

THE INAPPLICABILITY OF VAVILOV’S PRESUMPTION OF CONSISTENT EXPRESSION IN COMMERCIAL ARBITRATION

William G. Horton and Terence F. Young*

Table of Contents

1. Introduction	1
2. The Supreme Court Decision in Vavilov	7
3. The Presumption of Consistent Expression	10
4. Context and the Meaning of “Appeal”	13
5. The Fallacy of Applying Vavilov’s Presumption of Consistent Expression to Appeals in Commercial Arbitration	20
a. Applying the Presumption of Consistent Expression to Commercial Arbitration	25
i) Does the word “appeal” prescribe or preclude any particular standard of review?	26
ii) Do other surrounding words in the enactments being compared indicate a consistent legislative intent or preference on the question of standard of review?	28
6. Conclusion	33

1. Introduction

Without ever mentioning the word “arbitration”, the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (“*Vavilov*”)¹ has led to massive confusion with respect to appeals from domestic commercial arbitration awards.

* William G. Horton is an independent arbitrator of Canadian and international business disputes. Terence F. Young is an articling student in British Columbia. The authors are grateful to Tamar Meshel, Associate Professor and CN Professor of International Trade, University of Alberta Faculty of Law, for her assistance.

NOTE: Shortly before publication of this article, the authors became aware of a decision of the Manitoba Court of Appeal in *Buffalo Point First Nation et al. v. Buffalo Point Cottage Owners Association*, 2025 MBCA 72. The decision was released on August 12, 2025 and validates the conclusion and many of the key arguments in this article that the decision of the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 remains good law. We welcome this decision and hope the additional analysis in this article will fortify that conclusion. For the avoidance of doubt, we wish it to be known that this article was submitted for publication in March 2025.

1. 2019 CSC 65, 2019 SCC 65, [2019] 4 S.C.R. 653 (S.C.C.) [*Vavilov*].

Vavilov was decided in the context of an appeal from a decision of an administrative tribunal. On the basis of the “presumption of consistent expression”,² the Supreme Court held that any administrative statute that uses the word “appeal” gives rise to “appellate standards”—the same standards of review as for appeals within the court system, including the standard of “correctness” for questions of law, which was established by the Supreme Court of Canada in *Housen v Nikolaisen* (“*Housen*”)³ for appeals from lower courts to higher courts. The correctness standard would allow any judge or panel of judges by whom an appeal is heard to freely substitute their opinion for that of the tribunal under appeal.

In a prior unanimous decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.* (“*Sattva*”)⁴ the Court held that a “reasonableness standard” should be applied to arbitration appeals, meaning that the judge or judges hearing the appeal should not overturn the award if they find that the award is one that could have been reasonably arrived at even if they personally did not agree with the result or found a legal error in the decision.⁵

Even though the most ardent advocates for applying *Vavilov* to appeals from arbitration awards concede that *Vavilov* did not directly overrule *Sattva*, they nevertheless argue for that result by a process of legal triangulation.⁶ One argument is that the reasoning in

2. *Ibid* at para 44.

3. 2002 CSC 33, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para 36 [*Housen*].

4. 2014 CSC 53, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) [*Sattva*].

5. See *Sattva*, *ibid* at paras 74 and 75.

6. See James Plotkin and 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 Com Arb. For additional discussion on the presumption of consistent expression in the context of *Vavilov* and arbitration see, Levi Graham, Brendan MacArthur-Stevens and Mitchell Folk, “A Eulogy for Arbitral Deference? The Standard of Review for Private Arbitration Post-*Vavilov*” (2022) 35 Can J Admin L & Prac 205; Joel Richler, “A Second Kick: Appeals In Canadian Domestic Commercial Arbitration” (2021) 51 Adv Q 342.; and Paul Daly, “Unresolved Issues After *Vavilov*” (2022) 85 Sask L Rev 89 at 22-26. As will be seen from these and other articles, many of the arguments advanced in this paper have been made previously by others and disputed by still others. However, the debate goes on with some courts pointing to the differences in particular provincial statutes as a basis for arriving at one conclusion or the other (see: *Esfahani v. Samimi*, 2022 ABKB 795, 92 R.F.L. (8th) 272, 2022 A.C.W.S. 5881 (Alta. K.B.), leave to appeal refused 2023 ABCA 220, 2023 A.C.W.S. 3550, 2023 CarswellAlta 1895 (Alta. C.A.)). This suggests an ongoing need to keep alive, refocus and amplify the arguments until the issue is clarified by the Supreme Court of Canada.

Vavilov in some way discredits the reasoning in *Sattva* such that the conclusion in *Sattva* is no longer good law. A second argument is that parties who enter into arbitration agreements with rights of appeal must have wanted all along to have “appellate standards” apply in the same way as appeals from court judgments. Both arguments appear to turn on the assertion, said to be based on the decision in *Vavilov*, that the word “appeal” must be presumed to have the same meaning with specific reference to the standard of review whenever it appears.

The arguments in favour of *Vavilov* having displaced *Sattva* can be summarily dismissed by saying, first, that it is for the Supreme Court of Canada to say when one of its previous unanimous decisions no longer applies and, second, it defies common experience to suggest that parties to arbitration agreements have any concept of the difference between the “correctness” and “reasonableness” standards of review, or any pre-conceived preference at the time the agreement is entered into. In actuality, the word appeal does not have the same meaning in all contexts, either generally or with respect to standards of review. In addition, as we explain below, the “reasonableness” standard supports the contractual expectations of parties when they agree to arbitration whereas the “correctness standard”, despite its ostensible goal of producing “correct” results, defeats those expectations. For those reasons, *Sattva*, remains “good law” in both senses of the phrase.

However, the arguments in favour of the “appellate/correctness standard” continue to be advanced by losing parties to arbitrations and their counsel. Those arguments have been embraced by a number of lower courts to which the idea of substituting their “correct” opinions for those of an arbitration tribunal has some allure⁷. The Supreme Court of Canada and most provincial courts of appeal have yet to resolve the growing controversy. Continuing discussion of the issue is therefore necessary.

This article assumes *Vavilov* is binding precedent in Canadian law as it relates to appeals from administrative decisions. It does not question the correctness of *Vavilov* in that context, although the

7. See *Esfahani v. Samimi*, 2022 ABKB 795, 92 R.F.L. (8th) 272, 2022 A.C.W.S. 5881 (Alta. K.B.), leave to appeal refused 2023 ABCA 220, 2023 A.C.W.S. 3550, 2023 CarswellAlta 1895 (Alta. C.A.) and the cases cited therein. See also Campbell J. in *Mungo v. Saverino* (1995), 58 A.C.W.S. (3d) 175, 1995 CarswellOnt 3298, [1995] O.J. No. 3021 (Ont. Gen. Div.), additional reasons 1995 CarswellOnt 4250 (Ont. Gen. Div.): “For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.”

presence of a strong minority decision in *Vavilov* which disagreed with the majority's change in the standard of review is noted.⁸ This article argues that the reasoning in *Vavilov* does not apply to appeals from private commercial arbitration awards because, using the same context-driven approach to statutory interpretation as the majority in *Vavilov*, and applying that approach to the policy objectives and textual differences in arbitration legislation, the presumption of consistent expression does not support *Vavilov*'s application in the arbitration context. Even if the conditions for applying the presumption to the interpretation of arbitration legislation as well as to regulatory legislation were met, there is nothing in *Vavilov* to suggest that the presumption of consistent expression is irrebuttable. This article argues that, if applicable, the presumption would be rebutted by other considerations, many of which are noted in *Sattva*.

The issue of *Vavilov*'s possible applicability to commercial arbitration awards arises because most Canadian domestic arbitration statutes provide for the possibility of an "appeal" to the court from an arbitration award, either as a default recourse or with the parties' agreement.⁹ Indeed, the jurisdiction of any court to hear any appeal must be based on a statute.¹⁰ Courts across the

8. The fact that *Vavilov* was not a unanimous decision on the issue of standard of review suggests that it may prove to be more open to being modified in the future. Many of the arguments of the concurring minority in *Vavilov*, which vehemently criticized the changes to standard of review adopted by the majority, apply with even greater force to arbitration. For example, see the comments regarding the majority's adoption of a "court centric" model of decision making (see *Vavilov* para 240). However, this article focuses on the application of *Vavilov* to arbitration based on the presumption of consistent expression.

9. See e.g., *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 45; *Arbitration Act*, S.B.C. 2020, c. 2, s. 59; *Arbitration Act*, R.S.A. 2000, c. A-43, ss. 3, 44, 48; *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1, ss. 4, 45, 49; *The Arbitration Act*, C.C.S.M c. A120, ss. 3, 44, 48; *Arbitration Act*, R.S.N.B. 2014, c. 100, ss. 3, 45, 49; *Commercial Arbitration Act*, R.N.S. 1999, c. 5, ss. 5, 48, 52; *Arbitration Act*, R.S.P.E.I. c. A-16.1, ss. 3, 45, 49; *Arbitration Act*, RSY 2002, c. 8; amended by SY 2016, c.8 s. 26; *Arbitration Act*, RSNWT 1988, c A-5, s. 27; *Arbitration Act*, RSNWT (Nu) 1988, c A-5, s. 27. These provisions should be referred for provisions relating to arbitration appeals. The arbitration Acts of Quebec, Newfoundland and Labrador, and the federal Act do not provide for a right of appeal. It should be noted that legislation that provides for "appeals" from arbitration awards differ widely across Canadian jurisdictions as to the circumstances in which appeals are available or may be excluded, scope of appeal, and limitations placed on rights of appeal.

10. See *R. v. Chisholm*, 2012 NBCA 79, 292 C.C.C. (3d) 132, 270 C.R.R. (2d) 210 (N.B. C.A.) at para 6; *L. (H.) v. Canada (Attorney General)*, 2005 CSC 25, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.) at paras 180–181; *R. v. W. (G.)*,

country have expressed contrary views as to whether or not *Vavilov* does, or should be taken to, override *Sattva* and the subsequent decision of the Supreme Court in *Teal Cedar Products Ltd. v. British Columbia* (“*Teal*”)¹¹ which confirmed the decision in *Sattva*.

Some courts have applied *Vavilov* to the arbitration context, with the result that the level of scrutiny of arbitration awards increased exponentially.¹² Other courts have taken the opposite view and held that *Vavilov* could not be taken to have reversed *Sattva* and *Teal*—significant and recent jurisprudence of the Supreme Court—without even mentioning it.¹³

To this confusion, the Supreme Court itself added a chapter. In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*¹⁴ the Court set aside an arbitration award on an appeal under the former British Columbia *Arbitration Act*¹⁵ without resolving the controversy as to whether *Vavilov* applies to commercial arbitration. Indeed, the controversy was deepened by the exchange of opinions between the two factions of the Court in *Wastech*. The majority came as close to affirming *Sattva* and *Teal* as they could without deciding the point: “...*Vavilov* does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration (see *Sattva*, at para. 104; *Teal Cedar*, at paras. 81-83)”.¹⁶ Lest any reader might have taken silence as acquiescence, the majority

[1999] 3 S.C.R. 597, 178 D.L.R. (4th) 76, 138 C.C.C. (3d) 23 (S.C.C.) at para 8; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, 235 D.L.R. (4th) 587 (S.C.C.) at para 21; *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456, 81 C.C.C. (3d) 286 (S.C.C.).

11. 2017 CSC 32, 2017 SCC 32, [2017] 1 S.C.R. 688 (S.C.C.) [*Teal*].

12. See e.g., *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1, 456 D.L.R. (4th) 278, [2021] 2 W.W.R. 322 (N.W.T. C.A.) [*Northland*]; *Burwell et al v. Wozniak*, 2024 ONSC 5851, 174 O.R. (3d) 544, 2024 A.C.W.S. 5457 (Ont. S.C.J.) [*Burwell*]; *Buffalo Point First Nation et al. v. Cottage Owners Association*, 2020 MBQB 20, 315 A.C.W.S. (3d) 426, 2020 CarswellMan 28 (Man. Q.B.).

13. See e.g., *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516, 317 A.C.W.S. (3d) 56, 2020 CarswellOnt 4840 (Ont. S.C.J. [Commercial List]), affirmed 2021 ONCA 592, 2021 CarswellOnt 12281 (Ont. C.A.), additional reasons 2021 ONCA 646, 335 A.C.W.S. (3d) 726, 2021 CarswellOnt 13232 (Ont. C.A.); *Cove Contracting Ltd v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106, 9 C.L.R. (5th) 306, 10 Alta. L.R. (7th) 178 (Alta. Q.B.) at paras 3-12.

14. *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 CSC 7, 2021 SCC 7, [2021] 1 S.C.R. 32 (S.C.C.) [*Wastech*].

15. *Arbitration Act*, R.S.B.C. 1996, c. 55.

16. *Wastech*, *supra* note 14 at para 45.

pointedly noted that it was not to be taken as agreeing with *Vavilov*'s application to commercial arbitration, but preferred to wait until the issue was fully argued.¹⁷ However, the concurring minority was undeterred, declaring that "where a statute provides for an 'appeal' from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*".¹⁸ Despite this explicit disagreement, some lower courts have treated the reasoning of the concurring minority in *Wastech* as authority for *Vavilov*'s application to arbitration appeals.¹⁹

This article argues that the Supreme Court's own rationale in *Vavilov* weighs against expanding it to appeals from arbitration awards. The Court relied on the presumption of consistent expression in the distinctive context of appeals from administrative decisions. Appeals in the administrative context, as the *Vavilov* majority emphasized, involve constitutional considerations that govern the respective roles of the legislature and the courts and guide the interpretation of appeal rights in administrative statutes. Far from extending the presumption of consistent expression beyond administrative law, *Vavilov* makes abundantly clear the context in which the majority concluded 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" (emphasis added).²⁰

What is missing from the majority's reasoning in *Vavilov* (because it was never addressed) and from the concurring minority's reasoning in *Wastech* is a similar contextual analysis of commercial arbitration and a discussion of whether or not the presumption of consistent expression actually leads to the conclusion that the legislature(s) intended the standard of review to be the same for commercial arbitration awards as for

17. *Ibid* at para 46 ("Respectfully stated, the fact that I do not pursue discussion of this particular point raised in the opinion of my colleagues should not be understood as my agreeing with their view."). The authors would hope that if and when the issue is fully argued a deeper analysis of the application of the presumption of consistent expression to the arbitration context will be undertaken.

18. *Ibid* at para 120 (concurring minority).

19. See e.g., *Burwell*, *supra* note 12; *D Lands Inc. v. KS Victoria and King Inc.*, 2022 ONSC 1029, 2022 A.C.W.S. 3539, 2022 CarswellOnt 5708 (Ont. S.C.J. [Commercial List]) at paras 59-64; 719491 *Alberta Inc. v. The Canada Life Assurance Company*, 2021 ABQB 226, 333 A.C.W.S. (3d) 16, 2021 CarswellAlta 785 (Alta. Q.B.), leave to appeal refused 2021 ABCA 419, 40 Alta. L.R. (7th) 48, 343 A.C.W.S. (3d) 5 (Alta. C.A.), leave to appeal refused 2022 CarswellAlta 2311, 2022 CarswellAlta 2310 (S.C.C.) at paras 60-62.

20. *Vavilov*, *supra* note 1 at para 37 (emphasis added).

administrative decisions by statutory bodies. Given the administrative law context of *Vavilov*, it is not surprising that the Court did not engage in any analysis of domestic arbitration statutes, appeals from arbitration awards or, for that matter, of the nature of arbitration itself. However, such an analysis is necessary for any serious discussion of the standard of review applicable to arbitration awards and whether the law has changed due to the application of presumption of consistent expression in the arbitration context. This article attempts to address that narrow but crucial gap.

The article proceeds as follows. Section 2 briefly introduces the majority's holding in *Vavilov* which will be familiar to most readers. Section 3 discusses the presumption of consistent expression in Canadian law pre-*Vavilov*. Section 4 discusses the meaning of the word appeal in the arbitration context. Section 5 then explains why *Vavilov*'s reliance on the presumption of consistent expression in the administrative law context renders the Court's holding inapplicable in the context of arbitration and arbitration legislation. The article concludes in Section 6 that once the purpose, operation, legal framework and statutory language governing commercial arbitration are considered, as the presumption of consistent expression in fact requires, standards of review applicable to court judgments and administrative tribunals should not be applied to private commercial arbitration awards.

2. The Supreme Court Decision in *Vavilov*

Vavilov involved an application for judicial review of an administrative decision issued by the Canadian Registrar of Citizenship to cancel Mr. Vavilov's certificate of citizenship under the *Citizenship Act* and *Regulations*. To the majority of the Supreme Court, *Vavilov* presented an "opportunity to re-examine its approach to judicial review of administrative decisions" in order to "bring greater coherence and predictability to this area of law".²¹ To overcome the "uncertainty"²² resulting from the long-standing principles underlying judicial review that the Court articulated in *Dunsmuir v. New Brunswick* ("*Dunsmuir*"),²³ the Court in *Vavilov* "set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged".²⁴

21. *Vavilov*, supra note 1 at paras 1, 9-10.

22. *Ibid* at para 9.

23. 2008 CSC 9, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

24. *Vavilov*, supra note 1 at para 16.

The revised framework set out by the Court “starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions”.²⁵ This presumption may be rebutted on the basis of legislative intent where “the legislature explicitly prescribes the applicable standard of review” or “the legislature has provided a statutory appeal mechanism from an administrative decision to a court”.²⁶ In addition, the presumption may be rebutted “where the rule of law requires that the standard of correctness be applied”, such as to “constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies”.²⁷

The Supreme Court justified this revised framework by relying on the following constitutional and administrative law principles:

Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference.²⁸

By the same token, courts are required to give effect to the legislature’s intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision...Where a legislature has

25. *Ibid* at paras 16-17.

26. *Ibid* at paras 16-17.

27. *Ibid* at paras 16-17.

28. *Ibid* at paras 23-24 (internal citation omitted).

provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect.²⁹

It is crucial to note the majority's view that, in the administrative law context, the presence of the word "appeal" signals an intent to deviate from an alternative review process that would ordinarily apply—the constitutional right to judicial review on a presumptive standard of reasonableness.

As for the actual application of the presumptive reasonableness standard where no statutory right of appeal is involved, *Vavilov* envisioned a "robust" standard of review.³⁰ As the Supreme Court held:

[t]o be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside...the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment".³¹

As a result, "*Vavilovian* reasonableness review" is

more demanding than the articulation of the reasonableness standard developed in previous cases: decisions must be justified, not merely justifiable; decision makers must demonstrate their expertise; a decision must be responsive to the particularities of, and presented by, the parties; and only contemporaneous reasons can be offered in support of the reasonableness of a decision.³²

29. *Ibid* at para 36.

30. *Ibid* at para 72.

31. *Ibid* at para 102 (internal citations omitted). See also *Mason v. Canada (Citizenship and Immigration)*, 2023 CSC 21, 2023 SCC 21, 485 D.L.R. (4th) 583 (S.C.C.)

32. Paul Daly, "Unresolved Issues after *Vavilov*", 85 Sask. L. Rev. 89 (2022) at pp. 91-92.

One of the exceptions to this already very demanding new articulation of the presumptive reasonableness standard is where the legislature has created, in addition to the constitutional right of judicial review of administrative decisions, a statutory appeal right. Post-*Dunsmuir* courts reviewing administrative decisions “g[a]ve no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording”.³³ The Court in *Vavilov* held that appeal rights in administrative statutes signal the legislature’s intent that appellate standards apply when a court reviews an administrative decision, because the appeal mechanism must be differentiated from the judicial review process.

3. The Presumption of Consistent Expression

The analysis and conclusions of the Supreme Court set out above are expressly specific to the administrative law context. Yet, as previously noted, some lower courts and the concurring minority in *Wastech* have seized *Vavilov*’s reliance on the presumption of consistent expression to extend the Court’s holding to the arbitration context.³⁴ Therefore, it is of interest to consider how the presumption was viewed and applied before *Vavilov*.

The presumption of consistent expression has typically been applied to find that when the same word was used more than once *in a single statute*, the court should give that word the same meaning. As Sopinka J stated in *R v Zeolkowski*: “[g]iving the same words the same meaning *throughout a statute* is a basic principle of statutory interpretation.”³⁵ The corollary of this principle is that different words used in the same Act have different meanings. In *Peach Hill Management Inc v Canada*, Malone J.A. stated: “[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning”.³⁶ The presumption has also been

33. *Vavilov*, *supra* note 1 at para 41.

34. See, *Wastech*, *supra* note 14 at paras 119-120. See also *Northland*, *supra* note 12 at para 39 and *Esfahani v. Samimi*, 2022 ABKB 795, 92 R.F.L. (8th) 272, 2022 A.C.W.S. 5881 (Alta. K.B.), leave to appeal refused 2023 ABCA 220, 2023 A.C.W.S. 3550, 2023 CarswellAlta 1895 (Alta. C.A.) at para 69.

35. *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, 61 D.L.R. (4th) 725, 50 C.C.C. (3d) 566 (S.C.C.) at p. 1387. See also, *Thomson v. Canada (Department of Agriculture)*, (sub nom. Thomson v. Canada (Deputy Minister of Agriculture)) [1992] 1 S.C.R. 385, 89 D.L.R. (4th) 218, 3 Admin. L.R. (2d) 242 (S.C.C.) at paras 26-28 [*Thomson*].

36. *Peach Hill Management Ltd. v. R.* (2000), (sub nom. Jabel Image Concepts Inc. v. Minister of National Revenue) 257 N.R. 193, 98 A.C.W.S. (3d) 813, [2000] F.C.J. No. 894 (Fed. C.A.) at para 12. See also, *R. v. Schwartz* (1976),

applied to “recurring patterns of expression”.³⁷ This means, as stated in cases in which a single Act was under consideration, that when the legislature uses a particular pattern or structure to describe a situation, and then describes another situation without using that pattern or structure, then the legislature intended the two situations to be governed differently.

The presumption of consistent expression varies in strength depending on several factors, including the proximity of the word(s) being interpreted and their purpose in the statute. For instance, the presumption is strongest when the same word is used in a single subsection³⁸ and is also strong when an expression is present in adjacent subsections.³⁹ There is also a strong presumption when the word is integral to the legislative scheme, such as the word “income” in the *Income Tax Act*.⁴⁰ In other circumstances, the presumption may be weaker.

The strength of the presumption of consistent expression therefore inevitably depends on the circumstances and particular context. This makes sense given the known pitfalls of the presumption.⁴¹

First, all presumptions carry the risk that they will override the cardinal principles of statutory interpretation. In their article “Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation”, the Honourable Thomas A. Cromwell, Siena Anstis, and Thomas Touchie refer to the “modern approach” in Canadian statutory interpretation as it applies to presumptions as follows:

[1977] 1 S.C.R. 673, 67 D.L.R. (3d) 716, 29 C.C.C. (2d) 1 (S.C.C.) at p. 677-690 in dissent; approved by the majority in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1 (S.C.C.) at paras 88ff; *R. v. Barnier*, (sub nom. *R. v. Bauer*) [1980] 1 S.C.R. 1124, 109 D.L.R. (3d) 257, 51 C.C.C. (2d) 193 (S.C.C.) at p. 1135-1136.

37. R. Sullivan, *The Construction of Statutes*, 7th Ed., Toronto: LexisNexis Canada (2022) at 8.04[3] [Sullivan (7th)]. See also *Kirkpatrick v. Maple Ridge (District)*, [1986] 2 S.C.R. 124, 30 D.L.R. (4th) 431, 34 M.P.L.R. 128 (S.C.C.) and *Antosko v. Minister of National Revenue*, (sub nom. *Canada v. Antosko*) [1994] 2 S.C.R. 312, (sub nom. *Antosko v. R.*) [1994] 2 C.T.C. 25, 94 D.T.C. 6314 (S.C.C.) at p. 332. Both cases involved different patterns of expression within a single Act.

38. *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2001 FCA 236, 202 D.L.R. (4th) 272, [2001] 4 F.C. 237 (Fed. C.A.) at para 23, affirmed 2003 CSC 28, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.).

39. *Thomson*, supra note 35 at paras 26-28.

40. *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, 53 D.L.R. (4th) 656, [1988] 2 C.T.C. 294 (S.C.C.) at para 20.

41. Sullivan (7th), supra note 37 at 8.04[5]

This approach mandates that “the words of an Act are to be read **in their entire context** and in their grammatical and ordinary sense harmoniously **with the scheme of the Act, the object of the Act**, and the intention of Parliament.” In their current use, however, substantive presumptions of intent are not always congruent with this approach; applied as mandatory rules, for example, they may be used to defeat the results of this fully contextual approach. This issue forms part of the methodological critique of presumptions, which asks when and how presumptions of legislative intent should be used by the judiciary as well as how substantive presumptions relate to other approaches to statutory interpretation.⁴²

[Emphasis added.]

In their article, Hon. Thomas Cromwell et al. are specifically concerned with substantive presumptions, *i.e.*, presumptions that relate to “policies and values” that are brought to bear on the interpretation of statutes.⁴³ They make a distinction between such presumptions and textual presumptions such as the presumption of consistent expression, which they maintain “...are not, strictly speaking, presumptions of *intent*. Rather, they are rules of interpretation premised on commonsense expectations about *how* legislatures draft statutes”.⁴⁴ The application of the presumption of consistent expression in *Vavilov* has both substantive and textual aspects. It is rooted in a deep consideration of the constitutional framework within which administrative decisions are made as well as the overall scheme of judicial review. In that context, the majority in *Vavilov* ascribed a particular and consistent meaning to the single word “appeal”. Indeed, as noted below, the majority in *Vavilov* denied that it was adopting a textual approach.

In considering “how legislatures draft statutes”, the question arises as to whether it is realistic to presume that legislative drafters consider the intended meaning of a word in all other statutes when drafting a new Act. There is also the question as to whether legislative drafters may occasionally leave some questions to be determined by the courts when they concern matters that may be within the unique expertise of the courts, such as the standard of

42. Cromwell, Anstis and Touchie, “Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation”, 95(2) *Canadian Bar Review* 297 (2017) at p. 300 (internal citations omitted; emphasis added) [Cromwell, et al.]

43. *Ibid* at p. 299.

44. Cromwell et al., *supra* note 42 at p. 299 fn. 2 (citing R. Sullivan, *The Construction of Statutes*, 6th ed., Markham: LexisNexis Canada (2014) at p. 481).

review. Finally, there is the question whether legislative intent changes retroactively when the courts arrive at a new interpretation.⁴⁵

A second complication in the application of presumptions is that they may be subject to competing considerations. For example, in *Mitchell v Peguis Indian Band*, the Supreme Court deviated from the presumption of consistency (in this case, that “Her Majesty” referred to the federal Crown exclusively) in order to accommodate a competing constitutional presumption in favour of Indigenous Peoples.⁴⁶ Thus, the issue arises as to whether there are competing considerations that differentiate administrative law appeals from arbitration appeals.

These complications suggest that while the presumption of consistent expression is alive in Canadian law, it too must be applied in context.

4. Context and the Meaning of “Appeal”

The majority of the Supreme Court in *Vavilov* stated the following with respect to the word “appeal” and the presumption of consistent expression:

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**: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that **the legislature intends** an appellate standard of review to be applied when it uses the word “appeal” also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our

45. In fairness, this last question could also apply to *Sattva*; although *Sattva* does not place the same emphasis on searching for “legislative intent” in the interpretive exercise.

46. *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46 (S.C.C.). See also: *Potash Corp. of Saskatchewan Inc. v. Scott*, 2008 SCC 45, (*sub nom.* New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.) [2008] 2 S.C.R. 604, 295 D.L.R. (4th) 1, 75 Admin. L.R. (4th) 159 (S.C.C.); Sullivan (7th), *supra* note 37 at 8.04[6].

colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.⁴⁷

[Emphasis added.]

Some lower courts and the concurring minority in *Wastech* have relied on this passage from the *Vavilov* opinion to extend its holding beyond the administrative law context. Their understanding of *Vavilov*'s reasoning seems to be as follows: (1) the presumption of consistent expression dictates that the same word across statutes has the same meaning, hence (2) the word "appeal" must have the same meaning across statutes, hence, (3) because the legislator's use of the word "appeal" indicates an intention to apply appellate standards of review, such use necessarily conveys the intention that the same standards of review as apply to court judgments must apply in all contexts.

As stated by the concurring minority in *Wastech*:

What matters are the words chosen by the legislature, and giving effect to the intention incorporated within those words. Thus, where a statute provides for an 'appeal' from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*. Concluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein.⁴⁸

Apart from the fact that this interpretation by the concurring minority in *Wastech* of the majority decision in *Vavilov*, is in direct contradiction of above quoted passage from the majority in *Vavilov* that its decision does not hinge on a "textualist argument"⁴⁹, there are several flaws with this understanding of *Vavilov*'s reasoning.

First, it assumes that there is a commonsense expectation that a legislature intends the exact same meaning to attach to a given word in every statute it has enacted regardless of time of enactment, subject matter, context, or the object of the Act. While the majority in *Vavilov* suggested that the principle of consistent expression applies "across statutes", this suggestion is supported only by reference to the 6th edition of Sullivan on *The Construction of Statutes*.⁵⁰ However, no authority is cited for that proposition by Sullivan in that edition of the book. The next edition of the book,

47. *Vavilov*, *supra* note 1 at para 44 (emphasis added).

48. *Wastech*, *supra* note 14 at para 120.

49. *Vavilov*, *supra* note 1 at para 44.

50. R. Sullivan, *The Construction of Statutes*, 6th ed., Markham: LexisNexis Canada (2014) at p. 217.

which post dated *Vavilov*, cites *Vavilov* as the only authority for that proposition.⁵¹ However, in the same footnote, Sullivan also quotes the strongly worded minority decision in *Vavilov* which stated:

The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced...The idea that *Housen v. Nikolaisen* [...] 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

Second, while it is uncontroversial that an "appeal" involves a procedure whereby a decision of one court or tribunal can be brought before another court or tribunal with the possibility of the initial decision being reconsidered, reversed, modified or affirmed⁵³ it does not necessarily or logically lead to the conclusion that legislatures view all rights of appeal in the same light. For example, appeal procedures can vary considerably. Some appeals are as of right, some require leave of the court and some may be excluded by agreement. Some appeals may be to a single judge, and some may be to an intermediate court of appeal, such as a Divisional Court. Further appeals may or may not be allowed. The test for leave to appeal may or may not be stated and may vary in each instance. These variations may point to varying legislative intent to provide for full rights of appeal or limited rights of appeal, with a greater or lesser emphasis on the benefits of the initial decision being final. That the same standard of review or degree of deference should apply in all these circumstances without consideration for context is not only contrary to common sense and experience but also contrary to the contextual approach that *Vavilov* adopts.

Third, with some exceptions in the administrative law context,⁵⁴ statutes do not generally prescribe standards of review.⁵⁵ Where statutes are silent, that issue has been left to common law decisions rendered by courts, most notably by the Supreme Court of Canada.

51. Sullivan (7th), *supra* note 37 at 8.04.

52. *Vavilov*, *supra* note 1 at para 247 (concurring minority).

53. See "appeal" in Barber, Katherine, *The Canadian Oxford Dictionary*, (Oxford University Press, 1998) at p. 58.

54. See e.g., the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59.

55. There are no Canadian arbitration acts that prescribe a standard of review for arbitration appeals. Notably, despite the controversy regarding *Sattva* and *Vavilov*, the 2020 British Columbia *Arbitration Act*, S.B.C. 2020, c. 2 and the 2023 Prince Edward Island *Arbitration Act*, S.P.E.I. 2023, c. 15 make no provision regarding standard of review of appeals. It is open to legislatures to enact specific standards of review, but to presume what standards it would enact is simply circular logic.

All the decisions under consideration outside the administrative law context (*Sattva*, *Teal*, *Wastech*) are examples of the Court addressing that issue in the absence of specific statutory direction. Therefore, the legislature's mere use of the word "appeal" where there is no other constitutionally mandated review of the merits as in administrative law cannot be taken to indicate any intention at all with respect to the applicable standard of review.

Finally, the modern rule for interpreting statutes is not open to serious dispute and *Vavilov* should not be taken as displacing it. As stated in the opening words of Professor Ruth Sullivan's leading text, *Sullivan on the Construction of Statutes*:

More than thirty years ago, in the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo & Rizzo Shoes Ltd.* it was declared to be the preferred approach of the Supreme Court of Canada. It has even been applied to interpretation of Quebec's Civil Code.⁵⁶

[Emphasis added.]

Indeed, Sullivan goes on to cite the following passage from *Vavilov* on the continued importance of the "modern principle" of statutory interpretation:

This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because **legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context**: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker.⁵⁷

[Emphasis added.]

56. Sullivan (7th), *supra* note 37 at 2.01[1].

57. *Vavilov*, *supra* note 1 at para 118.

So, on what basis may the presumption of consistent expression in a statute be taken to express a legislative intention to require the same standard of review for appeals across all statutes regardless of the context? *Vavilov* has been interpreted by some lower courts and by the concurring minority in *Wastech* as simply ignoring context:

There are important differences between commercial arbitration and administrative decision-making (*Sattva*, at para. 104). Those differences do not, however, affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov*, “a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts” (para. 39). This interpretive principle applies in similar manner to statutory rights of appeal from arbitral awards...Factors that justify deference to the arbitrator, notably respect for the parties’ decision in favour of alternative dispute resolution and selection of an appropriate decision-maker, are not relevant to this interpretive exercise.⁵⁸

It is interesting to note in the context of these observations that, apart from technical rules of stare decisis, the concurring minority in *Wastech* cannot speak definitively as to an interpretation of *Vavilov* as they (Côté, Brown and Rowe JJ) were a minority of the majority of the judges who decided *Vavilov* (Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ).

In any event, the reliance of the concurring minority in *Wastech* on *Vavilov* as authority for disregarding the contextual differences between commercial arbitration and administrative law is misplaced, because the majority in *Vavilov* *did* conduct a contextual analysis. It is important to understand that this contextual analysis was undertaken at the level of administrative law statutes *as a group*, rather than at the level of individual administrative law statutes or at the level of individual statutes outside the administrative law context.

Vavilov begins: “This appeal ... provide(s) this Court with an opportunity to re-examine its approach to **judicial review of administrative decisions**”.⁵⁹ The Court continues:

Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns **matters which are fundamental to our legal and constitutional order**, and seeks to navigate **the proper relationship**

58. *Wastech*, *supra* note 14 at paras 119-120.

59. *Vavilov*, *supra* note 1 at para 1 (emphasis added).

between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. **The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.**⁶⁰

[Emphasis added.]

The Court goes on:

The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to **the core of the coherence of our administrative law jurisprudence** and to the practical implications of this lack of coherence...

This process has led us to conclude that a reconsideration of this Court's approach is necessary in order **to bring greater coherence and predictability to this area of law.**⁶¹

[Emphasis added.]

It is not surprising that the Supreme Court determined the applicable standard of review under administrative law statutes as a group. These statutes are united by unique constitutional features, historical antecedents relating to the review of administrative decisions, and particular roles reserved for the legislature and the courts. It is an important common characteristic of administrative tribunal decisions that such decisions are already subject to judicial review *on the merits* applying the reasonableness test, based on statutory rights of review that are rooted in constitutional rights and such common law remedies as *mandamus*, prohibition, and *certiorari*.⁶² Thus, if an additional right of appeal is granted but is subject to the same standard of review as would apply in the absence

60. *Ibid* at paras 4-5 (emphasis added).

61. *Ibid* at paras 9-10 (emphasis added).

62. *Ibid* at para 44 ("Accepting that the legislature intends an appellate standard of review to be applied when it uses the word 'appeal' also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts...").

of a right of appeal then, in the words of *Vavilov*, statutory rights of appeal would “play no role in administrative law”⁶³—the precise outcome that *Vavilov* sought to avoid. Interpreting administrative law statutes in this way would also contravene the presumption against tautology, whereby a statutory provision should not be interpreted in such a way as to make it redundant.⁶⁴ As the majority in *Vavilov* explained:

...if the same standards of review applied regardless of whether a question was covered by [an] appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant—contrary to the well-established principle that the legislature does not speak in vain.⁶⁵

In sum, the Court in *Vavilov* undertook a contextual analysis in devising its framework for judicial review of administrative decisions. In that context, the application of interpretive presumptions to harmonize the role of the courts with respect to a particular area of the law is justified. That contextual analysis, however, was of administrative statutes as a group and against the jurisprudential background of *Dunsmuir* and its progeny. Focusing on administrative statutes in this way, the Court then applied the presumption of consistent expression so that no further contextual analysis will have to be made in the future for individual administrative statutes. This led the Court to find that, based on their commonalities, the word “appeal” in all administrative statutes must imply a standard of review similar to appeals from court judgments. Clearly, the analysis and *ratio decidendi* of *Vavilov* are rooted in and circumscribed by the characteristics uniquely shared by administrative law statutes creating tribunals whose decisions affect the rights of citizens and who are constitutionally subject to review by the courts. On a proper reading of the majority’s reasons, *Vavilov* does not purport to eliminate the fundamental rule that statutes must be interpreted in context or to dictate the standard of review applicable across all Canadian statutes on the basis of the presumption of consistent expression and the single word “appeal”.

63. *Ibid* at para 47.

64. Sullivan (7th), *supra* note 37 at 8.03[1].

65. *Vavilov*, *supra* note 1 at para 45 and at paras 39 and 41-43.

5. The Fallacy of Applying Vavilov's Presumption of Consistent Expression to Appeals in Commercial Arbitration

Given the context-specific nature of *Vavilov*, any attempt to extend the decision beyond administrative law necessitates a comparative examination to ascertain whether the presumption of consistent expression justifies the same interpretation of the word "appeal" as in administrative law statutes. This section undertakes such an examination with respect to private commercial arbitration. It first establishes the unique nature of arbitration tribunals, statutes, and appeals, which makes *Vavilov*'s application in the arbitration context inapt. The section then argues that, when properly considered, the presumption of consistent expression does not require the word "appeal" to be equated with court based appellate standards of review in the commercial arbitration context.

a. Arbitration Tribunals, Statutes, and Appeals

Tribunals, statutes, and appeals in the private commercial arbitration context and the administrative context are distinguishable on many of the foundational elements of *Vavilov*'s reasoning.

Private commercial arbitration tribunals are not statutory tribunals.⁶⁶ They are not created or mandated by the legislature, and they do not administer a statutory scheme. Private arbitration tribunals are either chosen by the parties or by a mechanism agreed upon by the parties. Therefore, the diversion of authority from the courts to arbitrators is done by the parties and the powers of arbitrators are derived from the parties rather than from legislation. In short, private commercial arbitration is voluntary and does not result from the coercive powers of the state.

Private commercial arbitration tribunals also do not determine the public law rights of parties. Therefore, the public law dimension of administrative law is not applicable in private commercial arbitration. This public law dimension means, for instance, that in administrative law consistency is important as between one citizen and another. In contrast, consistency on substantive issues is not

66. We are not here concerned with the hybrid situation where statutes require parties to submit certain types of disputes to arbitration under the arbitration acts. It should also be noted that the Supreme Court has, consistently with its ruling in *Sattva*, varied its standard of review for arbitration appeals in specific contexts such as standard form contracts: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 CSC 37, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.). In addition, non-commercial arbitration such as family and employment are often governed by special provisions of the arbitration legislation or other enactments.

important in arbitration because there is no system of precedent in place and arbitrators do not make or develop the law.⁶⁷ Similarly, detailed reasons are not as important in arbitration as in the administrative context, as arbitrators write decisions for the parties and not for the public. Accordingly, “[a]t common law, there is no duty upon an arbitrator to provide reasons”⁶⁸ and parties may contract out of the statutory requirement to provide reasons contained in some of the arbitration acts.⁶⁹ Therefore, *Vavilov*’s demanding reasonableness standard, focused as it is on the reasons for the decision under review, and its correctness standard in relation to questions of law are inapposite in the private commercial arbitration context and may defeat the primary objectives of parties who choose to engage in arbitration as opposed to litigation before the courts—“efficiency and finality”.⁷⁰

A primary objective of arbitration statutes, including their appeal provisions, is to limit court intervention in arbitrations. Most arbitration acts therefore include a general clause expressly limiting court intervention to specific purposes, such as enforcing arbitration awards.⁷¹ Ensuring that arbitral decisions are “correct” is not one of the stated purposes for which court intervention is permitted in any Canadian arbitration statute that has such a provision.

Unlike administrative decisions which are always subject to judicial review, including a review of the decision on the merits even if there is no right to appeal, arbitration awards are not subject to any merits review in the absence of a right to appeal. This is a decisive difference in terms of the application of the reasoning in *Vavilov* to

67. See e.g., Tamar Meshel, “Procedural Cross-Fertilization in International Commercial and Investment Arbitration: A Functional Approach”, 12 *Journal of International Dispute Settlement* 585 (2021) at pp. 605-612.

68. *Hashimoto v. Century 21 Carrie Realty Ltd.*, 2010 MBQB 271, 260 Man. R. (2d) 168, 196 A.C.W.S. (3d) 16 (Man. Q.B.) at para 33.

69. See e.g., *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 38(1) and s. 3; *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), *Commercial Arbitration Code* Article 31(2); *Arbitration Act*, SBC 2020, c 2, s. 48(3); *Arbitration Act*, RSA 2000, c A-43, s.38(1) and s. 3; *The Arbitration Act*, 1992, SS 1992, c A-24.1, s. 39 and s. 3; *The Arbitration Act*, CCSM c A120, s. 38(1) and s. 3; *Arbitration Act*, RSNB 2014, c 100 s. 38(1) and s. 3; *Commercial Arbitration Act*, SNS 1999, c 5, s. 42(1); *Arbitration Act*, RSPEI 1988, c A-16.1, s. 53(2) and s. 3(2).

70. *Teal*, *supra* note 8 at para 74.

71. See e.g., *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 6; *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), *Commercial Arbitration Code*, Article 5; *Arbitration Act*, SBC 2020, c 2, s. 4; *Arbitration Act*, RSA 2000, c A-43, s. 6; *The Arbitration Act*, 1992, SS 1992, c A-24.1, s. 7; *The Arbitration Act*, CCSM c A120, s. 6; *Commercial Arbitration Act*, SNS 1999, c 5, s. 8; *Arbitration Act*, RSPEI 1988, c A-16.1, s. 5.

commercial arbitration. Statutory provisions exist for setting aside an award but these are based on specific statutory grounds that do not engage whether the reviewing court finds the award to be reasonable or correct. As explained by J. Brian Casey in his authoritative work *Arbitration Law of Canada: Practice and Procedure*:

The provisions for setting aside an award deal with procedural matters, not the legal correctness of the decision. There is no judicial review of an arbitral tribunal's decision, except as specified in the appropriate arbitration Act. The old common law remedies do not apply to consensual arbitration. An application for "judicial review" is a public law remedy, dealing with statutory tribunals and public officials and is not available to challenge the award of a private, consensual arbitrator. The British Columbia International Act specifically states this in section 5(b).⁷²

(Footnotes omitted.)

Two interesting observations flow from Casey's comments.

First, the phrase "judicial review" itself is an example of how the same legal words or phrases can have different meanings. The term "judicial review" is regularly used to describe the situation where any court has before it an application to consider a decision of an arbitral tribunal, but it clearly does not import the full scope of judicial review as may be laid out under common law remedies or statutory powers and procedures legislation.⁷³

Second, there is no "argument against tautology" in the arbitration context because, unlike administrative decisions, arbitration awards are not subject to a merits review in the absence of a specific legislated ground for setting aside an award or appeal rights that are either expressly adopted or not excluded by the parties.⁷⁴ This is explicitly stated in some arbitration statutes⁷⁵ and

72. J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (4th edition), JurisNet, 2022 pp. 508 and 509.

73. It is interesting to note that even where a statutory ground for setting aside an award is found to exist arbitration statutes typically provide the court with discretion not to do so – a further indication of the legislatures intention to support the finality of arbitration awards where possible. See for example the phrase "**may** set aside" (bolding added) in the *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 46(1). See also: *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), *Commercial Arbitration Code*, Article 34(2); *Arbitration Act*, RSA 2000, c A-43, s. 45(1); *The Arbitration Act*, 1992, SS 1992, c A-24.1, s. 46(1); *The Arbitration Act*, CCSM c A120, s. 45(1); *Commercial Arbitration Act*, SNS 1999, c 5, s. 15(2); *Arbitration Act*, RSPEI 1988, c A-16.1, s. 65(2).

74. See note 9 above. The *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, ss. 3,

has been confirmed by the courts.⁷⁶ There being no statutory or constitutional right to “judicial review” of private arbitration awards, the argument against tautology has no application and there is no reason to speculate about the intention to differentiate between arbitration appeals and “judicial review”. To the extent that the term “judicial review” may be loosely used to describe setting aside proceedings, these are already very distinct from arbitration appeals. Moreover, equating “judicial review” in relation to arbitration and administrative tribunals could imply that courts could potentially grant judicial review of arbitral findings in the absence of a right of appeal. This is the case in the administrative context, because “legislatures *cannot* shield decision making from curial scrutiny entirely”.⁷⁷ But this rationale does not apply to the private arbitration context in which legislatures are not restrained by constitutional limits.

44(2) is an exception in that it does not allow parties to contract out of the section providing that “[i]f the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law”.

75. See e.g., *Arbitration Act*, S.B.C. 2020, c. 2, s. 4(b) (“the following must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act: (i) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal...”).
76. See e.g., *Piazza Family Trust v. Veillette*, 2011 ONSC 2820, 279 O.A.C. 175, 201 A.C.W.S. (3d) 884 (Ont. Div. Ct.), additional reasons 2011 ONSC 3561, 203 A.C.W.S. (3d) 480, 2011 CarswellOnt 5012 (Ont. Div. Ct.) at para 81 (“the remedy of judicial review under section 2 of the *Judicial Review Procedure Act* is not available of an arbitrator’s decision made under a commercial arbitration agreement based on a consensual agreement between private parties”); *Ellsworth v. Ness Homes Ltd.*, 1999 ABQB 287, 241 A.R. 186, 1999 CarswellAlta 1168 (Alta. Q.B.) at para 13 (“This is a purely consensual arbitration... the Applicants are not entitled to relief under the procedure of the judicial review rules, and certainly not to *certiorari* or *mandamus*”); *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2021 MBQB 77, 332 A.C.W.S. (3d) 621, 2021 CarswellMan 121 (Man. Q.B.) at para 41, aff’d *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2021 MBCA 103, 341 A.C.W.S. (3d) 348, 2021 CarswellMan 756 (Man. C.A.) (“judicial review, [] by its nature, is distinct from an appeal arising from an arbitration where the decision maker was not an administrative tribunal sitting on behalf of an administrative body. Instead, an appeal from an arbitration is taken respecting an award made by a decision maker (the arbitrator) who is adjudicating a dispute that is private, which dispute is usually devoid of any public law component”).
77. *Vavilov*, *supra* note 1 at para 24.

As private arbitration tribunals, statutes, and appeals share none of the features that played a prominent role in *Vavilov*, commercial arbitration requires its own distinct contextual analysis, an analysis which was not broached in *Vavilov* and not undertaken in *Wastech*.

By contrast, in its unanimous decision in *Sattva* the Supreme Court specifically addressed appeals from commercial arbitration awards in concluding that arbitral awards should be subject, on appeal, to a reasonableness rather than a correctness standard of review:

Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in [*Dunsmuir*], and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the [*Arbitration Act*] forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference.

Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker...aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

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. The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.⁷⁸

Sattva was affirmed by the Supreme Court in *Teal*, where Chief Justice McLachlin noted that:

78. *Sattva*, *supra* note 4 at paras 104-106 (internal citation omitted).

In an arbitral context like this one, where the decision under review is an award under the *Arbitration Act*, *Sattva* establishes that the standard of review is “almost always” reasonableness (para. 75). This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality.

It follows that the nature of the question under review—i.e. legal, factual, or mixed—may inform whether one of those circumstances is present, but it is not dispositive, in itself, of the applicable standard of review. For instance, it would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. While statutory interpretation is a legal question [], the mere presence of a legal question does not, on its own, preclude the application of a reasonableness review in a commercial arbitration context. *Sattva* is clear in this regard.⁷⁹

[Emphasis added.]

As with *Sattva*, the controlling consideration in *Teal* was “the arbitration context”.

a. Applying the Presumption of Consistent Expression to Commercial Arbitration

The question then arises whether *Vavilov*, which exclusively addressed appeals from administrative law decisions and considered contextual factors particular to such proceedings, should be taken to have overruled *Sattva* and *Teal*, which specifically addressed the contextual considerations that distinguish arbitration appeals from administrative law appeals. Does the presumption of consistent expression dictate that result with specific reference to standard of review based only on the occurrence of the word “appeal” in arbitration statutes?

In answering this question, the following line of inquiry seems appropriate:

- i. Does the word “appeal” in its ordinary grammatical or common sense meaning prescribe or preclude any particular standard of review?
- ii. Is it useful to consider whether other surrounding words in the enactments being compared indicate a consistent

79. *Teal*, *supra* note 11 at paras 74-75 (internal citations omitted; emphasis added).

legislative intent or preference on the question of standard of review?

i) Does the word “appeal” prescribe or preclude any particular standard of review?

Clearly the basis on which an appeal must be considered, i.e. the standard of review, must be derived from the context in which the word is used. For example, it is entirely compatible with the notion that an appeal may be conducted on a *de novo* basis where there is no deference to the first instance decision even on questions of mixed fact and law,⁸⁰ or on the basis of equitable principles,⁸¹ or by ministerial fiat,⁸² or only to correct “unreasonable results”.⁸³ Indeed, it is hard to imagine any standards of review that a legislature would be precluded from enacting, subject only to constitutional limitations.

The two standards of review for questions of law that are under consideration in *Sattva* and *Vavilov* seem to be well within the range of standards that might be rationally and uncontroversially adopted by either the legislature or the courts. The names they have been given (“correctness” and “reasonableness”) are not necessarily self-descriptive, so it is useful to give them further consideration. The application of a correctness standard would seem to suggest that the result is more likely to be “correct”. This is not necessarily so. In fact,

80. See e.g., *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, 445 D.L.R. (4th) 448, 76 Admin. L.R. (6th) 317 (B.C. C.A.) at para 48; *Atateks Foreign Trade Ltd. v Private Label Sourcing, LLC*, 402 F. App’x 623, 625 (2d Cir. 2010) (“We review *de novo* mixed questions of law and fact.”).

81. See e.g., the student appeal process at McMaster University, where the student may appeal on the basis that the “decision was unfair, unreasonable or unjust”: University Secretariat, McMaster University, “Student Appeal Procedures”, online: <<https://secretariat.mcmaster.ca/hearings-and-appeals/student-appeals/#tab-content-form-c-appeal-to-the-sbsa>>.

82. See e.g., the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c O-7, s. 51 (“The Governor in Council may at any time, in his discretion, either on petition of any interested person or of his own motion, vary or rescind any decision or order of the Committee made under this Act, whether the order is made between parties or otherwise and any order that the Governor in Council makes with respect thereto becomes a decision or order of the Committee and, subject to section 52, is binding on the Committee and on all parties”).

83. See e.g., *Moffat v. Edmonton (City) Police Service*, 2021 ABCA 183, 2021 CarswellAlta 1225 (Alta. C.A.) at para 50 (concerning the standard of review to be applied by the Law Enforcement Review Board to decisions of Presiding Officers, that is, internal administrative review).

neither standard is more or less likely to produce a “correct” result. Case law is replete with examples of courts applying the correctness standard only to be overturned by higher courts.⁸⁴ Often two different courts purporting to apply a correctness standard will reach contradictory conclusions on the same issue.⁸⁵ The jurisprudence on standard of review is a prime example of the fact that the application of the “correctness standard” does not produce unique results that are universally recognized to be correct.

As previously noted, what the correctness standard actually provides is that the appeal judge or panel is free to apply their own opinion without deference to the tribunal whose decision is under appeal. The reasonableness standard requires the appeal judge or panel to accept a reasonable result even if they disagree with it. In other words, the reasonableness standard encourages the appeal judge or panel to consider whether others (for example other judges of the same court) might consider the result to be correct, even if the judge or judges hearing the appeal do not.

In considering the interpretation of the word “appeal” in relation to the applicable standard of review in arbitration, the question may be posed in this way: where the parties have voluntarily submitted to a process whereby their dispute is to be resolved by a chosen decision-maker, does it make sense that they would want an appeal to simply substitute the decision of a randomly selected judge or panel of judges within the court system for the opinion of their chosen decision-maker? Or would they want an appeal to provide a guardrail against a decision by the chosen decision-maker that could not have been anticipated because it was unreasonable in the sense that no reasonable adjudicator could have reached that result? In the absence of any empirical evidence as to the desires of parties to arbitration agreements, the latter seems to be the obvious answer.

In effect, the reasonableness standard holds parties to their choice to arbitrate rather than to litigate and to accept the outcome unless the decision is beyond what could have been reasonably expected when they contracted to arbitrate their dispute. This makes sense,

84. See discussion of several cases that illustrate this point in William G. Horton, “Reforming Arbitration Appeals”, 75 *The Advocate*, 40-45 (2017), online: <https://www.wgharb.com/wp-content/uploads/Reforming-Arbitration-Appeals_The-New-ULCC-Uniform-Arbitration-Act-75-Advocate-37_January-2017.pdf>.

85. See e.g., *West Whitby Landowners Group Inc. v. Elexicon Energy Inc.*, 2024 ONCA 910, 174 O.R. (3d) 321, 2024 A.C.W.S. 6449 (Ont. C.A.) and *Davis v. Aviva General Insurance Company*, 2024 ONCA 944, (*sub nom.* *Davis v. Aviva General Insurance Co.*) 174 O.R. (3d) 788, 2024 A.C.W.S. 6676 (Ont. C.A.).

because in arbitration law the courts are called upon to enforce contracts voluntarily entered into by parties⁸⁶ and, if and when appeals occur, to protect their reasonable expectations with respect to the decisions of their chosen arbitrators. The correctness standard allows for a decision of an arbitral tribunal to be reversed if an individual judge or group of judges would have come to a different conclusion – even if the views of those judges would not necessarily be shared by other judges or groups of judges.⁸⁷ While neither standard necessarily discourages a losing party to exercise a right of appeal, the reasonableness standard provides greater assurance that a decision of the arbitral tribunal will be respected. Given that the parties made a rational choice to arbitrate rather than to litigate and with respect to the selection of the tribunal or the method of choosing the tribunal, it is reasonable to assume that that is what they would want. Both standards are compatible with the general concept of an “appeal” although the latter emphasises the authority of the courts whereas the former supports the authority of the chosen arbitral tribunal.

ii) Do other surrounding words in the enactments being compared indicate a consistent legislative intent or preference on the question of standard of review?

Any serious attempt to apply the presumption of consistent expression across statutes must start by examining the words of the statutes within which one is seeking to find a consistent meaning. It will be recalled that, according to the presumption of consistent expression, the same word may be given a different meaning when it is surrounded by different words or appears in a differently structured provision. It is important to note that this stage of the analysis (i.e. textual comparison) is missing from all of the jurisprudence to date. Let us then consider the language by which

86. The extent to which statutorily mandated arbitrations and arbitration clauses in contracts of adhesion should be considered in the same light is beyond the scope of this paper. Regarding the latter See William G. Horton and David Campbell, “*Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration*”, 2019 Annual Review of Civil Litigation (Todd Archibald ed) p 93 (<https://www.wgharb.com/wp-content/uploads/The-Mirage-of-Mandatory-Arbitration.pdf>).

87. For a further discussion of the implications of the relationship between the notion of “correctness” and the “correctness standard” see: William G. Horton “*The Correctness Standard of Review: What’s in a name?*” in *The Advocate (Vancouver Bar Association)* Vol. 81 Part 1 January 2023 (<https://www.wgharb.com/wp-content/uploads/The-Correctness-Standard-of-Review.pdf>).

the courts are given jurisdiction to hear an appeal from a court of first instance and from an arbitration award. The following Ontario statutes are used as a point of reference:

Courts of Justice Act, R.S.O. 1990, c. C.43 ⁸⁸	Arbitration Act, 1991, S.O. 1991, c. 17 ⁸⁹
Court of Appeal jurisdiction 6 (1) An appeal lies to the Court of Appeal from, (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court; (b) a final order of a judge of the Superior Court of Justice, [exceptions omitted as not relevant]	Appeal on question of law 45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that, (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the question of law at issue will significantly affect the rights of the parties. Idem (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law. Appeal on question of fact or mixed fact and law (3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law. ... 49 An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of

88. Other provisions in Canadian statutes addressing rights of appeal within the court system: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 13; *Judicature Act*, R.S.A. 2000, c. J-2, s. 3; *Court of Appeal Act*, R.S.S. 2000, c. C-42.1, s. 10; *The Court of King's Bench Act*, C.C.S.M. c. C280, s. 8; *Court of Appeal Act*, R.S.M. 1987, c. C240, s. 25; *Judicature Act*, R.S.N.B. 1973, c. J-2, ss. 8(2), (3), (3.1); *Judicature Act*, R.N.S. 1998, c. 240, ss. 7, 38; *Appeals Act*, R.S.P.E.I. 1988, c. A-13, s. 2; *Court of Appeal Act*, S.N.L. 2017, c. C-37.002, ss. 6, 7.

89. See note 9 for provisions addressing arbitration appeals in other Canadian jurisdictions.

	invalidity may be made to the Court of Appeal, with leave of that court. ... Contracting out 3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following...[not listing s. 45]
--	--

Consider the differences between these appeal provisions:

Courts of Justice Act	Arbitration Act
Absolute right to appeal from a final order of a judge.	Only absolute right is to seek leave of the court to appeal and only on a question of law.
No provision for excluding rights of appeal by agreement.	All rights of appeal, including on a question of law, can be excluded by agreement.
No distinction between questions of law and questions of mixed fact and law in appeals from the Superior Court of Justice. In relation to appeals from the Divisional Court, appeals on questions of law and questions of mixed fact and law are allowed but appeals on questions of fact alone are excluded.	Distinction between questions of law, on the one hand, and questions of mixed fact and law or questions of fact alone, on the other hand, is crucial to whether or not an appeal may be available without the agreement of the other side. A party can only appeal on either a mixed question of fact and law or on a question of fact if the arbitration agreement so provides.
Appeal is to the Court of Appeal. Access to appeal to the Court of Appeal is not restricted except in relation to appeals from the Divisional Court on questions of fact alone.	Appeal is to a single judge of the Superior Court. Access to a further appeal to the court of Appeal is subject to receiving leave to appeal.

Given these differences in the statutory texts providing for appeals from court judgments and from arbitration awards and the Ontario legislature's silence as to the applicable standard of review under

each statute, what elements of consistent expression can we attribute to the legislature? Apart from the obvious impression that the legislature is attempting to facilitate almost absolute rights of appeal from decisions of lower courts and to restrict rights of appeal from arbitration awards, it is possible to discern other features and distinctions that would undermine any attempt to determine the standards of review applicable to appeals from arbitration awards by applying the standards applicable to administrative law appeals.

For example, it is well established that in court appeals the standard of review for pure questions of fact alone is much more deferential (“only one standard”, which is “palpable and overriding error”)⁹⁰ than for questions of law⁹¹ or questions of mixed fact and law.⁹² Similarly, standard of review jurisprudence sometimes attempts to distinguish between questions of law and questions of fact that arise within a question of mixed fact and law.⁹³ But what is the *statutory* basis for those distinctions in relation to standard of review? The *Courts of Justice Act* does not speak to standard of review at all. Rather, the appellate standards of review applicable to appeals from court judgments were judicially created. Therefore,

90. *Housen*, *supra* note 3 at para 25.

91. *Ibid* at para 33 (“Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a “correctness” standard of review”).

92. *Ibid* at para 36 (“Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error”).

93. *Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 CAF 151, 2020 FCA 151, 328 A.C.W.S. (3d) 510 (F.C.A.) at para 16, citing *Canadian National Railway v. Emerson Milling Inc.*, 2017 CAF 79, 2017 FCA 79, [2018] 2 F.C.R. 573 (F.C.A.) (“Extricable questions of law/legal standards are best regarded as questions of law of the sort intended by Parliament to be reviewed by this Court under subsection 41(1). In a number of cases, this Court determined appeals where extricable questions of law/legal standards (in addition to other legal and jurisdictional questions) were present...”).

these standards cannot be said to reflect any legislative intent that would be capable of extrapolation to other contexts.

Similarly, there is no distinction in the *Courts of Justice Act* between questions of law and questions of fact or mixed fact and law.⁹⁴ Therefore, there is no textual basis in the *Courts of Justice Act* for applying any presumption of consistent expression in this regard. But the distinction between questions of law and other questions is expressly included in the *Arbitration Act* and is crucial to appeals from arbitration awards under that *Act*. The heightened importance of this distinction in the arbitration context was recognized by the Supreme Court in *Teal*:

Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question—for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments—are transparent. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

From this standpoint, **the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (*Housen*, at para. 36).**⁹⁵

[Emphasis added.]

Therefore, given:

- i. the clearly opposing overall objectives of the appeal provisions of the *Courts of Justice Act* and the *Arbitration Act* (enabling vs restrictive),

94. Except, as noted above, in relation to “questions of fact alone” on appeals from the Divisional Court.

95. *Teal*, *supra* note 11 at paras 45-46 (some internal citations omitted).

- ii. the stark structural differences in those provisions of the two Acts (different rights in relation to different categories of appeal),
- iii. as well as the “vastly different consequences”⁹⁶ cited in *Teal* of applying standards of review to arbitration awards as opposed to civil litigation judgments,

it is untenable to suggest that the standard of review applicable to appeals from arbitration awards may be conclusively determined by reference to the use of the single word “appeal” in both the *Courts of Justice Act* and the *Arbitration Act*. Whatever one’s preference may be in relation to the role of the court in arbitration appeals, the presumption of consistent expression is not available in aid of that preference. Perhaps surprisingly to some, neither is the decision of the majority in *Vavilov*.

6. Conclusion

Vavilov did not, and should not be understood to, dispense with the principle of contextual statutory interpretation. Quite the contrary, in interpreting administrative law statutes to determine the standard of review, the majority in *Vavilov* engaged in a highly contextual analysis that accounted for the common constitutional underpinnings of administrative statutes and the particular legislative and judicial roles involved in appeals from administrative decisions. On that basis, the majority decided to depart from its previous administrative law jurisprudence and held that statutory appeal rights were to be given determinative meaning in terms of standards of review. Its fleeting references to the “commercial law context” and to the “presumption of consistent expression” cannot foist *Vavilov* onto the arbitration context. This is especially so given the strongly reasoned, contextually justified, and unanimous decisions of the Supreme Court in *Sattva* and *Teal*⁹⁷ and the admonitions of the majority in *Wastech*.

This article seeks to make the single point that the legal reasoning behind the majority decision in *Vavilov* does not invalidate *Sattva* and indeed may be seen to support it. The consequence of this argument is that *Sattva* remains good law and binding precedent. As with all binding precedent there is room for some of the reasoning to be updated when the issue is next visited by the Supreme Court of

96. *Ibid* at para 46.

97. There was a dissent in *Teal*, but it did not engage the issue of standard of review.

Canada. The analogy to regulatory law in *Dunsmuir* and pre-*Vavilov* jurisprudence no longer holds true. If the analogy no longer holds true, it is because the law in relation to administrative decisions has changed. But the policy considerations and legislative context in relation to commercial arbitration remain unchanged.