



Drafting enabling provisions

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Overview

- A brief discussion of current caselaw
- Some considerations for drafting enabling provisions, including implications of current state of the law
- Other considerations

Current State of the Law

- Judicial deference in the context of the exercise of regulation-making authority
- *Vavilov* suggests that a reasonableness standard will apply to the review of the *vires* of regulations (regulations not often being subject to statutory rights of appeal) and likely not subject to the ROL exceptions (no more true question of jurisdiction)
 - “Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision” (para 108)
 - “Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker’s authority” (para 110)

Current State of the Law

- *Vavilov* confirms the continued application of *Katz*, which provides for the following :
 - Presumption of validity of regulations
 - Vires challenge requires demonstrating that the regulations are inconsistent with the objective of the enabling statute or the scope of the statutory mandate
 - Broad and purposive approach to interpretation
 - Not an assessment of the policy merits or effectiveness; not an inquiry into the underlying “political, economic, social or partisan considerations”
- Recent application of *Vavilov* and *Katz* to the vires of a regulation : *Innovative Medicines Canada v. Canada (Attorney General)*
 - Court applies a reasonableness standard

Drafting implications

- **Drafting in more general terms, where appropriate**
 - (d) governing applications for licences and permits, and for amendments to licences and permits, including,
 - (i) their contents, form and preparation, and
 - (ii) the documentation that shall be included in the application;
 - (d) governing applications for licences and permits;
- **Conversely, the “contours” of the enabling provision need to be considered in light of a potentially broad interpretation**

What makes for a good enabling provision

- An effective enabling provision communicates:
 - the precise power transferred
 - the person to whom the transfer is made
 - the manner in which the power is to be exercised
 - any discretion to make use of the power or not
- The key considerations that we have been discussing in Ontario are the level of precision necessary and the placement of enabling provisions

Level of precision

- The level of precision required in the provision is a careful balancing act between various factors :
 - certitude and flexibility
 - stricter application and potential for uncertainty
 - complicated (greater chance for gaps) and simple and concise (but potentially broad)
 - potentially restrictive and large interpretation informed by the purpose of the Act

Placement

- Use of “signposting”
- Regulation-making powers being incorporated other than at the end
- Example:

Application to employers

5 (1) This Act applies to the following employers:

...

Same, Minister

38 (3) The Minister may make regulations exempting employers from the application of this Act.

Application to employers

5 (1) This Act applies to the following employers, unless a Minister’s regulation specifies otherwise:

...

Same, Minister

38 (3) The Minister may make regulations with respect to any matter that, in this Act, is described as being done by a regulation made by the Minister.

Placement

- Drafting and ROL considerations :
 - Greater visibility of what the regulations would be dealing with in the context of specific rules for both users and parliamentarians
 - Greater synthesis of regulation-making powers in the statutory framework to “tell the story”
 - Can sometimes help constrain regulation-making authority (provided you have clear client instructions)
 - Residual regulation-making authority that may be necessary can be reviewed without the “distraction” of other regulation-making powers
- Some challenges :
 - Clarifying whether the regulation is necessary to the application of a provision
 - Framing regulation-making powers as substantive provisions
 - Multiple regulation-makers

Omnibus or basket clauses

- How do omnibus or basket clauses work with current case law?
- Does placement matter?

x. The Lieutenant Governor in Council may make regulations respecting any matter or advisable to carry out effectively the intent and purpose of this Act, including,

(a)....

y. The Lieutenant Governor in Council may make regulations,

... (f) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Standing Committee on Regulations and Private Bills

- Required by section 33 of the *Legislation Act, 2006*
- Every regulation stands permanently referred to the standing committee
- The committee examines the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts
- The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations
- Standing Order 111, 13 (i) establishes the “terms of reference” of the Committee
- “...before drawing the attention of the House to a regulation or other statutory instrument, the Committee shall afford the ministry or agency concerned an opportunity to furnish orally or in writing to the Committee such explanation as the ministry or agency thinks fit”

Committee reports

- Committee Reports contain various interesting statistics
- Reported issues often narrow :
 - Issues of incorporation by reference
 - Order of approval where a regulation-authority is vested in a body but subject to ministerial approval
 - Amendments to a regulation made reference to repealed provisions of another regulation
 - Whether consultation or notice requirements have been met
 - Whether “governing the composition and appointment of the board of directors...” allows for members to be elected
- Report covering a six month period usually only results in a handful of regulations being reported
- Committee’s terms of reference provides that “...regulations should be in strict accordance with the statute conferring of power...”

Parliamentary Debate

- *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*
 - Continued orders made under the *Emergency Management and Civil Protection Act* (EMCPA) and ended the COVID-19 declared emergency
 - Allows for certain amendments to the continued orders for a period of one year (though the Assembly can extend that expiry date by periods of no more than one year)
 - Significantly, the EMCPA required the declaration of emergency to be extended by the Legislative Assembly every 28 days
 - Act includes requirement for regular reporting to the public and a standing or select committee of the Assembly
 - CCLA of the view that the bill “...eliminates essential democratic controls over unprecedented emergency powers”
- Could emergency powers foster an increased interest in and scrutiny of the consolidation of rule-making power within the executive branch?



Thank You