2021 CANADIAN COMMERCIAL ARBITRATION CASE LAW: A YEAR IN REVIEW

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INTRODUCTION

A look at courts' review of commercial arbitration decisions throughout 2021 demonstrates the continued appetite of disappointed parties and the ingenuity of their lawyers to find ways to challenge arbitral awards in the courts by, for example, challenging the sufficiency of the arbitrator's reasons or alleging arbitrator misconduct, raising issues concerning the merits of the award to oppose an enforcement application, proffering multiple "extricable errors of law" in support of an appeal, or launching an appeal joined with a set-aside application.

At the same time, the 2021 jurisprudence also shows that courts consistently are willing to defer to the parties' intentions, as expressed in their arbitration agreement, to refer their disputes to arbitration. Invariably, stay motions succeeded wherever it was "arguable" that a dispute fell within the scope of the arbitration agreement, including cases where some matters in dispute fell outside the arbitration agreement. Even where the parties did not provide for arbitration or agreed to pursue remedies in the courts notwithstanding an arbitration

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clause in their agreement, Canadian courts increasingly recommended arbitration as a way to obtain the benefit of confidentiality, to avoid a multiplicity of court proceedings in different jurisdictions, or to achieve speed and efficiency.

This review does not cover all that ground, but rather focusses on the "highlights", a few issues of particular interest to commercial arbitration practitioners.

First, the appropriate standard of review of an arbitral award remains a murky area of the law; courts have continued to grapple with the application of the Supreme Court of Canada's 2019 decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[1] to both appeals and other court reviews of commercial arbitral awards. The decisions of *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District,* [2] *lululemon athletica canada inc v Industrial Color Productions Inc,*[3] *and Russian Federation v Luxtona Ltd*[4] are of particular interest.

Second, a challenge to the nature and purpose of the foundational doctrine of separability is central to *Petrowest Corporation v Peace River Hydro Partners*.[5] In 2021, the Supreme Court of Canada granted leave to appeal the British Columbia Court of Appeal decision, which applied the doctrine of separability to allow a receiver/trustee in bankruptcy to disclaim an arbitration clause while suing upon the main contract. This is a novel interpretation of separability and is at odds with the historical international and domestic approach.

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[1] 2019 SCC 65 [Vavilov].

[2] 2021 SCC 7 [*Wastech*].

[3] 2021 BCCA 428 [*lululemon*].

[4] 2021 ONSC 4604 [*Luxtona*].

[5] 2020 BCCA 339 [*Petrowest*].

VAVILOV AND THE STANDARD OF REVIEW FOR APPEALS OF COMMERCIAL ARBITRAL AWARDS

2021 was the year many arbitration practitioners hoped for clarity on the application of the Supreme Court of Canada's 2019 decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* to appeals of commercial arbitration awards.[6] In *Vavilov*, the Supreme Court held that, in the administrative law context, the presumptive standard of review is reasonableness, but that appellate standards of review apply to statutory appeals. More than a year after *Vavilov*, lower courts remain divided about its application to appeals of commercial arbitration awards. It seems that the Supreme Court of Canada will have to resolve the issue. The 2021 Supreme Court of Canada decision *Wastech* presented an opportunity for the court to do so, but it ultimately declined to take up that opportunity.[7]

Wastech involved an appeal of a commercial arbitration award brought pursuant to s 31 of the former B.C. *Arbitration Act* on a question of law.[8] On the issue of the applicable standard of review, Wastech urged the court to apply its earlier decisions in *Sattva Capital Corp v Creston Moly Corp.*[9] and *Teal Cedar Products Ltd v British Columbia*,[10] which both held that the standard of review for appeals of commercial arbitration awards under s 31 of the *Act* is reasonableness (unless the specific question is one that would attract the correctness standard). In *Wastech*, the six-justice majority noted that *Vavilov*

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[6] For two recent papers that provide an analysis of this subject, see Paul Daly, "Vavilov on the Road" (15 October 2021), online *SSRN* <https://ssrn.com/abstract=3943490>; Jennifer K Choi & The Honourable Thomas A Cromwell, "The Impact of *Vavilov* on Appeals of Commercial Arbitration Awards" (2021) 79:5 The Advocate 663.

[7] *Supra* note 2.

[8] RSBC 1996, c 55.

[9] 2014 SCC 53.

[10] 2017 SCC 32.

set out a revised framework for determining the standard of review that should be applied by a court when reviewing the merits of an administrative decision on appeal. However, it decided to "leave for another day" the effect, if any, of *Vavilov* on appeals of commercial arbitration awards, noting that the court in *Vavilov* did not advert to either *Sattva* or *Teal Cedar*. Those cases emphasized that deference to the tribunal serves the particular objectives of commercial arbitration; however, the majority explained that it did not have the benefit of submissions from the parties or reasons from the courts below on the standard of review issue (*Wastech* was heard before *Vavilov* was decided). Ultimately, the majority in *Wastech* declined to decide the standard of review issue, in part because it would not affect the outcome of the case; the court's decision would be the same whether the standard of review was "reasonableness" (under *Sattva* and *Teal Cedar*) or "correctness" (the appellate standard of review for appeal on a question of law under *Act*). Either way, the arbitrator's award could not stand.

The three-justice minority (concurring in the result) held that the court *should* resolve the question of the applicable standard of review for appeals of arbitral awards because of the conflicting lines of authority that have arisen since *Vavilov.* It noted that certain courts below have offered two reasons for not applying *Vavilov*; first, that in *Vavilov* the court did not expressly overrule *Sattva* and *Teal Cedar*; and second, that *Vavilov* was driven by, "constitutional considerations that justify deference by the judiciary to the legislature" in the administrative law context. In contrast, the standard of review of appeals of private arbitration awards is "guided by commercial considerations about respect for the decision-makers chosen by the parties."[11] The minority held that despite the differences between commercial arbitration and administrative decision-making, the

[11] *Supra* note 2 at para 118, citing *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 at para 72.

appellate standards of review identified in *Housen v Nikolaisen*[12] will apply wherever the legislature has provided for a statutory right of appeal. This is a matter of statutory interpretation, and there is no convincing reason to conclude that legislatures have ascribed a different meaning to the word "appeal" in different contexts. Factors that justify deference to an arbitrator in commercial arbitrations are irrelevant to this exercise of statutory interpretation. Therefore, "to this extent", *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*. Thus, reasoned the minority, the appropriate standard was one of "correctness" because s 31 of the *Arbitration Act* provided for an "appeal" on a question of law.

While the minority's position is attractive for the simplicity of its logic, in *Sattva*, the court articulated clear policy reasons why appeals of arbitral awards should not be considered analogous to administrative law appeals, and that the framework established in that context by the court in *Dunsmuir v New Brunswick*[13] (which was revised in *Vavilov*) did not apply. However, it is now open to debate whether a standard of review of reasonableness should be applied to an appeal on a question of law.

It appears that the Supreme Court of Canada will have to address both these issues directly. The outcome of such a case can hardly be predicted; the current Court is clearly divided. The three justices in the minority in *Wastech* (Côté, Brown, and Rowe JJ) were in the majority in *Vavilov*. They would apply *Vavilov* to appeals of commercial arbitration awards. But the views of the rest of the members of the Court are not clear. There has been some turnover since the *Sattva* and *Teal Cedar* appeals: Martin, Kasirer, Côté, and Jamal JJ have joined the Court and LeBel, Abella, Rothstein, and Gascon JJ and McLachlin CJ have departed. Moreover, the *Wastech* majority (Kasirer,

[12] 2002 SCC 33.

[13] 2008 SCC 9.

Abella, Moldaver, Karakatsanis, and Martin JJ, and Wagner CJ) stated expressly that their choice not to decide the applicable standard of review on appeals of commercial arbitration awards should not be interpreted as agreement with the minority's view.[14]

Therefore, we are left with the state of the law as described by the minority in *Wastech* in early 2021: two approaches to the application of *Vavilov* taken by different lower courts.

The first approach is that *Vavilov* has no application whatsoever to appeals of commercial arbitration awards. Because the court did not mention the earlier leading cases on the standard of review in this context, *Sattva* or *Teal Cedar,* it could not have intended to overrule them, particularly in an administrative law decision having nothing to do with arbitration. Those cases provide that the standard of review is reasonableness, unless the question is one that would attract the correctness standard.[15]

The second approach is that *Vavilov* applies wherever the legislature has provided for a statutory right of appeal, in which case appellate standards of review will apply. That would include any appeal rights arising out of the Canadian domestic arbitration statutes.[16]

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[14] *Supra* note 2 at para 46.

[15] See e.g. *Bergmanis v Diamond*, 2021 ONSC 2375; *Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd*, 2021 BCSC 1415.

[16] See e.g. *Northland Utilities (NWT) Limited v Hay River (Town Of)*, 2021 NWTA 1; *Broadband Communications North Inc v 6901001 Manitoba Ltd*, 2021 MBQB 25; *Parc-IX Limited v The Manufacturer's Life Insurance Company*, 2021 ONSC 1252; *719491 Alberta Inc v The Canada Life Assurance Company*, 2021 ABQB 226; *Her Majesty the Queen in Right of Ontario (Minister of Government and Consumer Services) v Royal & Sun Alliance Insurance Company of Canada,* 2021 ONSC 3922.

Consensus seems to be building that the second approach will ultimately prevail.[17] Meanwhile, a growing trend in the courts, beginning with the British Columbia Court of Appeal's 2020 decision in *Nolin v Ramirez*[18] and continuing with *Wastech*,[19] is to recognize the divergent approaches and to conclude that it doesn't matter since the result would be the same regardless of the standard of review applied.[20] In their recent article, "The Impact of *Vavilov* on Appeals of Commercial Arbitration Awards", Jennifer K. Choi and the Honourable Thomas A. Cromwell, make the following observation:

> …[W]hile the majority's reasoning in Vavilov that the word "appeal" refers to the same type of procedure in [a criminal or commercial law context] seems to point to Vavilov overturning the decision in Sattva, the reluctance of the majority in Wastech to decide the issue and the principles of stare decisis suggest that Sattva is still good law, for now, on the issue of standard of review for arbitral decisions.[21]

One unfortunate outcome of this lack of clarity is that some courts are applying *Vavilov* to court reviews of commercial arbitral awards

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[17] See e.g. Paul Daly, "Unresolved Issues after *Vavilov* IV: The Constitutional Foundations of Judicial Review" (17 November 2020), online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2020/11/17/unresolved-issues-after-vavilov-iv-the-constitutional-foundations-of-judicial-review/>; James Plotkin & Mark Mancini, "Inspired by *Vavilov*, Made for Arbitration; Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards" (2021) 2:1 Can J Comm Arb 1.

[18] 2020 BCCA 274.

[19] *Supra* note 2.

[20] See e.g. *Allard v The University of British Columbia,* 2021 BCSC 60; *Johnston v Octaform Inc*, 2021 BCSC 536*; Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2021 MBQB 77; *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592.

[21] Choi & Cromwell, *supra* note 6 at 669.

that are not appeals, which adds to the confusion. This is evident in the next few cases.

LULULEMON AND THE STANDARD OF REVIEW FOR SET-ASIDE APPLICATIONS IN COMMERCIAL ARBITRATIONS

In *lululemon athletica canada inc v Industrial Color Productions Inc*,[22] lululemon applied to the British Columbia Supreme Court to set aside part of a commercial arbitral award pursuant to section 34(2)(a)(iv) of the British Columbia *International Commercial Arbitration Act*[23] (which is virtually identical to article 34(2)(a)(iii) of the *UNCITRAL Model Law)*. lululemon claimed that the arbitrator went beyond the scope of the submission to arbitration in making an award on issues that were not pleaded.

The BC Supreme Court determined that in a consensual arbitration, on a set-aside application made on the basis of a jurisdictional challenge, the standard of reasonableness applies. The court listed a number of reasons to support this conclusion, including *Vavilov*.

First, the court referred to a decision of the BC Court of Appeal, *Quintette Coal Ltd v Nippon Steel Corporation*, which applied a reasonableness standard to a set-aside application in which the allegation was that the arbitrator had gone beyond the submission to arbitration.[24] In *Quintette Coal*, the court stated: "It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in

[22] 2021 BCSC 15.

[23] RSBC 1996, c 233.

[24] [1991] 1 WWR 219, 50 BCLR (2d) 207 (BCCA).

British Columbia. That is the standard to be followed in this case."[25]

Second, the BC Supreme Court in *lululemon* held that as a matter of statutory interpretation, the fact that the arbitral tribunal may rule on its own jurisdiction under section 16 of the *Act*, "buttresses the use of reasonableness as the generally appropriate standard of review".[26]

Third, the court stated that a reasonableness standard of review also "aligns with the general framework set forth in [*Vavilov*] for the judicial review of a decision of a statutory tribunal and for the general framework for commercial arbitration", citing *Sattva*.[27]

Fourth, the court considered and distinguished the leading Ontario Court of Appeal decision, *United Mexican States v Cargill, Incorporated*, [28] which determined that on a set-aside application under article 34(2)(a)(iii) of the *UNCITRAL Model Law*, the question of whether the tribunal had the jurisdiction to make an award is a pure question of law so the standard of review is correctness. That case involved questions of law relating to the North American Free Trade Agreement. The court stated: "[a] dispute involving two commercial parties over the termination of a private contract is, without more, foundationally different than a claim for damages against a country under NAFTA engaging international multilateral trade agreement or treaty interpretation principles."[29]

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[25] *Supra* note 24 at para 32.

[26] *Supra* note 22 at para 21.

[27] *Supra* note 22 at para 22.

[28] 2011 ONCA 622, leave to appeal to SCC refused, 2012 CanLII 25159 [*Cargill*].

[29] *Supra* note 22 at para 25 [emphasis added].

Fifth, citing Gary B Born, the court referred to the lack of a common international approach which "has yet to develop with respect to the standard of judicial review of jurisdictional rulings by arbitral tribunals under the *UNCITRAL Model Law*".[30]

The BC Supreme Court ultimately concluded that a standard of review of reasonableness applied and that the arbitrator's decision met that standard. On that basis, the court dismissed the set- aside application.

The court's decision conflicts with the prevailing Canadian view before this decision that, in general, the standard of review on a matter of jurisdiction is correctness. In other words, the concepts of party autonomy and consensual referral to arbitration to resolve commercial disputes require that the arbitral tribunal be correct in determining its authority. The question of the tribunal's jurisdiction has been considered a pure question of law. In addition, the court's reference to both *Vavilov* and *Sattva* as supporting a reasonableness standard on a set-aside application is unexplained.

The BC Court of Appeal dismissed lululemon's appeal, upholding the BC Supreme Court's dismissal of the set-aside application, but for different reasons.[31] Contrary to the decision of the lower court, the BC Court of Appeal found that *Cargill*[32] remains the leading case on the standard of review for applications to set aside arbitral awards for jurisdiction reasons under s 34(2)(a)(iv) of the BC *International Commercial Arbitration Act*. Therefore, the standard of review on set-aside applications on jurisdiction issues is correctness. In addition, the policy objectives that discourage court intervention in arbitrations are met by the legislation itself, which significantly limits the scope for judicial intervention to matters specifically

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[30] Gary B Born, *International Commercial Arbitration,* 3rd ed (The Netherlands: Kluwer Law International, 2020) at 1198.

[31] *Supra* note 3.

[32] *Supra* note 28.

identified in the legislation and does not permit appeals. Finally, the court characterized *Sattva* and *Vavilov* as not "helpful".

Sattva establishes that the standard of review on an appeal from a domestic commercial arbitration is generally reasonableness. However, Sattva does not address the standard of review on applications to set aside domestic or international arbitral awards on jurisdictional grounds. Post-*Sattva*, the standard of review for such applications has been held to be correctness in both the domestic and international context. See e.g., *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at para. 86 (in the domestic context); *Canada (Attorney General) v. Clayton*, 2018 FC 436 at paras. 73–82 (in the international context).

Vavilov is the leading case on the standard of review in administrative law. It does not address the field of arbitration. In *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, Justice Tysoe, as he then was, distinguished the approach to judicial review of awards of domestic tribunals established by statute from that in respect of for the international arbitration of private disputes. *Metalclad* continues to stand for the proposition that administrative law standards should not be used "to create a standard of review not provided for in the [*ICAA*]": at para. 54.[33]

LUXTONA AND STANDARD OF REVIEW OF PRELIMINARY DETERMINATIONS OF JURISDICTION

In 2021, a number of cases considered the standard of review by a court where a tribunal has ruled "as a preliminary question" that it has jurisdiction pursuant to article 16(3) of the *Model Law*. It provides that following such a determination by the tribunal, any party may apply to the court to "decide the matter", which decision shall not be subject to appeal. Comparable provisions also appear in the domestic arbitration

[33] *Supra* note 3 at paras 45 and 46.

acts. The question is the role of the reviewing court asked to "decide the matter". Confusion also exists as to whether such a hearing is a "review" or hearing *de novo* and whether that determination has any bearing upon the standard of review of the arbitral tribunal's determination.

In *Russian Federation v Luxtona Limited,*[34] two judges of the Ontario Superior Court of Justice came to contradictory conclusions on the issue of whether fresh evidence adduced by Russia was admissible on its application under *UNCITRAL Model Law* articles 16(3) to "decide the issue" of jurisdiction and 34(2)(a)(iii) to set aside the tribunal's award on jurisdiction. The tribunal had decided as a "preliminary question" that it had jurisdiction.

Initially, Dunphy J found that a hearing under the relevant statutory provisions was not an appeal and, relying upon *Cargill* as to the standard of review on a question of jurisdiction (although that case did not apply article 16(3)), held that the standard of review was correctness. As a consequence, he was not bound to the record adduced before the tribunal: "whether or not described as a hearing '*de novo*', such a hearing cannot be confined in advance to the record before the tribunal…The court is well able to control its own process to ensure that evidence is strictly confined to the narrow question of jurisdiction…."[35] He found that the language of the statute, which allows a court to "decide the matter", did not involve a mere review of the tribunal's decision. Therefore, he permitted Russia to file new evidence.

Thereafter, Penny J became seized of the set-aside application. He considered the issue afresh when Luxtona objected to the new evidence filed by Russia. He found that he had the jurisdiction to re-visit Justice Dunphy's decision and reversed it.

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[34] 2018 ONSC 2419, rev'd 2019 ONSC 7558, rev'd 2021 ONSC 4604.

[35] *Ibid* at para 4, Dunphy J.

First, he considered the standard of review of the tribunal's preliminary jurisdiction award. He too relied upon *Cargill* to apply a correctness standard of review; when deciding its own jurisdiction, the tribunal must be correct.

Second, he noted that what constituted the "record" for the purposes of the court's review was a separate issue that had never before been decided in Canada. In his view, the language of the *Model Law* made it clear that the court was undertaking a "review" of the preliminary jurisdiction decision, which he found is not the same as a hearing *de novo*. Further, allowing new evidence would undermine the competence-competence principle, by encouraging a losing party to routinely search for new evidence and seek court intervention after a tribunal has determined it has jurisdiction as a preliminary matter. Russia therefore could not adduce additional evidence, as of right, in support of its set-aside application.

On appeal of that decision, the Ontario Divisional Court disagreed.[36] It found that the language of article 16(3) of the *Model Law* required the court "to decide the matter", not to "review the tribunal's decision". This, the Divisional Court reasoned, conferred original jurisdiction upon the Ontario Superior Court of Justice to decide jurisdiction. The Divisional Court also held that *Cargill* was distinguishable because it dealt with a different provision of the *Model Law,* which provides for a different test to be applied by the court; *Cargill* involved a set-aside application on jurisdictional grounds under s 34(2)(a)(iii), not a preliminary decision as to jurisdiction, so article 16(3) of the *Model Law* was not engaged. The Divisional Court found that the text of the *Model Law* and the weight of international authority prescribed a *de novo* hearing in a court application "to decide the matter". Because the court was hearing the jurisdictional issue *de novo*, the parties could adduce fresh evidence as of right.

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[36] 2021 ONSC 4604.

This decision was later applied to s 17(8) of the Ontario *Arbitration Act, 1991*[37] in *Hornepayne First Nation v Ontario First Nations (2008) Limited Partnership*.[38] The Ontario Superior Court of Justice found that a court asked to "decide the matter" must decide the question *de novo.* It is not clear from the decision, but it appears that the parties adduced new evidence on the application.

Similarly, in *Saskatchewan v Capitol Steel Corporation*, Saskatchewan alleged that Capitol Steel had repudiated their arbitration agreement.[39] It challenged the arbitrator's preliminary determination that he had jurisdiction by way of an "appeal" to the court "to decide the matter" under s 18(9) of the Saskatchewan *Arbitration Act, 1992*.[40]

The Saskatchewan Court of Queen's Bench found that there were no cases in Saskatchewan dealing with this provision; and apparently it was not alerted to the Ontario jurisprudence. It considered the case law from Alberta, which has a similar provision at s 17(9) of its *Arbitration Act*,[41] and determined that Alberta law required the court to make a decision regarding jurisdiction, not just to "review" the arbitrator's jurisdiction, and that this this language demonstrated a legislative choice to engage in a form of judicial review, not an appeal, in which the court is to make a final decision on the issue. Therefore, appellate standards of review did not apply.

The court also considered the application of *Vavilov* to the standard of review analysis. It noted that the wording of s 18(9) came into effect before *Vavilov*, which "reformulated the approach courts are to take when reviewing the decisions of administrative tribunals" and that, prior to *Vavilov*, "questions

[37] SO 1991, c 17.

[38] 2021 ONSC 5534.

[39] 2021 SKQB 224.

[40] SS 1992, c A-24.1.

[41] RSA 2000, c A-43.

going to the jurisdiction of an administrative tribunal were reviewed on a correctness standard".[42] The court reasoned that that was the state of the law when s 18(9) was enacted and, moreover, the wording of the provision "strongly suggests that the Legislature intended a correctness standard to be applied to preliminary rulings on jurisdiction".[43] The court stated that *Vavilov* "establishes reasonableness as the default standard…" and that the standard applied by the court "must reflect the legislature's intent with respect to the role of the reviewing court".[44] Therefore, the process contemplated by s 18(9) of the *Act* is an application for judicial review; it does not contemplate a hearing *de novo*, but rather a decision by the court as to whether the arbitration's decision was correct based upon the record before the arbitrator. The standard of review was correctness and the arbitrator was correct.

The correctness standard of review in jurisdiction cases is a natural extension of the competence-competence principle. Where there is a dispute as to whether a party is bound by an arbitration clause, the arbitral tribunal must decide the issue in the first instance, subject always to the court having the last word. It remains to be seen whether *Vavilov's* elimination of "true questions of jurisdiction" as a separate category of analysis that requires a correctness standard has any impact on these cases and on *Cargill*.[45]

However, the different characterization by the Ontario and Saskatchewan courts as to the process causes confusion as to whether such court proceedings are "reviews" or hearings *de novo*. The words "*de novo*" in the case law suggest the court may consider the jurisdiction issue afresh, with new evidence, and that the standard of review is correctness. The statutory

[42] *Supra* note 39 at para 29.

[43] *Ibid*.

[44] *Ibid*.

[45] *Vavilov*, *supra* note 1 at paras 65 and 200.

language that provides that the court is to "decide the matter" of jurisdiction also suggests that the court has original jurisdiction and that the standard of review is correctness. However, Penny J held the view that the standard of review and the nature of the proceeding are to be considered separately from the record that is to be put before the court.

In his treatise, Brian Casey observes:

> There is an issue about the appropriate standard of review to be employed by the court on a jurisdictional challenge. The Domestic Acts and the Model Law provide that a party who wishes to challenge the arbitrator's jurisdiction may make an application to the court "to decide the matter". This language can be interpreted as permitting the court to hear the matter *de novo*, which includes the right of a party to lead new evidence.[46]

The introduction of *Vavilov* to the standard of review analysis (in this context), in the *Saskatchewan* case demonstrates again that clarity is needed from the Supreme Court of Canada on the issue of standard of review of commercial arbitration awards, and not just on appeals.

Finally, *Luxtona* raises another interesting issue that has yet to be resolved. Russia brought an application to challenge the tribunal's preliminary jurisdiction award pursuant to both articles 16(3) and 34(2) of the *Model Law*, presumably because the former provides no right of appeal. The effect of these provisions is that a court's decision on jurisdiction becomes final if it arises out of a preliminary award, but the same decision in a final award may be the subject of a set-aside application in respect of which there is a right of appeal. In *United Mexican*

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[46] J Brian Casey, *Arbitration Law in Canada: Practice and Procedure,* 3rd ed (Juris, 2017) at 425.

States v Burr,[47] counsel agreed that it was possible to "ride both horses", but the Ontario Court of Appeal did not have to decide the issue, because it quashed the appeal. It found that the tribunal had decided the jurisdiction issue as a "preliminary question", thereby triggering article 16(3), which provided for no appeal. Mexico did not pursue article 34(2)(a)(iii) in its argument, so it remains an issue that will complicate the standard of review analysis for some time to come. Referring back to the main issue in *Luxtona*, it is interesting that the Court of Appeal in *Burr* articulated the role of the court on an article 16(3) review to "decide the matter" as ruling on the "correctness" of an arbitral tribunal's ruling on a jurisdictional plea as a "preliminary question". However, since that question was not before the Court of Appeal, this cannot be taken as the definitive Ontario position on this issue.

PETROWEST AND THE DOCTRINE OF SEPARABILITY OF THE ARBITRATION AGREEMENT

The BC Court of Appeal's decision in *Petrowest Corporation v Peace River Hydro Partners* [48] calls into question the foundational doctrine of separability in arbitration law. Petrowest and its affiliates were in receivership or bankruptcy.[49] In their name and its own, the receiver/trustee commenced a court action against Peace River Hydro for amounts allegedly owing under business agreements predating the receivership, which included arbitration clauses. As a result, Peace River Hydro applied for a stay of the action pursuant to s 15 of the (former) BC *Arbitration Act.*[50] That section provided

[47] 2021 ONCA 64 [*Burr*].

[48] *Supra* note 5.

[49] For an overview of the doctrine of separability and a useful analysis of how it applies to this case, see Anthony Daimsis, "Liquidating Separability: *Peace River v Petrowest* and the Meaning of Separability in Canadian Arbitration Law" (2021) 2:1 Can J Comm Arb 102.

[50] RSBC 1996, c 55. Section 7 of the current BC *Arbitration Act*, SBC 2020, c 2, is comparable.

that if a party to an arbitration agreement commences proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, the court must stay the legal proceedings unless it determines that the arbitration agreement is void, inoperative, or incapable of being performed.

The BC Court of Appeal held that, under bankruptcy law, a receiver may either affirm or disclaim an executory contract. Further, it stated that the doctrine of separability allows a receiver/trustee to disclaim the arbitration agreement and sue on the main contract. Therefore, the court reasoned, the receiver/trustee is not a "party" to the arbitration agreement and s 15 of the *Act* is not engaged. In any event, due to the receiver's disclaimer, the arbitration clause became "void, inoperative or incapable of being performed" within the meaning of s 15. No stay was granted.

On June 6, 2021, the Supreme Court of Canada granted Peace River Hydro leave to appeal this decision. Peace River Hydro argues that a receiver steps into the shoes of the debtor and is therefore a "party" to the contract and any arbitration agreement contained in it within the meaning of s 15 of the *Arbitration Act*. It argues further that a receiver/trustee's disclaimer of an executory contract does not make an arbitration clause "void, inoperative or incapable of being performed", because it gives rise to the right of the counterparty to terminate the contact and sue for damages. Finally, Peace River Hydro asserts that the doctrine of separability does not allow a receiver to enforce parts of a contract and simultaneously disclaim the arbitration agreement contained in the contract.

The potential implications of this case for the meaning of separability are vast. The BC Court of Appeal stated that the separability doctrine is used to preserve the effect of an arbitration agreement and the jurisdiction of the arbitrator, "even where a party impugns the validity of the contract in

which it is found".[51] It also stated that, "the doctrine has been employed to preserve the validity of the contract though the arbitration clause is found to be invalid."[52] On that basis, the court concluded that the doctrine of separability recognizes the arbitration clause as an independent agreement from the main contract, which the receiver may disclaim while suing on the main contract.[53]

This is a controversial proposition and one that is at odds with both the domestic and international jurisprudence. The relevant domestic and international statutory provisions are consistent in that they provide that: (1) the arbitral tribunal may rule own its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement; (2) for that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (3) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.[54] These provisions combine the principles of competence-competence and separability, whose purpose is to protect the jurisdiction of the tribunal and enforce parties' agreements to arbitrate, where a challenge is made to the validity of the underlying commercial agreement. For that purpose, the arbitration clause is said to be a separate contract from the main contract.

In *Petrowest*, the BC Court of Appeal applied the doctrine of separability for a novel purpose, to allow a receiver/trustee to treat the arbitration agreement and the parties' underlying commercial agreement as separate for the purpose of allowing

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[51] *Petrowest*, *supra* note 5 at para 53.

[52] *Ibid* at para 54.

[53] *Ibid* at para 55.

[54] See e.g. art 16(1) of the *UNCITRAL Model Law* and s 17 of the Ontario *Arbitration Act*, 1991, RSO, c 17.

the receiver/trustee to disclaim the arbitration agreement and sue in court on the main contract.

This will be the Supreme Court of Canada's first opportunity to address the doctrine of separability directly. The issue was referred to in *Uber Technologies Inc v Heller*, but was not relevant, as the challenge there was to the arbitration clause itself, not to the parties' underlying business agreement.[55] The arbitration clause was found to be unconscionable and therefore unenforceable and was severed from the main contract. The question was not referred to an arbitrator on the ground that, on the facts, the terms of the arbitration agreement meant that no arbitration would ever be constituted. In any event, the court found that the enforceability of the arbitration clause was a question of law which it could determine on a superficial review of the record under the *Dell Computer Corp. v Union des consommateurs* framework.[56]

CONCLUSION

The cases highlighted in this review show that Canadian courts and counsel alike continue to struggle with some of the basic principles that underlie commercial arbitration: when courts may interfere with an arbitral award while still respecting competence-competence and party autonomy; and how the principle of separability, which historically has protected the jurisdiction of the tribunal, applies when it conflicts with rights established to meet other policy objectives, such as those arising under bankruptcy law. However, the good news is that clarity on the application of the doctrine of separability should now be imminent, as the *Petrowest* appeal was heard on January 19, 2022.

As for the issue of the standard of review to be applied by courts reviewing the decisions of arbitral tribunals, there are cases, such as the BC Court of Appeal's decision in *lululemon*,

[55] 2020 SCC 16.

[56] 2007 SCC 34.

that recognize that different standards of review may apply to appeals, set-aside applications, and other court reviews provided for in arbitration legislation. But until there is a consensus among provincial appellate courts, or a further decision by the Supreme Court of Canada, the application of *Vavilov* to any of these court reviews of arbitral awards will continue to bewilder arbitration practitioners and courts alike.