Alberta Court confirms that legislative bodies can shield administrative decisions

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The *Responsible Energy and Development Act* (REDA) states that every decision of the Alberta Energy Regulator (AER) "shall not be questioned or reviewed in any court by application for judicial review."[1] Despite this, there has been debate as to whether a decision of the AER could be judicially reviewed. In *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*[2] (Stoney Nakoda), the Court confirmed that the privative clause in the REDA precluded judicial review of decisions of the AER.

Background

In the *Stoney Nakoda* case, the AER sought to have the Alberta Court of King's Bench dismiss judicial review applications filed by proponents of the Grassy Mountain Coal Project (the Project) after the AER decided not to approve the Project (the AER Decision). The legal debate centered around REDA section 56 which as stated barred judicial review of "every decision of the Regulator."[3] Instead, REDA section 45 allows for appeals of AER decisions to the Alberta Court of Appeal on matters of law or jurisdiction, and with permission of the Court. This presents difficulties as an appeal to the Court of Appeal is a more challenging procedure, legally and practically.

In this case, the Project proponents had already taken advantage of their right to appeal under section 45 of REDA, but their appeal was rejected by the Court of Appeal. Consequently, the AER argued that the proponents had exhausted their rights to judicial review. The AER's key argument was that: "the appeal rights under REDA afford the requisite, constitutionally required, degree of supervision over the AER Decision."[4]

This raised a critical question: what is the minimum level of judicial oversight required by the Constitution?

The Court of King 's Bench decision

The Court ruled that REDA does not allow for judicial review of AER decisions. In doing so, the Court held that the presence of both an appeal clause and a privative clause can

satisfy the fundamental requirement of judicial oversight. In forming its judgment, the Court made several key observations:

- While there is a constitutional guarantee for judicial review, a statutory right to appeal (*e.g.*, section 45 of REDA) is part of the judicial review framework.[5]
- Legislative bodies can shield administrative decisions "to some extent (perhaps through a privative clause) just not absolutely."[6]
- Although it was suggested that the principles established by the Supreme Court of Canada (SCC) in *Vavilov*[7] provide that rights of appeal cannot "on [their] own" preclude judicial review, they may when coupled with a privative clause.[8]

Implications

This case is timely as the SCC recently heard arguments on a similar issue in the appeal of *Yatar v TD Insurance Meloche Monnex*,[9] with a decision expected in the coming months. While the Ontario Court of Appeal's *Yatar* decision largely aligns with Stoney Nakoda, judicial opinions have varied across different cases.[10] In *Yatar*, the SCC will be faced with the critical decision of: Is a restricted right of appeal, which limits the scope of questions eligible for review, constitutionally sufficient?

The decision is important as the SCC will be required to determine whether legislative bodies can legitimately eliminate judicial review on questions of fact. This issue raises fundamental considerations about the judiciary's function in maintaining the separation of power among government branches, including the extent to which legislatures can insulate executive actions from judicial scrutiny.

In Alberta, where there is a significant amount of judicial review related to natural resource management, government decisions often necessitate weighing various factors, including social, economic, technological, and environmental considerations. Alleged mistakes by decision-makers in these areas are frequently seen as factual issues (or as mixed questions of fact and law). This is particularly relevant given that, like the REDA, the *Alberta Utilities Commission Act* – the legislation governing the Alberta Utilities Commission (AUC) – also precludes judicial review, requiring appellants to identify a legal or jurisdictional question that merits an appeal.[11]

Following Stoney Nakoda and similar decisions being made nationwide, parties challenging decisions of the AER and other regulatory bodies operating under similar statutory frameworks, such as the AUC, will need to carefully consider their procedural options.

BLG has deep experience advancing and opposing judicial reviews and statutory appeals from the AER, AUC, and many other administrative tribunals. If you are considering challenging an administrative decision or are faced with such a challenge, it is essential to obtain sound legal advice.

Footnotes

[1] *Responsible Energy Development Act*, SA 2012, c R-17.3, s 56 [REDA].

[2] *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700 [Stoney Nakoda].

[3] REDA, s 56.

[4] Stoney Nakoda at para 3.

[5] Stoney Nakoda at para 13.

[6] Stoney Nakoda at para 14.

[7] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[8] Stoney Nakoda at paras 16-17.

[9] *Yatar v TD Insurance Meloche Monnex*, 2022 ONCA 446.

[10] See *e.g.*, the concurring opinion of Justices Gleason and LeBlanc in *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161.

[11] *Alberta Utilities Commission Act*, SA 2007, c A-37.2, ss 29(1), 30.

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