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A New Test for the Validity of Subordinate Legislation: Auernâ€™t You Glad the Supreme Court Weighed In?

When we think about the broad direction of government policy, we generally think about the statutes introduced by the legislature. However, the reality is that much of the laws that impact us are subordinate legislation: regulations, rules, and policies that are enacted by Ministers, boards and agencies, or other government actors pursuant to rule-making power provided to them under legislation. For nearly a decade, challenges to subordinate legislation were extremely challenging. The Supreme Court of Canada's 2013 decision in *Katz Group Canada Inc v Ontario (Health and Longâ€'Term Care)* set a high bar for challenging such subordinate legislation. The Court in that case held subordinate legislation "must be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose."

Since the Supreme Court of Canada's seminal administrative law decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, it has been an open question as to whether the high bar set out in *Katz Group* remained good law. Two recent decisions of the Supreme Court of Canada, *Auer v Auer* and *TransAlta Generation Partnership v Alberta*, have definitively answered that question. While much of the Supreme Court's earlier decision in *Katz Group* remains good law, the hyper-deferential standard articulated in that decision has been replaced with reasonableness review, as articulated in *Vavilov*.

Auer v Auer and *TransAlta Generation Partnership v Alberta* have virtually nothing in common as to their facts. *Auer* was about child support owing between former spouses, while *TransAlta* was about the approach to municipal taxation of coal-fired electric power generation facilities. However, both cases involved challenges to the validity of subordinate legislation: in the case of *Auer*, the *Federal Child Support Guidelines*; in the case of *TransAlta*, the *2017 Alberta Linear Property Assessment Minister's Guidelines*. In both cases, lower courts had grappled with the standard of review applicable to challenges of subordinate legislation. The Supreme Court of

Canada granted leave to clarify this important issue.

In both cases, nine-member panels of the Court rendered unanimous decisions authored by Justice Côté. Both decisions reaffirm the primacy of *Vavilov* in determining the appropriate standard of review, but they also recognize the unique considerations applicable to challenges to subordinate legislation.

The basic principles articulated by the Supreme Court in *Auer* for reviews of subordinate legislation are as follows:

- The general *Vavilov* framework for determining standard of review applies when determining the validity of subordinate legislation.
- The presumptive standard for reviewing the validity of subordinate legislation is reasonableness.
- Subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object.
- Subordinate legislation benefits from a presumption of validity. This means that, where possible, subordinate legislation should be construed in a manner that renders it valid.
- Review of subordinate legislation does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.
- The requirement in *Katz Group* that a party must show that subordinate legislation is “irrelevant”, “extraneous”, or “completely unrelated” to the statutory provisions authorizing them is no longer good law.

Key Takeaways

The Supreme Court’s decisions in these cases are welcome, for several reasons.

First, they are a welcome clarification as to how the validity of subordinate legislation should be assessed. This is a significant issue which is both conceptually important and arises frequently in practice. The prior *Katz Group* approach was to some extent a doctrinal orphan: internally coherent, but not coherent with the broader backdrop of administrative law. The Supreme Court in *Auer* has now made the challenge of subordinate legislation broadly consistent with the backdrop of administrative law more generally.

Second, the Supreme Court’s treatment of precedent in *Auer* is a welcome approach to overruling past precedent. Rather than

overruling *Katz Group* in its entirety, the Supreme Court preserved much of it, and only overruled those parties which it viewed as being inconsistent with *Vavilov*. This is a welcome approach that reflects an appropriately gradual evolution in the law, rather than one that sees the baby thrown out with the bath water. Perhaps even more importantly, the Supreme Court clearly articulated those elements of *Katz Group* which survived, and those which did not. There is no ambiguity as to that matter going forward. This clarity is also a welcome development.

Third, the fact that both decisions were 9-0 is itself a positive development. The Supreme Court has been relatively divided in recent years. Administrative law has been a particularly fraught area, arguably for several decades. The fact that the Supreme Court was able to speak with a single voice in such a clear decision on such a significant matter bodes well for the future.

Finally, and perhaps most practically, it is a welcome development that the Supreme Court has made it slightly easier to challenge subordinate legislation. The “irrelevant”, “extraneous”, or “completely unrelated” standard from *Katz Group* was a very difficult standard to meet in practice. While reasonableness review is deferential as well, it provides slightly more scope for challenging subordinate legislation. Indeed, it seems difficult to defend the notion that subordinate legislation that is admittedly unreasonable, yet at least tangentially related to the statutory purpose, would survive review. *Auer* eliminates that possibility.

That being said, *Auer* makes it clear that governmental bodies retain broad latitude to promulgate subordinate legislation. Indeed, as to the result, the Supreme Court upheld the validity of the challenged regulations in both *Auer* and *TransAlta*. This shows that while parties now have slightly more scope to challenge subordinate legislation, it is by no means open season for such challenges. Thus, *Auer* has struck an appropriate balance that gives the government reasonable scope for subordinate legislation in the public interest, while ensuring that unreasonable regulations are not immunized from review.