

Alberta Court of Appeal decision clarifies judicial review of administrative decisions in the absence of reasons and treatment of quarries under Alberta's environmental assessment regime

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In a decision issued May 6, 2020, the Alberta Court of Appeal in *Alexis v. Alberta (Environment and Parks)*, 2020 ABCA 188 (CanLII) reversed the judicial review decision of the Alberta Court of Queen's Bench and held that the decision by the Director of Environmental Assessment (the Director) that an environmental impact assessment (EIA) was not required for a major silica sand project was unreasonable.

This expands on the recent guidance from the Supreme Court of Canada regarding judicial review of administrative decisions in the absence of reasons, as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov (Vavilov)*.

Background

In 2017, Wayfinder Corp. contacted the Director regarding the proposed Big Molly silica sand project (the Project). Wayfinder Corp. requested a ruling on whether the development, which included a sand pit producing 500,000 tonnes of silica sand per year and associated processing elements, would require an EIA under section 44 of the *Environmental Protection and Enhancement Act* (EPEA). Without any further reasons provided, the Director concluded that the activity was not on the mandatory activities list and that an EIA would not be required.

In a judicial review of this decision (the JR decision), Justice Jeffrey of the Alberta Court of Queen's Bench found this to be within the range of reasonable conclusions.

Successful appeal

On their review of the JR decision, the majority of the Alberta Court of Appeal analyzed the inquiry that the Director had to make in coming to a decision on whether the Project would require an EIA. This inquiry consisted of two questions; first, whether the Project was a "quarry" under EPEA; and second, whether it was a "mandatory activity" under the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*.

Regarding the first question, EPEA defines a "quarry" as any opening in, excavation in or working of the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral other than coal (among other things), and includes any associated infrastructures. The EPEA definition of "minerals" is simply "all naturally occurring minerals," which is followed by a non-exhaustive list of substances included in that definition.

In the absence of reasons from the Director, the majority undertook its own analysis of whether the project was a quarry within the meaning of EPEA. It acknowledged that while silica sand is not included in the list of minerals, neither are other important minerals such as zinc. The majority concluded that silica sand must be considered a mineral and, therefore, the Project, as an excavation to recover and work that mineral, must be a quarry. Once established as a quarry, the remaining question was whether the Project qualified as an activity subject to mandatory EIA. Under the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, quarries producing more than 45,000 tonnes per year are mandatory activities. As the Project was expected to produce 500,000 tonnes of silica sand per year, it was considered to be a mandatory activity.

The majority specifically rejected an alternative chain of analysis that began by asking whether the Project was a pit for the purposes of EPEA, because the definition of a pit expressly excluded quarries. The majority concluded that the only possible chain of analysis was first to ask whether the Project was a quarry. In coming to this conclusion, the majority pointed to its logical consistency with the legislated purpose of EPEA “to support and promote the protection, enhancement and wise use of the environment.”

Ultimately, the majority of the Court of Appeal found that whether or not the Director was under an obligation to provide reasons for the decision, the decision made was illogical and had to be set aside. Because the decision itself was found to be unreasonable, the panel did not engage in a review of the necessity for reasons.

Impact of the case

As one of the early examples of appellate-level judicial review post-*Vavilov*, this case demonstrates how courts may engage in a searching review of the reasonableness of administrative decisions, even in the absence of reasons. The Alberta Court of Appeal held the Director to a logical interpretation of the definitions in EPEA, rejecting as unreasonable the analysis that appeared to have taken place. This decision provides some comfort to project proponents that decisions by administrative decision makers must be at least logically consistent with the legislative regime in question and its purposes. It also brings important clarity to Alberta’s previously inconsistent treatment of major silica sand projects for the purposes of EPEA.

The Alberta Court of Appeal also signalled that administrative decisions without written reasons will not be able to escape judicial scrutiny. Where reasons for an administrative decision are not provided, the Courts may apply the principles of statutory interpretation to determine whether legal and factual constraints lead to a single, reasonable result that differs from the conclusion reached by the administrative decision maker and therefore renders that decision unreasonable.