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Article

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Law governing appeals from commercial arbitration needs clarification

By Marco P. Falco

Ontario courts adopt a deferential posture toward commercial arbitration awards. This approach is consistent with the fundamental principle underlying Ontario's *Arbitration Act, 1991,* S.O. 1991, c.17 (the Act), i.e. to promote the resolution of disputes between sophisticated commercial parties without court interference.

A recent conflict has emerged in Ontario case law, however, about which standards of review apply to commercial arbitration awards on appeal.

Two 2022 decisions of the Ontario Superior Court, *Serbcan Inc. v. National Trust Co.,* 2022 ONSC 2644, and *D Lands Inc. v. KS Victoria and King Inc.,* 2022 ONSC 1029, illustrate the problem. Each case proposes a fundamentally different approach to how courts should analyze the merits of commercial arbitration orders.

The issue is ripe for appellate intervention and requires resolution by either the Ontario Court of Appeal or the Supreme Court of Canada.

1. The possible standards of review

Generally, there are two categories of "standards of review" in Canada:

1. In the administrative law context, the standards are reasonableness (the presumptive deferential standard of review) and correctness (the less deferential standard): see *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (the Administrative Standards); and
2. The civil appellate standards of review, being "palpable and overriding error" (the deferential standard) and correctness (the less deferential standard) (the Civil Standards).

The Civil Standards usually apply to appeals from tribunal or lower court decisions. The

Administrative Standards typically apply to courts reviewing tribunal or regulatory decisions on an *application for judicial review.*

2. The Administrative Standards applicable to commercial arbitration

In *Serbcan,* the Ontario Superior Court held that, pursuant to the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, the standard of review applicable to commercial arbitrations was "reasonableness," unless the question was one that would attract the less deferential posture of correctness, such as questions of law or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise: see also *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32.

In other words, the Administrative Standards applied.

However, the court in *Serbcan* observed that the standard-of-review landscape had changed significantly with the Supreme Court of Canada's decision in *Vavilov.*

In *Vavilov,* the court held that, going forward, where a statute provides an express right of appeal to a court (as s.45 of the Ontario Act does), then the Civil Standards of "palpable and overriding error" and "correctness" apply instead.

The court in *Serbcan* observed that the minority of the Supreme Court of Canada in a decision called *Wastech Services Ltd. v. Greater Sewarage and Drainage District,* 2021 SCC 7, held that "where a statute provides for an appeal' from an arbitration award, the [Civil Standards] apply." Notably, the majority in *Wastech* made no similar pronouncement.

According to the minority in *Wastech,* then, *Vavilov* displaced the reasoning in *Sattva* and *Teal Cedar.*

In the face of this conflicting line of authorities, *Serbcan* held that the court was bound by the *Sattva* and *Teal Cedar* decisions, such that the Administrative Standards applied to appeals of commercial arbitration awards under s. 45 of the Act:

In my view, the correct standard of review is reasonableness. The majority judgment in *Wastech* declined to address whether *Vavilov* applied to awards of commercial Arbitrators. As a result, *Sattva* and *Teal Cedar* continue to govern. Until a decision of the Supreme Court of Canada overrules *Sattva* and *Teal Cedar* in this regard, the standard of reasonableness to appeals from commercial arbitrators continues to bind me.

0. The case for Civil Standards

By contrast, the Ontario Superior Court in *D Lands, supra,* reached the opposite conclusion, holding that *Vavilov* shifted the landscape for appeals from commercial arbitration awards, such that the Civil Standards apply.

The court echoed the minority's opinion in *Wastech:*

There are important differences between commercial arbitration and administrative decision-making. ...Those differences do not, however, affect the standard of review where the

legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov,* "a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts".

1. The need for appellate intervention

The standards of review applicable under s. 45 of the Act (and similar provisions nationally) require clarification by an appellate court.

The minority's case for applying the Civil Standards in *Wastech* is appealing – after all, *Vavilov* now draws a red line between the courts' review of administrative decisions on judicial review and the review of cases in which there is an express statutory right of appeal.

Commercial arbitration, being subject to an express right of appeal under s. 45 of Ontario's Act, arguably calls for the application of the Civil Standards. After all, a commercial arbitration award is not the same as the decision of an administrative tribunal. Most important, commercial arbitration awards are subject to an express right of appeal under the Act.

To the degree that *Sattva* and *Teal Cedar* imply otherwise, these decisions may need to be revisited in view of the courts' analysis in *Vavilov* and the minority's decision in *Wastech.*

Until such time, however, Ontario law remains in a state of uncertainty as to which of the Administrative and Civil Standards apply.

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