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Stores Block Meets *Vavilov*: The Status of Pre-*Vavilov* ABCA Decisions

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Decision commented on: *ATCO Electric Ltd v Alberta Utilities Commission*, 2023 ABCA 129 (CanLII)

This case is an appeal of the ATCO Fort McMurray fire decision of the Alberta Utilities Commission (AUC). In this case, a panel of the Court of Appeal made an important statement as to the status of previous court decisions on AUC-related matters that were rendered prior to the Supreme Court of Canada's decision in *Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65.

In its Fort McMurray fire decision, the AUC had concluded that assets lost by ATCO in the Fort McMurray fires could not continue to be depreciated in the regulated accounts of the utility, with the necessary consequence that the undepreciated value associated with these assets would be for the account of the shareholders. In reaching that conclusion, the AUC was informed by the *Stores Block Decision* (*ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII)), its own decision *Re Utilities Asset Disposition*, (AUC Decision 2013-417; ABlawg post here) which was affirmed by *FortisAlberta Inc v Alberta (Utilities Commission)*, 2015 ABCA 295, 28 Alta LR (6th) 252, leave to appeal refused [2016] 1 SCR ix.

The Court of Appeal concluded that the AUC had misread the implications of the *Stores Block* and *FortisAlberta* cases, and, in particular, "the decision under appeal is based on errors of law, particularly the conclusion that the Commission's options for treating destroyed assets were constrained by *Stores Block*" (at para 61). The Court has sent the matter back to the AUC, emphasising that while the ultimate disposition of the matter lies within the AUC's discretion to establish just and reasonable rates, the AUC must exercise that discretion "consistently with the words of the *Electric Utilities Act*, having regard to all relevant considerations, while disregarding irrelevant ones." (at para 60) Much of the balance of the Court of Appeal's judgment can be read as some fairly intrusive directions (I am grateful to David Mullan for this characterization) from the Court as to what might be relevant and irrelevant considerations.

It will be interesting to see how the AUC responds. Will it simply reverse itself and allow the assets in question to be depreciated in the ordinary course even though they are no longer "used and useful" (at para 38; see the Court's comment on this concept in the context of the *Electric Utilities Act*, SA 2003, c. E-5.1), or will the AUC conclude that it still has discretion to share the risks associated with unanticipated natural events between shareholders and consumers? This latter approach would of course be ironic in light of the actual decision in *Stores Block*, which was to strike down an approach that shared the upside benefits associated with the disposition of non-depreciable assets. But, as the Court of Appeal reminds us in this case, there are important

differences between *Stores Block* and this case. *Stores Block* was primarily concerned with non-depreciable assets (although perhaps the court forgets that at para 53); and *Stores Block* was concerned with the asset disposition provisions of the *Gas Utilities Act*, RSA 2000, c G-5 rather than with the power to set just and reasonable rates under the more prescriptive provisions of the *Electric Utilities Act.*

I will not comment further on the *Stores Block* issues in this post. Instead, I want to focus my remarks on a single paragraph in which the Court deals with the status of older Court of Appeal decisions:

> [18] *Vavilov* should not be read as automatically displacing all the case law decided under the pre-*Vavilov* standard of review regime. For one thing, even if a decision was reviewed for "reasonableness" and found to be reasonable, that does not mean that the reviewing court did not also agree that the decision was "correct": see for example *FortisAlberta* at paras. 130, 134, 137-38, 148. Further, decisions like *FortisAlberta* were themselves based on binding decisions like *Stores Block*. If the tribunal decision in *FortisAlberta* had failed to follow binding precedent it would not have been reasonable. The importance of stability in the law means that after *Vavilov* binding precedents of this Court should presumptively be regarded as continuing to be binding, notwithstanding the change in the standard of review analysis: see *Vavilov* at paras. 18, 143-44.

And within that paragraph I wish to draw attention to the final sentence:

> The importance of stability in the law means that after *Vavilov binding precedents of this Court should presumptively be regarded as continuing to be binding*, notwithstanding the change in the standard of review analysis … (Emphasis added).

Prior to *Vavilov*, AUC decisions on questions of law in relation to the AUC's home statutes would have been assessed against a reasonableness standard of review (subject to certain well known exceptions: questions of constitutional law, general questions of law of central importance to the legal system, questions relating to jurisdictional boundaries, and perhaps "true" jurisdictional questions such as the question the majority of the Court identified in *Stores Block*) rather than a correctness standard of review. But in *Vavilov* the court drew a bright line distinction between statutory decision makers subject to ordinary judicial review proceedings and those subject to statutory appeal provisions. The *Vavilov* majority concluded that the adoption of appeal provisions signalled the legislature's intention that decisions subject to an appeal (whether as of right or by permission) should not be entitled to deference but should instead be subject to the usual standard of review for appeals in civil matters, with the implication that the standard of review for questions of law or jurisdiction, even in relation to a tribunal's home statutes, should be correctness.

This represented a significant change in the law, and I expressed my reservations as to this part of the *Vavilov* decision in an ABlawg post here. But the question for present purposes is whether the Court of Appeal has correctly assessed the implications of this significant change in the law for the status of its earlier decisions. In my opinion, the Court of Appeal has endorsed a presumption that is not logically supportable.

The Court begins paragraph 18 by setting up and demolishing a straw person argument:

> *Vavilov* should not be read as automatically displacing all the case law decided under the pre-*Vavilov* standard of review regime.

I agree with this sentence, but I wonder if any of the parties actually made an automatic displacement argument? I suspect not.

Instead of automatic displacement, the court proposes a presumption of bindingness without indicating how such a presumption might be rebutted. In my opinion, such a presumption is only supportable for those decisions that examined questions of law based upon a standard of correctness. For prior decisions based upon a standard of reasonableness, the presumption should be the exact opposite: namely that it should be presumed that a pre-*Vavilov* decision based upon a reasonableness standard of review in relation to any point of law should be regarded as unreliable and not binding on the current court, unless the decision itself demonstrates, on its face, that the court rendering the earlier decision considered that the AUC's determination of the point of law was not only reasonable but also correct.

The Court appears to give three reasons for its preferred presumption. The first reason is that a pre-*Vavilov* court might well have opined that a decision reviewed on reasonableness grounds might not also be correct. I agree with this proposition, but it hardly supports a presumption of bindingness in those cases where the court simply applied a reasonableness analysis.

The second reason offered for the Court's preferred presumption is that decisions based upon a reasonableness analysis may themselves have been based on a binding authority and thus a decision to depart from that would not have been reasonable. I am not sure what the court is getting at here. To use the Court's own example, insofar as the specific question in *Stores Block* was subject to a correctness standard of review, any subsequent decision in relation to that same or identical statutory provision would clearly need to follow that decision and, insofar as all statutory decisions are now subject to a correctness standard, both cases would still be authoritative on that specific point. But I don't see how a pre-*Vavilov* decision on a reasonableness standard that follows an earlier decision, also based on a reasonableness standard, obtains some additional bootstrap authority because of that, if the applicable standard is now correctness.

The final reason that the court offers is the importance of stability in the law. While we can all acknowledge that stability in the law is important, it is a fairly startling proposition to suggest that decisions based on older authority are still presumed to be binding even though the apex court in the jurisdiction has decided to change the law *notwithstanding the importance of stability in the law*. Such a suggestion is entirely contrary to the principle of *stare decisis* and in itself undermines stability in the law. The Court offers in support of this proposition three paragraphs from *Vavilov*. The first paragraph is paragraph 18, in which the majority acknowledges that it is changing the law on the standard of review and that it does not do so lightly:

> Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified

> only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach ….

It is hard to see how this paragraph supports the Court of Appeal's preferred presumption insofar as, at this point, the *Vavilov* majority is doing little more than emphasising that apex courts should be reluctant to change the law; it is not saying anything about the consequences of doing so for the authority of existing decisions.

The two subsequent references that the Court of Appeal offers are, I think, more pertinent since here the majority in *Vavilov* is grappling directly with the "Role of Prior Jurisprudence". Here is what the majority has to say:

> [143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.
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> [144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

I do not see anything in these paragraphs that comes close to conferring a presumption of continuing bindingness on pre-*Vavilov* cases dealing with points of law that were assessed under a reasonableness standard rather than a correctness standard. The only decisions that the *Vavilov* majority seems to validate, and hardly surprisingly, are those decisions that have always been made on the basis of a correctness standard. Indeed, the principal advice of the *Vavilov* majority outside of these cases is that "[a] court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case." (at para 143).

In sum, I think that the Alberta Court of Appeal has endorsed an incorrect and inappropriate approach to assessing the legal bindingness of pre-*Vavilov* decisions of this Court. I don't think that this misstep affects the Court's conclusion in this particular case because I don't think that the Court's decision is really driven by a rule extracted from any particular pre-*Vavilov* reasonableness decision. But I do worry that future panels of the Court of Appeal (and the submissions of counsel not only to those panels but also to the AUC itself) will tie themselves in unproductive knots if they follow the presumption of continuing bindingness as expounded in paragraph 18 of this decision.

This post may be cited as: Nigel Bankes, "*Stores Block* meets *Vavilov*: The status of pre-*Vavilov* ABCA Decisions" (May 1, 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/05/Blog_NB_Stores_Block_meets_Vavilov.pdf