December 24, 2021

Reviewing Regulations Post-*Vavilov*: *Ecology Action Centre v Canada* (Part II)

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Case Commented On: *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367 (CanLII)

This is the second post on the Federal Court's recent decision in *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367 (CanLII). For the background on this decision, see Martin Olszynski's first post here.

Reviewing Regulations pursuant to *Vavilov* Reasonableness

Ecology Action Centre presents another important post-*Vavilov* issue: what is the test applied by a court in reviewing the legality of regulations? In our view, and notwithstanding statements to the contrary, Justice Richard Bell effectively applies the well-worn standard for the review of regulations, encapsulated by the Supreme Court's decision in *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII). That approach provides the following, as endorsed in *Ecology Action Centre* (at paras 70- 71):

> It is not the role of the Court to assess the policy merits of the regulations, or to determine whether regulations are "necessary, wise or effective in practice" (*Jafari v. Canada (Minister of Employment & Immigration)*, [1995] 2 FC 595, 125 DLR (4th) 141 at p. 604; and *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, 211 D.L.R. (4th) 741, 158 OAC 255).
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> A regulation will be inconsistent if it is "irrelevant, extraneous or completely unrelated to the statutory purpose" (*Wildland League v. Ontario (Lieutenant Governor in Council*, 2016 ONCA 741, 402 DLR (4th) 738 [*Wildland League*] at para. 46; *Katz Group* at para. 28; and *West Fraser Mills Ltd. v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635 at paras. 10-12).

In our view, and in the view of the Federal Court of Appeal, the *Katz* approach no longer applies post-*Vavilov*. This position was adopted in *Portnov v Canada (Attorney General)*, 2021 FCA 17 (CanLII). Among other things, the Court in *Portnov* was convinced that *Katz* no longer applies because: (1) *Vavilov* was intended "to be sweeping and comprehensive," and courts must look to *Vavilov* before any other case in determining and applying the standard of review (*Portnov* at para 25); and (2) *Vavilov* endorses a bounded contextual approach to reasonableness review, whereas *Katz* proceeds on a "hyper-deferential," categorical presumption of validity (*Portnov* at paras 19, 27; see also Paul Daly, "Regulations and Reasonableness Review" in Administrative Law Matters (29 January 2021).

We find wisdom in *Portnov*. It is justified from first principles. Regulation-making is functionally different from other forms of administrative decision-making, but it is legally the same: it flows from delegated power, and regulations are nothing more than "binding legal instruments that administrative officials decide to make" (*Portnov* at para 23). A special rule for regulations ignores this fundamental fact, resting instead on a now-discarded distinction between "legislative" and "administrative" actions (see *Portnov* at para 21). But these actions all derive from the same font of authority: legislative delegation. Since a challenge to a regulation is nothing more than a challenge to the "merits" of administrative action, it clearly falls under the ambit of *Vavilov* (*Vavilov* at para 2). Indeed, considering the proliferation of regulations over the past half-century and their binding effect on whole sectors of the economy, there are good reasons to suggest that regulations are *just as* deserving of *Vavilov* scrutiny as individual administrative decisions.

But Justice Bell did not consider this possibility in *Ecology Action Centre,* and only begrudgingly follows *Portnov*. He questions *Portnov* on two fronts. First, he says that "there is a huge distinction between orders or regulations enacted by, for example, one of hundreds of administrative tribunals such as the various agricultural marketing boards in the provinces and subordinate legislation enacted by the Governor in Council" (*Ecology Action Centre* at para 37); and second, *Vavilov* did not explicitly mention that *Katz* should be overturned (*Ecology Action Centre* at para 37).

This, with respect, puts form over substance, which *Vavilov* resists. It does so in two ways. First, Justice Bell draws an artificial distinction between administrative actors that does not actually exist in law. *Vavilov*, as a simplifying exercise, introduces an approach that applies to *all* administrative actors, and it does not suggest that different standards should apply depending on the identity of a decision-maker. While different contextual constraints will be relevant in different administrative contexts, the same principles will apply. We also note that Justice Bell's approach is self-defeating on its own terms: if he is worried about context, *Katz* will do no good. It is wholly categorical. As but one example, sometimes the Governor in Council enacts regulations; other times it makes decisions about individual projects.

Secondly, as mentioned above, where a court is unsure whether a decision falls under the ambit of *Vavilov*, they should first look to *Vavilov* to determine how its principles apply. With specific reference to the conduct of reasonableness review, *Vavilov* states that while cases pre-*Vavilov* dealing with reasonableness review "will often continue to provide insight," they should also "be used carefully to ensure that *their application is aligned in principle with these reasons*" (*Vavilov* at para 143, emphasis added). Yet Justice Bell does not address this issue at the level of *principle,* asking how *Vavilov*'s general pronouncements and specific doctrinal guidance apply to regulations. Rather, he simply asks why *Vavilov* did not expressly mention *Katz*.

Here, we note that it may very well be the case that the factual and legal constraints in particular regulatory contexts may counsel deference. But the deference contemplated by *Vavilov* is different. It is a robust form of review that is attuned to the legal context; it is not a hyper-deferential approach to review that applies no matter the regulatory context. The culture of justification in this context should demand the application of the same principles of judicial review, even if the form of review may take a different colour given the regulation-making context.

Altogether, *Portnov* introduces a new approach to review of regulations, relying on *Vavilov*. The approach seems to open more avenues for challenging regulations in certain circumstances. Indeed, one way to understand the emerging approach to regulations suggested by *Portnov* is in comparison with the "hard look" approach to regulations in the United States. Hard look review is best encapsulated in the famous *Motor Vehicles Manufacturers Ass'n v State Farm Mutual Automobile Insurance Co*, 463 U.S. 29 (1983) case:

> [A]n agency rule [analogous to executive regulations in Canada] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (at 43)

This is functionally similar to what *Vavilov* suggests should be the new approach to regulations. Courts will look to determine whether the administrator adequately accounted for (1) the law circumscribing its authority; and (2) the evidence and submissions that are fed into the regulation-making process (*Vavilov* at paras 108 – 128). What this looks like in distinct regulatory contexts will, obviously, differ: but *Vavilov* at least provides new, clear guideposts for what this contextual review will accomplish. Future doctrinal research could attempt to draw comparisons between the American experience with "hard look review" and the emerging approach in *Portnov/Vavilov.* At the same time, we acknowledge that, in Canada, grants of regulatory authority are generally framed in broad and permissive terms – certainly much more so than in the United States, where that country's stronger separation of powers (the legislative and executive branches are completely distinct, whereas in Canada the Prime Minister and his cabinet are sitting members of the legislature) result in a more acute principal-agent problem. While the requirements of the *Administrative Procedure Act*, as interpreted by American courts, further infuse this sort of review with considerations particular to the American context, there are similarities between "hard look review" and what is emerging as *Vavilov*ian regulatory review.

Substantive Regulatory Review: The Law and Evidence

This raises the next question: what should review of regulations for their reasonableness look like now, under *Vavilov*? Here, we also find *Portnov* convincing. As *Portnov* says, *Katz* is categorical, granting a wide swath of deference to regulations regardless of the context. But as *Vavilov* suggests, its contextual constraints are now the relevant considerations for a court on judicial review. And so, regulation-making will be subject to those constraints, which will differ depending on the regulatory context.

We note two areas where we believe *Vavilov* will make a difference in the review of regulations—two areas that could have been relevant in *Ecology Action Centre.* First, *Vavilov* doubles down on the importance of the statutory scheme as the central aspect of review (*Vavilov* at paras 108-110). The regular principles of statutory interpretation will apply, and administrative decision-makers will have only some margin for error in applying these principles (*Vavilov* at para 115 et seq). This envisions an administrative decision-maker, in a general sense, taking account of the ordinary rules of interpretation that apply in every other statutory context. This approach is inconsistent with

Katz, which methodologically only asks courts to view the "purpose" of legislation—at whatever level of abstraction—in conjunction with the regulation. Now, courts must pay close attention to the statutory scheme to determine just how tightly or loosely constrained the legal context of a decision appears to be (*Vavilov* at para 90). Not all statutes are created equally, and so a departure from *Katz* is welcome to recognize that certain contextual constraints will have more force in certain regulation-making contexts than in others.

Second, the evidence, submissions, and factual context of a regulatory proceeding will take on greater importance under *Vavilov*. *Vavilov* notes quite clearly that a reviewing court "must also read the decision-maker's reasons in light of the history and context of the proceedings in which they were rendered" (*Vavilov* at para 94). Central to this is the evidence that is fed into the regulatory process in its potentially various stages. On this front, it may now be the case that while courts do not *directly* question the merits or policy wisdom of a regulation, the effectiveness of a regulation could be a relevant consideration if the parties raised it in regulatory proceedings. Put differently, an administrator promulgating a regulation may at least have to turn their mind to the effectiveness of a regulation, if raised in regulatory proceedings, as part of the factual constraint that bears on the decision.

The situation in *Ecology Action Centre* provides a good baseline to view how these legal and factual considerations could work in the regulatory context. The applicants alleged numerous errors in the Regional Assessment and Report. We do not consider all of those here but rather focus on one kind of error commonly alleged in the impact assessment context: namely that the Agency or a panel did not give sufficient consideration to a given environmental effect or issue. The first three of the applicant's arguments fall within this category:

i. the Final Report does not identify and consider changes to the environment, effects of malfunctions or accidents and cumulative effects, contrary to the Committee's Terms of Reference;
ii. the Committee chose to report on "enhanced mitigation and follow-up measures";
iii. the cumulative effects set out in the Final Report are superficial, as it reviewed only the potential sources of effects rather than the effects themselves.

Similar arguments were made in *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 (CanLII) (*Ontario Power Generation*), wherein a majority of the Federal Court of Appeal held that a report could only be challenged on such a ground if it gave "no consideration" to such issues at all – the approach that Justice Bell adopted here:

> Section 5.4 of the Agreement states that the Final Report will contain information as outlined in the Factors to be considered in the Regional Assessment… Concerning the adequacy of the decision-maker's consideration of scientific evidence, the Federal Court of Appeal, in *Ontario Power Generation*, *supra*, at para. 126, stated that its role is to assess, *in a formal rather than substantive sense*, whether there has been some consideration of the factors which the statute requires the study to address. The Factors to be considered in the Regional Assessment state that the Committee "will include a consideration" of the listed factors. Given the wording, I am of the opinion that the Applicants can only establish

> a failure to consider factors if the Committee failed to give them any consideration (*Ontario Power Generation*, at para. 130). [at para 48, emphasis added]

Again, one of us expressed concerns with this approach when *Ontario Power Generation* was first released in 2015. Here we add that this approach is entirely inconsistent with *Vavilov* (the current authority, and which post-dates *Ontario Power Generation*) in that it purports to single out scientific evidence in the environmental assessment context from the more robust reasonableness review set out by the Supreme Court. It is untenable to suggest that the Supreme Court intended certain administrative decision-makers to get a pass from the "need to develop and strengthen a culture of justification" (*Vavilov* para 2). Indeed, to the extent that Justice Bell's approach is driven by concerns about complexity and expertise (*Ecology Action Centre* para 43), *Vavilov* is opposite:

> An administrative decision maker may *demonstrate* through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to *the application by decision makers of specialized knowledge, as demonstrated by their reasons*. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This *demonstrated experience and expertise* may also explain why a given issue is treated in less detail. [at para 93, emphasis added]

This paragraph in *Vavilov* introduces the concept that judicial review of administrative action—including regulatory action—is no longer animated by blanket presumptions of expertise. Rather, as part of the culture of justification, expertise must be demonstrated, even if the problem is particularly "complex." While it is true that the complexity of a problem may present opportunities for a decision-maker to apply specialized knowledge in a "counterintuitive" way, this is not assumed: it must be demonstrated. As noted by the Supreme Court of Canada over two decades ago now – when first describing reasonableness review: "Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert ...." (*Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385, [1997] 1 SCR 748 at para 62).

Justice Bell's approach in this case grants deference without any meaningful examination of how this expertise was demonstrated in the Final Report (*Ecology Action Centre* at para 41) and is characteristic of his approach to the review of regulations throughout. He relies on blanket presumptions of expertise, regularity, and evidentiary soundness to limit the reviewing role of the court.

As a matter of law, this approach is now incorrect. Instead, he should have turned to the relevant legal and factual constraints bearing on this particular regulation. With respect to the former, we note that the decision is silent with respect to *Impact Assessment Act*, SC 2019, c 28, s 1 subsection 6(3), which imposed a new duty of scientific integrity: "The Government of Canada, the Minister, the Agency and federal authorities must, in the administration of this Act, exercise their powers in

a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy." This significant norm is part of the statutory context that must be incorporated in a reasonableness analysis as directed by *Vavilov* (for more on the legislative history of this provision, see Martin Olszynski and Justina Ray, "Chapter 20: Science and Indigenous Knowledge as the Evidentiary Basis for Impact Assessment" in Meinhard Doelle and John Sinclair, eds, *The Next Generation of Impact Assessment Act* (2021)). And in terms of factual constraints, the Court's adoption of the *Ontario Power Generation* approach is inconsistent with *Vavilov*—it does not meaningfully ask administrators to grapple with the submissions and evidence that the regulatory process invites.

All told, *Vavilov* is quite different in orientation from both *Katz* and *Ontario Power Generation*. These cases presume a highly deferential approach. *Vavilov* rejects such an approach, instead setting up clearly defined guideposts to adequately guide contextual review. This is important. At the very least, it was incumbent on Justice Bell to explain how *Katz* and *Ontario Power Generation* are at all consistent with the new orientation in *Vavilov*. The presumptive approach to review of regulations adopted by Justice Bell eschews such an analysis. For all of these reasons, we hope *Portnov* ultimately rules the day in the review of regulations.

This post may be cited as: Mark Mancini and Martin Olszynski, "Reviewing Regulations Post-*Vavilov*: *Ecology Action Centre v Canada* (Part II)" (December 24, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/12/Blog_MM_MO_Ecology_Action_Centre_2.pdf