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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

In *Auer v. Auer*, 2024 CSC 36, 2024 SCC 36, 2024 CarswellAlta 2816, 2024 CarswellAlta 2817 (S.C.C.), and *TransAlta Generation Partnership v. Alberta*, 2024 CSC 37, 2024 SCC 37, 2024 CarswellAlta 2818, 2024 CarswellAlta 2819 (S.C.C.), the Supreme Court of Canada addressed an important debate in the post-*Vavilov* interpretation of standard of review in the context of executive regulations. In these appeals, the Supreme Court was called on to determine the standard of review that applies when reviewing the validity (*vires*) of subordinate legislation, and in this context, resolving a debate among appellate courts in Canada as to the continuing relevance of *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, 2013 CarswellOnt 15719, 2013 CarswellOnt 15720, [2013] 3 S.C.R. 810 (S.C.C.), in light of the Court's framework of judicial review over executive action in in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, [2019] 4 S.C.R. 653 (S.C.C.).

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The Court concluded that the reasonableness standard as set out in *Vavilov* presumptively applies when reviewing the vires of subordinate legislation. However, the Court also concluded that some of the principles from *Katz Group* continue to "inform" such reasonableness review, including that (1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; (2) a presumption of validity continues to operate with respect to subordinate legislation; (3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and (4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

Auer involved the validity of the *Federal Child Support Guidelines*, SOR/97-175, established by the Governor in Council under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), which determine the amount of child support to be paid in case of divorce, except in the province of Quebec. The Court held that the Child Support Guidelines are *intra vires* the GIC. The Court held that they fall within a reasonable interpretation of the scope of the GIC's authority under s. 26.1 of the *Divorce Act*.

In short, the Court resolved the debate referred to above by agreeing with both sides. Cote J. summarized the Court's approach in *Auer* as follows:

> I conclude that the reasonableness standard as set out in *Vavilov* presumptively applies when reviewing the vires of subordinate legislation. I also conclude that some of the principles from *Katz Group* continue to inform such reasonableness review: (1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; (2) subordinate legislation benefits from a presumption of validity; (3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and (4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

Through these decisions in *Auer* and *TransAlta Generation Partnership,* the Supreme Court has resolved the inconsistent approaches to the judicial review of regulations by different appellate courts in Canada. Of course, this represents more of a beginning than an end for the issue of the review of regulations and other subordinate legislation. Applying *Vavilov*, with the presumption of validity and other key aspects of *Katz Group* preserved by the Court, will not be without its challenges — some anticipated and addressed in *Auer* itself (the difficulty in obtaining a sufficient record for judicial review, the absence of formal reasons for regulations, etc), and some not.

Additionally, *Katz Group* did not stand alone in public law jurisprudence. It rested on a foundation of thought about executive legislation and why/how it was distinct from other kinds of executive action. To take just one example, the view that procedural fairness does not arise in the regulation-making process, set out in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CarswellNat 633, 1980 CarswellNat 633F, [1980] 2 S.C.R. 735 (S.C.C.), is premised on a distinction between the executive and legislative functions of the

executive that may also now be necessary to revisit in light of *Auer*.

This Release also includes a variety of updates on other important new administrative law decisions:

In *Eskasoni First Nation v. Canada (Attorney General)*, 2024 CF 1856, 2024 FC 1856, 2024 CarswellNat 4658, 2024 CarswellNat 4659 (F.C.), the Federal Court considered the relationship between the duty to consult and accommodate, and the duty of fairness. The subject-matter was an application for judicial review related to the readjustment of the federal election boundaries for the Province of Nova Scotia. The key issue before the Court was whether the Commission responsible for the review of the federal election boundaries gave "due consideration to the community of interest, community of identity in, or the historical pattern of the electoral district" as required by the governing legislation. The Court concluded no duty of procedural fairness arose in the circumstances, nor was a duty to consult applicable to the Commission process.

In *Morabito v. British Columbia (Securities Commission)*, 2024 BCCA 377, 2024 CarswellBC 3379 (B.C. C.A.), the B.C. Court of Appeal examined the procedural fairness implications of blended hearings. The Court found the blended hearing process adopted by the B.C. Securities Commission breached its fairness obligations to the chairperson of an airline company and the company subject to insider trading allegations. The Court found that the blended hearing contemplated the tendering of evidence by the Commission to prove the substantive charges against the subjects of the hearing, while also permitting the subject of the hearing to produce evidence of abuse of process. According to the Court, these two tasks were incompatible, and were subject to conflicting burdens of proof.

In *Haas v. The Saskatchewan Veterinary Medical Association*, 2024 SKCA 110, 2024 CarswellSask 496 (Sask. C.A.), the Saskatchewan Court of Appeal considered the distinction between mandatory statutory provisions (in the sense that non-compliance results in invalidity) and directory statutory provisions (where non-compliance may in certain circumstances be relieved against in determining procedural fairness rights). The application for judicial review was brought by a veterinarian opposed to the Saskatchewan Veterinary Medical Association's adoption of an amendment to bylaws banning members from performing onychectomy (declawing) of cats for cosmetic or non-therapeutic reasons. The applicant argued that notice of the meeting was delivered to him electronically, and not by traditional mail. The application was dismissed by a judge of the Saskatchewan Court of King's Bench. The Court of Appeal dismissed the appeal, finding the notice provisions in question not to be mandatory.

L.S.