A QUESTION FOR ANOTHER DAY: *VAVILOV* AND APPEALS FROM COMMERCIAL ARBITRATION

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The Supreme Court of Canada's landmark decision, Canada (Citizenship and Immigration) v Vavilov*, reset how courts are to approach the standard of review analysis. Before* Vavilov*, the standard of review applicable to appeals of arbitration awards was clear, as a result of the Supreme Court of Canada rulings in* Sattva Capital Corp. v Creston Moly Corp *and* Teal Cedar Products Ltd. v. British Columbia*. However,* Vavilov *has created uncertainty and renewed debate on the appropriate standard of review for appeals of commercial arbitration awards. Last year, a majority of the Court declined to address the issue in* Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, holding that it was appropriate to "leave for another day consideration of the effect, if any, of* Vavilov *on the standard of review principles articulated in* Sattva *and* Teal Cedar*".*[1] *This article considers how, two years after* Vavilov*, courts across Canada continue to grapple with the question of whether the Vavilov framework for determining the applicable standard of judicial review applies to appeals of arbitration awards.*

I. INTRODUCTION

Two years ago this past December, the Supreme Court of Canada released its decision in *Canada (Citizenship and*

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1 Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7 at para 46. [*Wastech*].

Immigration) v Vavilov,[2] which reset how courts are to approach the standard of review analysis. In a much anticipated decision, the seven justice majority produced what Professor Paul Daly has called the "big bang" of Canadian administrative law.[3]

While the Court's majority wrote with a view to simplifying the *Dunsmuir*-framework,[4] in at least one respect—the standard of review on appeals from commercial arbitration awards—the minority's concern that *Vavilov* would "disturb settled interpretations of many statutes that contain a right of appeal" was prescient.[5] Before *Vavilov*, the standard of review in that context was clear as a result of the Supreme Court of Canada rulings in *Sattva Capital Corp. v Creston Moly Corp* and *Teal Cedar Products Ltd. v British Columbia.* However, this is no longer the case.[6]

Today, two years after *Vavilov*, courts across Canada still have not come to a consensus on the question of whether the *Vavilov* framework for determining the applicable standard of judicial review applies to appeals of arbitration awards. The question of whether *Vavilov* has displaced the standard of review framework set out in *Sattva* is one that many courts have had to face but few have decided consistently, creating a fractured judicial landscape.

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[2] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*].

[3] Paul Daly, "Unresolved Issues after Vavilov", Hugh Ketcheson QC Memorial Lecture, 19 November 2020.

[4] *Dunsmuir v New Brunswick*, 2008 SCC 9.

[5] *Vavilov, supra* note 3 at 670.

[6] *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53 [*Sattva*]; *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 [*Teal Cedar*].

A majority of the Court declined to address the question in *Wastech,*[7] holding that it was appropriate to "leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*". The Court in *Wastech* did not have the benefit of submissions on the issue because that appeal was heard before the reasons in *Vavilov* were released.[8] Notably, three judges would have decided the issue and done so in favour of applying *Vavilov*'s framework to appeals of commercial arbitration awards.

A number of courts, including the Courts of Appeal of Ontario and British Columbia,[9] have nimbly sidestepped the question, finding that the result would be the same in the case before them regardless of whether the reasonableness standard or the appellate standard applied. As one justice of the Supreme Court of British Columbia noted early last year, "in these circumstances, one can hardly fault a lowly trial court judge for similarly sidestepping the question".[10]

In *Nolin v Ramirez*,[11] a decision pre-*Wastech*, the Court of Appeal of British Columbia was confronted with the question of whether *Vavilov* applied to the appeal of an arbitral award (in the context of family arbitration) under the old *Arbitration Act*.[12] The Court of Appeal declined to opine on the applicability of *Vavilov*, stating that it made no difference in the case before the

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[7] *Wastech, supra* note 2.

[8] *Ibid* at para 46.

[9] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation,* 2021 ONCA 592 [*OFN CA*]; *Nolin v Ramirez*, 2020 BCCA 274 [*Nolin*].

[10] *Johnston v Octaform Inc*., 2021 BCSC 536 at para 46.

[11] *Nolin, supra* note 7.

[12] *Arbitration Act,* RSBC 1996, c 55. In their facta, the parties agreed that *Vavilov* established the proper standard of review. However, during oral argument, counsel for the defendant stepped back from that position.

panel, since the result would be the same regardless of whether the standard of review was reasonableness or palpable and overriding error.[13] A year later, in *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*,[14] the Court of Appeal for Ontario, when faced with an appeal of the lower court's decision on the standard of review in an appeal of an arbitral award, similarly declined to make a determination. The panel held that it did not need to address the standard of review, because on either standard the lower court did not err.[15]

At present, Northland *Utilities (NWT) Limited v Hay River (Town of),* which was released shortly before *Wastech*, is the only appellate level authority that directly addresses (and was required to address) whether *Vavilov* applies to commercial arbitration.[16] In *Northland*, the Court of Appeal for the Northwest Territories found that *Vavilov* did apply to commercial arbitration under the *Arbitration Act*.[17] However, obiter comments made by the Court of Appeal for Alberta, in *Moffat v Edmonton (City) Police Service*,[18] and more recently by the Court of Appeal for British Columbia in *lululemon athletica canada inc. v Industrial Color Productions Inc.,*[19] discussed

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13 *Nolin, supra* note 7 at para 39.

14 *OFN CA, supra* note 7.

15 *Ibid* at para 38.

16 *Northland Utilities (NWT) Limited v Hay River (Town of),* 2021 NWTCA 1 [*Northland*].

17 *Arbitration Act*, RSNWT 1988, c A-5; *Northland, supra* note 11 at paras 44, 85. Although the decision in *Northland* was split on whether the question being appealed raised an extricable question of law, the Court of Appeal unanimously held that *Vavilov* did apply to commercial arbitrations.

18 *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 56.

19 *lululemon athletica canada inc. v Industrial Color Productions Inc*., 2021 BCCA 428 at paras 45-46 [*lululemon*].

further below, suggest that no consensus is emerging among the appellate courts.

It is unclear when the Supreme Court of Canada will be able to address the questions raised by *Vavilov* and its implications for the standard of review for commercial arbitration awards. Until then, given the importance of alternative dispute resolution mechanisms in modern commercial practice, a clear understanding of how *Vavilov* potentially impacts private arbitration, or at least an understanding of how the courts in various provinces are dealing with the issue, is important so that parties can properly assess risk and take steps in drafting their arbitration agreements to create as much certainty as is possible.

II. *VAVILOV*

The majority's decision in *Vavilov* addressed a growing concern among practitioners of administrative law about the complexity of the standard of review analysis and the lack of clarity on how to apply the reasonableness standard.[20] The majority in *Vavilov,* looking back on the framework set out in *Dunsmuir*, expressed that the words of Justice Binnie in that case were still apt more than a decade later:

> [J]udicial review is burdened with undue cost and delay... If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis]..[21]

Similarly harsh criticism was expressed regarding the application of the reasonableness standard: "administrative

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[20] *Vavilov, supra* note 3 at paras 9,11.

[21] *Ibid* at para 21 citing *Dunsmuir v New Brunswick,* 2008 SCC 9, at para 133.

decisions are entitled only to an outcome somewhere between 'good enough' and 'not quite wrong'".[22] In light of this opprobrium, the majority of the Court determined that it was best to go back to the drawing board and recalibrate the legal framework for the standard of review and the reasonableness standard. Their goal, it appears, was to simplify the "lengthy and arcane" discussions of standard of review and make more robust the approach to assessing reasonableness.

To achieve that ambition, the majority set out a rules-based formula for determining the standard of review of administrative decisions based primarily on the Court's view of legislative intent. The majority recognized that the legislative intent behind appointing an administrative decision maker to administer a statutory scheme is to imbue the decision maker with the authority to function with "a minimum of judicial interference".[23] As such, the starting point for the analysis of the standard of review under the *Vavilov* framework is that the standard of judicial review of administrative decisions is presumed to be reasonableness. In coming to this conclusion, the majority stepped back from a number of historical reasons for finding that the reasonableness standard would apply when reviewing the decision of an administrative decision maker. In particular, the majority held that the expertise of the administrative decision maker was no longer relevant to the standard of review analysis and a factor in favour of reasonableness.[24]

As is expected, the new starting point of reasonableness is a rebuttable presumption. The majority, however, endorsed very few exceptions to reasonableness, although it was clear that additional categories of legal questions requiring derogation

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[22] *Ibid* at para 11.

[23] *Ibid* at para 24.

[24] *Ibid* at paras 27-31.

from the presumption could be recognized in the future.[25] Four of the categories of circumstances requiring derogation from the presumption of reasonableness are in line with the categories of questions that attracted a standard of correctness under the *Dunsmuir* framework: (1) where the legislature has indicated that courts are to apply the standard of correctness; (2) constitutional questions; (3) general questions of law central to the legal system as a whole; and (4) questions regarding the jurisdictional boundaries between two or more administrative bodies.[26]

The final circumstance where the majority recognized that it was appropriate to rebut the presumption of reasonableness is where the relevant legislation contains a statutory appeal mechanism from the administrative decision to a court.[27] This is the most interesting category of exceptions to reasonableness, because it represents a clear departure from the Court's recent jurisprudence (which held that an appeal provision was merely a factor to be considered in the standard of review analysis) and, also, the one that has become relevant in the context of private arbitration.

The majority's reasons start from the position that the standard of review analysis must give effect to a legislature's institutional design choices, which can be determined from statutory language:

> It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with

25 *Ibid* at para 70.

26 *Ibid.*

27 *Ibid* at para 37.

> reference to the nature of the question and to this Court's jurisprudence on appellate standards of review.[28]

The Court reasons that it has no satisfactory justification to give no effect to statutory rights of appeal in the standard of review analysis.[29] This leads to the observation that legislatures must mean the same type of procedure whenever they use the term "appeal", regardless of the context:

> More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes.[30]

In recognizing that the presence of a statutory appeal alone is sufficient to rebut the presumption of reasonableness, the majority "close[d] the door" on the application of the contextual approach—including the consideration of a tribunal's expertise—in determining the standard of review.[31]

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[28] *Ibid* at para 37.

[29] *Ibid* at para 41.

[30] *Ibid a*t para 44.

[31] *Ibid* at para 47.

III. APPLICATION OF *VAVILOV* TO ARBITRATION

The issue that parties to arbitration face in light of *Vavilov* is that there is no consensus in the courts and limited appellate authority to draw upon. Some courts have taken the comments made by Justice Rothstein in *Sattva* regarding the analogies between administrative decision-making and arbitral decision-making, and found that appeals of private arbitral awards are not affected by *Vavilov's* changes to the standard of review for administrative decisions.[32] Others have adopted the position of the minority of the Supreme Court of Canada in *Wastech*: the question is simply one of statutory interpretation.[33] While acknowledging that there are important differences between commercial arbitration and administrative decision-making, the minority justices conclude that those differences do not affect the standard of review where the legislature has provided for a statutory right of appeal.[34] A further few courts have undertaken a review of the doctrine of *stare decisis*, and the policies and principles underlying commercial arbitration, and concluded that *Sattva* was not overruled.[35]

In this fragmented landscape, the only thing that is clear is that the application of *Vavilov* to private commercial arbitration is a complicated question that requires further consideration.[36]

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[32] *Sattva, supra* note 4; see e.g. *Northland, supra* note 14.

[33] *Wastech, supra* note 2 at para 119; see e.g. *Northland, supra* note 14.

[34] *Wastech, supra* note 2 at para 119

[35] See e.g. *Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd*., 2021 BCSC 1415.

[36] As was acknowledged by the *Wastech* majority. *Wastech, supra* note 5 at paras 45-46.

1. *Sattva and the Standard of Review of Arbitral Decisions*

Although most courts have reviewed commercial arbitral awards on appeal on the standard of reasonableness, this approach was not authoritatively settled until the Supreme Court of Canada's decision in *Sattva Capital Corp. v Creston Moly Corp*. In *Sattva,* Justice Rothstein, for the Court, acknowledged that appellate review of these awards takes place in the context of a unique regime that is specifically tailored to the objectives of commercial arbitration.[37] However, he pointed to two key factors, shared between judicial review of administrative decisions and arbitral appeals, suggesting that the *Dunsmuir* framework could be helpful in determining the appropriate standard of review of commercial arbitration awards: (1) the appointment of a non-judicial decision maker to determine the issues between the parties; and (2) the presumed expertise of the decision maker.[38]

Considering these factors and the post-*Dunsmuir* jurisprudence, Justice Rothstein confirmed that the applicable standard of review was reasonableness:

> 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 importance to the legal system as a whole and outside the adjudicator's expertise.[39]

Prior to *Vavilov,* the expertise of the non-judicial decision maker was a primary factor in the courts taking a deferential

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[37] *Sattva*, *supra* note 4 at para 104.

[38] *Ibid* at para 105.

[39] *Ibid* at para 106.

approach to the decisions of administrative tribunals. Reasonableness was considered the appropriate standard to review the decisions of expert decision makers because that standard reflected appropriate respect for the legislature's choice to leave some matters in the hands of decision makers who could draw on their expertise gained from working day-to-day with complex administrative schemes.[40] This principle has been repeated numerous times by the Supreme Court of Canada since *Dunsmuir*, including in *Edmonton (City)* where the majority of the Court held:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: ". . . in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" [41]

Although an arbitrator in a commercial arbitration may not always have the same type of expertise as an administrative decision maker, the fact that the parties choose their own decision maker supports a presumption that he or she has some expertise or qualification that is acceptable to the parties.[42] The Supreme Court of Canada's decision in *Sattva* was followed by a

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[40] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 49.

[41] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at para 33.

[42] *Sattva, supra* note 4 at para 105.

majority of the Court in *Teal Cedar Products Ltd. v. British Columbia.*[43]

Therefore, while administrative law principles have not been directly applied to commercial arbitration, Justice Rothstein drew and relied on analogies between the two processes to conclude that the rationale supporting reasonableness review of administrative decisions also applies to appeals from commercial arbitration awards. However, the foundation of this reasoning is largely undermined by *Vavilov*: disregarding expertise as an important factor and interpreting a statutory appeal provision as an important signal that appellate standards of review should apply, both weigh in favour of a conclusion that *Vavilov* overturns *Sattva*, making the appellate standard the new standard of review applicable to commercial arbitration.

2. *Stare Decisis*

Vavilov mentions neither *Sattva* nor commercial arbitration, despite the fact that the British Columbia International Commercial Arbitration Centre Foundation intervened in *Vavilov*. The question, therefore, arises as to what the principles of *stare decisis* have to say about the impact of *Vavilov* on *Sattva*.

The technical answer is quite straightforward. *Vavilov* did not purport to overrule Sattva, and a majority of the Court confirmed that the issue was not resolved. There is no doubt that the Supreme Court of Canada may overturn its own precedents. However, the Court has stressed that overturning recent precedent—particularly precedent that represents the view of firm majorities—is a very serious matter.[44] The rationales for *stare decisis* are that the law should be predictable, consistent, and stable, that judicial administration

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[43] *Teal Cedar, supra* note 4 at para 74.

[44] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at paras 56-57.

should be sound and fair, and that the system should foster public confidence in the administration of justice.[45] Overturning precedent too often or without compelling justification could create a sense of arbitrariness or judicial incompetence:

> There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith… The legitimacy of the Court would fade with the frequency of its vacillation.[46]

In addition, the Court is reluctant to depart from precedent without having the issue fully argued.[47] This approach minimizes the potential for unforeseen consequences resulting in a deviation from precedent. As the minority in *Vavilov* points out, reliance interests—specifically, the reliance of confidence placed on a particular state of the law by persons arranging their affairs—represent powerful reasons to respect precedent.[48]

This reasoning suggests that if the Court had intended to overturn *Sattva*, it would have done so explicitly. As the Manitoba Court of Queen's Bench put it:

> [I]t need be acknowledged that it is anything but obvious that the Supreme Court of Canada intended *Vavilov* to apply to a statutory appeal of a commercial arbitration award and thereby overrule its own significant judgments in *Sattva* and *Teal Cedar Products Ltd.* along with the long-standing legal principles which acknowledge the

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45 *Vavilov, supra* note 3 at para 254.

46 *Ibid* at para 261, citing *Planned Parenthood of Southeastern Pennsylvania v Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992) at 866 .

47 *Wastech, supra* note 2 at paras 45-46; *R. v. Oland*, 2017 SCC 17 at para 26; *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 41.

48 *Vavilov, supra* note 3 at para 270.

> reasons for limited judicial intervention in commercial arbitration. If that had been the intention of the Supreme Court of Canada, it is reasonable to suggest that such an intention would have been more clearly and obviously stated in a case as significant as *Vavilov*.[49]

The Supreme Court of British Columbia has recently taken a more definitive stance, finding that the principles of *stare decisis* required that it apply the reasonableness standard from *Sattva* and *Teal Cedar* until further guidance from a higher court is provided:

> Although by leaving open the question of the standard of review to be applied in reviewing arbitral decisions under s. 31 of [*Arbitration*] *Act* the majority in *Wastech* has allowed some uncertainty in administrative law to continue, I am satisfied that *stare decisis* requires that the reasonableness standard enunciated in Sattva and *Teal Cedar* must still be applied in determining the issues raised on this appeal.[50]

Therefore, while the majority's reasoning in *Vavilov* that "the word 'appeal' refers to the same type of procedure in [a criminal or commercial law context]",[51] seems to point to *Vavilov* overturning *Sattva*, the reluctance of the majority in *Wastech* to decide the issue, together with the principles of *stare decisis*, suggest that *Sattva* is still binding on the standard of review for arbitral awards.

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[49] *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited,* 2021 MBQB 77 at para 75.

[50] *Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd*., 2021 BCSC 1415 at para 59.

[51] *Vavilov, supra* note 3 at para 44.

3. *The Statutory Appeal Mechanism*

The dissenting judges in *Vavilov* were highly critical of the majority's reliance on the "presumption of consistent expression" regarding the word "appeal", and contended that the term cannot be imbued with the consistent intent the majority ascribed to it:

> The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.[52]

Echoing the dissent, Professor Daly criticizes the majority's approach as applying "equal correctness review on questions of law, context and nuance be damned, all in the name of 'institutional design'".[53]

Vavilov's elevation of the importance of a statutory appeal mechanism in determining the standard of review, and the current uncertainty as to how this affects commercial arbitration, have significant implications for arbitration in

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[52] *Ibid* at para 247.

[53] Paul Daly, "The Vavilov Framework and the Future of Canadian Administrative Law", Ottawa Faculty of Law Working Paper No. 2020-09 at 7.

Canada. Each province has its own domestic and international arbitration legislation.[54] While the international arbitration acts are quite similar across the country (closely adopting the *UNCITRAL Model Law on International Commercial Arbitration*), domestic legislation is quite varied.[55]

Of particular relevance, the scope of the parties' appeal rights vary significantly across Canada. Many of the provinces allow parties to agree to appeal questions of both fact and law to the courts. British Columbia, however, only allows parties to appeal questions of law. Prince Edward Island appears to allow appeals on both questions of fact and law, but only to the Court of Appeal. At the far end of the spectrum, Newfoundland and Labrador does not provide any rights of appeal and is, in fact, silent on the topic of appeals altogether. Here are the details:

a) The arbitration acts of Alberta, Saskatchewan, Manitoba, Ontario and New Brunswick state that the parties may agree in their arbitration agreement to appeal questions of both fact and law to the provincial superior court. If the arbitration agreement is silent on rights of appeal, the parties may only appeal a question of law, and only with leave from the court.[56]

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54 Federal arbitration legislation also exists, which will not be discussed in detail in this paper: *Commercial Arbitration Act*, R.S.C. 1985, c. 17.

55 UNCITRAL Model Law on International Commercial Arbitration (1985), U.N. Doc. A/40/17, Ann. I adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006.

56 *Arbitration Act*, R.S.A. 2000, c. A-43, s. 44; *The Arbitration Act*, 1992, S.S. 1992, c. A-24.1, s. 45; *The Arbitration Act*, C.C.S.M. c. A120, s. 44; *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 45; *Arbitration Act*, R.S.N.B. 2014, c. 100, s. 45.

b) The Nova Scotia Commercial Arbitration Act states that "unless the parties otherwise agree, there is no appeal of an award". The parties can agree to appeal questions of fact, law, or mixed fact and law to the Supreme Court of Nova Scotia.[57]

c) The Northwest Territories and Yukon arbitration acts state that where the parties agree in the arbitration agreement that the award can be appealed, the appeal lies with the superior courts of those territories. The legislation is silent on the ability of the parties to appeal where they have not provided for appeals in their arbitration agreement.[58]

d) The Prince Edward Island Arbitration Act states that where the parties agree in the arbitration agreement that the award can be appealed, the appeal lies with the Court of Appeal.[59]

e) The British Columbia Arbitration Act states that parties may appeal a question of law to the Court of Appeal, unless the arbitration agreement expressly states that the parties may not pursue an appeal.[60]

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57 *Commercial Arbitration Act*, S.N.S. 1999, c. 5, s. 48.

58 *Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 27; *Arbitration Act*, R.S.Y. 2002, c. 8, s. 26.

59 *Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 21(2).

60 *Arbitration Act*, S.B.C. 2020, c. 2, s. 59.

f) The Newfoundland and Labrador Arbitration Act does not contain a provision granting parties a statutory right of appeal.[61]

Under the Vavilov framework, if there is a statutory appeal mechanism in the legislation, any appeal of a domestic commercial arbitral award would be reviewed on the appellate standard. The generality of this proposition, however, has been limited in the most recent cases. In the recent case *Moffat v Edmonton (City) Police Service*, the Court of Appeal of Alberta found that the term "appeal" does not have consistent expression where the appeal is to a body other than a court, for example an internal review panel, because of the policy considerations behind such a structure, compared with judicial review:

> However, where an appeal is to a body *other than a court*, it cannot be presumed in all instances that the legislature intended by the use of the word "appeal" a standard of review framework designed for courts.[62]

Interestingly, the Court of Appeal commented in *obiter* that *Vavilov* could apply (and had been applied) to appeals of commercial arbitration awards, distinguishing those cases on the basis that the appeals were to courts:

> We would stress that our conclusion is not dependent on *Vavilov* being restricted to the issues with which it explicitly dealt. For instance,

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61 *Arbitration Act*, R.S.N.L. 1990, c. A-14.

62 *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 55 (emphasis in original). The question before the Court of Appeal was whether *Vavilov* applied to the standard of review applied by the Law Enforcement Review Board when reviewing a presiding officer's determinations. There was no question that *Vavilov* applied to the court's judicial review of the Law Enforcement Review Board's decision.

> it has recently been held that *Vavilov* also changed the standard of review for commercial arbitration in instances where the governing legislation provides a statutory appeal from a decision of an arbitrator to a court: *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 at paras 20-44; see also *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras 117-121, per Brown and Rowe JJ (concurring). In such instances, the *Housen* framework is said to apply because, as a matter of statutory interpretation, the word "appeal" should be given a consistent meaning in legislation. However, even if *Vavilov* does extend to the review of certain commercial arbitration decisions (a question we need not decide), this has no bearing on the question of internal administrative review. Like *Vavilov*, these cases involve external review by a court. Different considerations apply to internal appeal tribunals, which are created by a legislature to fulfill any number of diverse purposes. [63]

While this reasoning is in line with the majority in *Vavilov*, the Court's finding that an "appeal" is not always an "appeal" if the context shifts outside of the courts supports the *Vavilov* minority's argument that the "broad purpose of the statutory scheme" ought to be considered in determining the standard of review.

For example, provincial international arbitration legislation almost entirely omits the term "appeal" from any of the

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63 *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 56.

statutes.[64] As such, any appeal of an international arbitral award (to the extent it is even possible) must be conducted on a reasonableness standard. Although the policies underlying domestic and international arbitration differ to a degree, the purpose of both is to provide a framework for parties to avail themselves of alternative dispute resolution mechanisms outside of the typical court process. It is an idiosyncratic result to have most domestic awards subject to the appellate standard and most international awards subject to the reasonableness standard, when the general policy and purpose of the statutory scheme is the same for both.[65]

Given these legislative differences in providing for a statutory appeal, parties may have to carefully consider the jurisdiction in which they want to situate their arbitration, and whether they want to provide for appeals by agreement. Parties who are already bound by a domestic arbitration agreement may want to discuss with their legal counsel ways to increase the certainty of their awards or renegotiate with their counterparty. This will be particularly pertinent while the uncertainty around the application of *Vavilov* remains unresolved.

IV. WHAT HAVE THE COURTS DONE POST-*VAVILOV*?

The reluctance of the majority in *Wastech* to endorse the statutory interpretation reasoning of the minority has led to another year of fragmentation in the lower courts across Canada. Whether this has led to an overall decrease in appeals

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[64] The Ontario *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sched. 5 uses the term "appeal" in the title of s 11. None of the other statutes provides a statutory appeal mechanism.

[65] The Quebec legislation regulates both domestic and international arbitrations under the same set of Civil Code provisions: Civil Code of Quebec: Civil Code of Quebec, SQ 1991, c 64, Articles 2638–2643, 3121, 3133, 3148 and 3168; Code of Civil Procedure, CQLR, c C-25.01 at Articles 649–651.

of commercial arbitration decisions remains to be seen. However, the majority's decision to defer to another day the question of whether *Vavilov* applies to commercial arbitration, looms large over all of the lower court decisions to date and has signalled the need for submissions by parties each time the issue is raised.

As mentioned above, the superior courts have split on whether *Vavilov* applies to appeals of commercial arbitration decisions. Last year, the authors commented that the split showed neither geographic nor legislative clustering.[66] Now, however, it appears that the courts in British Columbia are moving towards a consensus that *Vavilov* does not apply to appeals of commercial arbitration awards. This trend may strengthen, given the Court of Appeal for British Columbia's *obiter* comments in *lululemon athletica canada inc. v Industrial Color Productions Inc:*

> Finally, respectfully, *Sattva* and *Vavilov* are not helpful [to the standard of review for applications to set aside arbitral awards under s. 34(2)(a)(iv) of the *International Commercial Arbitration Act*].
>
> *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.[67]

To illustrate the current state of the courts, let us look at a selection of post-*Vavilov* decisions that demonstrate the

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[66] Jennifer K. Choi and the Honourable Thomas A. Cromwell, "The Impact of *Vavilov* on Appeals of Commercial Arbitration Awards" (2021) 79:5 Advoc. (B.C.) 663.

[67] *lululemon, supra* note 20 at paras 44-45.

progression of the various positions taken by the courts on the issue of standard of review over the past two years.[68]

4. *Vavilov Applies and the Standard is Correctness*

A. *Buffalo Point First Nation v Cottage Owners Association*

Buffalo Point First Nation v Cottage Owners Association was the first decision relating to an appeal of an arbitral award published post-*Vavilov*.[69] Buffalo Point First Nation leased land to individuals, represented by the Cottage Owners Association, for cottage development. The cottagers and the First Nation engaged in a series of legal disputes in relation to the lease, including through arbitration.

The Manitoba Court of Queen's Bench held that, where an arbitration agreement is silent respecting the right of appeal, section 44(2) of the Manitoba *Arbitration Act* applies.[70] The court queried whether *Vavilov* applied to its determination of the standard of review and, without much discussion of whether it was appropriate to apply administrative law principles to review of arbitral awards, determined that it did.[71] As such, the court held that it was required to consider the question of law before it on the appellate standard of correctness.

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[68] This selection of cases is not an exhaustive listing of all of the commercial arbitration cases that have involved a consideration of the application of *Vavilov*, since it was decided on December 12, 2019. They also represent a broader selection of cases than just decisions on appeals of commercial arbitration decisions. The authors have endeavored to provide a full representation of the views expressed by the courts in the commercial arbitration space.

[69] *Buffalo Point First Nation et al. v. Cottage Owners Association*, 2020 MBQB 20.

[70] *Ibid* at para 31.

[71] *Ibid* at paras 46-48.

B. *Allstate Insurance Company v Her Majesty the Queen*

Allstate Insurance Company v Her Majesty the Queen was the second reported appeal of an arbitral award following *Vavilov*.[72] This case related to an automobile insurance policy that Allstate alleged had been cancelled at the time of a catastrophic motor-vehicle accident. The issue proceeded to arbitration, pursuant to O. Reg. 283/95.[73] Allstate appealed the arbitral award.

In its analysis of the standard of review, the Ontario Superior Court of Justice considered whether *Vavilov* changed the standard of review on appeals from insurance arbitrations mandated by legislation. (The standard of review had previously been reasonableness.)[74] The court held that Allstate's appeal was a statutory appeal and determined that the fact that parties could agree on the scope of appeal from the arbitral award—i.e., they could agree in the arbitration agreement to allow appeals of fact, law, and mixed fact and law—did not change the fact that the appeal arose out of a statutory appeal mechanism.[75] Therefore, the court found that the appellate standard of review applied.

Interestingly, in a footnote, the court distinguished between private commercial arbitration and insurance arbitration, stating the insurance arbitration was not autonomous and self-contained in the same manner as commercial arbitration. However, the language used by the court makes it unclear whether this distinction would matter in light of a statutory appeal provision. A year later, this decision was followed in *Her Majesty the Queen in Right of Ontario (Minister of Government*

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72 *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 [*Allstate*].

73 *Disputes Between Insurers*, O. Reg. 283/95.

74 *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 at para 19.

75 *Ibid* at para 20-21.

and Consumer Services) v Royal & Sun Alliance Insurance Company of Canada, another insurance arbitration.[76]

C. *Northland Utilities (NWT) Limited v Hay River (Town of)*

Northland Utilities (NWT) Limited v Hay River (Town of) was the first appellate court case to weigh in on the application of *Vavilov* to commercial arbitration.[77] As noted above, *Northland* is not a typical commercial arbitration, since arbitration was mandated by the *Cities, Towns and Villages Act.*[78] However, the implications of this distinction were not addressed by the Court of Appeal for the Northwest Territories.

The Court held that the Supreme Court of Canada's silence on the issue of commercial arbitration was not material to the question of *Vavilov's* applicability. Instead, the Court held that the proper analysis was to determine whether the reasoning of the majority in *Vavilov* applied to statutory appeals from a commercial arbitrator's decision.[79]

The Court of Appeal held that the presumption of consistent expression applied equally to commercial arbitration as it did to administrative law.[80] Further, *Vavilov's* minimization of the role of expertise in the standard of review analysis was held to support the argument that a commercial arbitrator's expertise does not justify exemption from an appellate standard or review

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[76] *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.

[77] *Northland, supra* note 14.

[78] *Cities, Towns and Villages Act*, S.N.W.T. 2003, c. 22, Sch. B, s. 91(5).

[79] *Northland, supra* note 14 at para 37.

[80] *Ibid* at para 39.

any more than does the expertise of an administrative decision maker.[81]

Finally, looking at the question of whether applying *Vavilov* to commercial arbitration awards would make Canada a less favourable jurisdiction for arbitration, the Court of Appeal held that it would not:

> It is difficult to follow the argument that the reliability of Canada as a forum for resolution of local and global business disputes, would be rendered less grounded in the rule of law in a rules-based system of law by employing an appellate review standard. The *Dunsmuir* standard requiring deference to arbitrator's decisions, no matter the basis upon which they were determined, resulted in greater uncertainty than an appellate standard of review. In other words, commercial attractiveness may be enhanced, rather than reduced, by allowing appeals based on an arbitrator's errors on questions of law. The development of a body of arbitral jurisprudence based on appellate rulings will assist in fostering acceptance of the predictability and reliability of Canadian decision-making.[82]

D. *Broadband Communications North Inc. v 6901001 Manitoba Ltd.*

In *Broadband Communications North Inc. v 6901001 Manitoba Ltd*., the parties were given leave to appeal questions of law arising from an arbitral decision relating to a stipulated

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81 *Ibid* at para 40.

82 *Ibid* at para 42.

price contract.[83] The decision of the Court of Queen's Bench of Manitoba was released on the same day as *Wastech*.

The court held that, although there were conflicting decisions regarding the application of *Vavilov*, it was persuaded by the decisions in *Buffalo Point* and in *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board)*,[84] which was not a commercial arbitration case. Therefore, because the appeal was a "statutory appeal limited to a question of law", the court held that the *Vavilov* standard of correctness for questions of law applied.[85]

E. *719491 Alberta Inc v The Canada Life Assurance Company*

In *719491 Alberta Inc v The Canada Life Assurance Company*, the applicant numbered company sought an order setting aside the arbitral award or, in the alternative, an order granting leave to appeal the arbitrator's decision, pursuant to section 44(2) of the *Arbitration Act,* R.S.A. 2000, c A-43.[86] The Court of Queen's Bench for Alberta determined that there was no basis to set aside the arbitral award, and denied the application for leave to appeal the arbitrator's decision.[87] However, the Court chose to comment in *obiter* on the standard of review for appeals of arbitral awards in the commercial context. It noted that the conclusion reached by the minority in *Wastech* was consistent

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[83] *Broadband Communications North Inc. v. 6901001 Manitoba Ltd*., 2021 MBQB 25.

[84] *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board) et al*, 2020 MBCA 60, an appeal of a decision of the Manitoba Public Utilities Board.

[85] *Broadband Communications North Inc. v. 6901001 Manitoba Ltd*., 2021 MBQB 25 at para 28.

[86] *719491 Alberta Inc v The Canada Life Assurance Company*, 2021 ABQB 226.

[87] *Ibid* at paras 59, 72-73.

with the decision of the Court of Appeal for the Northwest Territories (which is comprised of a panel of judges from the Court of Appeal of Alberta) in *Northland.*[88] Given the reasoning in *Northland*, the court voiced its agreement that the standard of review for arbitration appeals has effectively been modified by the *Vavilov* framework.[89]

5. *Vavilov Does Not Apply and Sattva Continues to Apply*

A. *Cove Contracting Ltd. v Condominium Corporation No. 012 5598 o/a Ravine Park*

Cove Contracting Ltd. v Condominium Corporation No. 012 5598 o/a Ravine Park was the first post-*Vavilov* decision to seriously consider the question of whether changes to the standard of review framework in administrative law should impact appeals of arbitral awards.[90] This case is an example of a typical commercial arbitration, where the private arbitrator was asked by the parties to interpret a fixed price construction contract.

The Court of Queen's Bench of Alberta held that *Vavilov* did not change the standard of review on commercial arbitration appeals.[91] The Court concluded that the reasoning in *Vavilov* does not apply to appeals from commercial arbitrators, since the arbitration was not statutorily mandated and does not involve an administrative body.[92] With respect to the Supreme Court of Canada's assertion that the word "appeal" held the same meaning in administrative and commercial contexts, the Court

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88 *Ibid* at para 61.

89 *Ibid* at para 62.

90 *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park),* 2020 ABQB 106.

91 *Ibid* at para 6.

92 *Ibid* at para 7.

held that *Vavilov*'s conclusion that the word "appeal" implied an appellate standard of review was limited to administrative decision makers, because the majority in *Vavilov* had provided no guidance on its application outside of administrative law.[93] Further, the Court held that *Sattva* and *Teal Cedar* had not been overruled by *Vavilov* and, therefore, remained binding on it.[94]

B. *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*

In *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, the Ontario Superior Court of Justice declined to follow the precedent set in *Allstate* and instead held that *Vavilov* did not apply to appeals from arbitral awards.[95]

In its judgment, the Court engaged in a lengthy analysis of whether *Vavilov* applied to the appeal. OLG argued that *Vavilov* changed the standard of review applicable to appeals where the decision maker sits as an appellate court under the *Arbitration Act*.[96] However, the Court noted that the appeal before it was brought pursuant to the parties' contract and not pursuant to a statutory right of appeal:

> However, this appeal is not brought pursuant to a statutory right of appeal. It is brought pursuant to s. 9.2 of the GRSFA which provides as follows:
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> The award of any arbitration shall be appealable by the parties to the appropriate Ontario court on questions of law, or questions of mixed fact and

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93 *Ibid* at para 10.

94 *Ibid* at para 12.

95 *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516 at para 74.

96 *Ibid* at para 64.

> law, including, without limitation, matters of process and procedure.
>
> Section 45 of the Arbitration Act does not mandate an appeal from an arbitration decision but provides for an appeal "If the arbitration agreement so provides". This appeal is therefore not statutorily mandated.[97]

The court distinguished the situation before it from the appeal in *Allstate*, on the grounds that the appeal in that case was statutorily mandated, and held that *Allstate* does not stand for the broad proposition that *Vavilov* has changed the standard of review to be applied generally to appeals from commercial arbitration.[98]

The court also found that it was not reasonable to conclude that the Supreme Court of Canada meant to overrule *Sattva* or *Teal Cedar*, since neither of those decisions, nor arbitration generally, were considered in *Vavilov*.[99] Further, the court stated that the constitutional principles justifying deference in administrative law do not apply to commercial arbitrations, which are guided by different, commercial considerations.[100] Therefore, it did not necessarily follow that a change to the judicial review framework for administrative decisions automatically changed the standard of review framework for arbitral awards.[101]

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97 *Ibid* at para 65-66.

98 *Ibid* at para 67.

99 *Ibid* at para 71.

100 *Ibid* at para 72.

101 *Ibid* at para 73.

On appeal, discussed in detail below, the Court of Appeal of Ontario determined that regardless of whether *Vavilov* applied, the lower court had not erred in its judgment.[102]

C. *Bergmanis v Diamond*

Bergmanis v Diamond raised the question of the rights of appeal for parties who are not bound to the terms of an arbitration agreement. In this case, during the arbitration, the arbitrator issued summonses to third-party witnesses. The witnesses successfully applied to the arbitrator to quash the summonses. The appellants appealed the arbitrator's decision to quash. However, under the *Arbitration Act*, the appellants could only appeal a question of law with leave.[103] Leave had not been sought.[104]

Regardless of the finding that the appellants had no right to appeal the arbitrator's decision to quash, the Ontario Superior Court of Justice continued on to consider the question of whether *Vavilov* would apply to an appeal. The court relied on the reasons in *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*,[105] stating in *obiter* that it was satisfied that the standard of review was reasonableness:

> I am satisfied that the standard of review of the Arbitrator's decision to quash the summonses is reasonableness. The issue on this appeal is not a question of law of central importance to the legal

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[102] *OFN CA*, supra note. 7.

[103] *Bergmanis v Diamond*, 2021 ONSC 2375 at para 29.

[104] *Ibid* at para 30. Further, the appeal involved the application of the law of solicitor-client privilege to the facts of the dispute and, therefore, was a question of mixed fact and law.

[105] *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation,* 2020 ONSC 1516 at paras 69-72.

> system as a whole. There is no dispute as to the legal principles that apply to the scope of solicitor-client privilege. The Arbitrator noted that the legal principles were agreed upon, and his decision was based on the application of those agreed-upon principles to the facts.[106]

D. *lululemon athletica canada inc. v Industrial Color Productions Inc.*

lululemon athletica canada inc. v Industrial Color Productions Inc., a case of the Court of Appeal of British Columbia, may signify that the British Columbia courts are interested in distinguishing between appeals of arbitral decisions in a strict commercial context from other arbitral decisions.[107] In the original appeal to the Supreme Court of British Columbia, the appellant, lululemon athletica canada inc., applied to have the arbitral award set aside on the basis that the arbitrator had decided a matter beyond the terms of the submission to arbitration. The application was brought pursuant to section 34(2)(a)(iv) of the *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233 ("*ICAA*"), which does not refer to an appeal or use the term "appeal". The Supreme Court of British Columbia dismissed the application.

On appeal, the Court of Appeal of British Columbia held that the lower court's finding that a reasonableness standard of review applied to the application to set aside the arbitral award was incorrect, although the decision to dismiss the application was correct.[108] One of the factors that the lower court considered in finding that the reasonableness standard applied

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106 *Bergmanis v Diamond*, 2021 ONSC 2375 at para 34.

107 *lululemon, supra* note 20.

108 *Ibid* at para 4.

was the fact that a reasonableness standard of review aligned with the general framework set forth in *Vavilov*.[109]

The Court of Appeal found that *United Mexican States v Cargill, Inc*.,[110] which the lower court distinguished from the case at bar the on the basis that it involved a public international law claim under *NAFTA*, was the leading case on the standard of review for applications to set aside awards under the *ICAA*.[111] The standard of review was, therefore, correctness.[112] The Court of Appeal expressly stated that neither *Vavilov* or *Sattva* were applicable or helpful to the analysis, because they do not address applications to set aside arbitral awards. However, the panel went further to say that *Sattva* continues to establish the standard of review in commercial arbitration and that *Vavilov* does not apply:

> *Vavilov* is the leading case on the standard of review in administrative law. It does not address the field of arbitration.[113]

6. *The Court can Resolve the Case Without Deciding Whether Vavilov Applies*

A. *Johnston v Octaform Inc.*

In *Johnston v Octaform Inc,* the petitioners petitioned the Supreme Court of British Columbia to set aside an interim award issued in an arbitration proceeding with their former employer. The Court held that the interim award was correct both in its reasoning and result, such that the petition was correctly

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109 *Ibid* at para 30.

110 *United Mexican States v. Cargill, Inc*., 2011 ONCA 622.

111 *lululemon, supra* note 20 at para 34.

112 *Ibid* at para 34.

113 *Ibid* at para 46.

dismissed, regardless of whether correctness or a more deferential standard of review applied.[114]

The Court looked at the two appellate-level decisions arising out of British Columbia, available at that time, regarding the application of *Vavilov* to commercial arbitrations: *Nolin* and *Wastech*. It recognized that between the two cases, nine appellate judges had declined to definitively decide whether *Vavilov* applies to commercial arbitration:

> In *Nolin* and *Wastech*, no less than nine appellate judges have declined to directly answer the question how *Vavilov* impacts the standard of review under section 31 of this Province's *Arbitration Act* and, in particular, whether any regime of reasonableness applies to arbitration appeals. All nine judges preferred to leave the matter for determination on another day since the outcome would have been no different regardless of which standard of review applied to the decision before them.[115]

The court commented that "in these circumstances, one can hardly fault a lowly trial court judge for similarly sidestepping the question",[116] and held that it was unnecessary to decide the question.[117] *Johnston v Octaform Inc* was decided while *lululemon* was pending before the Court of Appeal for British Columbia.

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114 *Johnston v Octaform Inc*., 2021 BCSC 536 at para 12.

115 *Ibid* at para 45-46.

116 *Ibid* at para 46.

117 *Ibid* at para 49.

B. *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*

Christie Building Holding Company, Limited v Shelter Canadian Properties Limited raised the question of what is the appropriate record for an appeal of an arbitral decision.

The court held that, given the specific choices of the parties to not create an expansive evidentiary record at the arbitration, and the inappropriateness of the record proposed by the appellant,[118] it was unnecessary to decide whether *Vavilov* applied to change the standard of review for arbitral decisions.[119] However, the Court nonetheless undertook a review of the debate in the lower courts across Canada:

> Insofar as Christie argues that its interpretation of the standard of review now requires this court to undertake its own analysis of a now created or reconstructed evidentiary record in order to decide if leave should be granted, I am in disagreement with that position and I reject it. Having so determined, I am nonetheless not persuaded that I must decide or that I am implicitly deciding in this judgment whether the reasoning and framework in *Vavilov* applies to

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[118] *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited,* 2021 MBQB 77 at paras 34-35. In this case, the parties at the arbitration agreed not to have a court reporter and only marked five exhibits. The appellant put forward a selection of the thousands of documents referenced over the course of the arbitration proceedings, but not made part of any official record, to be considered as part of the record on appeal. The court held that, given the specific choice of the parties to not create an official evidentiary record at the arbitration hearing, the record for the purpose of the leave applications (and any appeal were leave to be granted) would be limited to: the five exhibits marked at the arbitration proceedings; the pleadings, and the reasons for decision respecting the Awards.

[119] *Ibid* at paras 76-79.

> appeals from commercial arbitrations and whether *Sattva* and *Teal Cedar Products Ltd.* have been overruled such so as to change the standard of review on commercial arbitration appeals.[120]

The Court noted that it was important that the majority in *Vavilov* did not mention *Sattva* or *Teal Cedar* at any point in their reasons, much less express an intention to overrule those "seminal decisions".[121] It also found persuasive aspects of the reasons and conclusions set forth in *Cove Contracting* and *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*.[122] Although it staunchly maintained that it was not deciding the issue of whether *Vavilov* applied to commercial arbitration, the Court held that it was "anything but obvious that the Supreme Court of Canada intended *Vavilov* to apply to a statutory appeal of a commercial arbitration award".[123]

C. *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation, 2021 ONCA 592*

This appeal was the first time post-*Wastech* that an appellate court has squarely faced the question of what the standard of review is for an appeal of an arbitral award.[124] In the original appeal to the Ontario Superior Court of Justice, the lower court ruled that the reasonableness standard of review applied,

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120 *Ibid* at para 64.

121 *Ibid* at para 70.

122 *Cove Contracting Ltd v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation,* 2020 ONSC 1516.

123 *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited,* 2021 MBQB 77 at para 75.

124 *OFN CA*, *supra* note 7.

finding that *Vavilov* did not affect the Supreme Court of Canada's prior rulings in *Sattva* and *Teal Cedar*. One question before the Court of Appeal was whether the lower court erred as to the standard of review.

The appellants argued that *Vavilov* applies whenever the legislature has provided for a statutory appeal, such as under Ontario's *Arbitration Act*.[125] The respondents disputed that *Vavilov* overturned *Sattva* and *Teal Cedar.* They also argued that, because the appellants largely raised questions of mixed fact and law, whether or not *Vavilov* applies to the review of a commercial arbitral decision, the reasonableness standard of review applied to those questions.[126]

The Court of Appeal agreed with the respondents that it was unnecessary to determine *Vavilov*'s impact on the standard of review analysis.[127] It found that, regardless of whether *Vavilov* applied, the lower court did not err in upholding the arbitral decision.[128]

In justifying its decision to refrain from making a finding on the issue of *Vavilov* and standard of review, the Court of Appeal held that the most appropriate approach was to decline to address the issue, since it was unnecessary to resolve the appeal. It observed further:

> The Supreme Court took the same approach in *Wastech Services Ltd. v. Greater Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1, at para. 46, where the majority, per Kasirer J., declined to consider "the effect, if any, of Vavilov

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125 *Arbitration Act*, 1991, S.O. 1991, c. 17.

126 *OFN CA*, *supra* note 7 at para 36.

127 *Ibid* at para 37.

128 *Ibid* at para 38.

> on the standard of review principles articulated in Sattva and Teal Cedar", partly because the outcome of the case did not depend on the standard of review.[129]

V. WHERE ARE WE NOW?

A year after *Wastech*, it appears that parties to arbitration are going to have to continue to endure uncertainty until there is another opportunity for the Supreme Court of Canada to consider whether *Vavilov* applies to commercial arbitration. Parties in British Columbia may take some comfort from the Court of Appeal of British Columbia's *obiter* statement that "[*Vavilov*] does not address the field of arbitration".[130] Similarly, some certainty for parties in Alberta is provided by the Court of Appeal of Alberta's *obiter* statement that *Vavilov* does apply to commercial arbitration, in *Moffat v Edmonton (City) Police Service*.[131] Unfortunately, parties in Ontario will have to wait for more clarity, until another arbitration case is considered by the Court of Appeal.

However, even if some jurisdictions are aligning on the question of *Vavilov's* application, it is clear that there is currently no consensus at the appellate level as to whether *Vavilov* has overruled *Sattva* and *Teal Cedar.* Unless there is realignment, the Supreme Court of Canada will have to weigh in, as they signaled in *Wastech* that they would do, when the appropriate case arises.

As the law currently stands, the strict rule of *stare decisis* requires that *Sattva* be followed until it is expressly over-ruled by the Supreme Court of Canada. However, because the authority of *Sattva* is not stable at this time, the pragmatic

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129 *Ibid* at para 39.

130 *lululemon, supra* note 20 at para 46.

131 *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183.

approach of saying that the error is reviewable whether the applicable standard is reasonableness or correctness is probably the safest approach for courts, where realistically available.

Dispute resolution provisions are often a lesser concern when negotiating a commercial contract. However, the costs (time and money) of an appeal ought to be considered, particularly when it is unclear whether the reasonableness standard or the appellate standard will be applied on appeal.

Parties who are entering into arbitration agreements, who want to limit the uncertainty that an appeal of an arbitral award may create in their relationship, will want to discuss with their legal counsel whether it is appropriate to opt out of appellate review. Similarly, parties to existing arbitration agreements should ensure that there have not been intervening legislative changes that affect their right to appeal.[132] Where this has occurred, renegotiation of the terms of the agreement may be necessary to ensure that the parties' intentions are accurately captured. Parties are always at liberty to amend their arbitration agreements to better suit their needs and relationship.

VI. **CONCLUSION**

There is a certain irony that the Supreme Court of Canada, in *Vavilov,* set out to fashion a more streamlined and certain process for determining the standard of judicial review and yet created uncertainty and renewed debate on the appropriate standard of review for appeals of commercial arbitration awards.

Last year, we predicted that "it is likely that courts will try to avoid the issue (by holding that the standard of review will not

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[132] See for example, *D Lands Inc. v. KS Victoria and King Inc*., 2022 ONSC 1029.

affect the result) until the Supreme Court of Canada provides further clarity".[133] This prediction came true in the case of the Court of Appeal of Ontario, the only appellate level court post-*Wastech* to be squarely confronted with the question of *Vavilov's* application. However, to our surprise, a number of courts, including the appellate courts for British Columbia and Alberta, have weighed in on the question, in many cases without any clear need to do so. When a case will come to the Supreme Court of Canada so that they can resolve the current uncertainty is unknown. Until then, Canadian courts will continue to grapple with, or attempt to avoid, the issue.

[133] Jennifer K. Choi and the Honourable Thomas A. Cromwell, "The Impact of *Vavilov* on Appeals of Commercial Arbitration Awards" (2021) 79:5 Advoc. (B.C.) 663 at 675.