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What You Need to Know about the Courts' Varying Approaches to Appealing Commercial Arbitration Awards

By Marco P. Falco

Canadian appeal courts adopt a deferential posture toward commercial arbitration awards.

This approach protects the policy underlying Ontario's *Arbitration Act, 1991,* S.O. 1991, c.17 (the "*Act*"), which is 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 (that is, the grammar by which Courts analyze the merits of an arbitral award) apply.

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, suggest fundamentally different approaches to the standard of review applicable to arbitration orders. Which approach will ultimately govern remains unresolved. The issue is ripe for appellate intervention.

1. The Case for "Administrative Law" Standards

Broadly speaking, in Canada there are two classes of "standards of review":

i. In administrative law, the standards include 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

ii. 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 typically apply to *appeals* from tribunal or lower Court decisions. The Administrative Standards usually apply to Courts reviewing tribunal or regulatory decisions on an *application for judicial review*.

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 somewhat with the Supreme Court of Canada's decision in *Canada v. Vavilov, 2019 SCC 65*, in which the Court held that, going forward, where a statute provides an express right of appeal to a court (as s.45 of the *Act* does), then the Civil Standards of "palpable and overriding error" and "correctness" apply instead.

The Court in *Serbcan* further noted 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 such pronouncement.

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

Faced with this conflicting line of authorities, *Serbcan* established 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 section 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.

2. The Case for "Civil Standards"

On the other hand, based on the authorities above, 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.

In doing so, the Court relined on 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".

3. The Need for Appellate Intervention

There is no doubt the standards of review applicable to commercial arbitration awards require clarification by an appellate Court, be it the Court of Appeal or the Supreme Court of Canada.

The minority's case for applying the Civil Standards in *Wastech* is alluring – after all, *Vavilov* now draws a clear 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. The nature of commercial arbitration, being subject to an express right of appeal under section 45 of Ontario's *Act*, arguably calls for the application of the Civil Standards, then.

After all, a commercial arbitration award is not the same as the decision of a public 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 *Wastech*.

Until such time, however, Ontario law remains in a state of confusion in which the Superior Court oscillates between the Administrative and Civil Standards. The question needs to be clarified.

Standards of review are not simply the stuff of academic and judicial discourse: they determine the lens through which the Court scrutinizes the entire arbitral award.

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