INSPIRED BY *VAVILOV*, MADE FOR ARBITRATION: WHY THE APPELLATE STANDARD OF REVIEW FRAMEWORK SHOULD APPLY TO APPEALS FROM ARBITRAL AWARDS

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Vavilov re-imagined the law of judicial review in Canada. Among its most important changes, the Court held that rights of appeal impact the standard of review a court applies on judicial review. When an issue falls within the right of appeal, the appellate standards of review will apply (correctness on questions of law and palpable and overriding error on questions of fact and mixed fact/law). This paper explores the implications of this change for the world of arbitration. It argues that where arbitration legislation provides an appeal right and the parties have not excluded appeals in their arbitration agreement, reviewing courts should give effect to the parties' choice and apply the appellate standard of review. Put differently, parties can be assumed to understand that when they refer their matters to arbitration but provide for an appeal from the award(s), any appeal should be subject to the appellate standards of review. This conclusion is justified by one of the key principles underlying arbitration in the first place: party autonomy. The article outlines the state of the law before and after Vavilov. It then makes the argument that Vavilov's pronouncement on the standard of review for appeals and party autonomy go hand-in-hand.

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INTRODUCTION

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1], the Supreme Court of Canada attempted to do what most would think is impossible: untangle the challenges associated with judicial review of administrative action in Canada. Notably, the Court concluded that when a statute provides for an appeal from an administrative body's decision, the appellate standard of review framework described in *Housen v. Nikolaisen* applies.[2] The Court held that respect for legislative intent requires reviewing courts to treat an "appeal" of an administrative decision as a true appeal wherein questions of law are reviewed without deference.[3] This is because the legislature is presumed to appreciate the implications of its enactments.

One might ask what any of this has to do with arbitration. Eight provinces[4] and all three territories have adopted domestic arbitration legislation that, unlike their international counterparts, permit appeals on the merits of an arbitral award.[5] Until now, the Supreme Court's decision in *Sattva Capital Corp v Creston Moly Corp* governed the standard of review applicable to those appeals.[6] *Sattva* largely imported the administrative law standard of review framework, as defined in *Dunsmuir v. New Brunswick*[7], into the world of arbitral appeals. The Court specifically observed that aspects of administrative law "are helpful in determining the appropriate standard of

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

[2] *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

[3] *Ibid* at paras 8—9.

[4] The eight provinces are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, New Brunswick and Nova Scotia.

[5] The appeal provisions in these statutes are not all identical. For a breakdown of the differences, see Alexia Biscaro, "Domestic Commercial Arbitration Awards: To Appeal or Not Appeal?" (2018) 27 CAMJ 29.

[6] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 106 [*Sattva*].

[7] *Ibid*, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

review to apply in the case of commercial arbitration awards".[8] This meant that an arbitrator's legal conclusions were reviewable on the deferential "reasonableness" standard, [9] except in defined circumstances where the correctness standard would apply.[10]

Now, however, *Vavilov*'s holding on rights of appeal arguably changes the equation. Ontario's *Arbitration Act, 1991*, [11] and its equivalents in five other provinces [12] that also adopted the Uniform Law Conference of Canada's (ULCC) *Uniform Arbitration Act (1990)*, provide a right of appeal from arbitral awards in certain circumstances. [13] So do the domestic arbitration statutes in British Columbia, Prince Edward Island, and the Territories. [14] This means that if *Vavilov* alters the standard of review for arbitral awards governed by those statutes, the correctness standard applies to questions of law, and the palpable and overriding error standard to questions of fact and mixed fact and law.

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[8] *Ibid* at para 106.

[9] *Sattva, supra* note 6 at para 106.

[10] *Ibid*.

[11] *Arbitration Act, 1991*, SO 1991, c 17 [*Arbitration Act, 1991*].

[12] The five other provinces are Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia (only for commercial arbitration).

[13] We will refer to these as the "**ULCC Jurisdictions**" and their statutes the "***ULCC Acts***". The *Arbitration Act, 1991* and its counterparts in the other ULCC jurisdictions have identical or similar appeal provisions.

[14] *Arbitration Act*, SBC 2020, c 2, s 59 [*BC Act*]; *Arbitration Act*, RSPEI 1988, c A-16, s 21 [*PEI Act*]; *Arbitration Act*, RSNWT 1988, c A-5, s 26-30 [*NWT Act*]; *Arbitration Act*, RSY 2002, c 8, s 25-29 [*Yukon Act*]; *Arbitration Act*, RSNWT (Nu) 1988, c A-5, s 26-30 [*Nunavut Act*].

But it is not so clear that *Vavilov* applies to arbitration, and this question has already divided the courts.[15] There are good reasons, explored in *Sattva*, why arbitral and administrative decision-making are not the same enterprise. For example, transposing *Vavilov*'s holding on rights of appeal arguably minimizes the role of specialized expertise, a concept important to justifying deference in arbitration since the parties often choose, or at least have a say in choosing, their arbitrator(s).[16] Applying a correctness standard would also arguably diminish efficiency and finality, which are considered hallmarks of arbitration as noted in *Teal Cedar Products Ltd. v. British Columbia*[17], *Sattva*'s successor case.

Contrary to this conventional view, we argue that a faithful application of fundamental arbitration law principles—party autonomy and, relatedlty, the arbitral tribunal's presumed expertise—justifies rejecting *Sattva* and applying the *Housen* framework to appeals from arbitral awards, as *Vavilov* suggests. *Vavilov*'s refreshing and renewed focus on legislative intent forms the basis for this shift in administrative law. We argue the legislative intent underpinning appeal provisions in arbitration statutes militates in favour of the same conclusion. This is especially so for the *ULCC Acts*, which emphasize the role of party autonomy in designing the dispute resolution process to a

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[15] For cases concluding that Sattva no longer applies and has been overtaken by *Vavilov*, see *Allstate Insurance Company v Her Majesty the Queen*, 2020 ONSC 830 [*Allstate*], and *Buffalo Point First Nation et al v Cottage Owners Association*, 2020 MBQB 20 [*Buffalo Point*]. For cases concluding that *Sattva* does apply, see *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106 [*Cove Contracting*], and *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 [*Ontario Lottery and Gaming*]. These are addressed in subsection III below.

[16] *Sattva*, *supra* note 6 at paras 104-105. The parties can also define the arbitrators' required qualifications in their arbitration agreement.

[17] See e.g. *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 1 [*Teal Cedar*].

greater degree than the other statutes allowing for appeals.[18] In other words, when it comes to rights of appeal, arbitration and administrative law find harmony because of their shared focus on legislative intent. The sole exception to our argument would be where the parties expressly contemplate a deferential standard in their arbitration agreement, a choice one of us has argued ought to be respected.[19]

The upshot of our argument is that *Vavilov*, not *Sattva*, is most consistent with the principle of party autonomy. For that reason, and before proceeding, it is important to take on a popular criticism against arguments that *Vavilov* impacts private arbitration. It goes something like this: *Vavilov* is an administrative law case that does not mention *Sattva* by name or arbitration generally. There is therefore no basis for saying it overrules *Sattva*. This criticism, to the extent it is launched against the arguments made here, is misplaced.

First, *Sattva* itself directly analogizes to and borrows from the administrative law framework. It relies entirely on *Dunsmuir* as the basis for applying a reasonableness standard to appeals from arbitral awards on questions of law. The reasonableness standard itself, as applied in arbitration-related appeals, is one in the same with the administrative law standard described in *Dunsmuir* and subsequent cases.[20] We therefore find this critique somewhat curious.

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[18] Our overall position is nonetheless consistent with the *BC Act, PEI Act, NWT Act, Yukon Act* and *Nunavut Act* as well, albeit less forcefully for reasons that will become clear below.

[19] James Plotkin, "The Standard of Review on Appeals from Domestic Arbitral Awards Should be Open to Party Agreement", (2018—19) 5:7 MJDR 170. The following discussion presupposes the parties have not so decided. In other words, this paper sets out the 'default' position on the standard of review.

[20] Several cases dealing with appeals from arbitral awards cite *Dunsmuir* and subsequent cases directly for a description of reasonableness. See e.g.

Second, and building on the first point, to the extent *Vavilov* modifies *Dunsmuir*, and the understanding of when the appellate standard does or does not apply, it arguably modifies *Sattva* as well by transitive property. This is not strictly speaking a position we advance here since ours is an argument from principle rather than precedent. This position is nonetheless a sensible one and at least merits consideration.

Third, and as noted, we do not argue *Vavilov* 'overrules' *Sattva* directly. Rather, we argue the principles espoused in *Vavilov*, particularly those going to the legislative intent in including appeal clauses in statutes, apply *mutatis mutandis* to private arbitration. The rationale for applying the appellate standard of review framework expressed in *Vavilov* is consistent with the underlying principles nourishing arbitration law in Canada. It is this consistency between the legislative intent principle as applied in the administrative law and arbitration law contexts that makes *Sattva* a questionable precedent.

This last point is critical. We do not make the mistake, arguably made in *Sattva*, of hastily porting administrative law principles into the arbitration world. On the contrary, our justification is very much rooted in arbitration law. We also avoid relying on an impoverished version of party autonomy that bases the justification for deference on the bare decision to arbitrate.

We begin by unpacking what *Vavilov* says about appeal clauses generally (**I**). We then review the pre-*Vavilov* standard of review framework applicable to arbitral appeals as set out in *Sattva* (**II**). Next, we will analyze several of the post-*Vavilov* case law both for and against its application to appeals from arbitral awards (**III**). Finally, we argue that, in light of *Vavilov*'s "legislative intent" rationale as applied in conjunction with

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Sky Solar (Canada) Ltd v Marnoch Electrical Services Inc, 2016 ONSC 1295 at paras 14, 15; *Kerr v King's Landing*, 2015 ONSC 84 at para 26; *Healthcare Employees' Benefit Plan et al v Terhoch*, 2015 MBQB 56 at para 30.

arbitration law principles, *Sattva* is bad law and should be overtaken (**IV**).

I. VAVILOV AND THE LEGISLATIVE INTENT EMBEDDED IN "APPEAL" CLAUSES

In *Vavilov*, the Supreme Court revisited the law on substantive review of administrative decision-making in two main respects: 1) how the relevant standard of review is selected[21]; and 2) how to apply it.[22] Since our position here relates only to the applicable reviewing framework discussion of *Vavilov*, we address only that aspect.

Prior to *Vavilov*, *Dunsmuir* and its progeny governed the administrative law standard of review framework.[23] *Dunsmuir* came at a time when the law of judicial review was, like it was before *Vavilov*, in disarray. The problems with the standard of review framework came primarily from the lack of predictability generated by the former "pragmatic and functional" approach.[24] *Dunsmuir* thus attempted to redefine the law of judicial review to promote predictability. Famously, it

[21] *Vavilov*, *supra* note 1 at para 16.

[22] *Ibid* at para 73.

[23] See, specifically, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*]; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton East*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31.

[24] See, for example, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 27, 160 DLR (4th) 193; *Dunsmuir*, *supra* note 7 at para 43: the pragmatic and functional approach provides "...little real on-the-ground guidance…"

reduced the number of standards of review from three to two.[25]

When determining the standard of review, *Dunsmuir* held that certain categories and contextual factors will point to one or the other standard. For example, where a decision-maker interprets its home statute, "[d]eference will usually result."[26] Certain other categories would point to correctness review.[27] Where the categories do not produce an answer, courts looked to contextual factors.[28]

Importantly, *Dunsmuir* was also centrally focused on expertise as a reason for deference.[29] Later cases from the Supreme Court doubled-down. For example, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* hardened *Dunsmuir*'s category of home statute interpretation into a *presumption* of reasonableness whenever a decision-maker interpreted her home statute.[30] In this sense, expertise was a defining feature of the deference-driven standard of review analysis pre-*Vavilov*.

This was one of the fundamental problems the Court faced in *Vavilov*,[31] when it indicated it would revisit its precedents on

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[25] *Dunsmuir, supra* note 7 at para 45: collapsing the "patent unreasonableness" standard and the "reasonableness" standard into one reasonableness standard.

[26] *Ibid* at para 54.

[27] *Ibid* at para 58.

[28] *Ibid* at para 55.

[29] *Ibid* at para 49.

[30] *Alberta Teachers*, *supra* note 23 at para 41. See also *Edmonton East, supra* note 23.

[31] *Vavilov*, *supra* note 1 at para 7: "However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldly."

the law of substantive review.[32] The Court's starting point when it came to selecting the standard of review was a presumptive standard of reasonableness, justified only by the legislative design choice to create an administrative actor. [33] In other words, under *Vavilov*, the Court does away with expertise as a reflexive reason for deference.[34]

The *Vavilov* reasonableness presumption is rebuttable. Most significant for our purposes, where the legislature indicates it prefers a different standard of review, courts must follow that legislative signal. The legislature can signal so in two ways: 1) by actually legislating a standard of review (as British Columbia has)[35]; or 2) creating a statutory right of appeal to a court.[36] The Court held that where the legislature has specified a right of appeal, it is telling the reviewing court it is "to perform an appellate function with respect to that decision". [37] This "expressed intention" by the legislature "necessarily rebuts the blanket presumption of reasonableness review".[38]

The legal justification for this treatment of appeal rights boils down to the so-called "presumption of consistent expression".[39] So goes the argument, when a legislature uses the word "appeal" in a statute, the same meaning of that word will presumptively apply across statutory contexts. Put differently, there is no reason to assume that "appeal" means anything different in an administrative law statute than in a commercial

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[32] *Ibid* at para 1.

[33] *Vavilov*, *supra* note 1 at paras 23—24, 30.

[34] *Ibid* at para 31.

[35] *Vavilov*, *supra* note 1 at para 35.

[36] *Ibid* at paras 36—52.

[37] *Ibid* at para 36.

[38] *Ibid*.

[39] *Ibid* at para 44.

or criminal law statute.[40] In these judicial contexts, courts have held that the word "appeal" invites the appellate standards of review, namely those expressed in *Housen*: non-deferential correctness on questions of law and the deferential palpable and overriding threshold on questions of fact and mixed fact and law.[41] For the Court in *Vavilov*, there is no reason to conclude otherwise when the legislature uses the word "appeal" in a statute delegating authority to a decision-maker.

This summary highlights two aspects of the *Vavilov* framework deserving attention for our purposes. First is the sidelining of expertise as a reflexive reason for deference. Expertise is no longer automatically equated to deference in judicial review of administrative action because it is pragmatically difficult to apply. As we shall point out below, though expertise still performs an important function in arbitration, it does not *always* provide the degree of justification for deference *Sattva* suggests. Second, the Court's treatment of rights of appeal affects the framework for appeals from arbitral awards, which is consistent with the bedrock party autonomy principle.

II. THE PRE-VAVILOV STANDARD OF REVIEW FRAMEWORK FOR ARBITRAL APPEALS

The paragraphs in *Sattva* dedicated to the standard of review on appeals from arbitral awards are few, but dense.[42] Before landing on the *Dunsmuir* reasonableness standard, the Court outlined some differences and similarities between judicial review of administrative action and appeals from arbitral awards.

In terms of differences, Rothstein J noted that "parties engage in arbitration by mutual choice, not by way of a statutory

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[40] *Ibid*.

[41] *Housen*, *supra* note 2 at paras 8—37.

[42] *Sattva*, *supra* note 6 at paras 103—106 (para 102 falls under the standard of review section in the reasons but is merely expository).

process".[43] A corollary of this is that parties enjoy significant autonomy in designing their dispute resolution process. This includes selecting the number and often identity of arbitrators, something that does not happen in judicial review of administrative action.

Despite these differences, Rothstein J found the *Dunsmuir* framework largely apposite to arbitral appeals:

> Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of the dispute or are otherwise qualified in a manner that is acceptable to the parties.[44]

Based on these points of concordance, particularly the focus on expertise, Rothstein J concluded that "aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards".[45] Expressly adopting the holding in *Alberta Teachers Association*, Rothstein J imported the *Dunsmuir* framework into the world of arbitration appeals:

> In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central

[43] *Ibid* at para 106.

[44] *Sattva*, *supra* note 6 at para 105.

[45] See *Sattva*, *supra* note 6 at para 105 (though note that *Sattva* has not only been applied in the context of *commercial* arbitration awards).

> importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.[46]

The Court later confirmed this framework in *Teal Cedar*[47], which involved a statutorily mandated arbitration process. Both *Sattva* and *Teal Cedar* arise from disputes under British Columbia's domestic arbitration statute, which only permits appeals on questions of law.[48] This is significant for the reasons expressed in subsection IV below.

III. THE POST-VAVILOV CASES ON STANDARD OF REVIEW

In the months following *Vavilov's* release, four lower court cases emerged considering whether it alters the standard of review framework set out in *Sattva*.[49] These are: *Buffalo Point First Nation et al. v. Cottage Owners Association* [50] out of Manitoba, *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*[51] out of Alberta, and *Allstate Insurance Company v. Her Majesty the Queen*, and *Ontario First Nations*

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[46] *Ibid* at para 106.

[47] *Teal Cedar, supra* note 17.

[48] Except for family arbitration awards which, at the time, were also appelable for errors of mixed fact and law. Appeals on pure questions of fact appear to remain unavailable in either context. BC has since modified the *BC Act* such that family arbitrations are no longer contemplated and are dealt with in another law.

[49] On October 7, 2020, the Court of Appeal for British Columbia issued a decision in which it alluded to the question of whether *Vavilov* applies to appeals from arbitration awards. However, the Court ultimately left the matter for another day: *Nolin v Ramirez*, 2020 BCCA 274.

[50] *Buffalo Point, supra* note 15.

[51] *Cove Contracting, supra* note 15.

(2008) Limited Partnership v Ontario Lottery and Gaming Corporation, both from Ontario.[52]

The Courts in *Buffalo Point First Nation* and *Allstate Insurance* concluded that the appellate review framework did apply as per *Vavilov*. The Courts in *Cove Contracting* and *Ontario Lottery and Gaming* held the opposite. All of these courts were interpreting *ULCC Acts*.

Since then, several decisions, including from appellate courts, have considered the issue. Among these is a concurring opinion in the Supreme Court of Canada.[53] All of the appellate courts have come out in favour of reading *Vavilov* as applying to appeals from arbitral awards.

We begin by discussing the first wave of cases considering *Vavilov*'s application to appeals from arbitral awards. We then turn to two more recent and important appeal decisions: *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, from the Supreme Court of Canada, and *Northland Utilities (NWT) Limited v Hay River (Town of),* from the Northwest Territories Court of Appeal.[54]

In *Buffalo Point First Nation*, the Manitoba Court of Queen's Bench held that *Vavilov* prescribed the relevant standard of review for arbitral appeals.[55] The underlying dispute pertained to a land lease between a First Nation and a cottage owners

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[52] *Allstate, supra* note 15; *Ontario Lottery and Gaming, supra* note 15.

[53] See *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*] (concurring opinion); *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 [*Northland Utilities*]; *Travelers Insurance Company of Canada v CAA Insurance Company*, 2020 ONCA 382 [*Travelers Insurance*]; *Broadband Communications North Inc v 6901001 Manitoba Ltd*, 2021 MBQB 25; *Intact v Dominion and Wawanesa*, 2020 ONSC 7982.

[54] *Wastech, supra* note 53; *Northland Utilities, supra* note 53.

[55] *Buffalo Point, supra* note 15 at para 48.

association. In addressing the standard of review, the Court relied on the fact that the appeal at issue flowed from statute, which prompted it to apply *Vavilov* on a one-to-one basis:

> Applied to these applications, s.44(2) of the Arbitration Act expressly states "a party may appeal an award to the court…" Following the Supreme Court's *dicta*, the standard of review should be the appellate standard of correctness, not the reasonableness standard normally associated with a judicial review.[56]

In *Allstate Insurance*, the issue was whether an insurer had properly cancelled a policy.[57] As a preliminary issue, the Court assessed "whether the Supreme Court of Canada's decision in [*Vavilov*] change[s] the applicable standard of review in this case".[58] The Court noted that until now, the general standard of review was reasonableness for arbitral awards.[59] However, it observed that under section 45 of the *Arbitration Act, 1991* "the review of an insurance arbitration is styled as an appeal…".[60] As a result, based on *Vavilov*, the Court concluded that the standard of review must be revisited.[61] Since the appeal in question was a "statutory appeal", the appellate standards applied.[62] This was true, said the Court, even though the parties could circumscribe the right of appeal.[63] The bottom line is that since the case arrived at the Court via what was characterized as a statutory right of appeal, the appellate standards of review applied.

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[56] *Ibid.*

[57] See *Allstate*, *supra* note 15 at para 6.

[58] *Ibid* at para 8.

[59] *Ibid* at para 12.

[60] *Ibid* at para 13.

[61] *Ibid* at para 19.

[62] *Ibid* at para 21.

[63] *Ibid.*

In *Cove Contracting*, the Alberta Court of Queen's Bench decided, expressly, that *Vavilov* did not overtake *Sattva*.[64] At issue in *Cove Contracting* was an arbitration agreement interpreting a construction contract. The Court ultimately held *Sattva* still applied even in light of *Vavilov*. It reached this conclusion for several reasons. First, *Vavilov* did not mention *Sattva*.[65] Second, the Court offered a classic argument that, because arbitration is not governed by the same principle of legislative intent (in that parties contract to have arbitration), *Vavilov*'s underlying premise did not apply to commercial arbitration.[66] Third, and as a related argument to the first point, *Vavilov*'s comments on applying pre-*Vavilov* precedent did not reference the arbitral standard of review applicable to appeals from commercial arbitral awards. As a result, to the Court, *Sattva* remained good law.

Finally, there is *Ontario Lottery and Gaming*, the second Ontario case dealing with the issue.[67] The appeal in that case came to the Court by way of a consensual arbitration (i.e. not prescribed by statute). The Court interpreted this as meaning the appeal was not statutorily mandated.[68] The Court found this distinction important. Unlike in *Allstate*, where the appeal was held to have been statutorily mandated, the Court distinguished the arbitration at issue as purely contractual:

> The decision in *Allstate* does not stand for the broad proposition advanced by Ontario that *Vavilov* has changed the standard of review that is to be applied generally to appeals from commercial arbitration decisions because the

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[64] *Cove Contracting, supra* note 15 at para 12.

[65] *Ibid* at paras 6, 10.

[66] *Ibid* at para 7.

[67] *Ontario Lottery and Gaming, supra* note 15.

[68] *Ibid* at para 66.

> decision in *Allstate* only applies to statutorily mandated appeals from arbitration decisions.[69]

The Court went on to distinguish *Vavilov* along the same lines as the Alberta court in *Cove Contracting*. Since *Vavilov* "only applies to administrative law and makes no reference to commercial arbitrations",[70] and does not refer to either *Sattva* or *Teal Cedar*,[71] it would be odd to transpose *Vavilov* into the arbitral context. Furthermore, since *Vavilovian* deference "derives from constitutional considerations that justify deference by the judiciary to the legislature," and commercial arbitration does not, imposing the appellate standards of review would frustrate the parties' "contractual intent," which itself justifies deference.[72] The Court went on to conclude that since the legislative intent branch of *Vavilov*'s reasoning does not apply, *Vavilov* itself is inapplicable to commercial arbitrations.

In our view, the conclusions in *Cove Contracting* and *Ontario Lottery and Gaming* are fundamentally flawed, for the reasons given below. Based on the analyses in both cases, there is no indication any of our arguments for applying *Vavilov*'s rationale were before those Courts. Indeed, the question as framed in these cases appears to be where *Vavilov* "overrules" *Sattva* rather than what is argued for here—that its rationale *should* cause *Sattva* to wither away.

In addition to the general propositions below, there is some cause for concern in the way the Ontario Superior Court of Justice has treated the issue so far. Though the Court in *Allstate* got it right in applying the *Housen* framework, we disagree with the suggestion, picked up by the same Court in *Ontario Lottery and Gaming*, that *Housen* applies only when a particular statute

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[69] *Ibid* at para 67.

[70] *Ontario Lottery and Gaming, supra* note 15 at para 68.

[71] *Ibid* at para 71.

[72] *Ibid* at para 72.

(e.g. the *Insurance Act*) provides for arbitration.[73] With respect, the Court in *Ontario Lottery and Gaming* was simply incorrect that the appeal in *Allstate* was a "statutorily mandated appeal" [74], to the extent this purports to distinguish it from an appeal where the arbitration is not mandated by law.

The substantive legislative regime in *Allstate*—the *Insurance Act* and O. Reg. 283/95: *Disputes Between Insurers*—is silent on appeals. Whether and to what extent an award dealing with a claim under the *Insurance Act* may be appealed is, as in other arbitrations under the *Arbitration Act, 1991* (and the other statutes with appeal provisions), up to the parties.[75] Although the expression holds little if any explanatory power in this discussion[76], one can fairly call the arbitration that took place in *Allstate* a "statutory arbitration". But it is categorically wrong to classify the *appeal* from the award in *Allstate* as a "statutory appeal" to distinguish it from an appeal arising out of a consensual arbitration.[77]

The appeals in *Allstate* and *Ontario Lottery and Gaming* occurred because of the language the parties included in their arbitration agreements. Both agreements could have excluded all appeals. The inquiry into whether an arbitral award is subject to appeal does not end with the statute's appeal provision; it is

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[73] *Allstate*, *supra* note 15 at para 20.

[74] *Ontario Lottery and Gaming, supra* note 15 at para 67.

[75] The Court implicitly recognizes this by referring to section 45 of the *Arbitration Act, 1991* as the statutory footing for the appeal: *Allstate*, *supra* note 15 at para 20.

[76] Based on our arguments, there is no principled basis for distinguishing between a statutorily mandated arbitration and a contractual arbitration when, in both cases, the parties can decide the scope of any appeal or prohibit them altogether.

[77] *Allstate*, *supra* note 15 at para 20; *Ontario Lottery and Gaming, supra* note 15 at para 67.

in all cases[78] up to the parties and depends upon the language in their arbitration agreement. Incidentally, the arbitration agreements at issue in both *Allstate* and *Ontario Lottery and Gaming* provided for expansive rights of appeal to include appeals on factual matters.[79]

Despite the lower court split, newer appellate case law demonstrates that there is at least some appetite for the argument that the appellate standards of review should apply to appeals from arbitral awards.

Consider first *Wastech*, which arose out of a consensual arbitration.[80] At the Supreme Court, the parties raised the issue of the standard of review applicable to the arbitrator's decision.[81] Kasirer J, for the majority, noted that (according to the Supreme Court's jurisprudence including *Sattva*), "the standard of review applicable in appeals under s 31 of the *Arbitration Act* is reasonableness".[82] For Kasirer J, *Vavilov* seemed to be inapplicable: it "does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration."[83] While this last statement—controversial as it is—was

[78] Commercial cases, that is. Under several statutes, the parties cannot exclude appeals from family arbitration awards.

[79] *Allstate*, *supra* note 15 at para 21. The parties allowed for appeals on law, mixed questions of fact and law and questions of fact; *Ontario Lottery and Gaming, supra* note 15 at para 64. The parties allowed for appeals on questions of law and questions of mixed fact and law.

[80] *Wastech, supra* note 53 at para 18.

[81] The intervenor, the Attorney General of British Columbia, also made submissions on this point.

[82] *Wastech, supra* note 53 at para 45, excepting cases where the question "is one that would attract the correctness standard…"

[83] *Ibid*.

unsupported by Kasirer J, he and the majority opted to leave *Vavilov's* effect on *Sattva* and *Teal Cedar* for another day.[84]

Writing for themselves and Côté J, Brown and Rowe JJ concurred separately, in part to deal with the standard of review issue head on. For Brown and Rowe JJ, the fact that the legislature provided for a statutory right of appeal from arbitral awards in the *BC Act* was the entire story.[85] This is because a statutory right of appeal, as we will argue below, contains within it an assumption "as a matter of statutory interpretation"—the appellate standards of review apply when the legislature uses the word "appeal."[86] Functional reasons for arbitral deference, "notably respect for the parties' decision in favour of alternative dispute resolution and selection of an appropriate decision-maker, are not relevant to this interpretive exercise."[87] All that is relevant "are the words chosen by the legislature, and giving effect to the intention incorporated within those words."[88] This was the basis of *Vavilov's* conclusion that the appellate standards of review apply when the legislature uses the word "appeal"—and "[c]oncluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein".[89]

This burgeoning disagreement at the Supreme Court is representative of a larger discussion unfolding in the appellate courts on this issue. *Northland Utilities*, decided weeks before *Wastech*, is indicative. In that case, Northland Utilities appealed a decision of an arbitrator, brought under the *NWT Act* pursuant to contract providing a full right of appeal—on law, facts and

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[84] *Ibid* at para 46.

[85] *Wastech*, supra note 53 at paras 117—122.

[86] *Wastech, supra* note 53 at para 119.

[87] *Ibid* at para 120.

[88] *Ibid*.

[89] *Ibid*.

mixed fact and law—in the arbitration agreement.[90] At the Court of Appeal, one of the questions was whether the lower court judge correctly applied the reasonableness standard to the arbitrator's decision, despite the fact that, following *Vavilov*, the case was brought to the court via a standard statutory right of appeal.[91]

The NWTCA, seemingly rebuffing the view soon to be expressed by Kasirer J, concluded that *Vavilov*'s silence on commercial arbitration did not mean that the Court intended the reasonableness standard to continue to apply to commercial arbitration. Instead, the Court held that the standard of review must be decided by looking at *Vavilov* itself,[92] which presented the answer: the appeal provision in the relevant arbitration statute contains within it the application of the appellate standards of review.[93]

Importantly, the NWTCA grounded this decision in the principle of party autonomy in a passage that supports our argument in this paper:

> [43] The ability of parties to consensually participate in arbitration would also not be affected by the adoption of an appellate standard of review in relation to appeals arising under legislation akin to the *Arbitration Act*, which allows appeals only where contracting parties have agreed to include a right of appeal as a term of their contract; see *CTV Act*, s 91(5); *Arbitration*

[90] *Northland Utilities*, *supra* note 53 at para 2.

[91] *Ibid* at para 33.

[92] *Ibid* at para 37. Incidentally, this is exactly what the Supreme Court prescribes in *Vavilov* when it asks lower courts to determine whether an existing Supreme Court precedent is consistent with *Vavilov*: see *Vavilov*, supra note 1 at para 143: "A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applied to that case."

[93] *Ibid* at para 38.

> *Act*, ss 26, 27. The parties are free to sign an agreement which does not contain a right of appeal should they so choose.

In this way, *Northland Utilities* is a good starting place for the heart of our argument: party autonomy and the appellate standards of review can reside together.

IV. VAVILOV'S UNDERLYING RATIONALE BASED ON LEGISLATIVE INTENT APPLIES TO APPEALS FROM ARBITRAL AWARDS

Having set out the post-*Vavilov* jurisprudence on the arbitral appeal standard of review framework, we now turn to our normative argument: consistent with the legislative intent rationale espoused in *Vavilov,* appeals from arbitral awards under the *ULCC Acts* should also follow the appellate standard of review. This is for two reasons. First, *Vavilov*'s treatment of expertise, contrary to potential arguments, is not inconsistent with the party autonomy principle. Following from this, *Sattva*'s reliance on arbitral expertise to justify deference in all cases falls short. Second, *Vavilov*'s treatment of appeal clauses as evincing a legislative intent that the appellate review framework applies finds equal effect in the world of arbitration.

Uniting these two arguments is a simple insight. Giving effect to the legislature's inclusion of an "appeal" provision in the *ULCC Acts* (and to a lesser extent the *BC Act* and *PEI Act*), one the parties have unfettered discretion to modify or exclude, is wholly consistent with party autonomy, one of arbitration law's most fundamental principles. It follows that *Sattva* and *Teal Cedar* should be looked upon with suspicion.

Independent of the *Vavilov*-inspired rationale for applying *Housen* to appeals from arbitral awards, *Sattva's* doctrinal value is suspect for two further reasons, the first of which applies to all the domestic arbitration statutes providing for appeals: 1) *Sattva* rests on an incorrect assumption about how arbitral tribunals are often appointed; and 2) the *BC Act*, which was

before the Court in *Sattva* and *Teal Cedar*, materially differs from the *ULCC Acts* in the balance struck between party autonomy, on one hand, and finality and efficiency, on the other.[94] These critiques are enmeshed within our affirmative position, and we address them in the following sections setting out the arguments from expertise and legislative intent, respectively.

1. Expertise

Vavilov dethroned expertise as a basis for deferring to administrative decision-makers. Although expertise is still a relevant concept in arbitration law, it should not be used uncritically as a stand-alone or blanket basis for deference; the analysis is more nuanced. Indeed, *Sattva* proceeds on the false premise that parties to an arbitration agreement always select the identity and personal characteristics of the arbitrator(s) who decide their disputes.[95] First, this is not necessarily so. Second, even when they do, this does not always mean the parties intended deference on all matters.

On the first point, parties generally do not select arbitrators by name in their arbitration agreements. Although this is possible, it is ill-advised since the named individual's inability or unwillingness to act when a dispute arises could imperil the arbitration agreement.[96] When this happens, the arbitration

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[94] The *PEI Act* differs from the *ULCC Act* in a similar way. Although the *PEI Act* and *BC Act*'s appeal provisions differ, an exhaustive comparative analysis of all these statues tiles beyond the scope of this paper. Given the Supreme Court of Canada's case law on this point comes from BC, we focus on the *BC Act* when differentiating the *ULCC Acts* from the non-*ULCC Acts* with appeal provisions.

[95] *Sattva*, *supra* note 6 at para 104.

[96] The term "pathological arbitration clause" is attributed to Frédéric Eisemann, "La clause d'arbitrage pathologique" in Associazione Italiana per l'Arbitrato, ed, *Arbitrage Commercial – Essais in Memoriam Eugenio Minoli* (Turin: Unione tipografico-editrice torinese, 1974) 129 at 162—189. The death, incapacity or otherwise unwillingness of a named individual to act as arbitrator has been recognized as a species of pathological clause. See e.g. *ACC Ltd v Global Cements Ltd*, (2012) 7 SCC 71 (Supreme Court of India). See

agreement may be considered 'pathological' and declared void[97] or incapable of being performed.[98] Further, parties sometimes exhibit recalcitrance and refuse to cooperate in moving an arbitration forward. Even when both parties wish to arbitrate, they might not agree on one or more individuals to act as arbitrator(s). In such cases, the court or some other appointing authority might be required to step in and designate an arbitrator that the parties have not themselves chosen.[99]

More importantly, even when parties do select their arbitrator(s), their decision is not necessarily based on *legal* expertise. Sometimes disputes are highly technical. In such cases, parties might be inclined to select a non-lawyer arbitrator based on his or her subject-matter expertise.[100] Likewise, in faith-based arbitrations, the arbitrator(s) may be chosen for their expertise in a religious body of law, such as Sharia[101] or

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also Gary B Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2014) at 844.

[97] See e.g. *Arbitration Act, 1991 supra* note 11, s 7(2).

[98] *UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985) , with amendments as adopted in 2006 (effective 7 July 2006), art 8(1).

[99] E.g. *Arbitration Act, 1991 supra* note 11, s 10(1): "The court may appoint the arbitral tribunal, on a party's application, if, (a) the arbitration agreement provides no procedure for appointing the arbitral tribunal; or (b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do."

[100] Courts have held that, when it comes to review of arbitral awards, there is no automatic distinction between lay and legally trained arbitrators. See e.g. *Manitoba (Attorney General) v Kelly*, 1920 CanLII 667 (MB CA), citing *Russell on Arbitration and Awards*, 9th ed at 210; *Re Babcock & Wilcox Canada Ltd et al and Sheet Mitai, Workers International Association Local 437*, 1975 CanLII 1126 (NB CA), citing *Russell on The Law of Arbitration* at 367.

[101] E.g. *Mroue v Mroue*, 2016 ONSC 2992, aff'd 2017 ONCA 517.

Halacha[102], not applicable aspects of secular law. A rabbi might be well-studied in Jewish law governing the substance of the dispute, but not secular law that might, depending on the parties' agreement, govern the process. These include the law of limitations, evidence and procedure.[103] It is reasonable for parties desiring arbitration's efficiency and other perks like privacy to nevertheless prevent a non-lawyer arbitrator from having the last word on pure questions of law. There is no principled basis for denying the parties this flexibility if that is what they want.

Independent of these technical problems with the supposition made in *Sattva* about arbitration and expertise, *Vavilov* has caused the administrative law ground upon which *Sattva* made (a somewhat hasty) analogy to shift beneath its feet. *Vavilov* is clear that the basis for deference to administrative actors is the delegation of power to those actors.[104] Put differently:

> ...respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard...[105]

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[102] E.g. *Gerstel and 2102503 Ontario Inc (Harold the Jewellery Buyer) v Kelman and Mortgage Maven Inc*, 2017 ONSC 214; *Popack v Lipszyc*, 2017 ONSC 4581, rev'd 2018 ONCA 685.

[103] We acknowledge the view, espoused by the Court of Appeal for Ontario in *Popack v Lipszyc*, 2018 ONCA 685, that selecting faith-based arbitration is itself an agreement to depart from "secular" law. However, to the extent the applicable law comprises or at least contains elements of Canadian law, the parties whose arbitration agreements allow for appeals have not opted to oust the court's legal scrutiny entirely.

[104] *Vavilov*, *supra* note 1 at paras 30, 32.

[105] *Vavilov*, *supra* note 1 at para 30.

Crucially, expertise is no longer a presumptive basis for deference in administrative law[106], where *Sattva* drew from by importing *Dunsmuir* by analogy. Before *Vavilov*, expertise formed a critical part of *Dunsmuir*'s contextual analysis, which informed the Court's reasoning in *Sattva*. Accordingly, and as alluded to above, one might argue *Vavilov* does in fact overtake *Sattva* indirectly by altering *Dunsmuir* in this respect. Again, we leave that argument for others to develop.

2. Appeal Clauses

That the *Housen* standard of review framework should apply to appeals from arbitral awards, especially under the *ULCC Acts*, flows from the legislative intent evidenced in the statutes. That legislative intent manifests in two ways. First, it appears directly in the words the legislation uses. Second, it appears indirectly by conferring maximum choice and flexibility on the parties in crafting their arbitral procedure, which may include a full or partial right of appeal.

Before addressing these points, we observe that courts and counsel have uncritically applied *Sattva* and *Teal Cedar* to appeals under the *ULCC Acts* even though the statute at issue in those cases, the *BC Act*, is structurally and substantively different. This is a mistake since the *ULCC Acts* place a markedly higher premium on party autonomy, both generally and specifically as regards appeals. This has obvious implications for the argument we make in this paper.

However, and notwithstanding these differences, we contend that even appeals under the *BC Act* (and other non-*ULCC Acts*) should proceed using the *Housen* framework. We say this for two reasons. First, the points raised above about *Sattva*'s unnuanced treatment of expertise as a rationale for deference applies broadly to all the statutes. Second, the heart of our argument from legislative intent and party autonomy further

[106] *Ibid*.

developed below is not unique to the *ULCC Acts*, even if it finds in them its strongest articulation. The presumption of consistent expression and the impact of the parties' choice to include an appeal right in their arbitration agreement applies to all statutes that enable appeals on the merits of an arbitral award.

a. Sattva and Teal Cedar were Decided in a Materially Distinguishable Legislative Environment from the ULCC Acts

The *BC Act* at issue in both *Sattva* and its successor *Teal Cedar* is materially different from the *ULCC Acts*. It differs in how it balances party autonomy, on one hand, and efficiency and finality, on the other. When one considers these important differences, it is not self-evident that *Sattva* ever should have applied to the *ULCC Acts* at all, regardless of what *Vavilov* teaches.

In *Sattva*, Rothstein J expressly relies on the *BC Act*'s appeal provision as part of his rationale for imposing a deferential standard. The relevant part reads as follows:

> **Appeal to the court**
>
> **31** (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.[107]

In light of this provision, Rothstein J remarked that parties could not appeal arbitral awards based on factual or mixed fact and law errors, by agreement or otherwise:

> These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference.[108]

Although he does not expressly draw the link, this observation appears to inform the basis for the deferential standard expressed two paragraphs later.[109]

The *ULCC Acts* differ from the *BC Act* in this very respect. They permit greater court intervention, where the parties wish it, than what is possible under the *BC Act*. Specifically, they permit appeals on questions of fact or mixed fact and law if the

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[107] This provision has since been updated to carve out family law arbitrations wherein the parties may also appeal on questions of mixed fact and law and questions of fact. The version of s 31 at issue in *Sattva* was otherwise the same as the current version.

[108] *Sattva*, *supra* note 6 at para 104 (*AA* refers to *Arbitration Act*).

[109] *Sattva*, *supra* note 6 at para 106.

parties so choose.[110] In this way, the *ULCC Acts*' appeal framework is designed to maximize party autonomy in a way the *BC Act* does not. It does so at the expense of promoting efficiency and finality, which the Supreme Court in *Teal Cedar* identified as key policy goals underlying arbitration under the *BC Act*.[111] This is true, but the Court was examining legislation that balanced the relevant principles differently than the *ULCC Acts* do.

None of this should suggest efficiency and finality were unimportant to the ULCC in promulgating the Uniform Arbitration Act (1990).[112] Quite the opposite. The ULCC nevertheless unambiguously placed party autonomy above efficiency (subservient only to fair and equal treatment) in the hierarchy of principles underpinning the legislation. This is apparent from the Working Group's comments on the draft legislation that became the Uniform Arbitration Act (1990).[113] The Working Group states the legislation is based three principles:

> (a) fairness, or equality of treatment,
>
> (b) control by the parties (except as required by equality of treatment), and
>
> (c) efficiency, or satisfaction of the interests of the parties (except as required by equality of treatment, and except as agreed by the parties).[114]

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[110] Under the current version of the BC *Arbitration Act*, SBC 2020, c 2, parties to arbitration other than family law arbitration can still only appeal on questions of law.

[111] *Teal Cedar*, *supra* note 17 at para 74.

[112] Uniform Law Conference of Canada, *Proceedings of the Seventy-First Annual Meeting* (1989).

[113] *Ibid*.

[114] *Ibid* at 123.

Party autonomy's precedence over efficiency was therefore contemplated from the outset.

This hierarchy is not theoretical; it instantiates itself in the *ULCC Acts*' provisions. The parties are not free to derogate from the fairness and equality requirement[115], which, along with very few other provisions[116], trumps party autonomy. However, the parties are generally otherwise free to design the arbitration process as they see fit.[117] Although the *ULCC Acts*' default procedural regime arguably promotes an efficient process[118], the parties may alter or supplement those provisions to render the process less efficient. The hierarchy the ULCC Working Group foresaw thus pervades the *ULCC Acts* in a practical way. It is clear that party autonomy, which courses through Canadian arbitration jurisprudence[119], was also front and center before

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[115] See for example: *Arbitration Act, 1991 supra* note 11, s 19, under the heading "Equality and fairness": "(1) In an arbitration, the parties shall be treated equally and fairly. (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

[116] These mainly deal with the Court's role in extending the arbitral tribunal's time to make an award, invalidating arbitrations, setting aside awards and enforcing awards.

[117] See e.g. *Arbitration Act, 1991 supra* note 11, s 3. In the Alberta legislation, this provision's heading is actually "party autonomy".

[118] Little is required to commence an arbitration. For example, *Arbitration Act, 1991 supra* note 11, s 23(1) provides: "An arbitration may be commenced **in any way recognized by law, including** the following: 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement; 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties; 3. A party serves on the other parties a notice demanding arbitration under the agreement [emphasis added]."

[119] See e.g. *TELUS Communications Inc v Wellman*, 2019 SCC 19 at paras 52, 62, 69, 83 [*Wellman*]; *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at para 70.

the Working Group, whose recommendations ultimately lead to today's domestic arbitration statutes in most of Canada.

In contrast, the *BC Act* does not place the same emphasis on party autonomy. It lacks a general provision cementing party autonomy by expressly permitting the parties to vary nearly all of its provisions as found in the *ULCC Acts*. This is a major difference and yet another clue that efficiency and finality are more important vis-à-vis party autonomy in the *BC Act*, at issue in *Sattva* and *Teal Cedar*, than in the *ULCC Acts*.

For these reasons, the "balance between reviewability and finality" Rothstein J sought to identify in *Sattva* is not the same balance applying in the majority of Canadian domestic arbitration statutes.[120] To be clear, this is not in itself a shortcoming of *Sattva*. The Court was dealing with the statute it had before it. The problem only arises when one casually assumes the balance Rothstein J identified in *Sattva*, which we still say was incorrect as a matter of principle, applies to appeals under the *ULCC Acts* and the other statutes providing rights of appeal.

b. Legislative Intent, Especially as Expressed in the ULCC Acts, Justifies Applying the Housen Framework by Default

The first part of this section dealt with *Sattva* as a roadblock to argument. At this point, we move to the argument from principle: absent party agreement to the contrary, appeals from arbitral awards on questions of law should be reviewed without deference. This is especially so under the ULCC statutes. We partially explored the basis for this above in distinguishing the *ULCC Acts* from the *BC Act* as applied in *Sattva* and *Teal Cedar*. But there are further reasons pointing to the appellate review framework. We consider four. All apply to the ULCC statues. With the exception of the third, all apply equally to the *BC Act*.

[120] *Sattva*, *supra* note 6 at 1.

The fourth and final reason applies to all the statutes providing for appeals.

First, the language contained in the appeal provisions in the *ULCC Acts* and the *BC Act* indicates a legislative intent to apply the appellate review framework. All these provisions use the nomenclature of appeals, classifying them as appeals on law, fact or mixed fact and law. This is different from the reasonableness standard, which is primarily concerned with rational, transparent, intelligible, and justified outcomes in light of the overall record.[121] The legislatures could have employed outcome-focused language to track the reasonableness standard as espoused in the administrative law jurisprudence. They did not, and instead employed the language of *appeals*. They also could have legislated a standard of review expressly, as BC has done for administrative law judicial review.[122] They have not. If anything, the *ULCC Acts'* appeal provisions appear to indicate the reviewing court should not defer on law.

Second, the *ULCC Acts* and *BC Act* contain further clues that the legislature intended appeals to proceed on the appellate standard of review. The *ULCC Acts* provide that, unless the parties agree otherwise, the "arbitral tribunal shall decide a dispute in accordance with law, including equity".[123] The *BC Act* contains a similar provision.[124] To say the arbitral tribunal "shall decide in accordance with" law suggests that applying the law incorrectly invites scrutiny. Where the parties do not vary this requirement, it is fair to assume they agree.

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[121] *Vavilov, supra* note 1 at paras 94, 96; *Dunsmuir*, *supra* note 7 at para 47.

[122] *Administrative Tribunals Act*, SBC 2004, c 45, ss 58—59.

[123] For example: *Arbitration Act, 1991, supra* note 11, s 31.

[124] *BC Act, supra* note 14, s 23(1): "An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis."

Third, like in *Vavilov*, our starting point is the presumption of consistent expression. According to Canadian jurisprudence, appeals are assessed on the *Housen* standard of review: correctness on legal questions and palpable and overriding error on factual questions and inextricable mixed questions of fact and law. [125] All presumptive interpretation canons are rebuttable when "the context or the purpose of the statute suggests a different approach".[126] The arbitration context does not justify deviating from the presumption. Rather, the party autonomy principle, most pronounced in the *ULCC Acts* and the law of arbitration more generally, militates in favour of applying it.

Speaking to the *ULCC Acts*, the Supreme Court has recognized that one of the *Arbitration Act, 1991*'s (and by extension the other *ULCC Acts*') main purposes is to allow the parties to craft their own procedure.[127] But because purpose is usually sourced in text,[128] and *should* be sourced in text,[129] the party autonomy principle is instantiated in the *ULCC Acts*' provisions. Chief among these is section 3, titled "contracting out" in the *Arbitration Act, 1991*, which grants the parties a general power to exclude or vary any of the Act's provisions subject to a short list of exceptions:

> **Contracting out**
>
> 3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:
>
> 1. In the case of an arbitration agreement other than a family arbitration agreement,

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[125] *Housen, supra* note 2 at paras 8, 10, 26.

[126] *Arbitration Act, 1991, supra* note 11*; R v Steele*, 2014 SCC 61 at para 51.

[127] See *Wellman*, *supra* note 119 at para 52.

[128] See Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law Inc, 2016) at 193.

[129] See *Hillier v Canada (Attorney General)*, 2019 FCA 44 at para 25.

i. subsection 5 (4) ("Scott v. Avery" clauses),

ii. section 19 (equality and fairness),

iii. section 39 (extension of time limits),

iv. section 46 (setting aside award),

v. section 48 (declaration of invalidity of arbitration),

vi. section 50 (enforcement of award).

2. In the case of a family arbitration agreement,

i. the provisions listed in subparagraphs 1 i to vi,

ii. subsection 4 (2) (no deemed waiver of right to object),

iii. section 31 (application of law and equity),

iv. subsections 32 (3) and (4) (substantive law of Ontario or other Canadian jurisdiction), and

v. section 45 (appeals).[130]

This general power to alter the Act's provisions could not more strongly signal party autonomy's importance in the *ULCC Acts*, setting them apart in this respect from the other domestic arbitration statutes providing for rights of appeal.

Perhaps the second greatest indicator of party autonomy's privileged position in the ULCC statutes is the appeal provision itself. It begins with the default that parties may appeal on questions of law, with leave, even if the arbitration agreement is silent on appeals. Parties may also deviate from the default by expressly incorporating a right of appeal on questions of law, fact, or mixed fact and law. When they do, their choice governs and leave to appeal is not required. Finally, the parties (except in family arbitrations) may exclude appeals altogether.[131] The

[130] *Arbitration Act, 1991, supra* note 11, s 3.

[131] *Ibid*.

legislative intent here is to maximize the scope of the parties' procedural design choice on whether and to what extent they wish for the arbitral tribunal to have the final say. We note that in any other context it would be heretical for the parties to retain the ability to confer or oust the court's jurisdiction, which is a question of law on which the parties' consent or opinion is usually irrelevant.[132] But the arbitration context is different.

In light of this, while it is correct to say, as the jurisprudence does,[133] that the Court's role is "strictly limited" under the *ULCC Acts*, that comment must be qualified in cases where the parties choose greater potential court involvement in the form of appeals. Indeed, the case law espousing this strictly limited role generally comes from the stay motion context.[134] This is for good reason. Stay motions are about courts requiring parties who try to evade their arbitration agreements to honour them. As the Court of Appeal for Ontario said in *Inforica Inc. v. CGI Information Systems and Management Consultants Inc*: "The Act encourages parties to resort to arbitration" and "require[s] them to hold to that course once they have agreed to do so".[135]

This is entirely consonant with our argument since honouring the parties' agreement to arbitrate is our starting point. We simply say honouring the parties' agreement to

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[132] *Arbitration Act, 1991, supra* note 11, s 3. *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 CAF 4, 2015 FCA 4 at para 38; *Merck Frosst Canada Inc v Canada*, [1997] 2 FC 561, [1997] FCJ No 149 at para 10; *Armeco Construction Ltd v Canada*, [1995] FCJ No 1561, 103 FTR 240 at para 25; *Canadian National Railway Co v Canada (Canadian Transport Commission)*, [1988] 2 FC 437 at 449.

[133] E.g. *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 56 [*Wellman*], citing *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 at para 14 [*Inforica*].

[134] E.g. *Wellman, supra* note 119; *Gerstel v Kelman*, 2015 ONSC 978; *1146845 Ontario Inc v Pillar to Post Inc*, 2014 ONSC 7400. *Inforica, supra* note 133, though not a stay case, did not deal with appeals from final awards addressed here. It therefore does not negate our position.

[135] *Inforica*, *supra* note 133 at para 14, citing *Ontario Hydro v Denison Mines Ltd*, [1992] OJ No 2948 (Gen Div).

arbitrate means honouring *the entire agreement*, including a right of appeal. So, while party autonomy pushes away from court involvement in the context of stays, it pulls in court involvement when the parties agree to subject arbitral awards to appeals. It is therefore wrong to casually equivocate between the choice to arbitrate and limited court involvement, at least where appeals are concerned.

Fourth, just as it is presumed that "appeal means appeal" for the legislature, the same should be presumed for parties who allow for appeals in their arbitration agreements. When parties use a legal term of art in their contracts, they should be presumed to intend that the term carry its ordinary legal meaning.[136] This presumption is by no means absolute and may be rebutted by the contractual context (i.e. other provisions in the agreement and the factual matrix).[137] The fact remains that where an arbitration agreement provides for an appeal, and no contractual interpretation basis for suspecting otherwise arises, the parties should be taken to ascribe the ordinary legal meaning to the term "appeal", just like any other legal term in their contract.

As explained above, "appeal" carries a signified legal meaning when it comes to the standard of review. In a statutory world where parties are free to fully exclude courts from considering the merits of their dispute, the decision not to do so should send a signal.[138] It signals that *those* parties *did not* want the arbitral tribunal to have the last word. When this happens the justification for applying a deferential standard falls away.

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[136] See e.g. *Trico Developments Corporation v El Condor Developments Ltd*, 2020 ABCA 132 at para 25; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157, at paras 61, 104.

[137] For an example of this presumption being rebutted, see *One West Holdings Ltd v Greata Ranch Holdings Corp*, 2014 BCCA 67.

[138] See Sullivan, *supra* note 128 at 76.

Put differently, it is simply wrong to say that parties who opt to resolve their disputes by arbitration, but whose agreement entails a possible appeal, wanted to keep the matter out of court. One can more accurately infer that they wanted the first instance (although not necessarily final) adjudication to take place out of court. There are rational reasons why parties might choose this procedural set up. One of them—that the parties might select the arbitrator for expertise in something other than the law—was addressed above. Another might be efficiency. An arbitration with a possible appeal will likely conclude significantly quicker than a trial with the same possibility of appeal. [139] These are valid articulations of party autonomy. Equivocating between party autonomy and a desire to minimize court involvement, although accurate in many cases, is overly simplistic in a legal environment offering this level of flexibility as to appeal rights.

It is also worth mentioning that imposing a more deferential standard of review does not itself assure finality. The standard of review does not control whether there will be an appeal (i.e. whether the arbitral award will be the first and last decision on the merits). An appeal on a deferential standard is still an appeal, just a harder one to win. One might retort that if a potential appellant knows an appeal will be tougher, he or she will be less likely to file one. That may be so in some cases and not in others. The fact remains that the only reliable way to assure the arbitral tribunal has the first and last word on the merits of a dispute is to exclude appeals altogether. Parties can do this with the stroke of a pen. When they do not, that says something.[140]

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[139] This is especially so where parties require a challenging party to obtain leave from the appellate court, which is the default regime under the *ULCC Acts*. Where the parties' agreement is silent on appeals, an appeal on a question of law may only be brought with leave. See for example: *Arbitration Act, 1991, supra* note 11, s 45(1).

[140] One of the authors has heard the point made that parties do not necessarily know that they must expressly exclude appeals and do not turn

For these reasons, the wisdom underlying *Vavilov*'s prescription on rights of appeal applies with full force in the arbitration context where the parties have included a right of appeal, either expressly or by abstaining from opting out of the provision providing for an appeal on questions of law with leave of the court. On this last point, there is no distinction to be drawn between, on one hand, cases where the right of appeal is subject to leave based on the default under the *ULCC Acts* and, on the other hand, those where the arbitration agreement expressly provides for appeal. This is because the parties are free to modify the legislation's default scheme. The fact that the parties could have precluded any appeal but did not is, in itself, an exercise of party autonomy.

This is incidentally another reason why the distinction the Court attempted in *Ontario Lottery and Gaming* between so-called statutory appeals and contractual appeals is bunk. Using the Ontario legislation as a model, in both cases, the arbitration is governed by the *Arbitration Act, 1991*. In both cases, the parties control the existence and extent of any appeal. This distinction also holds no water based on the Supreme Court's jurisprudence. *Teal Cedar* dealt with an appeal from an award arising from an arbitration required by statute. The Court saw no reason to distinguish the standard of review framework from that applied in *Sattva*, a case flowing from a consensual arbitration agreement. It is hard to justify a new distinction between statutorily mandated and consensual arbitrations just because correctness should now be the presumptive standard.

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their minds to such things when agreeing to arbitrate. Accordingly, we cannot infer that the parties truly meant for an "appeal". This might be true in some cases. However, this paternalistic view is repugnant, not only to the party autonomy principle, but to the general notion that parties should presume to intend the consequences of their agreements: Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016) at 111; *Eli Lily & Co v Novopharm Ltd* 1998 CanLII 791 (SCC), [1998] 2 SCR 129, at paras 54—56.

The bottom line is this: a court must give effect to legislation that, by including a right of appeal the parties have decided to render operational by their agreement, *prescribes* a standard of review. Courts cannot, *themselves*, choose a standard of review in order to best effectuate their particular vision of final and efficient arbitration. A reasonableness standard does not necessarily, or automatically, promote party autonomy simply because a court thinks so. Moreover, the importance of finality and efficiency rest in the parties' hands, not those of the courts.

Finally, it is important to remember that this discussion relates exclusively to domestic arbitration. None of the international arbitration statutes in force in Canada allow for appeals on the merits, by party agreement or otherwise. This is generally appropriate. One of the important features of *international* arbitration is its supra-national character. A key reason parties to international agreements select arbitration is precisely to remove their dispute from any one court's jurisdiction.[141] The same concern does not apply in domestic arbitration where the legislation foresees potential appeals on the merits to a state court, and where parties, often from the jurisdiction in question, are not concerned about the other side having home court advantage. This is a point some of the "arbitration initiated" gloss over. They should not.

CONCLUSION

Does *Vavilov* overrule *Sattva* on the standard of review for appeals from arbitral awards? Maybe not, although *Sattva*'s own author and recent appellate jurisprudence have suggested it does.[142] But just as *Sattva*, an arbitration case, borrowed from

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[141] See for example: Jan Paulsson, "International Arbitration is not Arbitration" (John EC Brierley Memorial Lecture delivered at McGill University, 28 May 2008), online (pdf): <francais.mcgill.ca/pjrl/files/pjrl/john_e._c._brierley_memorial_lecture_jan_paulsson.pdf>.

[142] See Justice Marshall Rothstein "The Judicial Role in Constitutional and Administrative Law" (29 February 2020) at 00h:52m:43s, 00h:53m:59s,

Dunsmuir and its administrative law roots to create presumptive deference, we say courts should rely on the rationale in *Vavilov*, coupled with a mature treatment of party autonomy, to revisit the issue. Applying the tools used to discern legislative and contractual intent to the *ULCC Acts*' appeal provisions—and, to a lesser extent, the other legislation permitting appeals—within their broader legislative and policy context, we conclude parties allowing for an appeal in their arbitration agreement should be taken to mean what they say.

Standard of review aside, there is no doubt permitting parties to appeal arbitral awards impacts on finality and efficiency in arbitration. This was a legislative choice adopted in 11 of Canada's 13 provinces and territories. That choice does not reflect antipathy toward arbitration as a form of dispute resolution. It merely recognizes that, sometimes, parties might not want the arbitral tribunal to have the last word on a given issue. That choice is valid and might be motivated by several factors. It is not for the courts, in imposing a deferential standard of review, to second-guess that choice *a priori*. On the contrary, party autonomy recognizes that parties may decide how their dispute gets resolved, subject to few legislative limits. This means the importance of efficiency and finality are relative and need not be given the same weight in each case. The *ULCC Acts* plainly subordinate these concerns to party autonomy, which is wholly consistent with arbitration principles. Though less overtly, the other Canadian arbitration legislation providing for appeals does the same thing by permitting appeals in the first place.

In that regard, our position is premised on the law as it is, properly interpreted. We do not make a value judgement on the policy choice to permit appeals from arbitral awards. Indeed, and as noted in *Teal Cedar*, efficiency and finality are important

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online (video): *Youtube* <youtube.com/watch?v=8xC5AMgzDSM>; *Northland Utilities, supra* note 53; *Wastech, supra* note 53.

arbitration policy objectives in their own right.[143] There are no appeals from arbitral awards in Quebec under its *Code of Civil Procedure*,[144] or Newfoundland and Labrador under its domestic arbitration statute.[145] If a Province, particularly a ULCC Jurisdiction, decides to rebalance its statute to similarly enhance the goals of efficiency and finality at the expense of party choice, so be it. Until they do, however, the *ULCC Acts*' pronounced focus on party autonomy over efficiency and finality cannot be ignored. Given party autonomy's prominence as arbitration's lodestar, they would do well to consider whether such a modification is desirable.

One final thought. The proper approach to arbitral appeals may appear a niche issue of concern only to commercial arbitration lawyers. While it matters in the day-to-day practice of arbitration, the relationship between courts and arbitrators also touches the Rule of Law. In the law, there can be no such thing as absolute and untrammelled discretion,[146] and courts have a duty to survey the boundaries of non-judicial decision-making as a corollary to the Rule of Law.[147] *Sattva* itself draws a conceptual similarity between arbitral tribunals and administrative bodies, both classed as "non-judicial decision-makers" acting under a statutory framework exercising powers of decision that profoundly impact disputants.[148] How courts treat the private system of arbitration, then, matters a great deal to the reach and scope of private decision-making vis-à-vis judicial review. Subject to party autonomy and other

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[143] *Teal Cedar, supra* note 17 at para 74.

[144] Of note, and unlike in the common law provinces, the *Code of Civil Procedure*, CQLR c C-25.01 governs both domestic and international arbitrations seated in Quebec.

[145] *Arbitration Act*, RSNL 1990, c A-14.

[146] *Roncarelli v Duplessis*, [1959] SCR 121 at para 140.

[147] See *Crevier v AG (Quebec) et al*, [1981] 2 SCR 220.

[148] *Sattva*, *supra* note 6 at para 105. Although arbitrators do not usually get their jurisdiction from statute, they are limited in several respects by the applicable arbitration legislation.

arbitration-specific principles,[149] the conception of the Rule of Law permeating Canadian jurisprudence, which roared loudly in *Vavilov*, applies equally in the arbitral arena.

[149] The principle of party autonomy is the justification for permitting parties to opt out of the *ULCC Acts*' appeal provision altogether. The fundamentally private nature of arbitration necessarily excludes the fundamentally public "open court principle". Another example of a divergence is in the role of precedent. Since there is no publicly accessible corpus of arbitral jurisprudence, it is inapposite to assign what the common law would call 'precedent' to an arbitral award.