Court defers to COVID-19 regulations in Hudson's Bay v. Ontario

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In its December 23, 2020 decision in *Hudson's Bay Company ULC v. Ontario (Attorney General)*,[1] the Ontario Divisional Court dismissed Hudson's Bay Company's bid to ease retail lockdowns in regions of Ontario hardest hit by the COVID-19 pandemic. This decision signals a lingering post-*Vavilov* doubt about how closely courts will examine the legality of regulations, and also illustrates the courts' deferential approach to government restrictions on civil liberties during the pandemic.

Background

In December 2020, Hudson's Bay Company (HBC) sought judicial review of the *Rules for Areas in Stage 1*, O. Reg. 82/20 (the Regulation) under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA). The ROA gives the province special powers to continue and amend orders made under emergency powers legislation in relation to the COVID-19 pandemic after the end of the declaration of emergency. The Regulation determines which businesses may operate in regions of Ontario in "Stage 1," (now known as "Grey Zone" and "Shutdown Zone") the most restrictive stage that applies to the regions with the highest rates of COVID-19.[2]

HBC challenged a provision of the Regulation that allowed "discount and big box retailers selling groceries" to open while requiring big box retailers that do not sell groceries to close. HBC's primary argument was that it was irrational to allow stores like Walmart, which sells essentially the same type of products as HBC, to open simply because they also sold groceries. HBC also argued that "essential services" could not be a relevant consideration under the ROA, and that more onerous restrictions on big box stores that do not sell groceries were not supported by evidence on COVID-19 transmission.

The Court dismissed the application. It found that the Regulation was consistent with the purpose and scope of the ROA, which was "to provide a flexible approach to balancing the health and safety of Ontarians during the pandemic against the province's economic and business interests."[3] The Court held that it was not its place to rule on the "wisdom and efficacy" of the policy (despite noting that it was "certainly open to question").[4] Rather the court's role was limited to determining whether the provision is authorized by the ROA, which it "clearly is."[5]

The standard of review of regulations: *Vires* vs. reasonableness

The Court's disposition was grounded in its highly deferential standard of review, choosing to assess the Regulation based on the Supreme Court of Canada's *vires* test in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*[6] (*Katz*) rather than by conducting a reasonableness review as would be suggested by more recent jurisprudence, in particular *Vavilov*.

Under the *Katz* framework, assessing whether a regulation is *ultra vires* is a two-step process. The first step is to determine the purpose and scope of the regulatory authority under the enabling statute. The second step is to assess whether the regulation is inconsistent with that purpose or scope. This approach to the judicial review of regulations is extremely deferential — regulations must be "irrelevant," "extraneous" or "completely inconsistent" with the statutory purpose to be struck down, which will only happen in an "egregious" case.[7]

The Divisional Court's application of the *Katz* test is surprising. The Court described the *Katz* test as "well settled" in these circumstances, noting that subsequent decisions had followed this approach, including the Supreme Court's 2018 decision in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*.[8] But the status of the *Katz* test has been in question for some time given the development of a parallel line of jurisprudence in which courts have applied a standard of reasonableness in reviewing regulations or bylaws, including Supreme Court decisions such as *Catalyst Paper Corp. v. North Cowichan (District)*[9] (Catalyst Paper) in 2012 and *Green v. Law Society of Manitoba*[10] in 2017. Unhelpfully, the Supreme Court's 2018 decision in *West Fraser Mills* did not deal with this case law in applying the *Katz* test.

Further, as HBC argued in this case, the *Katz* framework was seemingly overtaken by the reasonableness standard in *Vavilov*, in which the Supreme Court of Canada established reasonableness as the presumptive standard of review.[11]

In *Vavilov,* the Supreme Court eliminated the category of jurisdictional questions attracting correctness review, and instead endorsed judicial review on a standard of reasonableness where, as in this case, "the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute."[12] However, the Divisional Court evidently did not get the message, and rejected HBC's argument on this point. As Professor Paul Daly has observed, the Court's decision in this case reopens doubt as to the state of the law on the proper standard of review for regulations, an unwelcome development given the goals of *Vavilov*.[13]

We would suggest that there is little reason to retain the *Katz* approach as a distinct analytical framework. As we know from the Supreme Court's review of by-laws in *Catalyst Paper*, reasonableness "takes its colour from the context," including the specific context that applies where regulations have been promulgated under statute.[14] Collapsing the *Katz* framework into the reasonableness standard would also logically subject regulations to other badges of reasonable decision-making already recognized in applicable circumstances, including the improper purpose analysis in the *Tesla Motors*[15] decision that the Court had to distinguish in this case.[16] However, at least for

now, it appears that regulations will continue to be given a particularly wide berth by courts on judicial review, and struck down only where egregiously inconsistent with the statutory grant of power.

The courts' deferential approach towards pandemic policy and its impact on civil liberties

On top of the Divisional Court's application of the highly deferential *Katz* test, the Court's substantive decision is also reflective of Canadian courts' strong reluctance to interfere with the decisions of government policymakers when it comes to pandemic-related restrictions on businesses and individuals.

At issue in this case was a policy that is, at least on some level, intuitively unfair. Big box stores which happen to also sell groceries may remain fully open, and may continue to sell non-grocery items for in-person shopping, while their competitors who do not sell groceries are required to stay closed except for curbside pickup. The Court could not help but note that the wisdom and efficacy of this policy was "certainly open to question,"[17] agreeing that the Regulation "seems to result in permitting behaviour that is inconsistent with the broader policy goal of reducing community transmission in lockdown zones while permitting the in-store sale of essential items."[18] But the Court maintained that it was not its role in judicially reviewing the Regulation to "make determinations about the efficacy or wisdom of policy choices otherwise within the scope of the LGIC's executive authority."[19] In short, the Court decides what the government *can* do — not what it *should* do.

This distinction feels particularly important now, at a time when governments are faced with responding to a modern public health crisis for which there is no clear rulebook. The COVID-19 pandemic has presented the courts with challenging questions about the extent to which normal activities, as well as civil liberties, can and should be curbed to slow the spread of the virus.

So far, the courts' preference seems to be to leave these choices to the lawmakers. For example, in *Taylor v. Newfoundland and Labrador*,[20] the Supreme Court of Newfoundland and Labrador upheld the province's decision to limit entry to Newfoundland and Labrador to residents, asymptomatic workers, and people with extenuating circumstances. Similarly, in *Ingram v. Alberta (Chief Medical Officer of Health)*,[21] the Alberta Court of Queen's Bench dismissed a legal challenge by churches and individuals arguing that restrictions against gatherings, including in places of worship, violated the *Charter*. And in *Monsanto v. Canada (Health)*,[22] the Federal Court dismissed an application for judicial review of a Canadian Border Security Agency officer's decision not to exempt a Canadian citizen who had spent one day in the United States for his job from the 14-day quarantine requirement.

While these cases each presented different legal issues, the common thread is the courts' emphasis on the risks the pandemic poses to the public, and refusal to intervene in governmental decisions to limit the rights of individuals in the interest of public health. Together, these decisions suggest Canadian courts will take a hands-off approach in the context of a public health emergency like COVID-19.

However, we are in the early stages of an unprecedented crisis, in which the risks to public health are at their highest and we have limited collective knowledge and experience about how to respond. As time goes on and this factual context continues to develop, it remains to be seen whether courts will maintain the same deferential approach or whether they will begin to take a harder look at the balance governments are striking between the infringement of civil liberties and the protection of public health.

This article originally appeared on the Ontario Bar Association Constitutional, Civil Liberties and Human Rights Law Section's Articles page.

[1] 2020 ONSC 8046 [*HBC v. Ontario*].

[2] *Ibid* at paras. 5, 10.

[3] *Ibid* at para. 71.

[4] *Ibid* at paras. 72-3.

[5] *Ibid* at para. 4.

[6] 2013 SCC 64 [*Katz*].

[7] *Katz* at para. 28.

[8] 2018 SCC 22.

[9] 2012 SCC 2 [*Catalyst Paper*].

[10] 2017 SCC 20.

[11] *HBC v. Ontario* at para. 39; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[12] *Ibid* at para. 66.

[13] Paul Daly, "Regulations and Reasonableness Review" (29 January 2021), online (blog): *Paul Daly*.

[14] *Catalyst Paper* at para. 18.

[15] *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation),* 2018 ONSC 5062.

[16] *HBC v. Ontario* at paras. 78-80.

[17] *Ibid* at para. 72.

[18] *Ibid.*

[19] *Ibid* at para. 73.

[21] 2020 NLSC 125.

[21] 2020 ABQB 806.

[22] 2020 FC 1053.

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