the proper functioning of the *MGA*. A regulation may create discrimination, or distinctions among classes, if this is implicitly authorized by the text and purpose of the enabling legislation.[220] The "general reasonableness or rationality of the distinction is not at issue," only whether the discrimination has been authorized.[221] As discussed in *Canadian Natural Resources Ltd v Fishing Lake Métis Settlement*:

> … [the] binding authorities make it clear that express authorization for discrimination is not necessary, but that "implicit delegation by necessary inference", implied authorization, authorization "in effect" or "necessarily or fairly implied by the expressed power in the statute" will be sufficient to authorize differential treatment.[222]

131. For instance, the "power to discriminate is generally implicit in zoning matters" as the setting of boundaries of the area to be affected involves an element of discrimination.[223] Similarly, discrimination is implicit in legislation which, for example, endows wide-ranging powers to design a system establishing different categories for the purpose of setting payment levels, distributing services, or providing permits.[224]

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[218] ABCA Decision, *supra* note 2 at para 84 [**AR, Tab 3, p 49**].
[219] *MGA*, *supra* note 2, s 322(1).
[220] *Clyke v Nova Scotia (Minister of Community Services)*, 2005 NSCA 3 at para 16.
[221] *R v Sharma*, [1993] 1 SCR 650 at para 26, 1992 CanLII 90 (SCC).
[222] *Canadian Natural Resources Ltd v Fishing Lake Métis Settlement*, 2022 ABQB 53 at para 65.
[223] *Montréal v Arcade Amusements Inc.*, [1985] 1 SCR 368 at 416, 1985 CanLII 97 (SCC).
[224] *Waldman v British Columbia (Medical Services Commission)*, 1999 BCCA 508 at para 19; *Forget v Quebec (Attorney General)*, [1988] SCR 90 at 106 – 107, 1998 CanLII 51 (SCC).

132. Similar to the circumstances in *Katz*, the Linear Guidelines could not properly perform their intended function if they could not create distinctions.[225] As found by the ABCA, distinctions between properties are "fundamental to a functional assessment regime". [226]

133. An example of this is found in *Bergman v Innisfree (Village)* where it was alleged that property owners with low-value parcels of land were discriminated against by being subjected to a minimum tax. The decision noted that "differentiation is not discrimination. To the contrary, differentiation between different classes of property owners is expressly contemplated by the *MGA*".[227]

134. The Linear Guidelines are specifically targeted at addressing properties that are inherently difficult to assess, recognizing that flexibility in the Guidelines is necessary. There is no merit to the Appellants' suggestion that the *MGA* only permits one "valuation standard" for regulated property.[228] In defining "linear property," the *MGA* recognizes various sub-types of linear property, including: electric power systems; street lighting systems; telecommunication systems; and pipelines.[229] Therefore, the *MGA* itself recognizes that even within the category of "linear property," sub-types of linear property are sufficiently distinct to warrant individual acknowledgement.

135. The Off-Coal Agreements, and the fact they entitle the owner of the subject power plants to ongoing, annual, multi-million-dollar payments, are the very kind of unique circumstances that are addressed as part of any assessment regime. "Far from being 'discriminatory', the distinctions [drawn] flow directly from the statutory purpose and the scope of the mandate".[230]

136. Differentiating between property owners in this manner does not amount to discrimination and is not *ultra vires*. It "complies with the rationale and purview of the statutory scheme under the *MGA*"[231] and there is no legal foundation to the Appellants' argument that an unauthorized distinction or "discrimination" has been made.

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[225] *Katz*, *supra* note 3 at para 47.
[226] ABCA Decision, *supra* note 2 at para 84 [**AR, Tab 3, p 49**].
[227] *Bergman v Innisfree (Village)*, 2020 ABQB 661 at paras 143, 145 and 148 [***Bergman***].
[228] See above at paras 113 – 119; See the Appellants' Factum at paras 69 – 74.
[229] *MGA*, *supra* note 2, s 284(1)(k).
[230] *Katz*, *supra* note 3 at para 49.
[231] *Bergman*, *supra* note 227 at paras 145 and 148.

## D. Conclusion

137. The ABCA correctly applied the framework for judicial review outlined in *Katz*, focusing on the authority for the Linear Guidelines and, just as the Chambers Judge, appropriately concluded that the Linear Guidelines are *intra vires*. The Linear Guidelines are consistent with the objectives of the *MGA* and the scope of the Minister's statutory mandate aimed at: fairly and equitably distributing taxes and promoting transparency, predictability and stability for municipalities and taxpayers.[232] Further, there is no basis for concluding the Linear Guidelines are discriminatory. To the extent that the Appellants challenge the merits of the Minister's exercise of authority, those challenges are not justiciable. This appeal should be dismissed.

138. Even if this Honourable Court modifies the application of *Katz*, the legislature clearly intended for the Minister to have flexibility in considering what circumstances impact the value of linear property for purposes of assessment. The Linear Guidelines "simply make clear that consideration of off-coal agreements and any legislation requiring the reduction or cessation of coal-fired emissions is to remain separate from the assessment process".[233]

## PART IV – SUBMISSION ON COSTS

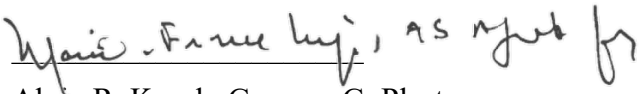
139. If this appeal is dismissed, the Respondents seek an order for costs of the appeal.

## PART V – ORDER SOUGHT

140. The Respondents request an order dismissing the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of April, 2024.**

**BROWNLEE LLP**
PER:



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[232] ABCA Decision, *supra* note 2 at para 7 [**AR, Tab 3, p 27**].
[233] *Ibid* at para 79 [**AR, Tab 3, p 48**].

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