

SCC 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**  
(Appellants)

-and-

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

**RESPONDENTS**  
(Respondents)

---

SCC File No: 40582

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

BETWEEN:

**ROLAND NIKOLAUS AUER**

**APPELLANT**  
(Appellant)

-and-

**AYSEL IGOREVNA AUER**

**RESPONDENT**  
(Respondent)

-and-

**ATTORNEY GENERAL OF CANADA**

**RESPONDENT**  
(Respondent)

*Style of cause continued next page*

---

**FACTUM OF THE INTERVENER,  
ATTORNEY GENERAL OF BRITISH COLUMBIA**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

---

*Style of cause continued*

-and-

**ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, HIV & AIDS LEGAL CLINIC ONTARIO AND HEALTH JUSTICE PROGRAM, CHICKEN FARMERS OF CANADA, EGG FARMERS OF CANADA, TURKEY FARMERS OF CANADA AND CANADIAN HATCHING EGG PRODUCERS (“THE SM-4”), WORKERS’ COMPENSATION BOARD OF BRITISH COLUMBIA, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, ASSOCIATION QUÉBÉCÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L’IMMIGRATION, ADVOCATES FOR THE RULE OF LAW, THE NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, CANADIAN COUNCIL FOR REFUGEES, THE CITY OF CALGARY, ECOJUSTICE CANADA SOCIETY,**

**INTERVENERS**

**MINISTRY OF ATTORNEY GENERAL  
OF BRITISH COLUMBIA**

Legal Services Branch  
1301 - 865 Hornby Street,  
Vancouver, BC V6Z 2G3

**Emily Lapper**  
**Christine Bant**  
**Solomon Kay-Reid, Articled Student**  
Tel: (604) 660-6795  
Fax: (604) 660-3567  
Email: [emily.lapper@gov.bc.ca](mailto:emily.lapper@gov.bc.ca)

Counsel for the Intervener, Attorney General  
of British Columbia

**LAWSON LUNDELL LLP**  
225 - 6th Avenue S.W.  
Suite 1100  
Calgary, AB T2P 1N2

**Michael J. Donaldson, K.C. /  
Katie Sykes**

**GOWLING WLG (CANADA) LLP**

Barristers & Solicitors  
160 Elgin Street, Suite 2600  
Ottawa ON K1P 1C3

**Matthew Estabrooks**  
Tel: (613) 786-0211  
Fax: (613) 788-3573  
Email:  
[matthew.estabrooks@gowlingwlg.com](mailto:matthew.estabrooks@gowlingwlg.com)

Ottawa Agent for Counsel for the Intervener,  
Attorney General of British Columbia

**MICHAEL J. SOBKIN**  
331 Somerset Street West  
Ottawa, ON K2P 0J8

Tel: (613) 282-1712  
Fax: (613) 288-2896  
Email: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

Tel: (403) 269-6900  
Fax: (403) 269-9494  
Email: [mdonaldson@lawsonlundell.com](mailto:mdonaldson@lawsonlundell.com)

Counsel for the Appellants,  
#40570 (TransAlta)

**BROWNLEE LLP**  
2200, 10155 – 102nd Street Edmonton  
Edmonton, AB T5J 4G8

**Alvin R. Kosak / Greg G. Plester /  
Rebecca L. Kos**  
Tel: (780) 497-4800  
Fax: (780) 424-3254  
Email: [akosak@brownleelaw.com](mailto:akosak@brownleelaw.com)

Counsel for the Respondents,  
#40570 (TransAlta)

**JENSEN SHAWA SOLOMON DUGUID  
HAWKES LLP**  
800, 304 8th Avenue SW  
Calgary, AB T2P 1C2

**Laura Warner / Ryan Phillips**  
Tel: (403) 571-1520  
Fax: (403) 571-1528  
Email: [warnerl@jssbarristers.ca](mailto:warnerl@jssbarristers.ca)

Counsel for the Appellant,  
40582 (Auer)

**CRERAR BASDEO HAGEN FAMILY  
LAW GROUP**  
7341 Roper Road NW  
Edmonton, Alberta T6E 0W4

**Jordan R. Crerar**  
Tel: (780) 760-1388  
Fax: (780) 760-1389  
Email: [jcrerar@crerarlaw.ca](mailto:jcrerar@crerarlaw.ca)  
-and-

**HUIZINGA DI TOPPA COLES &  
LAYTON**  
2nd Floor, 12225 - 105 Avenue  
Edmonton, AB T5N 0Y3

Ottawa Agent for Counsel for the Appellants,  
#40570 (TransAlta)

**SUPREME ADVOCACY LLP**  
340 Gilmour Street, Suite 100  
Ottawa, ON K2P 0R3

**Marie-France Major**  
Tel: (613) 695-8855 Ext: 102  
Fax: (613) 695-8580  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

Ottawa Agent for Counsel for the  
Respondents, #40570 (TransAlta)

**GOWLING WLG (CANADA) LLP**  
160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

**Jeffrey W. Beedell**  
Tel: (613) 786-0171  
Fax: (613) 788-3587  
Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

Ottawa Agent for Counsel for the Appellant,  
40582 (Auer)

**Tina Huizinga**

Tel: (587) 520-8229  
Fax: (587) 520-8215  
Email: [thuizinga@hdlaw.ca](mailto:thuizinga@hdlaw.ca)

Counsel for the Respondent,  
40582 (Auer)

**ATTORNEY GENERAL OF CANADA**

Ontario Regional Office  
120 Adelaide Street West, Suite 400  
Toronto, ON M5H 1T1

**Michael H. Morris**

**Joseph Cheng**

**Amy Martin-LeBlanc**

Tel: (647) 256-7539  
Fax: (416) 952-4518  
Email: [michael.morris@justice.gc.ca](mailto:michael.morris@justice.gc.ca)  
Email: [cam.regehr@justice.gc.ca](mailto:cam.regehr@justice.gc.ca)

Counsel for the Respondent,  
Attorney General of Canada,  
40582 (Auer)

**PROCUREUR GÉNÉRAL DU QUÉBEC**

1200, Route de l'Église, 8e étage  
Québec, QC G1V 4M1

**Stéphane Rochette**

**Francesca Boucher**

Tel: (418) 643-6552 Ext: 20734  
Fax: (418) 643-9749  
Email: [stephane.rochette@justice.gouv.qc.ca](mailto:stephane.rochette@justice.gouv.qc.ca)

Counsel for the Intervener, Attorney General  
of Québec

**ATTORNEY GENERAL OF ONTARIO**

Crown Law Office-Civil Law  
720 Bay Street, 8th Floor  
Toronto, ON M7A 2S9

**Judie Im**

Tel: (416) 326-3287

**ATTORNEY GENERAL OF CANADA**

50 O'Connor Street, 5th Floor  
Ottawa, Ontario K1A 0H8

**Christopher M. Rupar**

Tel: (613) 670-6290  
Fax: (613) 954-1920  
Email: [christopher.rupar@justice.gc.ca](mailto:christopher.rupar@justice.gc.ca)

Ottawa Agent for Counsel for the  
Respondent, Attorney General of Canada,  
40582 (Auer)

**NOËL ET ASSOCIÉS, S.E.N.C.R.L.**

225, montée Paiement, 2e étage  
Gatineau, QC J8P 6M7

**Sylvie Labbé**

Tel: (819) 503-2174  
Fax: (819) 771-5397  
Email: [s.labbe@noelassociés.com](mailto:s.labbe@noelassociés.com)

Ottawa Agent for Counsel for the Intervener,  
Attorney General of Québec

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen Street, suite 1300  
Ottawa, ON K1P 1J9

**Nadia Effendi**

Tel: (613) 787-3562

Fax: (416) 326-4015  
Email: [judie.im@ontario.ca](mailto:judie.im@ontario.ca)

Counsel for the Intervener, Attorney General  
of Ontario

**MINISTRY OF JUSTICE**  
**SASKATCHEWAN**  
1874 Scarth Street, 9th Floor  
Regina, SK S4P 4B3

**Kyle McCreary**  
Tel: (306) 798-1422  
Fax: (306) 787-0581  
Email: [kyle.mccreary@gov.sk.ca](mailto:kyle.mccreary@gov.sk.ca)

Counsel for the Intervener, Attorney General  
of Saskatchewan

**HUNTER LITIGATION CHAMBERS**  
2100 – 1040 West Georgia Street  
Vancouver, BC V6E 4H1

**Aubin P. Calvert**  
**Devin Eeg**  
Tel: (604) 891-2400  
Fax: (604) 647-4554  
Email: [acalvert@litigationchambers.com](mailto:acalvert@litigationchambers.com)

Counsel for the Intervener, Trial Lawyers  
Association of British Columbia

**PALIARE ROLAND ROSENBERG**  
**ROTHSTEIN LLP**  
155 Wellington Street West  
35th Floor  
Toronto, ON M5V 3H1

**Andrew Lokan**  
**Mannu Chowdhury**  
Tel: (416) 646-4324  
Fax: (416) 646-4301  
Email: [andrew.lokan@paliareroland.com](mailto:andrew.lokan@paliareroland.com)

Counsel for the Intervener, HIV & AIDS Legal  
Clinic Ontario and Health Justice Program

Fax: (613) 230-8842  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)

Ottawa Agent for Counsel for the Intervener,  
Attorney General of Ontario

**OLTHUIS VAN ERT**  
66 Lisgar Street  
Ottawa, ON K2P 0C1

**Dahlia Shuhaibar**  
Tel: (613) 501-5350  
Fax: (613) 651-0304  
Email: [dshuhaibar@ovcounsel.com](mailto:dshuhaibar@ovcounsel.com)

Ottawa Agent for Counsel for the Intervener,  
Trial Lawyers Association of British  
Columbia

**OLTHUIS VAN ERT**  
66 Lisgar Street  
Ottawa, ON K2P 0C1

**Dahlia Shuhaibar**  
Tel: (613) 501-5350  
Fax: (613) 651-0304  
Email: [dshuhaibar@ovcounsel.com](mailto:dshuhaibar@ovcounsel.com)

Ottawa Agent for Counsel for the Intervener,  
HIV & AIDS Legal Clinic Ontario and  
Health Justice Program

**CONWAY BAXTER WILSON LLP**

400-411 Roosevelt Avenue  
Ottawa, ON K2A 3X9

**M. Alyssa Holland**

**David K. Wilson**

**Julie Mouris**

Tel: (613) 288-0149

Fax: (613) 688-0271

Email: [aholland@conwaylitigation.ca](mailto:aholland@conwaylitigation.ca)

Counsel for the Intervener, Chicken Farmers of Canada, Egg Farmers of Canada, Turkey Farmers of Canada and Canadian Hatching Egg Producers (“The Sm-4”),

**WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**

Columbia  
6951 Westminster Hwy  
Richmond, BC V6C 1C6

**Johanna Goosen**

Tel: (604) 279-7569

Fax: (604) 279-8116

Email: [Johanna.Goosen@worksafebc.com](mailto:Johanna.Goosen@worksafebc.com)

Counsel for the Intervener, Workers' Compensation Board of British Columbia

**REFUGEE LAW OFFICE**

20 Dundas St. West  
Suite 201  
Toronto, ON M5G 2H1

**Andrew J. Brouwer**

Tel: (416) 435-3269 Ext: 7139

Fax: (416) 977-5567

Email: [Andrew.Brouwer@lao.on.ca](mailto:Andrew.Brouwer@lao.on.ca)

Counsel for the Intervener, Canadian Association of Refugee Lawyers

**HASA AVOCATS INC.**

2000 Ave McGill College, Suite 600,  
bureau 682  
Montréal, QC H3A 3H3

**SUPREME LAW GROUP**

1800 - 275 Slater Street  
Ottawa, ON K1P 5H9

**Moira Dillon**

Tel: (613) 691-1224

Fax: (613) 691-1338

Email: [mdillon@supremelawgroup.ca](mailto:mdillon@supremelawgroup.ca)

Ottawa Agent for Counsel for the Intervener, Workers' Compensation Board of British Columbia

**GOLDBLATT PARTNERS LLP**

1400-270 Albert Street  
Ottawa, ON K1P 5G8

**Colleen Bauman**

Tel: (613) 482-2459

Fax: (613) 235-3041

Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

Ottawa Agent for Counsel for the Intervener, Canadian Association of Refugee Lawyers

**Lawrence David**

**Gjergji Hasa**

Tel: (514) 849-7311

Fax: (514) 849-7313

Email: [l.david@havocats.ca](mailto:l.david@havocats.ca)

Counsel for the Intervener, Association  
québécoise des avocats et avocates en droit de  
l'immigration

**HENEIN HUTCHISON ROBITAILLE  
LLP**

235 King Street East

Toronto, ON M5A 1J9

**Peter Joseph Henein**

**Ewa Krajewska**

**Brandon Chung**

Tel: (416) 368-5000

Fax: (416) 368-6640

Email: [phenein@hhllp.ca](mailto:phenein@hhllp.ca)

Counsel for the Intervener, Advocates for the  
Rule of Law

**SHORES JARDINE LLP**

Suite 2250, 10104 – 103 Avenue

Edmonton, AB T5J 0H8

**William W. Shores, K.C.**

**Annabritt N. Chisholm**

Tel: (780) 448-9275

Fax: (780) 423-0163

Email: [Bill@shoresjardine.com](mailto:Bill@shoresjardine.com)

Counsel for the Intervener, The National  
Association of Pharmacy Regulatory  
Authorities

**LEHAL & COMPANY**

200 - 6905 - 120th Street

Delta, BC V4E 2A8

**Kamaljit Kaur Lehal**

**Jamie Liew**

**DENTONS CANADA LLP**

99 Bank Street

Suite 1420

Ottawa, ON K1P 1H4

**David R. Elliott**

Tel: (613) 783-9699

Fax: (613) 783-9690

Email: [david.elliott@dentons.com](mailto:david.elliott@dentons.com)

Ottawa Agent for Counsel for the Intervener,  
The National Association of Pharmacy  
Regulatory Authorities

**GOLDBLATT PARTNERS LLP**

1400-270 Albert Street

Ottawa, ON K1P 5G8

**Colleen Bauman**

Tel: (613) 482-2459

Tel: (604) 596-1321  
Fax: (604) 596-1320  
Email: [kklehal@lehallaw.com](mailto:kklehal@lehallaw.com)

Counsel for the Intervener, Canadian Council  
for Refugees (Auer)

**CITY OF CALGARY**  
Law | Legal Services and Security  
P.O Box 2100, Station M  
Calgary, AB T2P 2M5

**Henry Chan**  
Tel: (403) 268-5535  
Fax: (403) 268-4634  
Email: [henry.chan@calgary.ca](mailto:henry.chan@calgary.ca)

Counsel for the Intervener, The City of  
Calgary (Auer)

**ECOJUSTICE CANADA SOCIETY**  
1910 - 777 Bay Street  
P.O. Box 106  
Toronto, ON M5G 2C8

**Lindsay Beck**  
**Sean Nixon**  
Tel: (416) 368-7533 Ext: 551  
Fax: (416) 363-2746  
Email: [lbeck@ecojustice.ca](mailto:lbeck@ecojustice.ca)

Counsel for the Intervener, Ecojustice Canada  
Society (Auer)

Fax: (613) 235-3041  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

Ottawa Agent for Counsel for the Intervener,  
Counsel for the Intervener, Canadian Council  
for Refugees (Auer)

**CHAMP AND ASSOCIATES**  
43 Florence Street  
Ottawa, ON K2P 0W6

**Bijon Roy**  
Tel: (613) 237-4740  
Fax: (613) 232-2680  
Email: [broy@champlaw.ca](mailto:broy@champlaw.ca)

Ottawa Agent for Counsel for the Intervener,  
The City of Calgary (Auer)



## TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS .....	- 1 -
A. Overview .....	- 1 -
B. Statement of Facts .....	- 2 -
PART II – QUESTIONS IN ISSUE .....	- 2 -
PART III – STATEMENT OF ARGUMENT .....	- 2 -
A. Judicial review of Cabinet regulations requires narrow grounds of review.....	- 2 -
The Standard of Review is Reasonableness.....	- 3 -
<i>Katz</i> Prescribes How to Conduct Reasonableness Review of Cabinet Regulations .....	- 3 -
<i>Katz</i> is Consistent with the Separation of Powers and the Unique Role of Cabinet.....	- 4 -
B. The formation of the record on judicial review of Cabinet regulations ought to account for the unique role of Cabinet and Cabinet confidentiality.....	- 6 -
The Permissible Grounds of Review Will Impact the Formation of the Record .....	- 6 -
Cabinet Confidentiality Requires a Limited Record.....	- 8 -
Cabinet Documents are Not Producing, Unless a Bodner Application Test is Met.....	- 9 -
PART IV – COSTS .....	- 10 -
PART V – ORDER SOUGHT .....	- 10 -
TABLE OF AUTHORITIES .....	- 11 -

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Cabinet confidence, the unique role and function of Cabinet, and the dynamic and fluid nature of Cabinet decision making are key to good governance.<sup>1</sup> These appeals present an opportunity for the Court to set out a framework for applying these principles in the context of judicial review of regulations promulgated by Cabinet.
2. The Attorney General of British Columbia (the “AGBC”) intervenes in these appeals to make submissions on two interrelated issues: the appropriate framework for judicially reviewing delegated legislation, and the scope of the record available on judicial review of Cabinet regulations.
3. Judicial review, by its nature, analytically separates the concepts of the *standard* of review and the *grounds* of review. Thus, a reviewing court may conduct judicial review on a standard of reasonableness but limit the available grounds of review. The separation of powers and Cabinet’s role in our constitutional democracy require that the grounds of review for Cabinet regulations be constrained, even where the court is applying a reasonableness standard of review. The framework adopted by this Court in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*,<sup>2</sup> achieves this objective by allowing courts to ensure Cabinet regulations are authorized by statute and constitutionally sound, while leaving Parliament, and ultimately the electorate, to judge their merits.
4. The framework for judicial review of Cabinet regulations will inevitably have implications for the scope of the record on judicial review. The constitutional convention of Cabinet confidentiality necessarily limits the available record for Cabinet decisions. This Court therefore should clarify how the record ought to be formed in a judicial review of Cabinet regulations in light of the constitutional conventions at play.

---

<sup>1</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 [*Mandate Letters*] at para. [61](#).

<sup>2</sup> 2013 SCC 64 [*Katz*] at para. [24](#).

## **B. Statement of Facts**

5. The AGBC takes no position on the underlying facts in these appeals.

## **PART II – QUESTIONS IN ISSUE**

6. The AGBC directs her intervention in these appeals to two issues:
  - a. The available grounds of review for reviewing Cabinet regulations must be constrained in keeping with constitutional principles including the separation of powers. The framework prescribed by this Court in *Katz* achieves this goal and need not be modified.
  - b. The applicable framework for reviewing Cabinet regulations informs the scope of the record on judicial review. The framework for reviewing Cabinet regulations must account for the unique position of Cabinet, including respect for Cabinet confidentiality.

## **PART III – STATEMENT OF ARGUMENT**

### **A. Judicial review of Cabinet regulations requires narrow grounds of review**

7. In 2020, Professor John Mark Keyes observed that “judicial review of delegated legislation in Canada has become somewhat confused in the past decade”.<sup>3</sup> Professor Keyes noted that this Court’s decision in *Katz* said “nothing about the standard of review”,<sup>4</sup> while *Canada (Minister of Citizenship and Immigration) v. Vavilov*,<sup>5</sup> by contrast, “effectively amalgamated into the standards of review much of what has traditionally constituted grounds of review”.<sup>6</sup> However, Professor Keyes concluded that “while the Court in *Vavilov* did not comment expressly on the standard of review for executive regulations, there is

---

<sup>3</sup> John Mark Keyes, “Judicial Review of Delegated Legislation: The Long and Winding Road to *Vavilov*” (2020) at p. [1](#) online: Canadian Legal Information Institute [*Keyes*].

<sup>4</sup> *Keyes* at p. [7](#).

<sup>5</sup> [2019 SCC 65](#) [*Vavilov*].

<sup>6</sup> *Keyes* at p. [12](#).

good reason to think that reasonableness presumptively applies”.<sup>7</sup>

8. In these appeals, this Court can put to rest the confusion that Professor Keyes identified, and clearly distinguish between the applicable standard of review and the available grounds of review when Cabinet regulations are at issue.

### ***The Standard of Review is Reasonableness***

9. Accepting that *Vavilov* prescribes that a standard of reasonableness will presumptively apply to judicial review of Cabinet regulations, the key question in these appeals is not the *standard* of review, but the available *grounds* of review when a court is faced with judicial review of Cabinet regulations.
10. Although *Katz* makes no mention of the standard of review, and predates this Court’s decision in *Vavilov*, it clearly applies a deferential framework that recognizes that the grounds of review are limited when Cabinet decision making is at issue.
11. Indeed, since *Catalyst Paper Corp v. North Cowichan (District)*,<sup>8</sup> this Court has consistently applied a deferential framework for reviewing delegated legislation.<sup>9</sup> The *Katz* framework is deferential in that: it is the petitioner’s burden to prove that delegated legislation is invalid; delegated legislation benefits from a presumption of validity; and both the delegated legislation and the enabling statute must be interpreted using a broad and purposive approach.<sup>10</sup>

### ***Katz Prescribes How to Conduct Reasonableness Review of Cabinet Regulations***

12. In applying this deferential framework, the Court has limited the grounds of review.

---

<sup>7</sup> *Keyes* at p. 18. See also, Paul Daly, “[Regulations and Reasonableness Review](#)” (29 January 2021), online (blog): <administrativelawmatters.com> [https://web.archive.org/web/20240403213838/https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/].

<sup>8</sup> [2012 SCC 2](#).

<sup>9</sup> *Ibid* at paras. 19-21; *Katz* at paras. 25-26; *Green v. Law Society of Manitoba*, 2017 SCC 20 [*Green*] at para. 28; *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22 [*West Fraser*] at para. 11.

<sup>10</sup> *Katz* at para. 26.

Judicial review of regulations is usually restricted to the grounds that they are inconsistent with the purpose of the enabling statute, or that some condition precedent in the statute has not been observed.<sup>11</sup> Assessing whether this is the case does not involve evaluating the policy merits of the delegated regulation, nor the underlying political, economic, social, or partisan considerations animating the enactment of the delegated legislation.<sup>12</sup>

13. This Court has consistently applied the *Katz* framework in subsequent cases,<sup>13</sup> and until *Portnov v. Canada (Attorney General)*,<sup>14</sup> courts across Canada applied it without difficulty.<sup>15</sup> None of this Court’s jurisprudence has departed from *Katz*. There is no principled reason to do so now.

***Katz is Consistent with the Separation of Powers and the Unique Role of Cabinet***

14. The framework for judicial review of Cabinet regulations set out in *Katz* respects the separation of powers and Cabinet’s important role in our constitutional democracy.
15. Cabinet is fundamentally different from other statutory decision-makers, both in terms of its duties and level of accountability. Cabinet sits at the apex of the executive branch and is in most matters the “supreme executive authority”.<sup>16</sup> Cabinet’s responsibilities include formulating and administering government policy and action.
16. While statutory decision-makers are constrained by the factors they can reasonably consider under their grant of authority, Cabinet is an inherently political body that may be

---

<sup>11</sup> *Katz* at para. [27](#).

<sup>12</sup> *Katz* at para. [28](#).

<sup>13</sup> [Green](#); [West Fraser](#). See also, *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. [87](#); *Reference re Impact Assessment Act*, 2023 SCC 23 at para. [283](#) (per Karakatsanis and Jamal JJ., dissenting on other points).

<sup>14</sup> [2021 FCA 171](#) [*Portnov*].

<sup>15</sup> See e.g., *Hudson’s Bay Company ULC v. Ontario (Attorney General)*, [2020 ONSC 8046](#) [*Hudson’s Bay*]; *Alberta College of Pharmacists v. Sobeys West Inc.*, [2017 ABCA 306](#); *GSI Global Shelters Developments Ltd. v. Rural Municipality of Last Mountain Valley No. 250*, [2024 SKCA 30](#); *Crowder v. British Columbia (Attorney General)*, [2019 BCSC 1824](#) [*Crowder*].

<sup>16</sup> Peter W. Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2023) [*Hogg*] at § [9:5](#).

moved by political, economic, social or partisan considerations.<sup>17</sup> In establishing and administering government policy, Cabinet is entitled to take into account public response to policy matters and react accordingly.<sup>18</sup>

17. Cabinet is subject to direct parliamentary oversight. Responsible government is premised on the majority of the legislature maintaining confidence in Cabinet. A loss of confidence means that government must resign to facilitate the establishment of a new Cabinet or an election must take place.<sup>19</sup> Importantly, individual ministers are also held accountable for Cabinet's actions at the ballot box.
18. Given Cabinet's unique position, the separation of powers mandates a narrow approach to reviewing Cabinet regulations. This narrow approach is reflected in constrained grounds of review, in keeping with Cabinet's unique role in our constitutional democracy. The Court has recognized that the executive, legislative, and judicial branches play "critical and complementary roles in our constitutional democracy" and that "each branch will be unable to fulfill its role if it is unduly interfered with by the others."<sup>20</sup> Thus, the judicial branch must refrain from questioning the wisdom or efficacy of Cabinet regulations or investigating the underlying economic, political, or policy considerations that led to their enactment.<sup>21</sup> Such inquiries would constitute an undue interference with the executive branch of government and fall outside of the judiciary's institutional competence.<sup>22</sup>
19. The analysis prescribed by this Court in *Katz* respects the institutional boundaries between Cabinet and the judiciary.<sup>23</sup> The framework allows Cabinet to respond to social, political, and economic problems by making policy decisions and enacting subordinate legislation. In turn, the judiciary exercises its important function in ensuring such regulations are authorized by statute and conform to constitutional standards. Under *Katz*, the substance

---

<sup>17</sup> *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at pp. [112-113](#).

<sup>18</sup> *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683 at para. [54](#).

<sup>19</sup> Hogg at § [9:14](#).

<sup>20</sup> *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. [29](#).

<sup>21</sup> *Katz* at paras. [27-28](#).

<sup>22</sup> Justice Malcolm Rowe, "The Virtue of Judicial Restraint, or Who Guards the Guardians?" (2022) 55:1 UBC Law Review at [8-9](#).

<sup>23</sup> *Auer v. Auer*, 2022 ABCA 375 at para. [58](#).

or merits of Cabinet regulations appropriately remain subject to oversight by Parliament and the electorate.

**B. The formation of the record on judicial review of Cabinet regulations ought to account for the unique role of Cabinet and Cabinet confidentiality**

20. The framework adopted by this Court for judicial review of Cabinet regulations will necessarily have implications for how courts and parties are to approach the production of the record.
21. Courts have repeatedly recognized the difficulty in defining the record on judicial review of legislative decisions of Cabinet<sup>24</sup> and have taken inconsistent approaches in their consideration of the scope of the available record.<sup>25</sup> Disputes over the formation of the record on judicial review undermine *Vavilov*'s objectives of facilitating access to justice by delaying the adjudication of the merits of each case. Put simply, the "record" has become the new "standard of review" in cases involving Cabinet.
22. In addition to the uncertainty regarding the scope of the record, much of the confusion stems from the difficulties in accounting for the fundamental principle of Cabinet secrecy, and the nature of Cabinet decision-making.
23. This Court therefore ought to clarify the formation of the record on judicial review of Cabinet regulations in these appeals.

***The Permissible Grounds of Review Will Impact the Formation of the Record***

24. The materials a reviewing court requires in order to exercise its supervisory function on judicial review differ depending on the analysis it is required to undertake.

---

<sup>24</sup> See e.g., *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 [*Le*] at para. [92](#) (per Newbury J.A., dissenting in part); *Canada Mink Breeders Association v. British Columbia*, 2022 BCSC 1731 at para. [20](#), rev'd in part on other grounds in *British Columbia (Lieutenant Governor in Council) v. Canada Mink Breeders Association*, [2023 BCCA 310](#) [*Mink Breeders*]. An application for leave to appeal from this order is currently before this Court ([SCC No. 40922](#)).

<sup>25</sup> See e.g., *Hudson's Bay* at para. [88](#); *Crowder* at paras. [39-42](#) and [50-60](#); *Portnov* at para. [51](#).

25. The limited grounds of review prescribed in *Katz* will be informed by different materials than a “reasonableness” review of an administrative decision, particularly where that decision-maker is required to give reasons. The analysis prescribed by the Court in *Katz* is an exercise of statutory interpretation that is generally carried out on the face of the impugned regulation and its enabling statute. In keeping with principles of statutory interpretation, materials such as working papers and Hansard debates may assist the court in determining the purpose of the enabling statute.<sup>26</sup> However, the court is not required to go beyond these materials to carry out its supervisory role. Importantly, the materials before Cabinet in deliberating on and enacting an impugned regulation, which are of course generally protected from disclosure by Cabinet confidentiality, will be of no utility.
26. By contrast, reasonableness review that includes broader grounds of review arguably requires the reviewing court to look beyond the face of the regulation.<sup>27</sup> In the absence of reasons, courts may look to the “record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision”.<sup>28</sup> As recognized by Paul Daly, “*Vavilovian* reasonableness review might create pressure to expand the record normally put before a court when reviewing cabinet decisions”.<sup>29</sup> In this sense, expanding the grounds of review for Cabinet decision making will inevitably create tension with the constitutional convention of Cabinet confidence.

---

<sup>26</sup> *Le* at para. 140.

<sup>27</sup> For example, in *Portnov* at para. 33, the Court stated that in conducting reasonableness review of the impugned regulation, the Court was entitled to look at “the reasons offered by the decision maker, associated documents that shed light on the reasoning process, any submissions made to the decision-maker, and the record before the decision maker”.

<sup>28</sup> *Vavilov* at para. 137.

<sup>29</sup> Paul Daly, “[Resisting which Siren’s Call? \*Auer v Auer\*, 2022 ABCA 375 and \*TransAlta Generation Partnership v Alberta \(Minister of Municipal Affairs\)\*, 2022 ABCA 381](https://web.archive.org/web/20240403214111/https://www.administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381/)” (24 November 2022), online (blog): <administrativelawmatters.com> [https://web.archive.org/web/20240403214111/https://www.administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381/].



***Cabinet Confidentiality Requires a Limited Record***

27. The constitutional convention of Cabinet confidentiality should limit the record available for the judicial review of all Cabinet decisions. As this Court recently confirmed in *Mandate Letters*, Cabinet confidentiality “is essential to effective government” and is a “precondition to responsible government”.<sup>30</sup> Cabinet secrecy enables ministers to speak freely during deliberations without fear that what they say could be subject to public scrutiny.<sup>31</sup> The principle promotes executive accountability by permitting private disagreement and candor in ministerial deliberations, despite public solidarity.<sup>32</sup>
28. Cabinet is not required by the courts to give formal reasons for the enactment of regulations; Cabinet owes no duty of procedural fairness in its legislative decision-making.<sup>33</sup> The promulgation of regulations does not, in any event, lend itself easily to the creation of a single set of reasons.<sup>34</sup> Regulations are the product of collective decision-making, and like legislation, individual ministers may be motivated by different considerations.<sup>35</sup> These considerations are of course subject to Cabinet privilege.
29. Likewise, Cabinet confidentiality means that the general rules applying to the review of quasi-judicial decisions, namely that all materials before the decision-maker ought to be produced and “the record is the record”,<sup>36</sup> are ill-suited to judicial review of Cabinet regulations. The possibility of an adverse inference being drawn against Cabinet for refusing to waive its privilege, as suggested by the Federal Court of Appeal,<sup>37</sup> is antithetical

---

<sup>30</sup> *Mandate Letters* at paras. [28](#) and [31](#).

<sup>31</sup> *Mandate Letters* at para. [29](#).

<sup>32</sup> *Mandate Letters* at para. [29](#).

<sup>33</sup> *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at pp. [756-757](#).

<sup>34</sup> While the federal government issues regulatory impact analysis statements, such statements have been described as “high level, lacking analysis of evidence, facts and submissions of stakeholders if any were invited to comment on a draft”: Sara Blake, “[Clarity on the standard of review of regulations](#)” (December 2022) online: CanLII Connects.

<sup>35</sup> See *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at para. [17](#).

<sup>36</sup> *Mink Breeders* at para. [38](#).

<sup>37</sup> *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at para. [111](#).

to this important principle. Similarly, the Court of Appeal for British Columbia's requirement that the AGBC provide parties challenging subordinate legislation with a list of "all of those documents directly before Cabinet when the decision was made" subject to claims of privilege or immunity<sup>38</sup> may itself erode Cabinet confidentiality by disclosing the types of materials before Cabinet and inviting parties to challenge any claims of privilege.

***Cabinet Documents are Not Producible, Unless a Bodner Application Test is Met***

30. In order to prevent lengthy and irrelevant disputes relating to the record during judicial review, which would stifle access to justice and delay judgment on the merits, this Court ought to affirm that, as a general rule, Cabinet documents are not producible and do not form part of the record on judicial review of Cabinet regulations. This rule would ensure the judicial review process remains efficient and effective.
31. In the alternative, the Court ought to articulate a narrow test for disclosure of Cabinet documents on judicial reviews of Cabinet regulations similar to a *Bodner* application. There is no principled reason to allow broader disclosure of Cabinet documents in judicial reviews of regulations than in judicial compensation disputes. As this Court noted in *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, "[g]iven the strong public interest in keeping documents concerning Cabinet deliberations confidential, a strong countervailing public interest will usually be necessary to justify their disclosure."<sup>39</sup> Put differently, there must be a competing constitutional interest of similar importance to that of Cabinet confidence.<sup>40</sup>
32. The following two-step test would be appropriate for disclosure of Cabinet documents in judicial review. First, the party seeking to have Cabinet documents disclosed would have the onus of identifying a competing constitutional interest that is as important as Cabinet confidence, and establishing why the documents in question could be relevant to assessing

---

<sup>38</sup> *Mink Breeders* at para. [76](#).

<sup>39</sup> 2020 SCC 20 at para. [112](#).

<sup>40</sup> *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 at para. [27](#).

the grounds of review for the regulation. This onus must be met using materials available in the public record. If the first step of the test is met, the Court will then engage in a *Bodner*<sup>41</sup> style balancing test to determine whether disclosure is warranted, and to determine the materials are not subject to an applicable rule of evidence barring disclosure, such as solicitor-client privilege or public interest immunity.

#### PART IV – COSTS

33. The AGBC does not seek costs and asks that no costs be awarded against her.

#### PART V – ORDER SOUGHT

34. The AGBC takes no position with respect to the disposition of the appeals.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5<sup>th</sup> day of April, 2024.



---

Emily Lapper, Counsel for the Attorney  
General of British Columbia



---

Christine Bant, Counsel for the  
Attorney General of British Columbia



---

Solomon Kay-Reid, Articling Student  
for the Attorney General of British  
Columbia

---

<sup>41</sup> *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005 SCC 44](#).

**TABLE OF AUTHORITIES**

<b>Case Law</b>	<b>Para(s).</b>
<i>Alberta College of Pharmacists v. Sobeys West Inc.</i> , <a href="#">2017 ABCA 306</a>	13
<i>Auer v. Auer</i> , <a href="#">2022 ABCA 375</a>	19
<i>British Columbia (Attorney General) v. Le</i> , <a href="#">2023 BCCA 200</a>	21, 25
<i>British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia</i> , <a href="#">2020 SCC 20</a>	31
<i>British Columbia (Lieutenant Governor in Council) v. Canada Mink Breeders Association</i> , <a href="#">2023 BCCA 310</a>	21, 29
<i>Canada (Attorney General) v. Inuit Tapirisat of Canada</i> , <a href="#">[1980] 2 S.C.R. 735</a>	28
<i>Canada (Citizenship and Immigration) v. Canadian Council for Refugees</i> , <a href="#">2021 FCA 72</a>	29
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , <a href="#">2019 SCC 65</a>	7, 9, 10, 21, 26
<i>Canada Mink Breeders Association v. British Columbia</i> , <a href="#">2022 BCSC 1731</a>	21
<i>Catalyst Paper Corp v. North Cowichan (District)</i> , <a href="#">2012 SCC 2</a>	11
<i>Crowder v. British Columbia (Attorney General)</i> , <a href="#">2019 BCSC 1824</a>	13, 21
<i>Delisle v. Canada (Deputy Attorney General)</i> , <a href="#">[1999] 2 S.C.R. 989</a>	28
<i>Green v. Law Society of Manitoba</i> , <a href="#">2017 SCC 20</a>	11, 13
<i>GSI Global Shelters Developments Ltd. v. Rural Municipality of Last Mountain Valley No. 250</i> , <a href="#">2024 SKCA 30</a>	13
<i>Hudson's Bay Company ULC v. Ontario (Attorney General)</i> , <a href="#">2020 ONSC 8046</a>	13, 21
<i>Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)</i> , <a href="#">2013 SCC 64</a>	3, 6, 7, 10, 11, 12, 13, 14, 18, 19, 25
<i>Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia</i> , <a href="#">2020 SCC 21</a>	31

<i>Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)</i> , <a href="#">2024 SCC 4</a>	1, 27
<i>Ontario v. Criminal Lawyers' Association of Ontario</i> , <a href="#">2013 SCC 43</a>	18
<i>Portnov v. Canada (Attorney General)</i> , <a href="#">2021 FCA 171</a>	13, 21, 26
<i>Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)</i> ; <i>Ontario Judges' Assn. v. Ontario (Management Board)</i> ; <i>Bodner v. Alberta</i> ; <i>Conférence des juges du Québec v. Québec (Attorney General)</i> ; <i>Minc v. Québec (Attorney General)</i> , <a href="#">2005 SCC 44</a>	32
<i>Reference re Impact Assessment Act</i> , <a href="#">2023 SCC 23</a>	13
<i>References re Greenhouse Gas Pollution Pricing Act</i> , <a href="#">2021 SCC 11</a>	13
<i>Thorne's Hardware Ltd. v. The Queen</i> , <a href="#">[1983] 1 S.C.R. 106</a>	16
<i>Trillium Power Wind Corporation v. Ontario (Natural Resources)</i> , <a href="#">2013 ONCA 683</a>	16
<i>West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)</i> , <a href="#">2018 SCC 22</a>	11, 13
<b>Secondary Sources</b>	<b>Para(s).</b>
John Mark Keyes, " <a href="#">Judicial Review of Delegated Legislation: The Long and Winding Road to <i>Vavilov</i></a> " (2020) at p. <a href="#">1</a> online: Canadian Legal Information Institute	7
Justice Malcolm Rowe, " <a href="#">The Virtue of Judicial Restraint, or Who Guards the Guardians?</a> " (2022) 55:1 UBC Law Review	18
Paul Daly, " <a href="#">Regulations and Reasonableness Review</a> " (29 January 2021), online (blog): <administrativelawmatters.com> [ <a href="https://web.archive.org/web/20240403213838/https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/">https://web.archive.org/web/20240403213838/https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/</a> ]	7
Paul Daly, " <a href="#">Resisting which Siren's Call? <i>Auer v Auer</i>, 2022 ABCA 375 and <i>TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)</i>, 2022 ABCA 381</a> " (24 November 2022), online (blog): <administrativelawmatters.com> [ <a href="https://web.archive.org/web/20240403214111/https://www.administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381/">https://web.archive.org/web/20240403214111/https://www.administrativelawmatters.com/blog/2022/11/24/resisting-which-sirens-call-auer-v-auer-2022-abca-375-and-transalta-generation-partnership-v-alberta-minister-of-municipal-affairs-2022-abca-381/</a> ]	26

Peter W. Hogg & Wade Wright, <a href="#"><i>Constitutional Law of Canada</i></a> , 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2023)	15, 17
Sara Blake, " <a href="#">Clarity on the standard of review of regulations</a> " (December 2022) online: CanLII Connects	28