

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

BETWEEN:

**TRANSALTA GENERATION PARTNERSHIP and
TRANSALTA GENERATION (KEEPHILLS 3)**

Appellants

-AND-

**HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ALBERTA and
MINISTER OF MUNICIPAL AFFAIRS FOR THE PROVINCE OF ALBERTA**

Respondents

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FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN

(pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

AND BETWEEN:

ROLAND NIKOLAUS AUER

Appellant

-AND-

AYSEL IGOREVNA AUER and ATTORNEY GENERAL OF CANADA

Respondents

-AND-

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PART I: OVERVIEW OF POSITION

1. Provincial legislatures create policy-based laws in one of two ways: (i) by enacting primary legislation, and (ii) by delegating lawmaking powers to the executive branch to create regulations and other forms of delegated legislation. The review of delegated legislation must respect the separation of powers. Selection of the standard of review should accordingly focus on the legislative intent of the delegating authority.

2. In Saskatchewan, the requisite legislative intent is found in *The Legislation Act* [*Legislation Act*].¹ As discussed below, the *Act* creates a framework of legislative supremacy for the assessment of delegated legislation, so that the standard of review applied by the judiciary when assessing same should be limited to questions of *vires* or matters of legality.

¹ [SS 2019, c L-10.2.](#)

**PART II: POSITION OF THE ATTORNEY GENERAL FOR
SASKATCHEWAN**

3. This Honourable Court should not apply the presumptive reasonableness standard of review from *Vavilov* to delegated legislative action (which by its nature is different from pure administrative decision-making).² Approaching the matter through the prism of legislative intent, it is submitted that delegated legislative action should be reviewed on a presumptive *vires*-based review in line with the principles from *Katz Group*.³ This presumption could be rebutted where a legislature has evinced an intention for reasonableness or some other standard of review to apply to a specific delegated law-making authority.

² [*Canada \(Minister of Citizenship and Immigration\) v Vavilov*, 2019 SCC 65, \[2019\] 4 SCR 653 \[Vavilov\]](#).

³ [*Katz Group Canada Inc. v Ontario \(Health and Long-Term Care\)*, 2013 SCC 64, \[2013\] 3 SCR 810 \[Katz Group\]](#).

PART III: STATEMENT OF ARGUMENT

A. The legislative intent of *vires* review

4. Legislative intent is the “polar star” of judicial review.⁴ Accordingly, legislative intent should guide the selection of the framework applicable to judicial review of delegated legislation, whether that be under a *Vavilov* or *Katz Group* framework.

5. In *Vavilov*, the majority of this Honourable Court adopted a new framework for judicial review of administrative decisions based on respect for legislative intent.⁵ Delegated legislative decisions are principally legislative and not administrative in nature.⁶ That said, the same principles of legislative intent should be used to determine the approach to judicial review of delegated legislation. More particularly, the standard of review should be derived from a principled application of the rules of statutory interpretation, as a way to divine the legislative intent of the delegating authority.

6. Considering the approach of this Court in *Katz Group*, the question must be asked whether presumptive *vires* review for delegated legislative decisions is supported by the principles of statutory interpretation. It is respectfully submitted that the presumption is so supported, particularly when one considers the presumption of compliance.

⁴ *Vavilov* at para 33 citing *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149, [2009] 1 SCR 539.

⁵ *Vavilov* at para 33.

⁶ See e.g.: *Reference re Manitoba Language Rights*, [1992] 1 SCR 212 at 224-25; *Thorne's Hardware Ltd. v The Queen*, [1983] 1 SCR 106 at 111; *Potter v Halifax Regional School Board*, 2002 NSCA 88 at para 40, 215 DLR (4th) 441; *Métis Nation of Alberta Association v Alberta (Indigenous Relations)*, 2024 ABCA 40 at para 35.

7. The presumption of compliance does not originate in *Katz Group*, rather, it is a presumption that applies to all legislation as a matter of statutory interpretation. For example, in *R v McKay*, Cartwright J. wrote:

... [I]f an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. An alternative form in which the rule is expressed is that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted.⁷

8. Similarly, the Saskatchewan Court of Appeal in *Duffield v Prince Albert (City)* held that there is a rebuttable presumption that statutes and regulations are enacted in compliance with the legislator's jurisdiction:

[13] Next, as a matter of interpretation, I note that the courts will presume that a statute, regulation or municipal bylaw has been enacted in compliance with all limits on jurisdiction, see: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed, (Markham: Butterworths, 2002) at 366-373; however, the presumption may be rebutted.⁸

9. This interpretative approach was also adopted in *Amalgamated Transit Union Local 1374 v Saskatchewan (Finance)*:

[61] An Order in Council is a form of subordinate legislation which flows out of a grant of legislative authority. Where a statutory power to make subordinate legislation is conferred on the Lieutenant Governor in Council, it is typically expressed through an Order in Council. Subordinate legislation must be constitutionally sound and

⁷ [\[1965\] SCR 798](#) at 803-804.

⁸ [2015 SKCA 46](#), 457 Sask R 271. Application for leave dismissed: [2015 CanLII 75970](#) (SCC).

not exercised beyond the statutory grant of power. As a general principle, subordinate legislation should be construed in a manner which renders it *intra vires*. (*Judicial Review* at 15-57).⁹

10. As the presumption of validity, or presumption of compliance,¹⁰ is part of statutory interpretation, in Saskatchewan the *Legislation Act* requires statutes and regulations to be interpreted using the same approach. This is provided for in s. 2-10 of the [Legislation Act](#), which provides [emphasis added]:

Acts and regulations remedial

2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

11. Thus, as judicial review of legislation is generally restricted to *vires* review, there is statutory intent in Saskatchewan for a presumption of the *vires* review for the judicial review of regulations.

12. Presumptive *vires* review also accords with the principle of legislative supremacy. In describing this principle in *Reference re Canada Assistance Plan (B.C.)*, Sopinka J. for the Court noted that it is reflected in s. 42 of the federal *Interpretation Act*:

42.(1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting

⁹ [2017 SKQB 152](#), [2017] 12 WWR 603.

¹⁰ A distinction between these concepts is drawn in some authorities, including *Sullivan*.

or modifying any power, privilege or advantage thereby vested in or granted to any person.

In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the Interpretation Act governs the interpretation of the Plan and all federal statutes where no contrary intention appears, the matter will be resolved by reference to it.

It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the Plan. To assert the contrary would be to negate the sovereignty of Parliament.
...¹¹

13. A similar provision exists in the *Legislation Act*:

Legislature's power to repeal or amend preserved

3-2 Every Act is to be interpreted as reserving to the Legislature the power to repeal or amend it, and to revoke, restrict or modify a power, privilege or advantage that it vests in or grants to any person.

14. Importantly, the *Legislation Act* refers all regulations to the Legislative Assembly of Saskatchewan, which maintains an ability to disapprove of or require the repeal or amendment of any regulation. Accordingly, in Saskatchewan, the provincial Legislature has asserted legislative supremacy not only in relation to statutes but also in relation to regulations passed pursuant to legislation. Sections 4-15 and 4-16 of the *Legislation Act* make this clear:

Permanent reference to committee of Legislative Assembly

4-15 Every filed regulation stands permanently referred to any committee that the Legislative Assembly may appoint for any purpose directed by the Legislative Assembly.

¹¹ [\[1991\] 2 SCR 525](#) at 548-49.

Procedure if disapproved by Legislative Assembly

4-16(1) The Legislative Assembly may, by resolution:

(a) disapprove of a regulation or any part of a regulation; or

(b) require a regulation or any part of a regulation to be repealed or amended.

(2) If the Legislative Assembly disapproves of a regulation or part of a regulation or requires a regulation or part of a regulation to be repealed or amended, the Clerk of the Legislative Assembly shall forward the resolution to:

(a) the authority making the regulation; or

(b) in the case of a regulation made by the Lieutenant Governor in Council, the member of the Executive Council to whom for the time being the administration of the regulation is assigned.

(3) On receipt of the resolution, the authority making the regulation or the Lieutenant Governor in Council, as the case may be, shall repeal or amend the regulation or part of the regulation as required by the resolution.

15. In the Saskatchewan context, presumptive reasonableness review would not respect the Legislature's intent that review of regulations for policy considerations is within the purview of the legislative branch. Instead, the legislative intention, expressed through the provisions of the *Legislation Act*, is for the Courts to review the legality of delegated legislation and for the Legislature to review the merits (including questions of policy and efficacy) of delegated legislation.

B. How the presumption of *vires* review may be rebutted

16. Similar to legislative intent being able to rebut the presumption of reasonableness review under *Vavilov*, the presumption of *vires* review of regulations should be rebuttable by establishing a contrary legislative intent.

17. For example, a legislature could specifically prescribe a standard of review, or such a standard could in some cases be implied from the constraints of the regulation making provision. For example, where the legislator has indicated a decision maker must be of a specific opinion in order to exercise delegated legislative action, this could function as an indication that the opinion is reviewable on a reasonableness standard. In such cases, it could not be the intention of the legislator to require consideration of specific matters but permit that consideration to be unreasonable.

PART IV: COSTS

18. Saskatchewan submits that it should not be liable for costs beyond those in the purview of Rule 59(1)(a) and the March 20, 2024 Order of Justice Martin.

PART V: REQUEST FOR ORDER

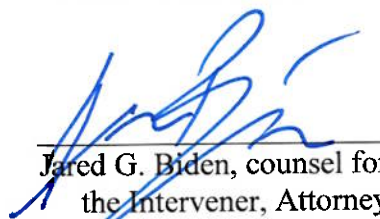
19. In light of the said Order of Justice Martin regarding interveners' oral arguments, Saskatchewan makes no further requests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 5th day of April, 2024.



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PART VI: AUTHORITIES**CASES**

Tab	Citation	Paragraphs
1.	<u><i>Amalgamated Transit Union Local 1374 v Saskatchewan (Finance)</i>, 2017 SKQB 152, [2017] 12 WWR 603.</u>	9.
2.	<u><i>Canada (Minister of Citizenship and Immigration) v Yavilov</i>, 2019 SCC 65, [2019] 4 SCR 653.</u>	3, 4, 5, 16.
3.	<u><i>C.U.P.E. v Ontario (Minister of Labour)</i>, 2003 SCC 29, [2009] 1 SCR 539.</u>	4.
4.	<u><i>Duffield v Prince Albert (City)</i>, 2015 SKCA 46, 457 Sask R 271.</u>	8.
5.	<u><i>Duffield v City of Prince Albert</i>, 2015 CanLII 75970 (SCC).</u>	8.
6.	<u><i>Métis Nation of Alberta Association v Alberta (Indigenous Relations)</i>, 2024 ABCA 40.</u>	5.
7.	<u><i>Katz Group Canada Inc. v Ontario (Health and Long-Term Care)</i>, 2013 SCC 64, [2013] 3 SCR 810.</u>	3, 4, 6, 7.
8.	<u><i>Potter v Halifax Regional School Board</i>, 2002 NSCA 88, 215 DLR (4th) 441.</u>	5.
9.	<u><i>Reference re Canada Assistance Plan (B.C.)</i>, [1991] 2 SCR 525.</u>	12.
10.	<u><i>Reference re Manitoba Language Rights</i>, [1992] 1 SCR 212.</u>	5.
11.	<u><i>R v McKay</i>, [1965] SCR 798.</u>	7.
12.	<u><i>Thorne's Hardware Ltd. v The Queen</i>, [1983] 1 SCR 106.</u>	5.

STATUTES, REGULATIONS, ETC.

Tab	Citation	Paragraphs
13.	<u><i>The Legislation Act, SS 2019, c L-10.2.</i></u>	2, 10, 13, 14, 15.

OTHER AUTHORITIES

Tab	Citation	Paragraphs
14.	Sullivan, Ruth. <i>Sullivan on the Construction of Statutes</i> , 7th ed. (Markham: LexisNexis Canada, 2014).	8, 9.