Shifting sands? Alberta Court of Appeal requires EIA for silica sand project

May 19, 2020

The Supreme Court of Canada's (SCC) landmark ruling in *Vavilov v Canada (Minister of Citizenship and Immigration)* reset the framework that governs how courts should review decisions made by administrative decision-makers. In an Insights article discussing the *Vavilov* decision our colleagues suggested that the *Vavilov* majority guidance on how to conduct a "reasonableness" review veers toward what a reviewing court would do when reviewing the "correctness" of a decision. A lingering question since the *Vavilov* decision has been how courts would balance the need for "robust" reasonableness reviews with the "principle of judicial restraint". The recent decision of the Alberta Court of Appeal (Court) in *Alexis v Alberta (Environment and Parks)* provides a data point that indicates Alberta courts might be moving toward this less deferential approach. If continued, this change will have ramifications for any project proponent whose permits may be subject to increased judicial scrutiny.

Background

Wayfinder Corp. (Wayfinder) is the proponent of the "Big Molly" silica sand project northwest of Edmonton. Big Molly involves the extraction, removal and processing of silica sand for use in hydraulic fracturing operations. In October 2017, Wayfinder's consultant wrote to the Director of Environmental Assessments (Director) at Alberta Environment and Parks, requesting a decision as to whether the Project would require an approval under Alberta's *Environmental Protection and Enhancement Act* (EPEA). The Director's response, issued several weeks after the initial request, stated that Wayfinder would not be required to submit an environmental impact assessment (EIA) for the Big Molly project.

In January 2018, Armin Alexis, a member of a First Nation near the Big Molly project site, wrote to the Director seeking an order that would require Wayfinder to provide an EIA report. The Director refused to issue that order on the basis that the requirement of an EIA is at the discretion of the Director for a pit with a footprint over two hectares. Shortly after receiving that response from the Director, Mr. Alexis applied for judicial review of the Director's decision not to require an EIA and sought an order requiring Wayfinder to submit an EIA in accordance with EPEA.

The primary issue in the judicial review proceedings and subsequent appeal was one of statutory interpretation: whether the Director acted reasonably in interpreting the relevant provisions of EPEA such that the Big Molly project was not a "mandatory activity" requiring an EIA. That decision depended on whether the Big Molly project was a "pit" or a "quarry" for the purposes of EPEA. That question, in turn, depended on whether the silica sand being extracted and removed by the Big Molly project constituted a "mineral" as defined in EPEA. If sand is a "mineral" for the purposes of EPEA, then Big Molly would be a "quarry" and because of its capacity would be required to undergo an EIA. If, on the other hand, sand is not a "mineral", Big Molly would be a "pit" and the requirement for an EIA would be at the Director's discretion.

The chambers judge dismissed the application, finding that it was "within the range of acceptable outcomes" for the

Director to conclude that sand is not a "mineral" for the purposes of EPEA. On appeal, the Court was unanimous that the Director's decision was unreasonable, but the Court was divided on the appropriate remedy. The majority decided that the decision of whether to require an EIA for the Big Molly project should be resolved with the conclusion reached by the majority's own analysis. The minority opined that the matter should be remitted to the Director for reconsideration, with the benefit of the Court's reasons.

Majority used a standard approaching correctness

After setting out the background and relevant statutory provisions, Justices Wakeling and Greckol, writing for the majority, began their analysis by noting that the Director gave no reasons for her decision. Rather than scrutinize the record before the Director in an attempt to determine whether the Director's decision was rational and logical, the majority stressed that the case turned on a question of statutory interpretation and provided a detailed overview of what it considered the applicable interpretation principles. The majority then carried out a *de novo* statutory interpretation analysis and satisfied themselves that the silica sand to be produced at the Big Molly project is a "mineral", which in turn led them to the conclusion that the project was a "quarry" that required a mandatory EIA under EPEA.

Having concluded that the Director's decision was unreasonable, the majority next turned to the appropriate remedy. The majority decided that "there is no valid reason to remit this matter to the Director" as "the Director could only have come to one rational conclusion", namely, that an EIA was mandatory for the Big Molly project. Instead, the majority set aside the decision of the chambers judge and ordered the Director to notify Wayfinder that it must submit an EIA report for the Big Molly project, pursuant to EPEA.

Minority sought to remit the decision to the Director

In minority reasons, Justice Pentelechuk agreed with the majority that the Director's decision was unreasonable, but arrived at that conclusion through a somewhat different approach. Justice Pentelechuk began her analysis by reviewing the SCC's *Vavilov* guidance, including on situations where the decision-maker does not provide reasons, noting the importance of "judicial restraint", as well as the need for decision-makers to ensure their decisions can "withstand scrutiny in the new culture of justification." The minority then briefly reviewed the Director's record and concluded that the Director's record does not reveal why the Director concluded the Big Molly project was not a quarry.

Absent reasons or a detailed record, Justice Pentelechuk also conducted a statutory interpretation analysis to assess the reasonableness of the Director's decision. Following a thorough review of the relevant provisions, Justice Pentelechuk agreed with the majority that the only reasonable interpretation was for the Director to conclude that the silica sand to be produced from the Big Molly project was a "mineral" for the purposes of EPEA.

Justice Pentelechuk disagreed with the majority that the Big Molly project must automatically be a "quarry" rather than a "pit" if silica sand falls within the definition of "mineral" for the purposes of EPEA. Instead, as part of her statutory interpretation analysis, Justice Pentelechuk noted that a sand extraction project could either be a "quarry" or a "pit" depending on the breadth of activities proposed as part of the project. The minority reasons noted that the record suggested the Director did not make the additional inquiries needed to address the concerns raised by her staff. Because the Director's record does not show whether the Director ignored those questions or how they were ultimately addressed, the reasonableness of the Director's decision was brought into question.

In determining the appropriate remedy, the minority reasons stressed, consistent with the guidance in *Vavilov*, that it would not be appropriate for a reviewing court to provide its own reasons to support the decision that the Big Molly

project is a quarry. That, according to Justice Pentelechuk, would be impermissible "re-drawing the dots" which would not respect judicial restraint principles. In her view, the decision should be referred back to the Director to decide whether the scope of operations at the Big Molly project would make it a "quarry" instead of a "pit".

Implications of *Alexis*

Vavilov stressed the importance of judicial restraint. It also repeatedly cautioned against courts conducting a *de novo* analysis or asking how they themselves would have resolved an issue (see, for example, *Vavilov*, paras 75 and 83). With respect to remedies, the *Vavilov* majority emphasized the importance of "recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision-maker, and not to the court, to decide." According to the *Vavilov* majority, it is most often appropriate to remit the matter to the decision-maker to have it re-consider the decision with the benefit of the court's reasons, subject to limited exceptions (e.g. concerns for delay, fairness, urgency, etc., see *Vavilov*, paras 140-142).

As noted above, commentary following *Vavilov* suggested that that decision could lead reviewing courts to take a more interventionist approach, despite the foregoing direction from the *Vavilov* majority. Indeed, the implications of a more "searching" or "correctness-oriented" framework was a chief concern of the **minority** in *Vavilov* (see, for example, para 239). Both sets of reasons given by the Court in this case appear to validate the *Vavilov* minority's concerns to some degree.

The analysis in the majority reasons and, to a lesser extent the minority reasons, both appear to go beyond this guidance. Both judgments include a *de novo* statutory interpretation analysis, resulting in conclusions that differed from those of the Director, leading to determinations that the Director’s decision was unreasonable. Both the majority and the minority reasons would have substituted their interpretation of the term "mineral" for that of the Director. While framed as "reasonableness" reviews, both sets of reasons arguably rely on the type of "correctness-oriented framework" that the *Vavilov* minority cautioned against.

Courts conducting reasonableness reviews in the pre-*Vavilov* era tended to be highly deferential to administrative decision-makers, particularly on home-statute interpretation issues such as those raised in *Alexis*. As a result, project proponents could be relatively confident that a reviewing court would not readily overturn a tribunal decision as part of a reasonableness review, absent a glaring error in the record. The Court's *Alexis* decision appears to confirm that judicial deference to statutory decision-makers has suffered a significant setback following *Vavilov*. If, as *Alexis* suggests, courts will now be more interventionist in reviewing administrative decisions, project proponents who successfully navigate the regulatory approvals process will have less certainty that favorable decisions will survive judicial scrutiny. It will be important to monitor subsequent decisions from Alberta courts to see if this less deferential approach takes hold. Alternatively, Alberta courts may show greater deference than they did in *Alexis* when presented with more thorough reasons and a more comprehensive evidentiary record, as the Federal Court of Appeal arguably did in *Coldwater Indian Band*.

Your Key Contacts

Bernie (Bernard) J. Roth
Partner, Calgary
D +1 403 268 6888
bernard.roth@dentons.com

Laura K. Estep
Partner, Calgary
D +1 403 268 6308
laura.estep@dentons.com

Dan Collins
Senior Associate, Calgary
D +1 403 268 6837
dan.collins@dentons.com