

Supreme Court clarifies standard of review for challenges to subordinate legislation



NOVEMBER 13, 2024 5 MIN READ

Related Expertise

- [Corporate and Commercial Disputes](#)
- [Disputes](#)
- [Regulatory](#)

Authors: [W. David Rankin](#), [David Williams](#)

The Supreme Court of Canada recently clarified the analytical framework for challenging regulations in *Auer v. Auer*, 2024 SCC 36, and its companion case, *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37.^[1] These decisions resolve a split among appellate courts that we wrote about in December 2022.^[2] Some courts applied a “hyper-deferential” standard that permitted minimal scope for judicial interference, whereas others applied the same flexible standard used for other types of government decision making.

The Supreme Court unanimously endorsed the latter, holding that the approach for reviewing administrative decisions set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, applies to challenges to regulations. The Court rejected a “hyper-deferential” standard as inconsistent with *Vavilov*’s promise for “robust” review of governmental decisions.^[3] In rejecting the “hyper-deferential” approach, the Court confirmed that it is not necessary for the challenger to show that the subordinate legislation is “irrelevant”, “extraneous” or “completely unrelated” to the purpose of the enabling legislation.

Applying the *Vavilov* framework, the Court confirmed that subordinate legislation

1. must be consistent with specific provisions of the enabling statute and its overriding purpose or object
2. benefits from a presumption of validity, meaning that: (a) the burden is on the challenger to demonstrate the invalidity of the subordinate legislation; and (b) where possible, the subordinate legislation should be construed in a manner that renders it valid
3. must be interpreted using a broad and purposive approach to statutory interpretation
4. is subject to challenge based on legality or validity, but the reviewing court is not permitted to assess the policy merits of the subordinate legislation^[4]

The Court also provided guidance on conducting *Vavilov* reasonableness review in the context of subordinate legislation where formal reasons are often absent. The reviewing court must determine whether the subordinate legislation has the hallmarks of reasonableness (justification, transparency, and intelligibility) and whether it is justified in relation to the legal and factual constraints.^[5] Absent formal reasons, the reviewing court looks to various sources to discern the reasoning process underlying the subordinate legislation. For example, there may be a regulatory impact analysis statement published

alongside the regulations that sheds light on the reasoning process.^[6] The reviewing court should consider any applicable constraints on the power of the regulation-making authority, including any constraints arising from the governing statutory scheme, other applicable statutory or common law and the principles of statutory interpretation.

The *Vavilov* framework for reasonableness review does not involve assessing the policy merits of subordinate legislation. The inquiry is not whether the regulations or their consequences are necessary, desirable or wise from a policy perspective. Rather, the analysis focuses on whether the regulation-making authority reasonably interpreted its statutory regulation-making power.^[7]

The *Auer* case illustrates the prohibition against wading into policy merits. The applicant in *Auer* challenged federal child support guidelines as unreasonable because they were based on assumptions and general rules which could result in the payor parent bearing a larger burden of childcare expenses.^[8] The Supreme Court accepted the applicant's position that the guidelines were based on assumptions and general rules, but found this was irrelevant to the challenge, as the statute authorized the Governor in Council to make these types of decisions.^[9] The applicant's challenge was effectively challenging the policy merits of the child support guidelines, which falls outside the scope of judicial review.

Practical considerations

First, the new framework invites more probing (though still limited) review of regulations and other subordinate legislation. That said, the impact of this shift towards more probing review is likely limited in most cases. In both *Auer* and *TransAlta*, all three levels of court arrived at the same result, even though each applied a different analytical approach.

Second, applying *Vavilov* reasonableness review to subordinate legislation places the rationale for the regulatory intervention squarely at issue. The source of this rationale may vary depending on the specific instrument being challenged. For example, the rationale for a municipal bylaw enacted by a council may be derived from council debates or statements of policy. For federal regulations, the rationale is often stated in an accompanying regulatory impact analysis.^[10] Many of these materials are publicly available and should be consulted in deciding whether to bring a challenge to subordinate legislation.

Third, there remains uncertainty about how to assess regulations if these types of materials are not available. The Supreme Court in *Vavilov* stresses the importance of the reasoning process to the analysis, but there is limited guidance on how to discern the reasoning process for regulations absent materials such as a regulatory impact analysis statement.^[11] The emphasis on the reasoning process may invite disputes about what materials constitute the "record" of the decision to pass the subordinate legislation. While the challenger is generally provided with the "record" that informed the decision to pass a regulation, challengers may seek additional materials if they feel this record does not adequately address the rationale for the regulation.^[12] This is an area where further guidance will be developed as more regulations are reviewed under the *Vavilov* framework.

[1] And other forms of subordinate legislation.

[2] We wrote about this in [December 2022](#).

[3] *Auer v. Auer*, 2024 SCC 36, at paras. 4 and 45.

[4] *Auer* at para. 29, 32–40; *TransAlta Generation Partnership v. Alberta*, 2024 SCC 37, para. 15.

[5] *Auer* at para. 50.

[6] *Auer* at paras 52–54.

[7] *Auer* at para. 56.

[8] *Auer* at paras. 80–104.

[9] *Auer* at paras. 75–79, 89, 94, 97, and 104.

[10] *Auer* at para. 53, citing Mancini, Mark P. “One Rule to Rule Them All: Subordinate Legislation and the Law of Judicial Review” (2024), 55 Ottawa L. Rev. 245.

[11] *Vavilov* at paras. 84–85.

[12] For example, section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, and section 317 of the *Federal Courts Rules*, S.O.R./98-106.