The SCC lowers the legal threshold for challenging the vires of subordinate legislation

November 14, 2024

Although the Supreme Court of Canada's decision in *Vavilov*[1] established a general framework for selecting which standard to apply on judicial review, it left open which standard of review applies to reviewing the *vires* of subordinate legislation, including regulations and guidelines. *Vavilov* therefore generated lingering uncertainty about whether pre-*Vavilov* principles still applied in such cases. The SCC had established in *Katz Group*[2] that a regulation would only be struck down if irrelevant, extraneous, or completely unrelated to the enabling statute. In companion decisions, *Auer v. Auer*, 2024 SCC 36 (*Auer*); *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37 (*TransAlta*), the SCC resolved this uncertainty, holding that the slightly less onerous reasonableness standard is the presumptive standard for reviewing the *vires* of regulations. Therefore, some regulations on the margins, which may not have been struck down in the past, may be more vulnerable moving forward.

Background

These companion cases emerged from challenges to two distinct sets of regulations. *Auer* involved a challenge to the *Child Support Guidelines*,[3] which determine the amount of child support one parent must pay to the other. *TransAlta* involved a challenge to the 2017 *Linear Guidelines*,[4] where TransAlta argued that Alberta's Minister of Municipal Affairs exceeded their authority[5] by enacting the *Linear Guidelines* that (1) violate the common law rule against administrative discrimination, which arises when regulations apply unequally to the actors engaging in the regulated activity, and (2) are inconsistent with the enabling statute.

In both cases, the Court of Appeal for Alberta upheld the regulations, but did not apply the reasonableness standard. The Court of Appeal for Alberta held that the general framework established in *Vavilov* did not displace the principle established in *Katz Group* that a regulation would only be struck down if irrelevant, extraneous, or completely unrelated to the enabling statute.[6]

The SCC held that *Vavilov*'s reasonableness review applies to regulations, while certain *Katz Group* principles still inform the analysis

In *Auer* and *TransAlta*, Justice Côté writing for a unanimous court dismissed both appeals and confirmed that the presumptive standard for reviewing the *vires* of regulations is the reasonableness standard set out in *Vavilov*. In so doing, the SCC held that neither the legislature nor the rule of law required a departure from this presumption. The applicability of reasonableness necessarily displaces the principle established in *Katz Group* that a regulation would only be struck down if irrelevant, extraneous, or completely unrelated to the enabling statute. Continuing to apply this higher threshold would undermine *Vavilov*'s promise of simplicity, predictability, and coherence in judicial review.

Notwithstanding the applicability of reasonableness, Justice Côté held that the remaining four principles established in *Katz Group* continue to inform the reasonableness review of regulations, insofar as they are consistent with the general framework established in *Vavilov*: (1) regulations must be consistent with the relevant specific provisions of the enabling statute, as well as the statute's overarching purpose; (2) regulations are presumptively valid; (3) regulations and their enabling statutes should be interpreted with a broad and purposive approach to statutory interpretation; and (4) the *vires* review of regulations does not involve assessing policy merits or whether the regulations are necessary, wise, or effective in practice.

On the principle that regulations are presumptively valid, Justice Côté explained that challengers must demonstrate that regulations are unreasonable and that courts should analyze regulations so as to maintain their validity, where possible. The presumption of validity does not raise the burden on applicants; it simply serves as a constraint on the reasonableness review.

Finally, the SCC confirmed how to conduct a reasonableness review of regulations consistent with *Vavilov*. The court must ask whether the regulation at issue bears the hallmarks of reasonableness – justification, transparency, and intelligibility – and whether it is justified to relevant factual and legal constraints. While reasonableness review does not involve an examination of policy merits, reviewing courts must consider the governing statutory scheme, other relevant statutes, common law principles, and principles of statutory interpretation.

Key takeaways

- By confirming that the reasonableness standard set out in *Vavilov* also governs challenges to the *vires* of regulations, the SCC appears to have relaxed the standard against which the validity of regulations will be measured. However, challengers can expect to continue facing a high bar in practice.
- In addition to the presumptive reasonableness standard for reviewing the *vires* of regulations, the remaining *Katz Group* principles continue to inform the reasonableness review of regulations, insofar as they are consistent with *Vavilov*.
- The impact of these decisions on which challenges are successful in the future remains to be seen.

- The impact may vary depending on the court in which a challenge is brought. The Federal Courts[7] and British Columbia[8] had already applied reasonableness, so that approach will continue. As the slightly more onerous *Katz Group* standard applied in Alberta, New Brunswick, Northwest Territories, and Yukon, even post-*Vavilov*, challenges in those jurisdictions will now be adjudicated under reasonableness.[9]

Footnotes

[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*).

[2] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (*Katz Group*).

[3] *Federal Child Support Guidelines*, S.O.R./97-175 (*Child Support Guidelines*).

[4] Alberta Linear Property Assessment Minister's Guidelines (*Linear Guidelines*).

[5] *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 322 and 322.1.

[6] *Auer v. Auer*, 2022 ABCA 375; *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381.

[7] *Portnov v. Canada (Attorney General)*, 2021 FCA 171; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210.

[8] *British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at para. 96.

[9] *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 at para. 46; *Auer v. Auer*, 2022 ABCA 375 at para. 63; Frank's Agricultural Ltd. v. *Dairy Farmers of New Brunswick*, 2022 NBQB 158 at para. 32; *A.B. v. Northwest Territories (Minister of Education, Culture and Employment)*, 2021 NWTCA 8 at para. 45; *Mercer v. Yukon (Government of)*, 2023 YKSC 59 at para. 127.

By

Nadia Effendi, Pierre N. Gemson, Patrick J. Leger, Michael O'Keefe

Expertise

Disputes, Appellate Advocacy, Public Law Litigation

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

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

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749