IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Friends of Davie Bay v. Province of British Columbia,* 2011 BCSC 572

Date: 20110503
Docket: S105307
Registry: Vancouver

Between:

Friends of Davie Bay

Petitioner

And

Her Majesty in Right of the Province of British Columbia, and Lehigh Hanson Materials Ltd.

Respondents

Before: The Honourable Mr. Justice Voith

Corrected Judgment: On the front page spelling of the surname of the second counsel for the plaintiff has been corrected on June 2, 2011.

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. February 1, 2011
Place and Date of Judgment:	Vancouver, B.C. May 3, 2011

Overview

[1] This petition arises from a proposed limestone quarry and load out facilities which the respondent Lehigh Hanson Materials Ltd ("Lehigh") intends to operate in and around the Davie Bay area of Texada Island, British Columbia (the "Project").

[2] The petitioner, Friends of Davie Bay, is a not-for-profit society formed for the purpose of conserving and protecting the environment of the Davie Bay area of Texada Island.

[3] The petitioner says that the Environmental Assessment Office (the "EAO"), which is a part of the Ministry of Environment, erred in its interpretation of the environmental assessment trigger for the new construction of stone and industrial mineral quarries found at Table 6 of Part 3 of the *Reviewable Projects Regulation,* B.C. Reg. 370/2002 (the "*Regulation*"), enacted under the *Environmental Assessment Act,* S.B.C. 2002, c. 43 (the "*Act*"). The *Regulation* provides that a new stone and industrial mineral quarry will be designated as a reviewable project when it:

> (a) involves the removal of construction stone or industrial minerals or both,
>
> (b) is regulated as a mine under the *Mines Act*, and
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> (c) during operations will have a production capacity of ≥ 250 000 tonnes/year of quarried product.

[4] The EAO interpreted the term "production capacity" in the *Regulation* as a proponent's estimated and permitted annual extraction rate. The petitioner argues that the EAO, by incorrectly interpreting the *Regulation*, failed to trigger an environmental assessment for the Project as required by the *Act*.

[5] The petitioner seeks three orders:

(a) an order declaring that the Part 3, Table 6 of the *Regulation* requires an environmental assessment for a new construction stone and industrial mineral quarry when the infrastructure investment,

equipment, operational plan and size of a proposed quarry and its reserves indicate that the project will have the ability to produce an output that exceeds the defined capacity of 250,000 tonnes per annum;

(b) an order declaring that the Project exceeds the defined production capacity in Part 3, Table 6 of the *Regulation*; or, alternatively

an order that the issue of the Project's production capacity be remitted to the EAO to reconsider given the infrastructure investment, equipment, operational plan and size of the proposed quarry and its reserves; and

(c) an order quashing any licenses, leases, permits or other types of authorizations provided to the respondent for the Project, the approval of which should have been subject to an environmental assessment under the *Act*.

[6] The petitioners do not seek judicial review of the discretionary decision made by the Minister of the Environment under s. 6 of the *Act*, which decision is described more fully below.

Issues to be Decided

[7] The central issue raised by the petitioner is whether the EAO correctly determined that the Project was not reviewable under the *Act*. This issue, in turn, devolves to two further questions. First, what standard of review governs the EAO's decision that the Project was not reviewable? Second, "do the words 'production capacity' in Table 6 of Part 3 of the *Regulation* mean a proponent's estimate of a project's annual throughput or does it mean the production potential of the project based on an objective evaluation of all aspects of its environmental footprint?

The Relevant Statutory Framework

[8] Environmental assessments examine the potential for adverse environmental, economic, social, heritage and health effects that may arise from the construction, operation and where required, decommissioning stage of a project. For any project which requires an environmental assessment certificate under the *Act*, the proponent must successfully complete an environmental assessment and receive a certificate from the EAO before other provincial agencies can issue permits and approvals for the project.

[9] Section 1 of the *Act* contains several relevant definitions:

> i) "reviewable project" means a project that is within a category of projects prescribed under section 5 or that is designated by the minister under section 6 or the executive director under section 7, and includes:
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> > (a) the facilities at the main site of the project,
> >
> > (b) any off-site facilities related to the project that the executive director or the minister may designate, and
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> > (c) any activities related to the project that the executive director or the minister may designate
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> ii) "project" means any
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> > (a) activity that has or may have adverse effects, or
> >
> > (b) construction, operation, modification, dismantling or abandonment of a physical work
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> iii) "assessment" means an assessment under this Act of a reviewable project's potential effects that is conducted in relation to an application for
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> > (a) an environmental assessment certificate, or
> >
> > (b)an amendment of an environmental assessment certificate
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> iv) "proponent" means a person or an organization that proposes to undertake a reviewable project, and includes the government of Canada, British Columbia, a municipality or regional district, another province, another jurisdiction and a first nation

[10] Section 8(1) of the *Act* which requires that proponents of a "reviewable" project obtain an environmental assessment certificate ("EAC") before commencing any work on the project, provides:

> 8(1) Despite any other enactment, a person must not
>
> (a) undertake or carry on any activity that is a reviewable project, or

> (b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project,
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> unless
>
> (c) the person first obtains an environmental assessment certificate for the project, or
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> (d) the executive director, under section 10(1)(b), has determined that an environmental assessment certificate is not required for the project.

[11] Section 5 of the *Act* empowers the Lieutenant Governor in Council to make regulations that prescribe what constitutes a reviewable project under the *Act*:

> 5(1) The Lieutenant Governor in Council may make regulations prescribing what constitutes a reviewable project for the purposes of this Act.
>
> (2) For the purpose of a regulation under subsection (1), the Lieutenant Governor in Council by regulation may
>
> (a) categorize projects according to size, production or storage capacity, timing, geographical location, potential for adverse effects, type of industry to which the projects are related, type of proponent or on any other basis that the Lieutenant Governor in Council considers appropriate, and
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> (b) provide differently for the different categories of projects.

[12] The Lieutenant Governor in Council has exercised this power by enacting the *Regulation*. This *Regulation* establishes criteria for determining whether a project is reviewable on an industry by industry basis. Mining projects are dealt with in Part 3 of the *Regulation*. Table 6 of Part 3 sets out the criteria for different types of reviewable mining projects. The three criteria for new projects which involve "Construction Stone and Industrial Mineral Quarries" are set out earlier in paragraph 3 of these reasons.

[13] If any of the foregoing criteria are not met, the project is not considered reviewable under the *Regulation* and the proponent is under no obligation to obtain an EAC. Simply put, section 8 of the *Act* does not apply.

[14] Importantly, neither the *Act* nor the *Regulation* requires that proponents apply to the EAO for a determination as to whether or not the criteria in the *Regulation* are met. Instead, the criteria in the *Regulation* are to be used by proponents to make their own determination of whether or not they need to apply to the EAO for an EAC.

Where a concern is raised (by any person) as to whether the criteria in the *Regulation* have been met or established, the EAO may be called upon to assist.

[15] The regulatory scheme for mining permits under the *Mines Act*, R.S.B.C. 1996, c. 293 is relevant to this proceeding because the second criterion in Table 6 of Part 3 of the *Regulation* specifically includes the regulatory scheme for mines as one of the requirements for a reviewable project.

[16] Under section 10 of the *Mines Act*, all mining developments are required to obtain a permit from the Minister of Energy, Minerals and Petroleum Resources ("MEMPR") prior to starting any work.

[17] Section 10.1.1 of the *Health, Safety and Reclamation Code for Mines in British Columbia* requires that the proponent of a proposed new quarry project must submit "the appropriate Notice of Work forms" to the MEMPR, which in the case of Sand and Gravel/Quarry Operations is a Notice of Work and Reclamation Program (the "Notice of Work"). The Notice of Work must be accompanied by the proponent's Mine Development Plan, which plan set out the "estimated annual extraction" from the site in either tonnes/year or m^3/year.

[18] MEMPR issues a Quarry Permit upon approving a Notice of Work. The Quarry Permit may, as it did in this case, specify the annual maximum volume of aggregate that may be extracted and processed by the proponent.

[19] Section 6 of the *Act* provides the Minister with a separate, discretionary power to designate a project as reviewable even though that project is not otherwise reviewable because it does not meet the criteria under Table 6 of Part 3 of the *Regulation*:

> 6 (1) Even though a project does not constitute a reviewable project under the regulations, the minister by order may designate the project as a reviewable project if
>
> > (a) the minister is satisfied that the project may have a significant adverse environmental, economic, social, heritage or health effect, and that the designation is in the public interest, and

> (b) the minister believes on reasonable grounds that the project is not substantially started at the time of the designation.
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> (2) A project designated as a reviewable project under subsection (1) is one for which an environmental assessment certificate is required.

[20] Where the Minister chooses to exercise his or her authority under s. 6, the proponent must apply for an EAC.

The Relevant Factual Background

a) The Project

[21] The Project is located on the southwest side of Texada Island, and will cover an area of rock outcrop approximately 1.6 kilometers inland from Davie Bay. The Project will include a marine load-out terminal situated at Davie Bay, which will be fed by an overland conveyor and which will carry the aggregate materials from the inland quarry.

[22] The Project is intended to quarry aggregate materials from two locations using drill and blast methods. These materials will be shipped by barge to Vancouver, Vancouver Island and potentially the Pacific Northwest of the United States. Quarrying will initially be conducted in a lower quarry site, and move to an upper quarry location once haul roads and infrastructure are complete. The intended infrastructure for the project includes a haulage road that allows for two-way passage of 100 tonne trucks and a conveyor system that can move 2500 tonnes of material per hour.

[23] The marine load-out will consist of an elevated, covered conveyor extending from the upland property to the shore, a floating standoff and a permanently moored conveyor barge to transfer and place the material on larger barges for shipment. The conveyor will, in part, be located above the water of Davie Bay, travelling over an isthmus before ending at the barge loading zone.

b) Environmental and Ecological Significance of the Davie Bay Area

[24] Texada Island is the largest island in the Strait of Georgia and is located to the west of the Sunshine Coast area. Davie Bay, the intended location of the Project, is located on the southwest shore of Texada Island.

[25] The evidence provided by the petitioners suggests that the Davie Bay area is host to a wide range of natural environments and species of flora and fauna.

[26] One of the primary natural features in the area of the Project is the karst cave system which has been identified by experts in the field as perhaps the most extensive karst caves along the B.C. mainland coast. Karst terrain is described as a fairly unique three dimensional landscape that develops from the weathering of soluble bedrock. While a portion of the karst area has been removed from Lehigh's mining application, the petitioners say that further analysis of the karst system and the potential effects of the quarrying is necessary to determine what impact the Project will have on the Davie Bay karst caves and if further protection is necessary.

[27] The marine environment of Davie Bay is also home to important aquatic species. The petitioners have gathered evidence of substantial eelgrass beds in and around the bay. Eelgrass has been designated as a species of importance due to the significant role it plays as habitat for juvenile salmon and other fish such as smelt.

[28] Davie Bay is also part of a Rockfish Conservation Area which is intended to protect the various species of rockfish in British Columbia. The petitioner has gathered evidence which it says indicates that industrial activity, such as the Project, should be avoided in a Rockfish Conservation Area to maintain high productivity.

[29] Numerous other important environmental features are found in the Davie Bay area including fish forage, seasonal and year round habitat for marine mammals including killer whales and harbour porpoise, and a Coastal Douglas Firs zone.

The Appropriate Standard of Review

[30] The *Administrative Tribunals Act*, S.B.C. 2004, c. 45 does not pertain to decisions made under the *Act*. Thus, the common law jurisprudence, as described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 governs: *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114 at para. 44.

[31] In *Weyerhaeuser Company Ltd. v. Assessor of Area No. 04 - Nanaimo Cowichan*, 2010 BCCA 46, Garson J.A., for the court, synthesized the standard of review analysis that is required post - *Dunsmuir*:

> [28] In the absence of a statutorily mandated standard of review, the tests described in *Dunsmuir* guide the court's analysis when reviewing a decision made by an administrative tribunal to determine if the standard of review should be correctness or reasonableness. The *Dunsmuir* test operates in two parts. First, courts must ascertain whether the jurisprudence has already determined the degree of deference to be accorded. This analysis must proceed by reference to the particular category of question at issue, and requires that previous decisions have resolved the question in a "satisfactory manner" (*Dunsmuir*, para. 62). Second, if the first step does not provide the answer, then courts must proceed to an analysis of the factors that make it possible to identify the proper standard of review (*Dunsmuir*, para. 62). This analysis must be contextual (*Dunsmuir*, para. 64).
>
> [29] These factors include: "(1) the presence or absence of a privative. clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal" (*Dunsmuir*, para. 64). Not all factors must be considered in every case; some or one of them may be determinative.
>
> [30] In *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, 309 D.L.R. (4th) 513, the Court further explained the application of the *Dunsmuir* test when analyzing a tribunal's interpretation of its own constating statute. The court explained that the analysis must balance two considerations. First, that deference is usually owed to a tribunal when it is interpreting its own statute, or statutes closely connected to its enabling statute with which it has particular familiarity (*Nolan*, para. 31). Second, that tribunals must be correct when interpreting the scope of their jurisdiction (*Nolan*, para. 32).
>
> [31] When considering these two factors, courts "should be cautious" when considering whether a tribunal's interpretation of its own statute is a jurisdictional issue. This means that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (*Nolan*, para. 34).

> [32] Accordingly, the standard of review for the Board must be determined using the test set out by the Supreme Court of Canada in *Dunsmuir*, and elucidated in *Nolan*.

[32] The respondent Lehigh has argued that the decision of the EAO is a question of mixed fact and law and in advancing this submission points to those portions of the Affidavit of Ms. Karen Cristie, Project Assessment Director, Environment Assessment Office that relate to the inquiries Ms. Christie made in response to the petitioner's request for a s. 6 designation. I do not believe that Ms. Christie's Affidavit, at paragraphs 14-21, goes this far. Instead that affidavit, and in particular Exhibits "F" and "G" respectively, confirm that the question of whether the Project was a "reviewable project" turned on the bright line issue of whether "the proposed quarry would have a production capacity of 240,000 tonnes per year".

[33] I am reinforced in this conclusion by the written and oral submissions of counsel for the Province, on behalf of the EAO. Those submissions focused on the permitted and intended production from the Project rather than on any argument that the EAO had engaged in any measured assessment or calculation of what production the infrastructure and equipment for the Project might yield. Thus, the exercise engaged in by the EAO, in ascertaining what the permitted and intended production from the Project was to be, was a largely mechanical determination. It looked at Lehigh's Notice of Work and its Quarry Permit and confirmed that the stated level of production in those materials fell below the 250,000 tonne threshold in Table 6 of the *Regulation*. Accordingly, I am satisfied that the issue raised by the petitioner is one which turns on the language of the *Regulation* and which raises a question of law.

[34] The principal argument of the petitioner as it relates to the appropriate standard of review, found in its written submissions at paragraph 28, is that "when the subject of judicial review is one of statutory interpretation it should be reviewed on a standard of correctness". It relies on the cases of *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233 at para. 59 and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2007 FC 955 at paras. 135-137.

[35] Counsel for the Province has accepted that "there is currently a live issue before the courts with respect to matters of what could be considered 'pure' statutory interpretation, historically considered by the courts to be dealt with on a correctness standard". Most of the cases cited by the Province, which address this debate, pertain to the Office of the Information and Privacy Commissioner.

[36] The cases relied on by the petitioner are not binding on me. In addition, once properly analyzed, they are of limited assistance. *MiningWatch* is a case which predates *Dunsmuir*. *David Suzuki Foundation*, however, does rely on the framework for analysis that is established in *Dunsmuir*. In that case, Russell J. relied on a series of factors to determine that a standard of correctness governed the issues before the court (at paras. 52-60). Those factors included the absence of a privative clause, the fact the question was jurisdictional in nature, the fact the decision maker was not addressing its home statute and a series of earlier cases that addressed the appropriate standard of review under the pertinent legislation. The conclusion in *David Suzuki Foundation* thus flowed from an analysis of the specific factors present before the court in that case.

[37] Furthermore, none of the case referred to by the Province address the *Act* or the *Regulation*. Instead, they focus on the considerations relevant to the specific statutory scheme and decision maker being addressed.

[38] Indeed, the proper starting point is to recognize that deference usually results where a tribunal is interpreting its own statute: *Dunsmuir* at para. 54. This proposition was confirmed in the portion of *Weyerhauser* that I referred to earlier and more fully in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, [2009] 2 S.C.R. 678, in which Rothstein J., for the majority, said:

> [33] Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional. However, the admonition of para. 59 of *Dunsmuir* is that courts should be cautious in doing so for fear of returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".
>
> [34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute

> and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

[39] The comments in *Nolan* that relate to "jurisdictional" questions and to the "caution" in *Dunsmuir* warrant further comment. In *Dunsmuir* at para. 59, the Court confirmed that tribunals "must also be correct in their determination of true questions of jurisdiction or *vires*". The Court further explained the ambit of a "true question of *vires*" and said at para. 59:

> ... In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City),* [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[40] In this instance, the issue raised by the petitioner does not give rise to a true question of jurisdiction. There is no dispute that the question of whether the Project was a "reviewable project" properly fell within the purview of the EAO. Instead, the issue is whether the EAO properly interpreted the relevant portion of Table 6 of the *Regulation* - an exercise that clearly falls within its jurisdiction.

[41] *Dunsmuir* also confirmed that not all questions of law are to be determined on a standard of correctness. Instead, for example, a correctness review applies to constitutional questions (para. 58). It also pertains to issues that engage the "general law". This was explained more fully at para. 60:

> As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers.

> Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process -- issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[42] With this backdrop I return to the suggestion that questions of "pure statutory" interpretation should be undertaken on a correctness standard. To properly address this question, one must return to *Dunsmuir* which establishes the relevant parameters for its analysis.

[43] The parties agree that there is no pre-existing case law which determines the appropriate standard of review for the regime before me. The *Act* does not contain a privative clause: *Dunsmuir* at para. 52. Nor does it contain a statutory right of appeal: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 55, [2009] 1 S.C.R. 339 and Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) vol. 3 at 14:2522. Still further, the question raised by the Petition is not "one of fact, discretion or policy" which would normally attract deference "automatically": *Dunsmuir* at para. 53.

[44] The interpretation of Table 6 of the *Regulation* does not raise a constitutional question, a question of "true jurisdiction" or a question that engages a legal issue of general application that would be outside of the expertise of the EAO.

[45] Instead, the interpretation of Table 6 of the *Regulation* requires the EAO to interpret its home statute and a regulation passed under that statute. We are dealing then with a "discrete and special administrative regime in which the decision maker has special expertise": *Dunsmuir* at para. 55. Deference will usually result where a tribunal is interpreting its own statute or a statute closely connected with its function with which it will have particular familiarity: *Dunsmuir* at para. 54. It is hard to imagine a function more closely tied to the role of the EAO than its determination of whether a particular project falls within the ambit of the *Regulation* and thereby constitutes "a reviewable project".

[46] The post-*Dunsmuir* emphasis on according a statutory body deference when it interprets its constating statute is a consistent and dominant theme in the case law. In *Khosa*, Binnie J., for the majority, said:

> [25] I do not share Rothstein J.'s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision-makers in matters that relate to their special role, function and expertise. *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P*. 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).

[47] If one steps back and reflects it is clear that the principle of deference, when applied to a statutory body's interpretation of its home statute, is grounded in the recognition that that interpretive exercise is often best served by individuals or tribunals whose daily business is the oversight of the legislation in question. A central component of any attempt to interpret legislation requires an assessment of both legislative context and legislative purpose. As it relates to questions of purpose, Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis Canada Inc., 2008) at 264, states:

> In its broadest sense, legislative purpose refers not only to the material goals the legislature hoped to achieve but also to the reasons underlying each feature of the implementing scheme. It asks the question why: why this legislation? why this arrangement of powers? why this direction or rule? why this turn of phrase? In purposive analysis every feature of legislation from the overall conception to the smallest linguistic detail is presumed to be there for a reason. It is presumed to address a concern, anticipate a difficulty, or in some way promote the legislature's goals.

[48] Under s. 2 of the *Act* the EAO is expressly charged with carrying out the responsibilities it is given under the *Act*. It is singularly well positioned to ensure that the policies and legislative objects that underlie the *Act* are properly given effect when interpreting the *Regulation*.

[49] Two other factors inform the present question. The first is that the specialized expertise of the EAO, in applying British Columbia's environmental legislation, has been recognized by the courts. In *Do Rav Right Coalition v. Hagen,* 2005 BCSC 991, Bauman J., as he then was, in considering the appropriate standard of review to be applied to the decision of the Project Assessment Director of the EAO, stated at para. 93:

> As to the expertise of the "tribunal", the Project Assessment Director is clearly expert in a field which engages many disciplines, in a position which calls for the assessment, and mitigation, of the social impacts or works and activities. The Project Assessment Director is clearly the superior position to this court in that regard.

[50] Second, the purposes which an administrative body serves may also signal the appropriate degree of deference that it should be shown. In *Brown* at 14:2530, the authors state:

> The purpose of the tribunal as indicated by the statutory scheme is also a factor that may point to the appropriate degree of judicial deference to be shown. In that regard, agencies with the broad statutory mandate to regulate, in the public interest, either a complex industry or economic relationship, are likely to attract judicial deference. And this is particularly so where the agency has been given not only adjudicative responsibilities, but also research and educational capacities, as well as powers of investigation, enforcement and policy-making.

[51] The EAO does have a broad and important mandate to regulate, in the public interest, the assessments necessary for significant projects with potential environmental ramifications or consequences. A review of the *Act* also confirms that the *Act* addresses questions of investigation and enforcement and that the EAO can, for example, under s. 49 of the *Act*, be directed to undertake an assessment of any "policy, enactment, plan, practice or procedure of the government" and to provide "a report and recommendations" to the Minister at the conclusion of its assessment.

[52] Based on the various considerations I have described, I am satisfied that the interpretation of Table 6 of the *Regulation* is to be reviewed on a standard of reasonableness.

[53] The concept of "reasonableness", in turn, gives rise to distinct requirements. These requirements were described in *Dunsmuir* at para. 47.

> ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision fails within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[54] The Supreme Court of Canada explained the reasonableness standard in *Khosa* at para. 59:

> Reasonableness is a single standard that takes its colour from the context. ... Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a review court to substitute its own view of a preferable outcome.

Was the EAO's Interpretation of Table 6 of the *Regulation* Reasonable

[55] The petitioner argues that Table 6 of the *Regulation*, properly interpreted, requires more than a rote or blunt determination of whether the permitted production of a quarry is under 250,000 tonnes per year. It requires, instead, a more measured assessment to ensure that the infrastructure and plant that will be acquired or constructed to generate a given level of production is consistent with such production. Absent such a determination there exists a real prospect that a project, with a significant environmental footprint, but a more modest level of intended production, could escape the mandatory assessment processes of the *Act*.

[56] The petitioner points to multiple aspects of the Project to establish that its "production capacity" far exceeds the 250,000 tonne threshold established in Table 6. The following excerpts from the petitioner's submissions relate to this assertion:

50. Lehigh's Notice of Work includes factors of its intended operation of the Proposed Texada South Quarry which demonstrates a production capacity greater than or equal to 250,000 tonnes per year:

> (a) The overland conveyor that will transfer the quarried product to the marine loadout terminal will have a belt width of 1.8 metres and be capable of a loading rate of up to 2500 tonnes per hour.
>
> (b) Haulage roads providing for unrestricted two-way traffic of 100 tonne trucks.
>
> (c) The estimated total mineable reserves are greater than 100 million metric tones.
>
> (d) The Proposed Texada South Quarry is intended to operate continuously throughout the year with a single shift of workers employed from 7:00 a.m. to 3:00 p.m., 5 days per week.
>
> (e) Lehigh's Mine Plan indicates that the mining disturbance of the Proposed Texada South Quarry will be 75.6 hectares.

51. Additionally, Lehigh intends to utilize the following equipment:

> (a) Portable Crusher Spread with a capacity of 200 tonnes per hour;
>
> (b) Barge Loader with a capacity of 1200 tonnes per hour;
>
> (c) Three Haul trucks with capacities of 50 to 100 tonnes;
>
> (d) Excavator with a capacity of 2 cubic metres;
>
> (e) Two Wheel loaders with capacities of 9 cubic metres; and
>
> (f) Dill rig with a capacity of 6 inch diameter.

52. Given the size and mineable reserves of the Proposed Texada South Quarry and Lehigh's intended equipment and mode of operation the production capacity of the Proposed Texada South Quarry clearly exceeds the 250,000 tonnes necessary to trigger an environmental assessment under the Regulation. This environmental assessment is triggered despite Lehigh's statement as the proponent that their estimated extraction is only 240,000 tonnes per year.

53. As stated above Lehigh intends to operate the Proposed Texada South Quarry continuously throughout the year with a single shift of workers employed from 7:00 a.m. to 3:00 p.m., 5 days per week. Even if the Proposed Texada South Quarry is only operational 48 weeks of the year the mine could produce only 5000 tonnes per week or 1000 tonnes per day of quarried material before it would exceed its estimated extraction of 240,000 tonnes per year.

54. This low production rate seems unlikely given the size and mineable reserves of the Proposed Texada South Quarry and the infrastructure and equipment that Lehigh intends to build and use.

55. The overland conveyor that will transfer the quarried product to the marine loadout terminal will have a belt width of 1.8 metres and be capable of a loading rate of up to 2,500 tomes per hour. Given the intended production of the mine, the conveyor system loading at 2,500 tonnes per hour would

> operate for just 96 hours per year. Based on a 48 week year this would be a utilization rate of only 5%. Production of one million tonnes per year would be achieved with a utilization rate of 21% and would provide for a quarry life of 100 years.
>
> ...
>
> 57. Given the size and mineable reserves of the Proposed Texada South Quarry and Lehigh's intended equipment and mode of operation the production capacity of the Proposed Texada South Quarry clearly exceeds the 250,000 tonnes necessary to trigger an environmental assessment under the Regulation. This environmental assessment is triggered despite Lehigh's statement as the proponent that their estimated extraction is only 240,000 tonnes per year.

[57] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J., for the Court, at para. 21, adopted Driedger's "modern principle" for the interpretation of statutes:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

a) Plain Meaning or Ordinary Sense

[58] For ease of reference I repeat the salient portion of Table 6:

> (1) a new quarry facility or other operation that
>
> (c) during operations, will have a production capacity of ≥ 250,000 tonnes / year of quarried product.

[59] The petitioner argues that the ordinary meaning of the term "production capacity" is the amount of a given product that can be produced or the maximum amount. The term, in its ordinary meaning, is not concerned with an intended, estimated, or actual level of production, but rather with what the capacity to produce is.

[60] This meaning of "production capacity" is supported by the dictionary definition of capacity in *Webster's Third New International Dictionary of the English Language, Unabridged*, 1986:

> capacity: ...the ability to store, process, treat, manufacture or produce: an instrumentality or facility for production: maximum processing, production, or output . . . attaining to or equalling maximum capacity
>
> [Emphasis added.]

[61] This definition of capacity is also supported, it is said, by the meaning which is ascribed to "capacity" in every day conversation. The capacity of a room or an elevator is the number of individuals who can safely occupy the area at a given time. The capacity of a gas tank in a motor vehicle is the volume of gasoline that the tank can contain at a single time. Capacity does not refer to the number of people actually in an elevator or the amount of gasoline actually in the vehicle's tank.

[62] Therefore, the petitioners say that "production capacity" in the *Regulation* should be interpreted as "what will be the ability of a proponent to produce a given product once the project is operational". In the case of the Project, determining its "production capacity" requires looking beyond the proponent's estimated or intended production, as stated in the Notice of Work, and requires an evaluation of the equipment and infrastructure to be utilized, the size of the mineable reserves, and the operation schedule for the Project.

[63] Conversely, the respondent Lehigh argue that business definitions of "capacity" do include or require a consideration of operation. Jonathan Law, ed., *Oxford Dictionary of Business and Management*, 5th ed. (Oxford: Oxford University Press, 2009) defines "capacity (system capacity)" as "[t]he highest sustainable output from an operating system in units per given time" [emphasis added]. It is thus clear that embedded in the ordinary sense of the term production capacity is a consideration of the operational capacity of the system or project in question.

[64] The respondents argue that the ordinary meaning of the term "capacity" must be determined within the context that the word is used. In some instances, scientific or physical limitations (like the volume of a gas tank) will apply to determining the meaning of "capacity". In other contexts a regulatory limitation will apply to determine the meaning of capacity. For instance, the capacity of an elevator is determined, in part, by limits placed by safety regulations on the number of people that may ride at

a given time. The capacity of a motor vehicle to travel a certain distance is determined, in part, by limits placed by motor vehicle laws on the speed that the vehicle may drive on public highways. Similarly, in the context of this matter, the capacity of the Project is determined, in part, by the Notice of Work and the Quarry Permit that limit production to a maximum of 240,000 tonnes / year.

b) Context

i) The Immediate Context

[65] Table 6 relies on three interwoven concepts: i) production capacity, ii) during operations, and iii) ≥ 250,000 tonnes / year. It is these three elements, in combination, that inform the meaning of the threshold or benchmark that is established in Table 6.

[66] Both respondents argue that the words “during operations will” precede and, accordingly, inform the words “production capacity”. They say that the proper question which emanates from the *Regulation* is “what will the annual production capacity of the operation be once it is operating?”

[67] In my view, the meaning of the words “during operations will have a production capacity”, without reference to additional considerations, remains ambiguous. The modifier “during operations” can just as easily be asking the question “once the quarry is operating what does it have the capacity to produce?”

[68] The words “production capacity” are, however, further modified or book-ended by the figure of “≥ 250,000 tonnes”. This latter consideration is important. It is a precise figure. If one were to adopt the petitioner’s submission this would be the quarry’s theoretical production capacity after taking into account its operation plan, equipment and infrastructure. How would this theoretical capacity be determined? Would it be based on the assumption that equipment would be used for one shift per day, or for two shifts, or for three shifts? If similar pieces of equipment had different capacities would those capacities be averaged? If the train of production equipment

had a single linchpin with a low production capacity, would this set the ceiling for the production capacity of the quarry?

[69] The exercise the petitioner advocates would engage a great many such considerations. No framework for any such assessment is established in the *Regulation* or otherwise and yet such a framework would be central to determining the production capacity of a project and to comparing that production capacity to the threshold established in Table 6.

[70] On the other hand, comparing the Table 6 production capacity figure to the capacity of a quarry as established in its Notice of Work and in the permits it receives is straightforward. This yields an easily ascertained and objective factor which sets a ceiling on permitted production capacity. The structure of the various Table 6 criteria in combination strongly suggests that the intention of the words in question was to assess a proponent's intended production from a project, as limited by its plans and permits, rather than the theoretical or notional maximum production capacity of its infrastructure and equipment.

ii) The Broad Context

[71] One aspect of the relevant context of Table 6 and of the *Act* arises from the overarching importance of environmental protection in our society. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40, [2001] 2 S.C.R. 241, the Court said at para. 1:

> ... This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society": *Ontario v. Canadian Pacific Ltd*., [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, at pp. 16-17..

[72] The significance of environmental protection, as a core value, provides an important backdrop and informs the interpretive exercise. In *Labrador Inuit Assn. v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50, 155 Nfld. & P.E.I.R. 93 [cited to D.L.R.], the Court of Appeal said:

> [11] ... The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> [12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

iii) The Context of the Regulation

[73] The concern which underlies the Petition is that a trigger for environmental assessment which only focuses on the initial intended production of a mine, without any consideration of the infrastructure that has been developed for that project, cannot properly or adequately address issues of environmental protection. The fact that a project can be overbuilt, in the sense that it can accommodate increased levels of production without further physical expansion, is clear. So too is the fact that the physical size of a mine, as well as its attendant works, processing facilities and other components, is relevant to the environmental impact or footprint that it may create. Yet these matters might escape environmental scrutiny if the trigger for an environmental assessment turned on the mine's initial intended production alone.

[74] This practical reality is reflected in the structure of Table 6. Table 6 deals with both "New Projects" and "Modifications of Existing Projects". For quarries, the "New Mine" threshold for environmental assessment is the ≥ 250,000 tonnes/year of production capacity that I have identified and addressed. For "Modifications of Existing Projects" the appropriate threshold, identified in s. 8(1)(b) of the *Regulation* is:

> (b) the modification will result in the disturbance of
>
> > (i) at least 750 hectares of land that was not previously permitted for disturbance, or
> >
> > (ii) an area of land that was not previously permitted for disturbance and it is at least 50% of the area of land that was previously permitted for disturbance at the existing facility

[75] Thus, for the "Modifications of an Existing Project", an environmental review is engaged when the physical footprint of the expansion exceeds a given threshold. The petitioner argues that the thresholds which are relevant to "Modifications" to existing mines inform the threshold that governs "New Mines". The operating premise is that the production levels which are permitted for new mines or quarries must be established on a land-base which is appropriate to or consistent with that production level. Thus, if one accepts the petitioner's submissions, both the "New Mine" and the "Modification of an Existing Project" can be interpreted consistently.

[76] Conversely, the result that ensues from the juxtaposition of the two schemes contained in Table 6, for "New Mines" and for "Modifications of an Existing Project", based on the respondents' submissions, is a source of real concern. The schemes would lack symmetry and could give rise to a result that is not coherent. One could, in concept, develop a significant mine with a modest level of initial production. That level of production would fall below the "production capacity" threshold for "New Mines". Thereafter, if the proponent chose to increase that initial level of production the project could again escape a mandatory environmental assessment if its initial physical footprint adequately accommodated the increased level of production.

[77] I should say there is no suggestion that Lehigh has engaged in any such stratagem. Indeed the evidence before me indicates that Lehigh's intended levels of production, as reflected in its Notice of Work, are consistent with its levels of production in the preceeding half decade.

[78] Nevertheless, neither counsel for the respondents was able to explain to me why Table 6 uses different measures or triggers, production capacity and land base, for "New Mines" and "Modifications of an Existing Project" respectively.

[79] I pause to note that one measure of reasonableness is whether a decision is rational or intelligible. A legislative scheme which cannot rationally or intelligibly be explained, absent recognizing that its structure is not harmonious or that a gap may exist in that structure, neither generates confidence nor does it yield decisions that are easily supported.

[80] The relevant context for Table 6, however, goes beyond the language in the Table that is specific to quarries. Of significant relevance is the fact that the initial question of whether a project is "reviewable" does not fall to the EAO. Neither the *Act* nor the *Regulation* contemplate that proponents apply to the EAO for a determination of whether or not the criteria in the *Regulation* are met and the project in question is "reviewable". There is then no process by which proponents of industrial or other projects make application to the EAO, regardless of how modest or ambitious that project may be, for a determination of whether the project falls within the ambit of the *Act*. Instead, the affidavit of Ms. Christie confirms at Exhibits "F" and "I", that Lehigh did not initially contact the EAO about the Project and was "not required to do so because the proposed quarry is below the RPR threshold".

[81] Having said this, it is clear that a party may, as in this case, contact the EAO and ask it to consider whether a proposed project is reviewable.

[82] The fact that it is a proponent who, in the first instance, determines whether a project is reviewable is relevant in several respects. First, it explains why the criteria in Table 6, for each of the various types of projects described, are expressed in clear and unambiguous terms. Overwhelmingly Table 6 stipulates or establishes particular numerical thresholds or confirms that projects "regardless of size" are reviewable. A new asbestos manufacturing facility would be an example of this latter category of project. Thus, project proponents are dealing with bright line figures that are easily understood and readily identified.

[83] Second, because the initial determination falls to the project proponent, the criteria in Table 6 do not admit of any discretion. The determination made by a

proponent does not require any judgment, nor for obvious reasons, could it be otherwise.

[84] Once one recognizes this essential attribute of Table 6 it also becomes clear that Table 6 does not extend any discretionary function to the EAO. It cannot be that the application or interpretation of Table 6 would, absent some explicit authority, engage different judgments or processes for a proponent and the EAO respectively. Instead, both are required to consider the specific criteria that pertain to specific categories of project in Table 6.

[85] The foregoing reality militates strongly against the petitioner who argues that the determination of "production capacity" must be made based on a full review and consideration of a project's land base, facilities and equipment. No such assessment arises from the plain language of Table 6. Certainly no such exercise could be entrusted to a proponent in its sole discretion. Still further, the interpretation advanced by the petitioner would necessarily have the EAO undertake such reviews for all projects regardless of their permitted and intended production levels. Such a detailed review would be necessary in order to ensure that the environmental footprint of a project was consonant with its stated and intended production levels - even if those stated production levels were modest.

iv) Context from Other Sections of the Act

[86] Section 9 of the *Act* gives rise to a similar issue. Section 9 relates to approvals issued under other enactments. The minister who administers another enactment must not issue any approval to a person to undertake or carry on an activity that is a reviewable project unless the person holds a valid EAC or there exists a determination under s. 10(1)(b) of the *Act* that no such certificate is required.

[87] Thus, s. 9 also suggests that the individuals who administer other legislation will be able to determine whether or not a project is reviewable. This is only possible if the determination of whether or not a project is reviewable is readily ascertained from clear and unambiguous criteria in Table 6.

[88] Finally, s. 6 of the *Act* is relevant and provides important context. Section 6, whose language is found at paragraph 19 of these reasons, allows the Minister to designate a project as reviewable even if the project "does not constitute a reviewable project under the regulations". The petitioner asserts that s. 6 is irrelevant to the interpretation of Table 6 and "the Minister's opinion with respect to a project... has no affect on the operation of the Regulation". I do not agree. While the Minister's views do not, strictly speaking, "affect the operation of the regulation", they do inform its interpretation and, in particular, make sense of the scheme that exists for new projects.

[89] One must recognize that a significant project consists of a great many components. It requires some land base, some processing or manufacturing facility, multiple kinds of equipment and a labour force. Depending on its location it may require roads, load out facilities and docks. Different projects will have unique requirements. Lumber processing facilities require log yards. Certain mining projects require tailing ponds. One or more of these components may be designed to accommodate a much higher level of production than the project's permits allow for or than is intended. This may be because the proponents of the project seek to be efficient or to enhance the use of their capital or to allow for future expansion.

[90] Still further, the ostensible production capacity of a particular component in a project may be misleading. In this case many such factors appear to be relevant. Three examples will suffice. The affidavits filed by Lehigh explain, for example, its choice of equipment, the sizing of its conveyor belt and the capacities of its load-out facility. These matters, it will be recalled, underlie some of the concerns of the petitioner.

[91] Lehigh and its associated companies have numerous operations in the Canadian region. As a cost saving and environmental initiative, Lehigh standardizes equipment within its operations to the extent possible. This practice of standardization allows Lehigh to effectively utilize surplus equipment from other

Lehigh operations. Moreover, it reduces parts inventories, allows for bulk purchasing of parts, and facilitates standard maintenance practise and schedules.

[92] Lehigh anticipates utilizing several items of surplus equipment for the Project from Lehigh's other operations including from its Sechelt and Steelhead pits. Lehigh originally proposed using one two cubic metre excavator and two nine cubic metre loaders. This size of excavator and loader were selected based on the type of equipment available from other Lehigh operations at the time Lehigh's application for a quarry permit was filed. Some of this equipment is no longer available and will be re-specified within the parameters of the approved mine plan.

[93] After the initial phases of set up for the Project are completed, it is likely that Lehigh will utilize surplus trucks with a fifty to seventy tonne capacity. Although Lehigh's application for a quarry permit contemplated trucks with a capacity of up to 100 tonnes, 50 and 70 tonne surplus trucks are currently available within Lehigh's existing operations.

[94] Similarly, Lehigh's decision to use conveyor belts with theoretical excess capacity was primarily driven by availability, environmental, safety, spill reduction, noise abatement, dust mitigation and standardization considerations. The width of a conveyor belt is only one factor in determining its capacity. The other prime factors are belt speed and feed rate. Faster belt speeds increase worker health and safety hazards and increase the risk to the environment from dust, spillage and mechanical breakdowns. Similarly, higher feed rates increase the risk of spillage. Lehigh intends to use a wide belt but run it at a lower speed and at a reduced feed rate for the reason outlined above.

[95] Finally, Lehigh has deposed that the marine load-out is an intermittent quarry activity and does not increase the production capacity of the Project. It simply increases the rate at which barges are loaded. The marine load-out is part of the transportation capacity of the Project and was designed to load several company barges (ranging from 3,500 to 5,500 tonnes each) or to load a customer's barge up 12,500 tonnes (the largest practical barge on the West Coast) in the crew's eight

hour shift. In designing the marine load-out in this manner Lehigh was mindful of economic, weather, environmental, safety, and standardization concerns.

[96] Transportation is a primary expense for the Project. Accordingly, adopting a system that maximizes the amount of product that can be loaded in a minimum amount of time reduces Lehigh's barge demurrage and tug boat standby fees. Moreover, limiting loading times to the eight hour work shift reduces manpower requirements and overtime premiums.

[97] Thus, the fact that a particular component appears on its face to be overbuilt or that a particular piece of equipment has significant theoretical capacity may, or may not, have any environmental significance.

[98] In addition, the likely reality is that all projects will have some components whose capacity, when extrapolated to theoretical maximum levels, will exceed the intended production capacity of the project. Once again, the result of this reality is that many, if not all projects, would have to be assessed by the EAO to determine whether they were "reviewable".

[99] The affidavit of Mr. Taje, a Senior Inspector of Mines with the Ministry of Energy, Mines and Petroleum Resources, directly addresses this issue. Mr. Taje, who has in excess of 40 years experience in the mining industry, deposed:

> 8. Quarries often operate with equipment that has varying design capacities. During mining operations, the primary limitations on production capacity include, but are not limited to, drill/blasting cycle, routine equipment maintenance, loading of trucks, and feed rates to the crusher. The selection of mining equipment and operations is made by the Mine Manager with the understanding that, in this case, their permit would limit production to 240,000 tonnes per year. The total potential capacity of an individual piece of equipment is not determinative of overall capacity; the *RPR* would capture almost every mining project in the province if that was the case.

[100] Section 6 of the *Act* recognizes these myriad variables. It allows the EAO to evaluate a project and its components and determine whether that project "may have a significant adverse environmental... effect" even though the project is not reviewable under the *Regulations*.

[101] Following its review, the EAO provides a recommendation which the Minister may or may not accept. In this case, a s. 6 assessment was undertaken. The Affidavit of Ms. Christie details what inquiries she made in response to the request for a s. 6 designation. Her Affidavit attaches, as Exhibit "I", a copy of the Decision Note she prepared which set out the EAO's Executive Director's Recommendation to the Minister. The Decision Note is eight pages long. It described the Project and in particular the proposed marine load-out. It identified the various issues of environmental concern that were raised including, *inter alia*, the karst caves, rock fish conservation and eel grass beds, noise and possible plant species at risk issues. It listed what information was reviewed and considered by Ms. Christie. It then addressed the specific criteria identified in s. 6. Specifically, it concluded that the proposed quarry and load-out would not likely lead to significant adverse affects on "public beach access, recreation and UREP areas, and future economic opportunities and diversification". It also confirmed that the proposed quarry would not cause "significant adverse effects on the karst caves, plant species at risk, or on marine habitat...".

[102] The Decision Note also addressed the public interest and concluded:

> The EAO's analysis of the factors leads to the following conclusions:
>
> - The proposed quarry would have a production capacity close to the RPR threshold; however, the main concerns identified by interested parties are not related to the proposed level of production (the size of the proposed quarry), but to the existence of the proposed quarry and marine loadout.
> - The MEMPR has confirmed that the South Coast MDRC will conduct a technical review of Lehigh's application for a *Mines Act* permit for the proposed Texada South Quarry and EAO considers that potential effects on the karst cave system and plant species at risk will be adequately addressed through their process:
>
> - Provincial, federal, regional and local government agencies and First Nations will be invited to participate in the MDRC.
> - The MDRC will assess the potential on-site environmental effects of the proposed quarry, as well as potential impacts to the nearby karst cave systems, and the mitigation proposed by Lehigh. To inform the MDRC process, MEMPR will conduct an overview karst assessment of the proposed quarry site, and will meet with Mr. Griffiths to obtain information regarding the known extent of the nearby karst cave systems. If required, additional avoidance

and mitigation measures (including additional studies), will be developed with input from Lehigh, ad incorporated in the *Mines Act* permit, should one be issued at the end of the review.

- The MDRC will also review potential health, social and heritage effects, although the review will not be as comprehensive as it would be during a provincial EA. The MDRC will not review potential economic impacts.
- For the proposed Texada South Quarry, the delegated statutory decision- maker is the Chief Inspector of Mines.

- The MEMPR has conducted public consultation on Lehigh's application for a *Mines Act* permit:
  - *Mines Act* application referrals were sent June 9, 2009 to provincial and federal agencies, the Sliammon First Nation and Hul'qumi'num Treaty Group, and the Powell River Regional District.
  - The permit application was advertised for public comment on June 10, 2009 in the local Powell River Peak and BC Gazette, with a 30-day response period.
  - Lehigh conducted site tours for the public in May 2009.
  - A public information meeting was held on June 27, 2009 on Texada Island.
- The federal screening level EA will address potential effects of the proposed marine loadout on marine fish and mammal habitat, as well as on navigation. Public consultation will be conducted as part of the federal screening level EA.
- Given the nature of the concerns, and the MEMPR and federal review processes that will address them, the expenditure of additional government resources on a provincial EA is not warranted.

[103] The Decision Note concluded with the recommendation that the Project not be designated a reviewable project under s. 6 of the *Act*. The Minister accepted that recommendation.

[104] Section 6 admittedly engages issues that are different from the narrow question of what the "production capacity" of a new project will be. Section 6 does, however, provide a failsafe for a situation where the production capacity of a project falls below the relevant Table 6 threshold, but one or more components of the project may have some significant adverse environmental consequences. Furthermore, what the petitioner advocates is that a project's production capacity be reviewed having regard to the project's operation plan, equipment and infrastructure.

What underlies this submission is the concern that elements or components of a project may in fact be consistent with much higher levels of production capacity with possible attendant harm to the environment. Section 6 allows the EAO to either focus on those facets of a project that are of particular concern or to address the broader concern that a project's initial intended production masks and understates its true production capacity as well as its true environmental footprint.

The Purpose of the *Act* and the *Regulation*

[105] La Forest J., for the majority of the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71, has recognized that the fundamental purpose of environmental impact assessment is:

> (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

[106] The petitioner argues, rightly in my view, that, "the purpose of environmental assessment legislation is to integrate the consideration of environmental impacts into planning and decision making".

[107] Thus, at least one important object of environmental legislation is the need to balance the potentially competing interests of environmental protection with those of economic development. Environmental assessments are a significant tool which advance this object and ensure that this balance is properly struck. The balance is recognized in the *Act* by categorizing projects as either "reviewable" or "not reviewable". There is no presumption in favour of either. Instead, s. 5 of the *Act* and the *Regulation* delineate with precision where that balance lies and how that determination is to be made.

[108] The recognition that environmental assessments seek to achieve a balance between the interests of different parties is critical. It suggests that the criteria which determine whether a project is reviewable or not should be clear and unambiguous.

This is true for each of the stakeholders or groups for whom the issue is important. The EAO must know with certainty what legislative imperatives guide its conduct. The proponent of a project must be able to plan its operations with certainty. To do so it must be able to ascertain whether its intended project falls within the *Act* and the *Regulations*. Other ministries, under s. 9 of the *Act*, must be able to determine for their own purposes whether a project is reviewable. Finally, the public must be satisfied that the *Act* is being adhered to and that the public interest is being properly safeguarded. This object is enhanced if the relevant criteria in Table 6 are transparent and readily understood. These disparate interests are also most effectively reconciled if Table 6 yields a discrete and consistent result. They cannot realistically be achieved if Table 6 requires a detailed consideration of the myriad unspecified and hypothetical factors that may be relevant to the "production capacity" of any given project.

Conclusion

[109] I am satisfied that the EAO's interpretation of Table 6 of the Regulation is reasonable.

[110] Specifically, I am satisfied that the meaning of "production capacity" in Table 6 of the *Regulation*, when properly informed by both the purpose and context of the *Regulation* and the *Act*, refers to the permitted and intended levels of production of the Project.

[111] The petitioner's application is dismissed. The respondents are to have the costs of this application.

"Voith J."