OSLER

Have the Katz been let out of the bag? Uncertainty about the standard of review for challenges to regulations

DECEMBER 21, 2022 10 MIN READ

Related Expertise

- Corporate and Commercial Disputes
- Government and Public Sector
- Regulatory
- Regulatory, Indigenous and Environmental

Authors: W. David Rankin, David Williams

Individuals or businesses aggrieved by regulations can apply to a court to review the regulation and determine whether it is valid or should be struck down. Recent case law has split on the appropriate standard of review: should the reviewing court assess whether the regulation is "reasonable" on the same flexible standard that applies to other types of government decision making? Or should the court instead apply a "hyperdeferential" standard that permits minimal scope for judicial interference?

Recent appellate decisions from Alberta apply the hyperdeferential approach, which does not depend on the specific facts and circumstances of each case and allows the court to find a regulation invalid only in the clearest of cases.

In contrast, since August 2021 the Federal Court of Appeal has applied a flexible, contextual standard of review which does not second-guess the policy decisions lying behind regulations but also does not give regulation-making authorities a blank cheque. Recently in *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210, the Federal Court of Appeal confirmed the flexible approach and explicitly rejected the hyperdeferential standard applied in Alberta.

The different approaches stem from a disagreement over whether the legal doctrine governing how courts review all other decisions of the executive branch of government applies to the review of regulations or not.

This Osler Update summarizes the contrasting views on this issue and notes the practical consequences for individuals and businesses who are directly affected by government regulation.

Legal framework

As we have written about previously, the Supreme Court of Canada fundamentally reshaped the nature and scope of judicial review of administrative action in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*). *Vavilov* holds that in most cases the reviewing court should be deferential to the decision-maker and apply a standard of reasonableness. In essence, the reviewing court must pay respectful attention to the decision of the administrative actor and only interfere where the decision falls outside the outer bounds of what is reasonable. "Reasonableness" must be assessed in relation to the specific facts and circumstances of each case.

Prior to *Vavilov*, the Supreme Court articulated a different approach to the review of regulations in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64

(*Katz*). Unlike *Vavilov,* the *Katz* standard of review is inflexible and does not depend on the specific facts and circumstances of each case. Instead, *Katz* holds that regulations always benefit from a presumption of validity and should be interpreted in a manner that render them valid whenever possible.[1] According to *Katz,* a regulation can only be invalid if it is "irrelevant", "extraneous", or "completely unrelated" to the statutory purpose.[2] Leading scholars have called *Katz* "hyperdeferential".[3]

While regulations are undoubtedly actions of the executive branch of government, *Vavilov* refers primarily to "administrative decision-makers" and does not explicitly address the standard of review for regulations. Some have said it is unclear if *Vavilov* has overtaken *Katz* or if *Katz* still provides the framework for reviewing regulations.[4]

In the face of this uncertainty, intermediate appellate courts have offered different views on whether the same flexible rules from *Vavilov* apply to the review of regulations or whether the inflexible rules from *Katz* apply.

Different approaches

The Federal Court of Appeal (FCA) considered this issue in *Portnov v. Canada (Attorney General)*, 2021 FCA 171 (*Portnov*), and found *Vavilov*, not *Katz*, applies to the review of regulations. The Court reasoned that "regulations, like administrative decisions and orders, are nothing more than binding legal instruments that administrative officials decide to make".[5]

Recently, the Court of Appeal of Alberta (ABCA) disagreed. In two recent decisions, the ABCA considered *Portnov* but refused to follow it and applied *Katz* instead of *Vavilov* to the review of two different types of regulations.

The first of these two decisions, *Auer v. Auer*, 2022 ABCA 375 (*Auer*), involved regulations enacted by the Governor in Council. The fact that the regulations at issue in *Auer* were enacted by the Governor in Council and underwent some parliamentary scrutiny led the Court to conclude that the regulations were more akin to legislation (which cannot be reviewed by courts, except on constitutional grounds) than administrative action (which can be reviewed under *Vavilov*). The Court found that because the regulations were akin to legislation, the hyperdeferential standard from *Katz* should apply.

While *Auer* relied on the "legislation-like" qualities of the regulation at issue in that case, it acknowledged that *Vavilov* applies to other types of decisions that have some "legislation-like" qualities (commonly referred to as "delegated legislation"), such as municipal by-laws and other types of regulations. The Court in *Auer* did not provide an exhaustive list of which delegated legislation attracts *Vavilov* and which attracts *Katz,* but it acknowledged that *Vavilov*, not *Katz*, applies to municipal by-laws,[6] law-society Rules passed by a democratically elected leadership group[7] and regulations enacted by a Workers Compensation Board.[8]

Read in this way, *Auer* stands for the narrow proposition that *Katz* applies to governor-in-council regulations that are subject to parliamentary debate, but *Vavilov* applies to other types of regulations and delegated legislation. Where to draw the line is an open question.

The second decision, *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 (*TransAlta*), goes one step further. In *TransAlta,* the ABCA held that *Katz* applies to regulations adopted by a provincial Minister — not the Governor in Council — that

were exempt from the routine scrutiny of the Alberta *Regulations Act,* R.S.A. 2000, c R-14.[9] While the ABCA in *TransAlta* purports to follow *Auer,* it actually extends *Auer* by applying *Katz* to types of regulations that were not considered in *Auer*.

In a recent decision, *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210 (*Innovative Medicines*), the FCA considered the ABCA's reasons in *Auer* and *TransAlta* for departing from *Portnov* and confirmed that, in its view, *Vavilov,* not *Katz*, applies to the judicial review of regulations. The FCA was not convinced by the ABCA's reasoning that regulations are "legislation-like" and so should attract a different standard of review. Instead, the FCA found this line of reasoning had been "thoroughly discredited" by jurisprudence of the Supreme Court and would lead to "[u]nnecessary complexity, confusion and incoherence."[10]

Practical consequences

At the moment, the standard of review that applies to a court reviewing the validity of a regulation will depend on which court is considering the issue. In Alberta, the "hyperdeferential" standard from *Katz* applies — at least to governor-in-council regulations, and perhaps others — whereas in the Federal Courts, the flexible *Vavilov* standard applies.

The practical consequence for litigants is that it will be harder to show that a regulation is invalid in Alberta than it would be in the Federal Courts. This is because the approach followed in Alberta gives regulations a presumption of validity and allows that presumption to be rebutted in only a narrow set of circumstances.

While this might not change the result in some cases (indeed, the FCA said the result in *Innovative Medicines* would have been the same under either standard),[11] it could affect the result in difficult cases that are close to the line.

Individuals and businesses considering regulatory challenges in the future should be aware of this uncertainty. If litigants are in the rare situation where they can challenge a regulation through an application for declaratory relief in the Federal Courts or just challenge the regulation in the context of ongoing proceedings in a Superior Court,[12] they should consider proceeding in the Federal Courts, which apply the flexible *Vavilov* standard rather than the hyperdeferential *Katz* standard that a Superior Court may apply.

The path forward

There is additional uncertainty for litigants outside of Alberta or the Federal Courts system. The appellate courts of other jurisdictions have not yet taken a firm stance on whether they will follow *Portnov*. Until these courts do take a firm stance, or the Supreme Court definitively rules on this issue, litigants outside of Alberta or the Federal Courts system do not know which standard of review will apply.

For these litigants, and for those trying to anticipate how the state of the law might change, there is good reason to anticipate that other jurisdictions might follow the Federal Courts' approach.

First, some lower courts appear to be applying *Portnov* already. At least two British Columbia lower court decisions suggest the courts in that province favour the *Portnov/Vavilov* approach.[13] The situation is less clear in other provinces. For example, no Ontario court has cited or considered *Portnov*. While there have been five Ontario decisions post-*Vavilov* that

follow *Katz,* the only decision that considers the application of *Vavilov* pre-dates *Portnov*,[14] two of the other five decisions also pre-date *Portnov*[15] and the two decisions that were released after *Portnov* do not consider or cite *Portnov* or *Vavilov*.[16]

Second, recent jurisprudence of the Supreme Court is inconsistent with the hyperdeferential standard of *Katz*. In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, the Supreme Court considered whether the broad regulation-making authority under the *Greenhouse Gas Pollution Pricing Act*[17] was constitutionally valid or an invalid delegation of legislative power. The majority of the Supreme Court found the broad regulation-making authority in the Act was constitutionally permissible because — though the regulation making authority was very broad — the statutory scheme imposed meaningful limits on the ability to make regulations.[18] Notably, the Supreme Court cited a passage from *Vavilov,* not *Katz*, in support of this proposition. This suggests the Supreme Court envisions that something other than the hyperdeferential *Katz* standard applies to the review of regulations.

Finally, at least one of the ABCA's main reasons for not applying *Vavilov* — that doing so would invite courts to interfere impermissibly with the regulation-making process and violate the separation of powers — is arguably not supported by *Vavilov* itself.

To the contrary, *Vavilov* tells courts *not* to weigh in on policy decisions that the legislature has delegated to the executive. *Vavilov* says that decision-makers acting under broad delegations of power are to have "greater flexibility"[19] and tells courts to send decisions back to the first-instance decision-maker for redetermination rather than trying to do the decision-makers' job for them.[20] Under *Vavilov,* the court's job is usually to police the outer bounds of acceptable decision-making, not to substitute its own view for that of the tribunal.[21] In many instances where courts are reviewing regulations under *Vavilov*, those outer bounds will be exceptionally wide, and so a reviewing court will not interfere.

The contrasting positions of the ABCA and the FCA on this issue highlight one of the few remaining points of uncertainty post-*Vavilov*. Individuals and businesses operating in heavily regulated industries should pay close attention to this disagreement, and any future resolution of it.

---

[1] *Katz* at para. 25.

[2] *Katz* at para. 28.

[3] Paul Daly, "Regulations and Reasonableness Review" in Administrative Law Matters (29 January 2021), <www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/>.

[4] John M. Evans, "Reviewing Delegated Legislation After Vavilov: Vires or Reasonableness?" (2021) 34:1 Can. J. Admin. L.& P. 1.

[5] *Portnov* at para. 23.

[6] *Catalyst Paper Corp v. North Cowichan (District)*, 2012 SCC 2.

[7] *Green v. Law Society of Manitoba*, 2017 SCC 20.

[8] *West Fraser Mills Ltd v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22.

[9] *TransAlta* at paras. 15–17.

[10] *Innovative Medicines* at paras. 35 and 37.

[11] *Innovative Medicines* at para. 49. See also *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211, at para. 191: "whether we assess the validity [...] through the lens of the reasonableness standard of review or through the more exacting prism of the *ultra vires* doctrine, the result would be the same."

[12] See *Strickland v. Canada (Attorney General)*, 2015 SCC 37.

[13] *Le v. British Columbia (Attorney General)*, 2022 BCSC 1146, at paras. 58–61 and *Pacific Wild Alliance v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 904, at paras. 68–75.

[14] *Hudson's Bay Company ULC v. Ontario (Attorney General)*, 2020 ONSC 8046.

[15] *Friends of Simcoe Forests Inc. v. Minister of Municipal Affairs and Housing,* 2021 ONSC 3813 (Div Ct.), and *Toronto District School Board v. Ontario*, 2021 ONSC 4348 (Div. Ct.)

[16] *Covant v. College of Veterinarians of Ontario*, 2021 ONSC 8193 (Div. Ct.), and *TransCanada Pipelines Ltd. v. Ontario (Minister of Finance),* 2022 ONSC 4432 (Div Ct.).

[17] S.C. 2018, c. 12, s. 186.

[18] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 73.

[19] *Vavilov* at para. 110 and see *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada,* 2020 FCA 100 (*Entertainment Software*), at paras. 28–32.

[20] *Vavilov* at paras. 139–141.

[21] Hon. David Stratas and David Williams, "The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review" October 26, 2020 (online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719276), and *Entertainment Software* at para. 32.