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The Discipline of *Vavilov*? Judicial Review in the Absence of Reasons

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Decision commented on: *Alexis v Alberta (Environment and Parks)*, 2020 ABCA 188 (CanLII)

One of the "wait-and-sees" following the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) was the question of whether or not (and if so, to what extent) the Court's guidance as to reasonableness review (where applicable) would result in a greater degree of scrutiny of the reasoning supporting administrative decisions. Another but related question was the application of that guidance to decisions for which there is no duty to provide reasons, and where the decision-maker provides no such reasons. This recent decision of the Court of Appeal (unanimous in terms of the decision to quash - some difference between the members of the Court as to the remedy) provides guidance on both questions.

The decision does suggest that reasonableness scrutiny will be more searching and that the failure to provide reasons may not render the decision inscrutable or presumptively reasonable. One possible result of this is that it might lead government lawyers acting for statutory decision makers to advise their clients to provide reasons, even where not obliged to do so by statute or natural justice. The rationale for doing so would be to make sure that as convincing a case as possible can be made for the decision in question, and to forestall the possibility that a reviewing court will draw inferences or identify unbridgeable gaps in reasoning between an application and an ultimate decision. If so that would be a good outcome. As another panel of the Court of Appeal has observed in another recent decision (*Mohr v Strathcona (County)*, 2020 ABCA 187 (CanLII) at para 35 (per Slatter JA)), reasons serve "(a) to tell the parties why a decision was made; (b) to provide public accountability for that decision; and (c) to permit effective appellate review." See also an earlier post on the importance of reasons in administrative decision-making in a somewhat different context: "Reasons, Respect and Reconciliation."

Wayfinder Corp. was the proponent of a project (Big Molly) to develop a deposit of silica sand for use as a proppant for fracking purposes in the oil and gas industry. The project included development of a sand pit with a production of about 500,000 tonnes/year of sand and an estimated 15 year life. The project would also involve lined ponds, a slurry pipeline, and closed loop facilities for de-watering, washing, drying, and storage of the produced sand. Trucks would take the product to customers in Fox Creek and northern Alberta.

In October 2017, Wayfinder's environmental consultant wrote to the Director of Environmental Assessments under s 44 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*) requesting a ruling as to whether the project required *EPEA* registration or approval and thus whether or not an environmental impact assessment (EIA) would be required. The

request consisted of a covering letter, a map showing the location of the extraction site, a one-page project summary and a one-page project description.

For present purposes, the question of whether or not the project was a mandatory activity. If the project is a mandatory activity the Director shall "direct the proponent by order in writing to prepare and submit an environmental impact assessment report in accordance with this Division". The *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta Reg 111/1993 provides a list of mandatory activities including "[t]he construction, operation or reclamation of… (b) a quarry producing more than 45 000 tonnes per year". Section 1 of EPEA defines "quarry" as meaning "any opening in, excavation in or working of the surface or subsurface for the purpose of working, recovering, opening up or proving (i) any mineral other than coal, a coal bearing substance, oil sands or an oil sands bearing substance …". *EPEA* defines minerals in s 1(ll) as *meaning*:

> all naturally occurring minerals, *including*, without limitation, gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona and volcanic ash. (emphasis added)

The *EPEA* definition of minerals therefore has two components: "one exhaustive and the other nonexhaustive" (at para 61). The majority notes at para 84, "We do not understand why the definition of minerals includes a nonexhaustive enumerated list of minerals." "Sand" is not included in the definition of minerals, but then neither are other substances that would universally be recognized as minerals, such as lead and zinc.

In addition to these definitions, the minority (Justice Dawn Pentelechuk) also considered that the project might be classified as a pit (at para 149). *EPEA* defines a pit to mean "any opening in, excavation in or working of the surface or subsurface made for the purpose of removing sand, gravel, clay or marl and includes any associated infrastructure, but does not include a mine or quarry." It is notable that this definition expressly references "sand" but it also makes it clear that a project cannot be a quarry and a pit; i.e. a project must be one or the other.

Less than a month after receiving the application, the Director informed Wayfinder that it did not have to submit an EIA for the Big Molly Project. The following seem to be the entire "reasons" for the decision (at para 28):

> I wish to advise you that … I have considered the application of the environmental assessment process to your proposed Wayfinder Corp., Big Molly Project. This activity is not a mandatory activity for the purposes of environmental assessment. Having regard to the consideration set out in Section 44(3) of EPEA, I have decided that further assessment of the activity is not required. Therefore, a screening report will not be prepared and an environmental impact assessment report is not required.

Further inquiries from Mr. Alexis adduced the following additional comment (at para 30): "[Environmental impact assessment] ... is discretionary since the Project involves the recovery of sand using a pit greater than 2 hectares." At this point, Mr. Alexis applied for judicial review (JR) of the Director's decision not to require an EIA.

The JR judge, Justice Paul Jeffrey, in oral unreported reasons and applying a standard of review of reasonableness, concluded that it was "within the range of acceptable outcomes" for the Director to conclude that sand was not a mineral within the meaning of EPEA and that therefore an EIA was not required (quoted at para 32 of the CA decision). In doing so, it seems fair to say that Justice Jeffrey, in a pre-*Vavilov* decision, effectively identified a line of reasoning that *might* have justified the conclusion by, *inter alia*. referring to the definitions of minerals in the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*), and the *Law of Property Act*, RSA 2000, c L-7 (*LPA*).

On the appeal, the majority emphasized that the Director gave no reasons for her key conclusion that the proposed project was a pit and not a quarry. In the absence of any reasons on that crucial point, the majority engaged in its own analysis of the statutory interpretation issue, concluding that the open definition of minerals in *EPEA* could not be confined by the non-exhaustive list of examples. As a result, sand had to be a mineral. Furthermore, the proponent's own description of the project made it clear that the project was a quarry, and since it was a quarry it could not be a pit.

Given that the project passed the volumetric threshold in the regulation for a reviewable project (i.e. it would produce more than 45 000 tonnes per year of sand), an EIA was required. In the majority's view this was the only possible interpretation and thus it saw no need to refer the matter back to the Director. Instead, it ordered the Director to notify Wayfinder that it would need to submit an EIA report. The majority reinforced this analysis by noting that it was not permissible to reference either the *LPA* or the *MMA* in construing the definition of mineral in *EPEA* since neither statute was *in pari materia* with the *EPEA*. The majority also took comfort from classifying the project as a quarry rather than a pit on the grounds that this interpretation would increase the number of projects requiring environmental review, which is consistent with the purposes of *EPEA* (at para 101).

It is difficult to avoid the conclusion that the majority's analysis is, in effect, a correctness analysis. It can be justified on the basis that the Director's decision gave the court very little to go on (i.e. the were no reasons to provide a starting point) but that's the nature of a decision without reasons. Post-*Vavilov*, and in a case which can be framed as a pure question of statutory interpretation, it may be fairly easy for a Court to question the major premise on which an administrative decision-maker's decision turns: in this case, quarry or pit.

Justice Pentelechuk's minority judgment is more nuanced and perhaps, because of that, more consistent with the instructions of the *Vavilov* majority. In particular, she notes that the distinction between a pit and a quarry might depend upon the scope of activities associated with the project (at para 178). Given that, the apparent failure of the Director to make additional inquiries along these lines, despite concerns raised by staff (at para 183), brought into question

(at para 184) "the reasonableness of the Director's decision." The following three paragraphs expand upon this point:

> [185] As already noted, while the Director did not provide reasons, the record does show that the Director's staff contemplated the Project as involving more than the simple removal of sand. They considered whether the "washing plant component" would need an approval under the *Activities Designation Regulation*, rather than simply a registration. As a pit only requires registration under that Regulation, they were necessarily considering whether the scope of activities at the plant might constitute more than a pit. This leads to a contradictory conclusion; the Project cannot both be something more than a pit and also be only a pit.
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> [186] In their discussions regarding the Project, the staff seemed to treat the extraction of sand and the treatment of the sand as two separate projects with different requirements. However, in the result, the Director lumped the Project activities together, deciding that because the sand removal did not require an EIA, the treatment of the sand at the plant did not either.
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> [187] As established in *Vavilov*, "a decision will be unreasonable if the reasons for it, read holistically... reveal that the decision was based on an irrational chain of analysis": para 103. While the reasons for the Director's decision are not complete or transparent, the parts that are discernable from the record reveal precisely such an irrational chain of analysis.

As a result, Justice Pentelechuk was able to join the majority in concluding that (at para 188), "the dearth of reasons, lack of information on the record, and contradictory conclusions made by staff members render the Director's decision unreasonable." But she could not join the majority in concluding that there was only one inevitable outcome. In particular, her analysis revealed the need for a more careful and fact-based examination of the distinction between a quarry and a pit in light of the activities included within the project description. As indicated above, this seems to me to be more consistent with the deferential, but more searching, analysis that *Vavilov* demands than is the majority opinion, which reads more like a correctness analysis.

Either way, both opinions seem to demand a harder look at administrative decisions post-*Vavilov* than pre-*Vavilov*, whether reasons or no reasons; and if this is the start of a trend then that is some cause for optimism that discretionary decisions under environmental statutes will need a harder look and will need to be scrutinized in light of the object and purposes of those statutes. But, as with the saying "one swallow does not a summer make," we likely need to "wait-and-see" a little longer before reaching any more definitive conclusions.

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