In the Court of Appeal of Alberta

Citation: McElgunn v Vermilion Energy Inc, 2026 ABCA 259

Date: 20260731
Docket: 2601-0094AC
Registry: Calgary

Between:

Julia McElgunn

Respondent
(Appellant)

- and -

Vermilion Energy Inc.

Applicant
(Respondent)

Reasons for Decision of
The Honourable Justice Jo'Anne Strekaf

Application for Permission to Appeal

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Overview

[1] The applicant employer is seeking permission to appeal a decision by a chambers justice that varied an arbitration award arising out of a wrongful dismissal claim brought by the respondent employee. The employer's application is brought pursuant to s 48 of the *Arbitration Act*, RSA 2000, c A-43.

[2] For the reasons that follow, the application for permission to appeal is denied.

Background

[3] The respondent employee was employed with the applicant, Vermilion Energy Inc, for approximately nine years. Her employment was terminated on August 24, 2022 without cause or reasonable notice. The parties agreed to arbitrate the notice period and damages to which the employee was entitled. The arbitrator issued a partial award in which he found the employee was entitled to ten months' notice and awarded her damages in lieu of notice (the arbitration award).

[4] One of the issues before the arbitrator was whether the employee was entitled to damages in lieu of receiving certain grants of shares under the Vermilion Incentive Plan (VIP). But for the employee's termination, those shares would have vested during the ten-month notice period (on April 1, 2023). In *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at para 55, the Supreme Court of Canada set out two questions that a decision-maker in such circumstances is required to consider:

(a) but for the termination, would the employee have been entitled to the bonus or benefit during the reasonable notice period; and

(b) if so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

[5] The arbitrator answered the first question in the affirmative, finding the employee would have been entitled to the shares during the notice period but for her termination.

[6] In considering the second question, the arbitrator concluded that the employee was bound by changes made to the VIP in 2020. Clause 6(g)(ii) of the 2020 VIP states:

> If a Grantee ceases to be a Service Provider as a result of being terminated other than a termination for cause, effective on the date that is 90 days after the Date of

> Termination and notwithstanding any other severance entitlements or entitlement to notice or compensation in lieu thereof, all outstanding Award Agreements and all unvested Share Awards (whether in whole or in part) credited to a Grantee's Share Award Account shall be terminated and all rights to receive a payment from the Corporation thereunder (whether in cash or Common Shares or any combination thereof) shall be forfeited by the Grantee, and the Grantee shall not be entitled to receive any payment (whether in cash or Common Shares or any combination thereof) or any other compensation in lieu thereof. For clarity, during the 90 day period following the Date of Termination and any notice period thereafter (whether actual or compensated in lieu thereof) the Grantee shall not be entitled to pro-rated vesting of any Share Awards or any other payment or compensation in lieu thereof.

"Date of Termination" is defined as "the actual date the Service Provider ceases to provide services to the Corporation, regardless of the reason for the cessation of services".

[7] The arbitrator concluded that clause 6(g)(ii) disentitled the employee to damages in lieu of the shares that would have vested during the notice period.

[8] The employee was granted permission to appeal two questions of law to the Alberta Court of King's Bench, pursuant to s 44(2) of the *Arbitration Act*:

> (a) did the Arbitrator breach procedural fairness by relying on the Board Amendment Provision despite it not being expressly pleaded or referred to by [the employer] Vermilion; and
>
> (b) did the Arbitrator err in law in applying part two of the *Matthews* test?

[9] The appeal proceeded before a chambers justice, who applied the "correctness" standard of review to both questions, relying on *Esfahani v Samimi*, 2022 ABKB 795. On the first issue, the chambers justice concluded the arbitrator did not violate the rules of procedural fairness by relying on the Board Amendment Provision to conclude that the 2020 Early Termination Provision was binding on the parties. However, on the second issue, the chambers justice found that the arbitrator erred in law by misapplying the second part of the *Matthews* test. The chambers justice concluded that the language of clause 6(g)(ii) did not "clearly and unambiguously" disentitle the employee to the shares, as required by *Matthews*. He varied the arbitration award accordingly: *McElgunn v Vermilion Energy Inc*, 2026 ABKB 188.

[10] The employer seeks a further appeal of the chambers justice's decision to a panel of this Court, pursuant to s 48 of the *Arbitration Act*. The employer's position is that the chambers justice: misapplied part two of the *Matthews* test; erred in reviewing the arbitrator's decision on a correctness standard rather than a standard of reasonableness; alternatively, exceeded the scope of the appeal, which is limited to questions of law, by adopting an interpretation of the contract that extended into questions of mixed fact and law.

[11] The essence of the questions for which permission to appeal is sought are (1) whether the chambers judge applied the correct standard of review, and (2) whether he erred in setting aside the arbitration award on part two of the *Matthews* test.

Application for permission to appeal pursuant to s 48 of the *Arbitration Act*

[12] The test for permission to appeal under s 48 of the *Arbitration Act* requires that there be an arguable error in the order appealed that affects the result. The test involves consideration of a number of factors:

(a) Is the question reasonably arguable;

(b) Is deciding the question likely to affect the result of the litigation;

(c) Is the answer likely to interest others or influence later cases; and

(d) Is there any independent reason not to relitigate the question.

ENMAX Energy Corporation v TransAlta Generation Partnership, 2020 ABCA 68, at para 21.

a. Are the questions reasonably arguable?

[13] The proposed appeal raises a reasonably arguable question with respect to the applicable standard of review on appeals from arbitration awards.

[14] There has been some inconsistency in the standard of review adopted by superior and appellate courts on appeals from commercial arbitration awards following the Supreme Court of Canada's decisions in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; and *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

[15] In Alberta, appellate standards of review were previously applied on appeals from arbitral awards under the *Arbitration Act*, meaning that a reviewing judge "was required to apply the correctness standard of review to the arbitrator's statements of law and the reasonableness or manifest error standard to the arbitrator's findings of fact": *Alberta (Minister of Infrastructure) v Nilsson*, 2002 ABCA 283 at para 37.

[16] In its 2014 decision in *Sattva*, the Supreme Court of Canada concluded that the reasonableness standard of review should be applied on an appeal of a commercial arbitration award under section 31 of British Columbia's *Arbitration Act*, RSBC 1996 c 55. That approach was confirmed by the Supreme Court's later decision in *Teal Cedar*. In its 2019 decision in

Vavilov, the Supreme Court revisited the standard of review to be applied to decisions of administrative tribunals, concluding there is a presumption of reasonableness review. The presumption can be rebutted in certain circumstances, including where the legislature has indicated it intends a different standard of review to apply, such as where there is a statutory appeal mechanism. In a statutory appeal, appellate review standards apply: *Vavilov* at para 17. *Vavilov* did not expressly address the standard of review on statutory appeals from the awards of commercial arbitrators. In *Wastech*, the majority of the Supreme Court expressly left that issue for determination on another day.

[17] Post-*Vavilov*, there is divided appellate authority on the applicable standard of review on statutory appeals from arbitration awards. Some appellate courts have applied the appellate standard (*Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1; *Vancouver School District No 39 v Kingsgate Property Ltd*, 2026 BCCA 98), while others have applied the reasonableness standard (*Buffalo Point First Nation v Buffalo Point Cottage Owners Association Inc*, 2025 MBCA 72).

[18] The question of whether the chambers justice applied the proper standard of review is reasonably arguable, as this Court has yet to consider which standard of review applies on an appeal from an arbitration award, following the Supreme Court's decision in *Vavilov*. It is worth noting that the Supreme Court of Canada has recently granted leave to appeal in the *Buffalo Point First Nation* case, so the issue may be addressed at that level in the near future: *Buffalo Point First Nation v Buffalo Point Cottage Owners Association Inc,* 2026 CanLII 73477 (SCC).

[19] Whether it is arguable that the chambers justice erred in his evaluation of the arbitrator's application of the second part of the *Matthews* test may depend, in part, on the applicable standard of review.

b. Is deciding the questions likely to affect the result?

[20] I am satisfied that the result before the chambers justice would not have been affected regardless of whether he applied a correctness or reasonableness standard of review to the arbitration award.

[21] As the chambers justice noted, the arbitrator correctly described the two parts of the *Matthews* test at para 40 of the arbitration award. The arbitrator further stated that to satisfy that test, the provisions of the plan "must unambiguously limit or remove [the employee's] common law rights", and "must be absolutely clear and unambiguous and must clearly cover the exact circumstances which have arisen": arbitration award at para 84. However, in considering the provisions the arbitrator failed to apply the central principles of the test. Instead, he applied conventional contract interpretation principles to the clause, stating:

> [90] *Reading Ms McElgunn's employment contract and the VIP text as a whole and giving the words used their ordinary and grammatical meaning, consistent with the*

> *surrounding circumstances known to the parties at the time of making the contract*, I conclude that provision 6(g)(ii) disentitles Ms McElgunn to have, or to have damages equal to the value of, the shares that would have vested April 2, 2023.
>
> [91] Ms McElgunn's Date of Termination was August 24, 2022 when she actually ceased to provide services to Vermilion. The date is determined regardless of the reason for the cessation of services, which I interpret to include all reasons including wrongful dismissal. *That provision along with "notwithstanding any other ... entitlement to notice or compensation in lieu thereof" is broad enough to include damages for breach of the implied requirement for reasonable notice.*
>
> [emphasis added]

[22] The arbitrator interpreted the provision as "broad enough" to include damages for breach of reasonable notice, but did not expressly find that the provisions at issue were "absolutely clear and unambiguous", as required by *Matthews*. For example, the arbitrator did not consider whether the definition of "Date of Termination" in the clause clearly and unambiguously includes the date notice was given, notwithstanding that the reasonable notice period had not expired.

[23] The failure of an arbitrator to apply a principle raises a question of law, although under the *Sattva* and *Teal Cedar* approach to standard of review such a question would generally be reviewed on the reasonableness standard: *Teal Cedar* at paras 63-65; *Sattva* at para 106. *Vavilov* instructs that a reasonable decision is based on a chain of analysis that is justified "in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. Where the arbitrator's analysis disregards a governing principle of the legal test, it cannot be reasonable.

[24] In his analysis of the arbitrator's decision, the chambers justice noted that he failed to apply the "absolutely clear and unambiguous" test required by the *Matthews* framework and set out the analytical errors that resulted. Although the chambers justice stated that he was considering whether the arbitrator's decision was correct, I am satisfied that the analysis of the chambers justice, with which I agree, also leads to the conclusion that the decision was unreasonable. The application of a different standard of review on appeal would not affect the result in this litigation.

c. Will determination of the questions likely to be of interest in future cases?

[25] Although the standard of review to be applied in Alberta on an appeal from an arbitral award has yet to be resolved at an appellate level, determination of that issue would not be necessary to decide this appeal.

[26] There is no evidence that this particular clause will be the subject of further litigation.

d. Are there independent reasons not to litigate the questions?

[27] The parties have already been through three court proceedings following the arbitration. Except in the limited circumstances contemplated in arbitration legislation, the policy behind that legislation as applied in the courts generally discourages judicial involvement when parties have elected to resolve their disputes through arbitration.

Conclusion

[28] The application for permission to appeal is denied.

Application heard on June 11, 2026

Reasons filed at Calgary, Alberta
this 31st day of July, 2026

Strekaf J.A.

Appearances:

R.J. Stack
for the Respondent

H.L. Treacy, KC
E. Oikawa
for the Applicant