A question for another day: Wastech, Vavilov, and arbitration awards

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The question of whether the standard of review framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, applies to commercial arbitration is unclear. In a recent case, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, the majority of the Supreme Court of Canada decided to "leave [that] for another day."

Background

Wastech Services Ltd. (Wastech) moves and disposes of waste. In 1996, Wastech and the Greater Vancouver Sewerage and Drainage District (Metro) entered into a 20-year contract for the disposal of waste from the Greater Vancouver Regional District (the Contract).

Wastech agreed to remove and transport waste to three disposal facilities. Metro was responsible for allocating where the waste was to be disposed. The volume of waste allocated to each facility was a critical variable in calculating Wastech's compensation. In 2010, Metro significantly redirected the volume of waste between the three facilities, such that it was impossible for Wastech to achieve its target operating revenue.

The Contract contained an arbitration clause. Wastech alleged Metro breached the Contract and referred the dispute to arbitration. The arbitrator ruled in favour of Wastech.

On appeal to the British Columbia Supreme Court, the arbitration award was overturned. The British Columbia Court of Appeal upheld the decision to overturn the award. Wastech then appealed to the Supreme Court of Canada.

No definitive answer on whether *Vavilov* applies to commercial arbitration

The *Wastech* case presented the Supreme Court of Canada an opportunity to clarify whether *Vavilov* changed the deferential standard of review framework applicable to

appeals of commercial arbitration awards, as set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32.

In *Vavilov,* the Supreme Court of Canada held that the appellate standard of review applies where the legislature provides a statutory appeal. The Court expressly stated that it was breaking from the administrative law standard of review framework set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The reasons, however, did not touch on the topic of commercial arbitration.

Since *Vavilov* was decided, three lines of case law have developed around the implications of the case on commercial arbitration:

- *Vavilov* applies;
- *Vavilov* does not apply; and
- *Vavilov* applies, but only if the court intervention is specifically called an "appeal."

This has led to uncertainty as to the correct interpretation of commercial arbitration legislation, since the court's only authority to intervene in arbitration is statutory – whether it is called an appeal or otherwise – unlike in administrative law, where the court's judicial review authority is constitutional.

The six-judge majority in *Wastech* held that they would "leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*." The majority reasoned that they did not have the benefit of submissions on the question, nor the assistance of reasons from the courts below. Notwithstanding the majority's decision to leave the question for later, they noted that *Vavilov* "does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration."

The minority in *Wastech* expressed concern with the current uncertainty in the law on this point, and was critical of the majority's decision to leave the question unresolved:

> Of no less concern are the implications of [the majority's] refusal to decide the appropriate standard of review, which risks undermining this Court's decision in *Vavilov* as it relates to statutory appeals. To leave this undecided is to invite conflict and confusion.[1]

The minority declared that *Vavilov* had displaced *Teal Cedar* and *Sattva*. They reasoned that the differences between commercial arbitration and administrative decision-making did not affect the finding that appellate standards of review apply to statutory rights of appeal as a matter of statutory interpretation. Further, the minority stated that factors justifying deference to an arbitrator are not relevant to the statutory interpretation exercise.

Takeaways

Although the minority's reasons may have significant persuasive effect on the courts below, the majority was clearly hesitant to apply the principles laid down in the

administrative law context to commercial arbitration without further and deeper consideration.

The majority's decision to wait for another opportunity to clarify the law in this area means that parties to arbitration should expect uncertainty when dealing with appeals of arbitration awards, and corresponding additional costs. Parties crafting arbitration agreements ought to carefully review appeal provisions in the commercial arbitration legislation across Canada and consider whether they want to take advantage of legislation that allows them to opt out of statutory appeals.

For further information, read BLG's article on the Supreme Court of Canada's reasons on the issue of good faith in contractual performance.

[1] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 122.

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