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Family

Importance of Vavilov to family law mediation/arbitration process

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(March 17, 2020, 12:29 PM EDT) -- The Supreme Court of Canada has recently taken the opportunity in the companion cases of *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 (*Vavilov*) and *Bell Canada v. Canada (Attorney General)* 2019 SCC 66 to revisit the treatment of appeals of administrative decisions as well as judicial review and has rewritten the law governing the following matters of administrative law: 1) the standard of review on a decision from an administrative decision maker; and 2) the scope of a "reasonableness review."

Vavilov is the first wholesale rewriting of administrative law since the 2008 SCC decision of *Dunsmuir v. New Brunswick* 2008 SCC 9. Most significantly, in the course of rewriting the law, the 7-2 majority of the SCC in *Vavilov* elevated the fact that there is a right of appeal from an administrative decision maker to a new stature: from now on appellate standards will be applied in all cases where there is a statutory right of appeal from an administrative decision maker.

Thus, where a right of appeal is provided, the applicable standard of review is to be determined with reference to the nature of the question and to the jurisprudence of the SCC on appellate standards of review.

This means that, in accordance with the previous SCC decision of *Housen v. Nikolaisen* 2002 SCC 33, a "correctness review" will be applied for all questions of law on appeal from an administrative decision maker; for questions of fact or mixed fact and law the appellate standard is a palpable and overriding error. This is as opposed to an administrative law review, where the more deferential standard of reasonableness is generally applied.

It has been argued in the aftermath of *Vavilov* that the legal principles in *Vavilov* would not apply to consensual arbitrators such as family law arbitrators participating in a mediation/arbitration process as they are not "administrative tribunals," and this is the conclusion in the recent Alberta case of *Cove Contracting Ltd. v. Condominium Corporation No. 012 5598* (*Ravine Park*) 2020 ABQB 106.

One of the first points to make is that both the majority and the minority in *Vavilov* refer throughout their judgments to "administrative decision makers" — they do not confine their remarks to administrative tribunals. The second point is that, in any event, the Alberta *Arbitration Act*, and many equivalent arbitration acts across the country, which govern the consensual arbitration of the family law med/arb process, refer to the "arbitral tribunal" throughout, even though there may be only one arbitrator. This argument and the conclusion in *Cove Contracting* would therefore not seem to be well-founded on these two bases alone.

There have been three lower court decisions to date considering whether *Vavilov* has changed the standard of review for consensual arbitrators from an administrative law review to an appellate review where there is a statutory right of appeal, and they have come to different conclusions — two out of the three apply the *Vavilov* principles to consensual arbitrators.

The first decision was issued in late January from the Manitoba Court of Queen's Bench. *Buffalo Point First Nation v. Cottage Owner's Association* 2020 MBQB 20 concerned a long-standing dispute between a First Nation and a cottage owner's association over an agreement whereby the cottagers paid fees to the First Nation. The agreement contained a binding arbitration provision. In 2011 Buffalo Point decided to enact taxation laws, which led to many years of arbitration with the cottage owners' association.

Buffalo Point appealed several arbitration awards and the reviewing court considered the issue of whether the arbitrator erred in law in concluding that he had jurisdiction to make the awards. The *Arbitration Act* of Manitoba provided a statutory right of appeal.

The court concluded that, in accordance with the new principles established in *Vavilov*, the standard of review of the arbitral award should be the appellate standard of correctness, not the more deferential reasonableness standard, (which had been set out in the prior Supreme Court of Canada cases of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 and *Teal Cedar Products Ltd. v. British Columbia* 2017 SCC 32 in the context of commercial arbitrators).

In the second lower court decision from the Alberta Court of Queen's Bench, *Cove Contracting*, Justice Grant Dunlop came to the opposite conclusion and continued to apply the reasonableness standard of review to a question of law arising from a commercial arbitration. *Cove Contracting* involved arbitration over whether a fixed price construction contract included the cost of electrical infrastructure.

The arbitrator concluded that the cost was included and Cove Contracting appealed. Essentially Justice Dunlop stated that if the Supreme Court of Canada in *Vavilov* had intended to overrule its previous authority of *Sattva* and *Teal Cedar* it would have said so — this notwithstanding the express statements in *Vavilov* that they were "recalibrating" administrative law, that the reasons in *Vavilov* should be looked to first and that older cases may have less precedential force (at para. 143).

Justice Dunlop further distinguished *Vavilov* as applicable only to administrative tribunals and not to consensual arbitrations, such as is the nature of a family law med/arb. In doing so, Justice Dunlop failed to address the explicit definition of arbitrators under the *Arbitration Act* of Alberta as "administrative tribunals," which, as noted, is a characterization that is made throughout the Act.

In the third decision, *Allstate Insurance Co. v. Ontario* (*Minister of Finance*) 2020 ONSC 830, a decision of Justice Breese Davies of the Ontario Superior Court of Justice, an insured suffered catastrophic injuries in a motor vehicle accident. Allstate denied coverage and the injured plaintiff was paid out by the Motor Vehicle Accident Claims Fund in accordance with the *Insurance Act* of Ontario.

The fund then took the position that Allstate had wrongly denied coverage and sued for reimbursement of the monies paid to the injured plaintiff. A consensual arbitration proceeded, governed by the *Arbitration Act* of Ontario, which had a statutory right of appeal. Justice Davies concluded that *Vavilov* had changed the law and the appellate standard of review would apply to an appeal of the arbitrator's award. Thus Davies concluded that, in view of the statutory right of appeal in the *Arbitration Act*, the standard of review was the appellate standard.

Why is this significant to the family law med/arb process? This is significant because the *Arbitration Act* of Alberta and the equivalent acts of many other provinces provide for a right of appeal from a consensual arbitrator. Thus, all reviews on a question of law from an arbitrator following a family law med/arb process will be on a correctness review, and reviews on matters of fact and mixed fact and law will be on the appellate standard of palpable and overriding error.

The significance of a correctness review is that it allows the reviewing court to substitute its own opinion as to what the outcome should have been in the place of the decision of the arbitrator. Thus, *Vavilov* may have wide impact on the family law med/arb process.

If a participant in a consensual arbitration may be subject to appeal to the courts pursuant to a statutory right of appeal, with the courts having the right to substitute their own opinion as to outcome if the standard of review is correctness, that is, on a question of law, with no deference to

the arbitrator, this may diminish the value of the arbitration. (The minority concurring opinion in *Vavilov* has characterized the majority's decision as a "eulogy for deference.")

A correctness review also has the potential of ballooning the expense of arbitration as judicial review may go from arbitrator to superior court to appellate court, with no deference shown to the arbitrator in the first instance. Has the goal of less expense and faster resolution by way of consensual arbitration when a correctness review is portended been kneecapped by *Vavilov*?

Thus *Vavilov*, if ultimately found to have application to consensual arbitrators, which is the view of two superior courts to date, will likely have a significant impact on the established family law med/arb process.

This is part one of a two-part series.

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