FIRST APPELLATE-LEVEL DECISION ON *VAVILOV* AND ARBITRATION MUDDIES ALREADY MURKY WATERS

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Until recently, the general consensus amongst Canadian courts was that a significant degree of deference should be shown to domestic arbitral awards, and any appellate review should be done on a standard of reasonableness. Then, in December 2019, the Supreme Court of Canada rendered its decision in *Vavilov*,[1] which entirely restated the law on judicial review. Although the decision did not refer to arbitration, it raised the question: was it meant to apply to appeals from domestic commercial arbitration awards? First instance courts have considered the issue and remain split. In *Northland Utilities*,[2] the Northwest Territories Court of Appeal ("NWTCA") was the first appellate-level court to weigh in. Far from helping to settle the matter, its decision has further muddied the waters.

I. FACTS

On January 20, 2021, the Northwest Territories Court of Appeal rendered a decision arising from an appeal relating to a

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

[2] *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 [*Northland Utilities*].

partial award in a domestic arbitration under the *Northwest Territories Arbitration Act, 1988* ("*Arbitration Act*").[3] While there were several issues before the Court, the most salient was whether the Supreme Court of Canada's decision in *Vavilov* governs appeals from domestic commercial arbitration awards. According to the NWTCA, it does.

The dispute dealt with a franchise agreement relating to the supply of electricity. Northland Utilities ("NU") built an electrical system infrastructure; according to the terms of the agreement, the Town of Hay River ("Hay River") could, but was not required to, purchase the system by a certain date. Before the deadline, Hay River notified NU of its intent to exercise the purchase option. However, the parties could not agree on the terms of purchase. The case was brought before an arbitrator under the *Arbitration Act*. The main issues were which assets could be purchased and how should they be valued. The arbitrator ruled that Hay River could purchase assets that NU argued were excluded from the agreement, and also accepted Hay River's valuation method.

II. RIGHT OF APPEAL AND LOWER COURT DECISION

Article 27 of the *Arbitration Act* allows for appeals on any question if such a right is agreed to in the arbitration agreement. It is an opt-in regime with no leave to appeal required. Clause 15 of the franchise agreement stated that the parties could appeal an award to a judge on any issue.

NU appealed the award before the Northwest Territories Supreme Court, which rendered its decision prior to *Vavilov*'s release in December 2019. The court held that the arbitrator's conclusions on questions of law were correct and that the arbitrator's conclusions on mixed questions of fact and law were reasonable. It therefore dismissed the appeal.

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[3] *Northwest Territories Arbitration Act,* RSNWT 1988, c a-5.

NU further appealed to the Court of Appeal, arguing that, according to *Vavilov*, the lower court's decision upholding the arbitrator's conclusions on a reasonableness standard must itself be reviewed on a correctness standard.

III. STATE OF CONFUSION POST-*VAVILOV*

In *Vavilov*, the Supreme Court of Canada held, *inter alia*, that where a statute explicitly provides for the right to appeal an administrative decision, the appellate standard of review applies. This was a marked departure from its previous administrative law jurisprudence. The question then was, are rights of appeal conferred by domestic arbitration statutes to be treated in the same way?

As a general comment, the Court of Appeal observed that the lower court was correct to conclude that, under the law at the time (*i.e.*, pre-*Vavilov*), the standard of review in commercial arbitration appeals was virtually always reasonableness. The Court of Appeal also noted that *Vavilov* did not indicate whether the new judicial review framework would apply to commercial arbitration. It then referred to competing trial-level decisions from Alberta, Manitoba and Ontario, which had split on that issue.

The Alberta Court of Queen's Bench held in *Cove Contracting* that *Vavilov* does not apply to commercial arbitrations.[4] The court reasoned that *Vavilov* could be distinguished from commercial arbitration cases because the former stemmed from the judicial review of decisions by administrative tribunals, rather than awards by decision-makers chosen by the disputing parties. It also noted that the Supreme Court of Canada in *Vavilov* did not refer to its earlier decisions in *Sattva* and *Teal*

[4] *Cove Contracting Ltd v Condominium Corp No 012 5598 (Ravine Park)*, 2020 ABQB 106, citing *Vavilov* at paras 6—7.

Cedar,[5] which had established the standard of review applicable to domestic arbitral awards. Although the appeal before it arose as a result of a right of appeal conferred by the *Alberta Arbitration Act,*[6] this did not bring it within the ambit of *Vavilov*.

The Alberta Court of Queen's Bench further observed that the particular circumstances of *Vavilov*, in which a decision-maker was called upon to interpret a statutory provision for the first time in a complex, unique case, is unlikely to arise in commercial arbitration, where the parties appoint the decision-maker and are thus able to select an experienced and informed arbitrator. This reasoning was followed by the Ontario Superior Court.[7] However, the Manitoba Court of Queen's Bench held in *Buffalo Point* that it was bound by *Vavilov* to apply a correctness standard to an appeal from an arbitral award on a point of law.[8]

IV. NWTCA EQUATES DOMESTIC ARBITRAL TRIBUNALS WITH ADMINISTRATIVE TRIBUNALS

Following its preliminary observations, the Court of Appeal's analysis becomes problematic.

First, it states that pre-*Vavilov*, the Supreme Court of Canada applied the *Dunsmuir* standard of review framework to commercial arbitration awards. This is not entirely accurate. In *Sattva*, the Supreme Court of Canada confirmed that, although administrative law concepts *may* be analogous in some respects, they are not entirely applicable in the domestic commercial arbitration context, where appellate review "takes place under

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[5] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*]; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32.

[6] *Alberta Arbitration Act,* RSA 2000, C A-43.

[7] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 at paras 69—73.

[8] *Buffalo Point First Nation et al v Cottage Owners Association*, 2020 MBQB 20 at paras 46—48.

a tightly defined regime specifically tailored to the objectives of commercial arbitrations".[9] As such, the Supreme Court of Canada confirmed in *Sattva* that administrative law concepts cannot be applied wholesale to commercial arbitration.

The NWTCA's understanding that the *Dunsmuir* standard of review applies *mutatis mutandis* to the review of commercial arbitration awards illustrates the historical difficulty that some Canadian courts have had in grappling with the nature and role of commercial arbitration. Indeed, there remains some hesitation in recognizing that commercial arbitration, unlike statutory arbitration in the labour context, for example, runs parallel to the domestic judicial system and does not need to be folded into it or treated as a rival.

Second, the NWTCA wrongly equated commercial arbitral tribunals with administrative tribunals. It stated that the term "appeal" must have the same meaning in all statutes, including domestic arbitration statutes. It also referred to the fact that in *Vavilov*, the Supreme Court of Canada stated the presumption of reasonableness is no longer premised upon the concept of a tribunal's relative expertise. The Court of Appeal took this relatively anodyne observation and ran with it, holding that commercial arbitrators have no greater expertise than "*other administrative boards* typically staffed by experienced adjudicators".[10]

The NWTCA also rejected the argument that disruptions to the legal landscape of domestic arbitration should be avoided. In its view, the *Dunsmuir* standard of reasonableness and deference created greater uncertainty than an appellate standard of review. The development of a body of jurisprudence based on appellate rulings will assist in fostering acceptance of

[9] *Sattva*, *supra* note 5 at para 104.

[10] *Northland Utilities*, *supra* note 2 at para 40 [emphasis added].

the predictability and reliability of Canadian decision-making, including decision-making by arbitrators.

On this basis, the NWTCA held that *Vavilov* applies to domestic commercial arbitrations: if a statute allows for an appeal, the standard of review is the standard on appeal. This means correctness for questions of law, and palpable and overriding error for mixed questions of fact and law and questions of fact.

V. WHERE DO WE GO FROM HERE?

The NWTCA's analysis and conclusions highlight the historical misunderstanding of commercial arbitration by some Canadian courts. As stated above, commercial arbitration is not one step in the "normal" judicial process. Rather, it runs parallel to it, as an alternative method of dispute resolution. Thus, commercial arbitral tribunals are not administrative tribunals. They may be governed in part by statutes such as the *Arbitration Act*, but these are not "home" or "enabling" statutes. Rather, domestic commercial arbitral tribunals derive their jurisdiction—and most of their powers—from the parties' arbitration agreement.

Though the NWTCA's decision could be dismissed as a one-off in a jurisdiction that does not deal with many arbitrations, it is of concern for two main reasons.

First, *Northland Utilities* is the first appellate-level decision on this issue. Trial courts across the country may look to this judgment for guidance, especially considering that lower court decisions remain split.

Second, the NWTCA is composed of judges from several provinces. In this particular case, all three judges sitting on the panel are listed as being from Calgary, Alberta. Therefore, this decision may offer a preview of how a panel of the Alberta Court of Appeal would approach the standard of review for domestic arbitral awards on appeal.

Recent developments at the Supreme Court of Canada add to this concern. The majority in *Wastech Services* opted not to opine on whether *Vavilov* affects the standard of review applicable to domestic arbitral awards as set out in *Sattva* and *Teal Cedar*.[11]

However, the concurring judges (Brown, Rowe and Côté JJ.), pointing to conflicting jurisprudence—including the NWTCA decision discussed here—deemed it necessary to resolve the issue. While they confirmed that there are important differences between commercial arbitration and administrative decision-making, they concluded that those differences do not affect the standard of review where the legislature has provided for a statutory right of appeal. In their view, factors that justify deference to an arbitrator, such as respect for the parties' decision to arbitrate their dispute and to select an appropriate decision-maker, have no bearing on the interpretation of the term "appeal" in domestic arbitration statutes. In other words, the concurring judges in *Wastech* would have held that *Vavilov* has displaced *Sattva* and *Teal Cedar*.[12]

It remains to be seen whether *Northland Utilities* and the concurring judgment in *Wastech* get any traction amongst first instance and appellate courts in other provinces. The Supreme Court of Canada has not overturned *Sattva* and *Teal Cedar*, so deference and the reasonableness standard of review should be maintained with respect to appeals from domestic commercial arbitration awards.

While the concurring judgment in *Wastech* is disconcerting, it is unlikely to be reflected in a majority judgment anytime soon. The three concurring judges are known for rendering concurring and dissenting judgments, often as a group. That said, given the current state of confusion—and the fact that the

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[11] *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

[12] *Ibid* at paras 119—120 (concurring judgment).

majority of the Supreme Court of Canada chose not to weigh in—lower court judges who are uncomfortable with domestic commercial arbitration may rely on the *Wastech* concurrence to bolster the precedential value of *Northland Utilities*. If this were to become a trend, it could roll back decades of progress with respect to how our courts treat domestic commercial arbitration, especially how it is to be distinguished from statutorily-regulated administrative and arbitral tribunals.