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Coherence over Deference: Regulations Are Subject to Same Standards of Judicial Review as Other Administrative Decisions

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In the companion cases of *Auer v Auer* (*Auer*) and *TransAlta Generation Partnership v Alberta* (*TransAlta*), the Supreme Court of Canada (SCC) unanimously confirmed that regulations and other forms of subordinate legislation (regulations) are subject to the robust form of judicial review established in Canada (*Minister of Citizenship and Immigration*) *v Vavilov* (*Vavilov*), which already applies to individual administrative decisions.

Key Takeaways

- The decisions in *Auer* and *TransAlta* make it easier to challenge the validity of regulations.
- In the past, persons challenging the validity of regulations had to show that they were "irrelevant," "extraneous" or "completely unrelated" to the enabling statute's purpose. This threshold was set aside by the SCC because it connoted a very high degree of deference to regulation-making authorities, which is inconsistent with robust judicial review.
- The SCC confirmed in *Auer* and *TransAlta* that in most situations, regulations will be reviewed on a standard of *reasonableness*. Their validity will depend on whether they fall within a *reasonable* interpretation of the enabling statute. This is a robust form of review: courts will intervene where necessary to safeguard the legality, rationality and fairness of the regulatory process.
- The more stringent standard of correctness will apply to the judicial review of regulations in certain cases, notably where regulations are challenged on the basis of constitutional arguments. In those cases, a reasonable interpretation will not suffice: courts will instead ascertain whether the regulations fall within the *correct* interpretation of the enabling statute.

The Decisions

The cases stem from two challenges to the validity of regulations, both initiated in Alberta. As the cases progressed through lower courts, they revealed disagreements between the justices on the standard of review to apply in cases in which regulations are argued to be invalid as a result of having been enacted without statutory authority or being inconsistent with their enabling statute.

The SCC offered a clear answer to the question, in rare unanimous reasons penned by Côté J. The Court held that the *Vavilov* framework applies to the judicial review of regulations when they are argued to have been enacted without authority. This is true regardless of the regulation-making authority, its proximity to the legislative branch or the process by which the regulations were enacted.

Under the *Vavilov* framework, as we previously commented, administrative decisions are presumptively reviewed on a standard of reasonableness. The more stringent standard of correctness applies where Parliament (or a legislature) has so indicated, or where required by the rule of law. The standard of correctness applies to constitutional questions, questions of law that are of central importance to the legal system as a whole and questions related to jurisdictional boundaries between administrative bodies, among others.

The application of those standards means that the validity of regulations will now depend on whether they fall within a reasonable interpretation of their enabling statute (when the standard of reasonableness applies) or within the correct interpretation of their enabling statute (when the standard of correctness applies, such as when regulations are argued to be inconsistent with the division of powers between the federal and provincial governments).

The SCC also had to determine whether the principles established in 2013 in *Katz Group Canada Inc. v Ontario* (*Health and Long-Term Care*) (*Katz*) remained relevant in light of *Vavilov*. In Katz, the SCC had held that regulations had to be "irrelevant," "extraneous" or "completely unrelated" to their enabling statute's purpose in order to be found inconsistent with such statute.

The SCC set aside this threshold, describing is as connoting a very high degree of deference, which was now inconsistent with the robust judicial review guaranteed under *Vavilov*. The SCC held that maintaining this threshold would have undermined *Vavilov*'s promise of simplicity, predictability and coherence in judicial review.

Beyond this threshold, several other principles of *Katz* will continue to be relevant. Regulations will continue to be presumed valid until shown otherwise, and where possible, the courts will continue to favour an interpretation that reconciles impugned regulations with their enabling statute. Moreover, the SCC has reiterated the long-standing principle that the judicial review of regulations is meant to determine whether there was legal authority for the enactment of regulations, not to determine whether regulations are necessary, wise or effective on a policy level.

In *Auer* and *TransAlta*, the SCC doubled down on its promise of simplicity, predictability and coherence in the law of judicial review, and put an end to one of the key controversies that had persisted despite *Vavilov*. Other questions that remain to be addressed by the highest court include the standard to be applied when regulations are challenged as a result of having been enacted without complying with a legally required process (e.g., without prior publication or consultations). The ability of Parliament or legislatures to legislate different standards of review will also continue to spill ink. In particular, following recent debates in the Federal Court of Appeal, the SCC may, before long, have to indicate whether Parliament and legislatures are empowered to completely oust judicial review on certain questions, such as questions of fact.

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