

Paul Daly, “Standard of Review of Regulations: Auer v. Auer, 2024 SCC 36” in Administrative Law Matters (November 8, 2024)

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

Ontario introduced regulations that effectively prohibited pharmacies from selling their own private-label generic drugs. Companies associated with pharmacies, including Shoppers Drug Mart, challenged the regulations. They argued that the Ontario government had gone beyond the authority Parliament actually (the Ontario Legislature) had delegated under the relevant drug legislation, so the regulations were ultra vires and invalid.

The Supreme Court upheld the regulations. It adopted a very deferential approach to reviewing regulations. Among other things, it said:

- Regulations are presumed valid;
- The challenger bears the burden of showing invalidity;
- The enabling statute should be interpreted broadly and purposively;
- Courts should not assess whether the regulation is wise, effective, or desirable; and
- Where the argument is that the regulation is inconsistent with the purpose of the enabling statute, it will generally be invalid only if it is “irrelevant, extraneous or completely unrelated” to that statutory purpose.

Katz made it quite difficult to invalidate a regulation for exceeding statutory authority.

Auer v. Auer, 2024 SCC 36

Mr. and Ms. Auer divorced and had a child. Mr. Auer was required to pay child support calculated under the federal Child Support Guidelines.

He challenged the Guidelines themselves. His argument was essentially that the Governor in Council had exceeded the regulation-making authority given to it by s. 26.1 of the Divorce Act. In particular, he argued that the Guidelines could require the paying parent to bear more of the child's expenses than was consistent with the statutory principle that both parents have a joint financial obligation according to their relative ability to contribute.

The important question became: How should a court review whether a regulation is authorized by its enabling statute?

Before Auer, there was uncertainty because Katz appeared to provide its own highly deferential test, whereas Vavilov had subsequently established reasonableness as the presumptive standard of judicial review of administrative decisions.

The Supreme Court unanimously held that Vavilov governs. When subordinate legislation is challenged as being beyond the authority delegated by statute, the presumptive standard is reasonableness.

The Court therefore changed an important part of Katz: A challenger does not now have to prove that the regulation is “irrelevant, extraneous or completely unrelated” to the statutory purpose.

Instead, the question is whether the regulation reasonably falls within the authority granted by the enabling statute, assessed using the statutory text, context, purpose, the statutory scheme, applicable law, and ordinary principles of statutory interpretation. Some other Katz principles may still inform that analysis.

Mr. Auer nevertheless lost. The Court concluded that the Child Support Guidelines reasonably fell within the very broad authority conferred on the Governor in Council by the Divorce Act.

The relationship between Katz and Auer

Katz (2013): Regulations receive extreme judicial deference - invalidate for inconsistency with statutory purpose only where the regulation is essentially “irrelevant, extraneous or completely unrelated.”

Vavilov (2019): Establishes a general framework of robust reasonableness review for administrative action.

Auer (2024): Says Vavilov applies to regulations too - Katz does not operate as a separate hyper-deferential standard. The “irrelevant, extraneous or completely unrelated” threshold is no longer the governing test.

So the doctrinal problem Paul Daly is discussing is essentially: After Auer, how much of Katz survives, and what does Vavilov-style reasonableness review actually mean when a court reviews the validity of regulations?

Standard of Review of Regulations: Auer v. Auer, 2024 SCC 36

The central issue in Auer v. Auer was the standard of review applicable when an applicant challenges the validity, or vires, of a regulation. Before Auer, Katz Group Canada Inc. v. Ontario (Health and Long-Term Care) had stated that judicial intervention on the basis of inconsistency with statutory purpose was appropriate only where regulations were “irrelevant”, “extraneous” or “completely unrelated” to that purpose. This had been criticized as a “hyperdeferential” standard in Portnov v. Canada (Attorney General) and as an inappropriate exception to the general Vavilov framework in British Columbia (Attorney General) v. Le. By contrast, the Alberta Court of Appeal majority in Auer had treated regulations as having a special status governed by the distinctive Katz approach. Daly notes that he had expected the Supreme Court to apply Vavilov to the regulations while nevertheless upholding the federal Child Support Guidelines, which is ultimately what occurred.

The Supreme Court, unanimously through Côté J., resolved the conflict in favour of Canada (Minister of Citizenship and Immigration) v. Vavilov. The Vavilov framework is “comprehensive” and represents a “sea change” in Canadian administrative law. Vavilov had expressly incorporated challenges to the lawfulness of regulations into its framework and contemplated that robust reasonableness review would be sufficient to ensure that administrative decision-makers, including regulation-makers, remain within the boundaries of

their statutory authority even where they provide no formal reasons. Regulations therefore do not receive a separate standard of review merely because of the identity of the delegate, its proximity to the legislative branch, or the process through which the subordinate legislation was enacted. Unless the legislature has indicated otherwise, or an issue requiring correctness review arises, the vires of subordinate legislation is reviewed for reasonableness. Daly agrees with this simplification, observing that separate treatment of regulations would be contrary to Vavilov's objectives of "simplification and clarity".

Daly emphasizes, however, that Auer did not discard Katz entirely. Katz contained five propositions: First, a regulation may be successfully challenged where it is inconsistent with the objective of the enabling statute or the scope of the statutory mandate; second, regulations benefit from a presumption of validity, placing the burden on the challenger and favouring an interpretation that reconciles the regulation with its enabling statute; third, both the regulation and enabling statute are interpreted broadly and purposively; fourth, courts do not assess whether regulations are necessary, wise, effective in practice, based on proper political, economic, social or partisan considerations, or actually successful in achieving statutory objectives; and fifth, inconsistency with statutory purpose invalidates a regulation only if it is "irrelevant", "extraneous" or "completely unrelated" to that purpose. Auer held only the fifth proposition inconsistent with Vavilov, because it created a special carve-out based on the status of the decision-maker and nature of the decision.

Daly agrees that the "irrelevant, extraneous or completely unrelated" threshold should not survive. In his view, Vavilov's "sea change" toward a presumption of reasonableness review removes the rationale for that exceptionally deferential threshold, while maintaining it would perpetuate uncertainty. He therefore regards Auer as a narrow departure from Katz rather than its wholesale rejection. The remaining Katz principles continue to provide "valuable guidance" so far as they do not conflict with Vavilov and form part of the application of the reasonableness standard. Daly refers in this context to *Canada (Attorney General) v. Power*, *R. v. Kirkpatrick* and *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*.

The first Katz principle was itself modified. The statement in Katz that a successful vires challenge "requires" inconsistency with statutory purpose or mandate suggested an exclusive ground of challenge. Auer instead treats inconsistency with statutory objectives or statutory scope as a basis, rather than necessarily the only basis, for attacking a regulation. Regulations must be consistent with both specific provisions of their enabling statute and its overriding purpose or object, but other Vavilov constraints may also be relevant. Daly points to the statutory scheme, common law principles and ordinary rules of statutory interpretation as particularly relevant constraints, while noting that other constraints might arise and, in an appropriate case, a regulation might also fail because it does not exhibit a coherent chain of reasoning.

Daly is more critical of the continued presumption of validity. Côté J. regarded it as consistent with Vavilov: The applicant already bears the burden of demonstrating

substantive unreasonableness, and the requirement that a challenger show that subordinate legislation does not fall within a reasonable interpretation of the delegate's statutory authority does not necessarily impose a heavier burden. Daly nevertheless expresses "some sympathy" for the contrary position advanced by Stratas JA in *Innovative Medicines*, according to which Vavilov does not impose a legal presumption that an administrative decision is reasonable. Daly distinguishes a de facto burden, under which the decision stands unless the applicant establishes unreasonableness, from a de jure presumption of validity. He considers the former more consistent with Vavilov. Judicial review should characterize the administrative decision fairly and with sensitivity to its institutional context and record, rather than begin with a legal presumption designed to save it.

Accordingly, Daly considers retention of the Katz presumption "a step too far" if it requires a judge to undertake a preliminary interpretive exercise designed to bring the regulation into conformity with the governing statutory scheme. Fairly characterizing a regulation for reasonableness review is legitimate; preliminary "interpretive gymnastics" designed to preserve validity are different. Daly acknowledges that he may be placing too much weight on the distinction between de facto and de jure burdens, but connects his concern to Côté J.'s insistence on the primacy of Vavilov, rejection of a special regulatory carve-out, and rejection of Katz's "very high degree of deference" as inconsistent with Vavilovian reasonableness review.

The fourth Katz principle remains important: Reasonableness review does not authorize courts to second-guess regulatory policy choices on their merits. Courts must organize the material before them around the limiting statutory language. The inquiry is not into whether the regulatory process used desirable inputs or whether the policy was wise, necessary or effective, but whether the subordinate instrument is consistent with the enabling statute's text, context and purpose. Daly gives the example of Regulatory Impact Analysis Statements, which may assist a court in identifying the relationship between the enabling statute's purpose and the regulatory objective, in a manner comparable to Hansard evidence. Such material may also demonstrate that effects of a regulation which initially appear unreasonable are in fact authorized by the primary legislation. Daly regards this approach as closer to the proper treatment of validity: The decision should be characterized fairly, without converting the presumption into an independent legal rule protecting the regulation.

On the facts of *Auer*, the challenge failed because of the statutory authority conferred by s. 26.1 of the Divorce Act. Section 26.1(1) gave the Governor in Council "extremely broad authority" to make regulations. Section 26.1(2) limited this by stating the principle that spouses have a joint financial obligation to maintain children of the marriage according to their relative abilities to contribute, but Côté J. regarded that principle itself as expressed in broad terms. The Court therefore found no basis to intervene in relation to the substantive reasonableness of the Child Support Guidelines.

The Governor in Council was entitled to adopt a child-support calculation method that did not take the recipient parent's income into account; assumed that parents spend the same linear

percentage of income on children regardless of income levels and the children's ages; did not account for government child benefits paid to recipient parents; did not account for direct spending on the child by a payer exercising less than 40 percent of annual parenting time; and risked double-counting some special or extraordinary expenses. The Court held that each choice fell within the statutory authority delegated by the Divorce Act.

Daly welcomes the elimination of the special Katz carve-out for regulations, regarding it as effectively inevitable after Vavilov. At the same time, he leaves an important question unresolved: Although the governing framework has been clarified, aspects of the Supreme Court's treatment of the surviving Katz principles, particularly the presumption of validity will require close examination in later cases to determine how much practical room remains for challengers to succeed in reasonableness challenges to regulations.