THE CORRECTNESS STANDARD OF REVIEW: WHAT'S IN A NAME?

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This is not an article about whether the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] is correct. Instead, this article focuses on the use of the word "correctness" to describe a standard of review on appeals from a lower court or tribunal to a court that exercises a statutory power of review. I suggest that the use of that word is inapt in its meaning, unhelpful in its application and the source of much of the dysfunctionality that surrounds standard of review jurisprudence. As it happens, *Vavilov* itself has turned out to be a very good example of why that is so.

BACKGROUND

The word "correctness" is, of course, based on the word "correct". Among the meanings of the latter, as a noun or verb, are "true, right, accurate"; "set right"; "substitute the right thing for the wrong one"; and "admonish or rebuke".[2]

The word "correctness" is central to any discussion of standards of review. With various qualifications, it is the label for one of the two common law standards of review, the other being "reasonableness". In general terms, correctness allows the full substitution of the views of the reviewing court for that of the judge or other tribunal whose decision is challenged. On the other hand, reasonableness allows only for substitution if the reviewing judge or court considers that no reasonable court or tribunal could have reached the same conclusion.

The standard of "correctness" arises in the context of both judicial review of a decision of a statutory tribunal and appeal from a decision of a lower court. With respect to the latter, in the 2002 *Housen v. Nikolaisen* decision, the Supreme Court of Canada expressly adopted the correctness standard

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for the appellate review of pure questions of law.[3] The majority decision, written by Justices Iacobucci and Major, cites the text by Justice R.P. Kerans, *Standards of Review Employed by Appellate Courts*, in support of using the correctness standard for pure questions of law.[4] Interestingly, Justice Kerans, in his text, uses the term "concurrence" rather than "correctness".[5] However, there was a long history before *Housen* of the Supreme Court of Canada discussing and applying the correctness standard.[6]

The purpose of the correctness standard was articulated in *Housen* as follows:

> On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness.
>
> … while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.[7]

A decision of an administrative tribunal from which there was a statutory right of appeal was under review in *Vavilov*. The Supreme Court of Canada held that appellate standards of review that apply in appeals from judgments of lower courts, including the standard of correctness, also apply in the context of "statutory appeal" appeals from decisions of administrative tribunals. The basis of the decision in *Vavilov* is that legislatures must be taken to mean the same thing whenever the same word is used in different statutes. Whereas previously the correctness standard was available only on a limited basis in statutory appeals from administrative tribunals, correctness became the principal standard of review of substantive decisions in such cases.[8]

Although *Vavilov* did not address appeals in the arbitration context, some judges and courts have held that, applying the reasoning in *Vavilov*, the word "appeal" must have the same meaning whether it relates to appeals from a lower court, from a statutory body or from an arbitration tribunal. Consequently they have held that the "correctness" standard should apply to appeals from arbitral awards given that any right to appeal an arbitration award to the court is based on a statute, as with appeals from statutory tribunals.[9] This is so despite prior case law, including a unanimous decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*,[10] holding that the "reasonableness" standard applies to most challenges to arbitration awards, including on questions of law.[11] Despite the decision in *Vavilov*, many other courts continue to apply the decision in

Sattva as the controlling decision in relation to appeals from arbitration awards.

While some commentators advocate against eliminating the "correctness" standard (including on the basis that at times courts are actually applying the correctness standard when they claim to be applying the reasonableness standard, and therefore eliminating the correctness standard would make little difference),[12] many judges, academics and commentators have questioned the utility of the correctness standard and have advocated for eliminating the correctness standard altogether.[13] Some have proposed a unified standard of review of reasonableness in administrative law,[14] or alternatively a standard of "reasoned justification".[15] Finally, there is the question, which I do not address here, as to whether the Supreme Court of Canada, in its formulation of a more rigorous version of the reasonableness standard in *Vavilov*, has in fact assimilated that standard with the correctness standard in most cases, such that the reasonableness standard provides even greater opportunities than the correctness standard for the reviewing judge or court to substitute their opinions over a broader range of substantive and procedural issues.

However, I have been unable to locate any prior commentary critiquing the use of the word "correctness" itself in the context of standards of review. I suggest that, as discussed in this article, this is a key problem with standard of review jurisprudence and its application.

Pending further discussion as to whether the two standards should survive and if so in what form, I propose that the two standards should be renamed the "substitution" and "non-substitution" standards. I argue that these terms provide more objective and less confusing guidance as to the purpose and methodology at work in applying the two standards. For the reasons outlined below, I suggest that the use of these terms may make the ongoing discussion as to standards of review clearer and less contentious even if the contents of the standards do not change.

CORRECTNESS AND THE LAW

On my first day of law school in September 1971, Gerald Le Dain, who was then the dean of Osgoode Hall Law School, delivered an introductory lecture on the law. His most memorable comment was that to be successful in law one has to be comfortable with ambiguity. As someone who had no family or personal background in the law, I was taken aback. I had the impression that the law was about clarity, consistency and—yes—correctness.

At first, I resisted Dean Le Dain's insight and plunged into the law school curriculum looking for correct answers. My first term marks fell far short of

results that would justify such efforts. I did not begin to succeed in law school until I realized that success did not come from seeking out the right answer but in recognizing that on most issues, including questions of law, it was very much a matter of opinion—and the only opinion that mattered in the law school context was the opinion of the person setting the exam. After I put that insight into practice, my success seemed to be assured.

Once I was launched in my career as an advocate specializing in commercial litigation, the opinion of consequence became that of the court. But, of course, that oversimplifies the issue because the court is not as unitary an entity as the expression "*La Cour*" would suggest. It very much mattered which judge would hear the case initially. On appeals, the issue became which judges would be placed on the panel and which combination of opinions on the bench would rule the day.

On one occasion early in my career, I was told by the president of a panel in the Court of Appeal that I should not waste the time of the court by making oral submissions in support of my appeal because a recent decision of the Supreme Court of Canada on standard of review made it impossible for me to win. However, another member of the appeal panel encouraged me to continue. In keeping with the tradition of the court, the president's dissent preceded the majority decision in my clients' favour.[16] The Supreme Court of Canada subsequently denied leave to appeal.

Even at the Supreme Court of Canada, the balance of opinion that decides a particular case does not necessarily represent a stable conclusion accepted by all as "correct". Whereas in law school the ruling professorial opinions had already been provided to students in class, in practice as counsel the challenge was to predict judicial opinions, and the factors that motivated them, in advance. While the last judicial pronouncement on a particular principle may be important, it is the *next* judicial pronouncement, in your particular case, that is determinative.

Even where the law is clear, how the principles will be *applied* in a particular case can be uncertain. Further, there are areas in which the principles of law are disputed or evolving. One recent example is in the area of bad faith in the performance of contracts. Another example, ironically, is in the area of standard of review itself. The notion that the law can change, even after a dispute as to its content has arisen, is not a flaw of the common law system; it is a feature. This feature is called "the development of the law".

CORRECTNESS VS FINALITY

The effect of the application of the correctness standard is the substitution of the opinion of the appeal judge or court for that of the lower court or tri-

bunal. It does not take much consideration of the matter to realize that the substituted decision may not be any more correct in any objective sense than the decision being reviewed.

As the Supreme Court of Canada itself noted in *Housen*: "There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result".[17]

Indeed, as is obvious from widespread dissenting opinions, judges on a given appeal panel may differ among themselves. As Justice Sheilah Martin relates having once said to a colleague, "I would like to agree with you, but then we would both be wrong."

The need to follow the last decision of the highest court is not related to the correctness of the decision. As Robert H. Jackson, a former associate justice of the Supreme Court of the United States, put it: "We are not final because we are infallible. We are infallible because we are final."[18]

Quoting the marketing slogan of one prominent counsel firm: "Whoever wins last, wins."

Ultimately, it is all a matter of opinion. As it turns out, in deciding which opinion matters, the notion of correctness is not particularly helpful.

EXAMPLES FROM THE ARBITRATION CONTEXT

Our jurisprudence is crammed with examples where application judges have substituted their decision for that of the adjudicator of first instance on a correctness standard only to be reversed by a higher court using the same standard of correctness, or by finding that the judge was not correct in applying the correctness standard. Very often the reversal is based on both standards where the original decision is found to be both correct and reasonable and the decision of the reversing court is found to be incorrect.

The case of *Boxer Capital Corp. v. JEL Investment Ltd.* provides a stark example. The first arbitration award was made on March 23, 2009. When JEL Investment Ltd. ("JEL") failed to comply with the award, Boxer Capital Corp. ("Boxer") commenced an action and was granted specific performance on September 22, 2009.[19] JEL sought leave to appeal the arbitration award to the B.C. Supreme Court. The leave application was dismissed.[20] That order was appealed to the B.C. Court of Appeal, which allowed the appeal and granted JEL leave to appeal to the B.C. Supreme Court.[21] The B.C. Supreme Court set aside the award in part.[22] JEL then commenced a second arbitration proceeding that resulted in two awards. These awards were then subject to a series of appeals. The appeal was ultimately allowed, and this decision was appealed to the B.C. Court of Appeal, which reinstated the second arbitration award.[23]

In the result, the March 2009 arbitration award was subject to a further six years of proceedings. One year involved the second arbitration. The remaining five years were spent with leave to appeal and appeal proceedings.[24] Had the order of the decision makers (both judicial and arbitral) been different, the result likely would not have been the same. Instead, the ultimate decision was the result of the random selection and ordering of decision makers, each of whom had different opinions.

Sattva provides another unfortunate example of a case that alternated between appellate judges and courts agreeing with the arbitrator's decision and those finding it should be set aside. The initial appeal by Creston Moly Corp. ("Creston") of the arbitration decision was denied.[25] Creston then appealed this decision to the B.C. Court of Appeal, which allowed the appeal and granted leave to appeal.[26] The appeal on the merits in the B.C. Supreme Court was heard and dismissed in May 2011.[27] That decision was appealed to the B.C. Court of Appeal, which allowed the appeal and concluded that the arbitrator's award was "absurd".[28] This decision was appealed and the Supreme Court of Canada concluded that the Court of Appeal erred in granting leave to appeal and found that the arbitrator's award was not unreasonable.[29] Five and a half years were spent on the appeals.

As Justice La Forest noted in *Kourtessis v. Minister of National Revenue*: "Sometimes the opportunity for more opinions does not serve the ends of justice."[30]

Ironically, the jurisprudence in relation to the standard of review provides a perfect example of the issues with the correctness standard. The precise boundaries between the correctness and reasonableness standards of review, in terms of when and how they are applied in the administrative law context, has bedeviled courts at all levels of the Canadian judicial system. The decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[31] had attempted to address this problem by establishing the correctness and reasonableness standards in relation to appeals from statutory tribunals. The correctness standard was to apply to jurisdictional issues as well as to a question of law "that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker".[32]

In *Vavilov*,[33] a majority of the same court decided that this was no longer correct: where a statute provides for an appeal from the decision of an administrative tribunal, the same standard of appeal should apply as in the case of appeals from a decision of a lower court. This requires the application of the correctness standard to any questions of law, thereby permitting unrestricted substitution of the opinion of the reviewing judge or court for

that of the administrative tribunal on that issue. The minority in *Vavilov* had condemned such changes to the law on the basis that they represented a judicial overreach that would undermine the basic premise of legislative delegation of decision-making power to bodies other than the court. The concern expressed by the minority in relation to administrative tribunals applies *a fortiori* to arbitration tribunals to which the disputants have by contract delegated the power to decide.

The *Vavilov* decision made no reference to arbitration but, at the same time, ignored an invitation by one intervenor (the British Columbia International Commercial Arbitration Centre, as it then was) to state explicitly that the decision did *not* apply to arbitration. Judges across the country remain divided on whether *Sattva* remains good law or whether it has been overturned by *Vavilov* in relation to appeals from arbitration awards.[34]

In the subsequent decision of the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*,[35] the majority declined to answer the above question on the ground that it was not necessary to do so. The concurring minority took the opportunity to assert that *Vavilov* did apply to arbitration appeals on the basis that the word "appeal" in arbitration statutes must mean the same thing as the word means in statutes that allow appeals within the court system and from administrative tribunals. On that basis, the concurring minority opined that *Vavilov* overruled *Sattva* such that in arbitration appeals the correctness standard would apply to any questions of law, regardless of the reasonableness of the outcome in the arbitration as a whole.[36]

Despite the majority's rebuke of the concurring minority for prematurely expressing a definitive opinion on an issue that was not necessary for the disposition of the case, those who favour the application of *Vavilov* to arbitration appeals have seized on the opinion of the *minority* and treated that as the decision of the Supreme Court of Canada in relation to arbitration appeals pending any further decision. This position is somewhat dubious given that the prior decision of the Supreme Court of Canada in *Sattva* is directly on point, rendered by a unanimous court, not mentioned in *Vavilov* and not overruled in *Wastech*. Nevertheless, *Vavilov* is now treated by some courts as having overruled *Sattva*.[37] At the same time, other courts continue to apply *Sattva*.[38]

In *D Lands Inc. v. KS Victoria and King Inc.*, Justice Dietrich provides a summary of the conflicting cases and ultimately concludes that *Vavilov* overruled *Sattva*.[39] The opposite conclusion was reached by Justice Koehnen in *Serbcan Inc. v. National Trust Company*[40] and by Justice Hainey in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gam-*

ing Corporation.[41] In the appeal from the latter decision, the Ontario Court of Appeal, following the lead of the majority in *Wastech*, declined to decide whether *Vavilov* had any effect on the decision of the Supreme Court of Canada in *Sattva* "[b]ecause a court should generally refrain from deciding issues that are unnecessary to the resolution of an appeal".[42]

Courts and commentators continue to express their confusion over which standard applies.[43]

Whatever can be salvaged from this jurisprudential shipwreck, the most obvious casualty of it is the notion of correctness itself.

How do we explain this obvious, widespread and ironic departure from basic principles of legal precedent by those who wish to impose a correctness standard? For that explanation, we turn to a further problem with the correctness standard.

WORDS MATTER

Applying the term "correctness" to a standard that results in the substitution of their opinion for the opinion of another person in a judicial or quasi-judicial role encourages the appeal judge or court to consider their own opinions to be the ones that are correct. In contrast to the correctness standard, the courts seem to perceive the reasonableness standard as an accommodation for less correct, or even incorrect, views. This conception of the difference between the two standards was exemplified by a comment made by Justice MacPherson during the argument of the appeal in the *Coliseum* case.[44] He observed that passing the correctness standard was like getting an A on a piece of schoolwork whereas passing the reasonableness standard was like getting a B or a C—not as good as an A, but still a passing grade. With respect, this is the very attitude that has made the distinction between the two standards labelled using the "correctness" and "reasonableness" nomenclature unworkable.

Possibly, the new "robust" reasonableness standard set out in *Vavilov* will require that a decision under review be at least a B+ and open the door to greater substitution of the opinions of the reviewing judge or court, without the necessity of resorting to the correctness standard. But the dichotomy remains and, based on the existing labels, turns on qualitative judgments about the decision under review rather than placing the focus on the objectives to be served by replacing one opinion with another.

If judges think of the difference between the two standards as a choice between giving the parties a correct result and giving them a less correct or possibly incorrect result, it is understandable that the attraction toward providing a correct result would be almost irresistible.

The correctness standard encourages judges to take the approach that, in the words of the great journalist David Brinkley, "Everyone is entitled to my opinion." Perhaps this describes an occupational trait shared by journalists, judges and—yes—arbitrators.

Frankly, whatever their role in the judicial system, lawyers need no encouragement to consider their own views as correct and those of others to be flawed. Indeed, one of the pervasive problems with the two standards of review under their current labels is that many judges are simply unable to accept that an opinion on a question that they find not to be correct could ever be viewed as being reasonable.[45]

I submit that this cognitive effect of the use of the word "correctness", in a standard that is not actually about correctness at all, creates much of the difficulty with the application of the two standards of review.

The corollary is that the use of the word correctness contributes to an overall reduction in the impulse towards deference and collegiality. If each individual judge's views are presumed to be correct, why should they have to defer to the views of anyone else? The characterization of individual views as "correct" leads to a greater tenacity in defending those views against the views of others, rather than focusing on the reasons why it makes sense to substitute the views of one decision maker for another.

A MODEST PROPOSAL

The word "correctness" is clearly inapt and unhelpful when used in reference to the standard of review. Also, it has counterproductive and pernicious consequences in terms of understanding and accomplishing the purpose for which that standard is applied. It unnecessarily transforms the standard into a question of who is right and who is wrong, instead of being a question about whose job it is to decide a given issue at a given point in time. The difficulty, I suggest, comes from the highly subjective use of a word that implies objectivity, and which unnecessarily places adjudicators at all levels in conflict as to who is "right".

It would be interesting to see whether applying substantively the same legal standards, but calling them something more attuned to their purpose, could have a positive impact on how the standards are applied. I propose that the "correctness" standard be renamed the "substitution" standard, and "reasonableness" the "non-substitution" standard. In this way, the name of the standard would be aligned with the content of the standard—namely, that it is not actually dependent on subjective views of correctness but on whether or not the criteria for substituting the views of the judge or court on the appeal were met in that instance. For those who argue that merely

changing the name of the standards will not eliminate the underlying conceptual and behavioural problems at play, the answer might be: if so, it would be at worst a harmless experiment and at best an ongoing reminder to appellate judges as to the objectives of the exercise.

At a minimum, and even more modestly, this brief article will have served its purpose if it causes readers to pause occasionally when they encounter the term "correctness standard" to remind themselves that it actually has little or nothing to do with which opinion under consideration is correct.

ENDNOTES

1. 2019 SCC 65 [*Vavilov*].
2. *The Canadian Oxford Dictionary*, Thumb Index Edition (1998).
3. 2002 SCC 33 at paras 8–9 [*Housen*]; John Sopinka, Mark Gelowitz & W David Rankin, "Standards of Appellate Review" in *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018).
4. *Housen*, *supra* note 3 at para 8.
5. Roger P Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994).
6. *Canada (Director of Investigation & Research) v Southam Inc*, [1997] 1 SCR 748; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557; *Pushpanathan v Canada (Minister of Employment & Immigration)*, [1998] 1 SCR 982 at para 27; *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316; *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369; *Canadian Broadcasting Corp v Canada (Labour Relations Board)*, [1995] 1 SCR 157 at para 32; *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487 at para 39.
7. *Housen*, *supra* note 3 at paras 8–9.
8. *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].
9. Indeed, as a general proposition, all appeal rights are statutory, as the jurisdiction of a court to hear any appeal must be based on a statute: *Kourtessis v Minister of National Revenue*, [1993] 2 SCR 53 [*Kourtessis*].
10. 2014 SCC 53 [*Sattva*].
11. *Ibid* at para 106.
12. Twila Reid, Amanda Whitehead & Jessica Habet, "Practitioner's Innovative Response to Abella's Call to Reform Judicial Review" (2018) 69 UNBLJ 364; *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 177, 218, per Karakatsanis, Gascon and Rowe JJ, dissenting [*Groia*]; Diana Ginn, "Some Initial Thoughts on *Wilson v. Atomic Energy of Canada Ltd.* and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*" (2017) 68 UNBLJ 285.
13. Reid, Whitehead & Habet, *supra* note 12.
14. Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ 68.
15. Matthew Lewans, "Renovating Judicial Review" (2017) 68 UNBLJ 109.
16. *Ontario (Attorney General) v Shanks*, [1981] OJ No 79 at para 40 (CA).
17. *Housen*, *supra* note 3 at para 4.
18. Recent events have called into question the application of either the word "infallibility" or the word "finality" in relation to that court.
19. *Boxer Capital Corp v JEL Investments Ltd*, 2009 BCSC 1294.
20. *JEL Investments Ltd v Boxer Capital Corp*, 2010 BCSC 947.
21. *JEL Investments Ltd v Boxer Capital Corp*, 2011 BCCA 142.
22. *JEL Investments Ltd v Boxer Capital Corp*, 2011 BCSC 1526.
23. *Boxer Capital Corp v JEL Investments Ltd*, 2015 BCCA 24.
24. William G Horton, "Reforming Arbitration Appeals: The New ULCC Uniform Arbitration Act" (2017) 75 Advocate 37.
25. *Creston Moly Corp v Sattva Capital Corp*, 2009 BCSC 1079.
26. *Creston Moly Corp v Sattva Capital Corp*, 2010 BCCA 239.
27. *Creston Moly Corp v Sattva Capital Corp*, 2011 BCSC 597.
28. *Creston Moly Corp v Sattva Capital Corp*, 2012 BCCA 329.
29. *Sattva*, *supra* note 10.
30. *Kourtessis*, *supra* note 9 at para 18.
31. *Supra* note 8.
32. *Ibid*; *Molson Canada 2005 v Anheuser-Busch Inc*, 2010 FC 283 at para 39.
33. *Supra* note 1.
34. *JEA v VJA*, 2022 BCSC 171; Levi Graham, Brendan MacArthur-Stevens & Mitchell Folk, "A Eulogy for Arbitral Deference? The Standard of Review for Private Arbitration Post-*Vavilov*" (2022) 35 Can J Admin L & Prac 205; Paul Daly, "*Vavilov* on the Road" (2022) 35 Can J Admin L & Prac 1 [Daly, "*Vavilov* on the Road"].
35. 2021 SCC 7.

36. *Ibid* at paras 117–22.
37. *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1; *719491 Alberta Inc v The Canada Life Assurance Company*, 2021 ABQB 226 at paras 60–62.
38. *Grewal v Mann*, 2022 BCSC 555 at paras 9–12; *Goel v Sangha*, 2022 BCSC 1476 at paras 23–25; *Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd*, 2021 BCSC 1415 at paras 53–59; *Serbcan Inc v National Trust Company*, 2022 ONSC 2644 at para 15. Justice Hunter, writing for the BC Court of Appeal, noted the following on appeal in the *Spirit Bay* case (2022 BCCA 407 at para 58) just before this article went to press: "[The appellant submitted] that the appeal judge erred in not giving effect to the minority view in *Wastech*. In the view that I take of this appeal, the standard of review does not affect the outcome. I would follow the approach of the majority judgment in *Wastech* and leave the determination of this question to a case where the outcome of the appeal will be affected".
39. *D Lands Inc v KS Victoria and King Inc*, 2022 ONSC 1029 at paras 59–64.
40. 2022 ONSC 2644 at para 15.
41. 2020 ONSC 1516. The decision was upheld by the Ontario Court of Appeal in the result (2021 ONCA 592), but following the majority in the Supreme Court of Canada decision in *Wastech* in holding that the applicability of *Vavilov* to arbitration appeals should not be determined until a decision on that point is necessary.
42. *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592 at para 38. Just as this article goes to press, the Ontario Court of Appeal has released its long awaited decision in *Tall Ships Development Inc. v. Brockville*, 2022 ONCA 861 [*Tall Ships*]. The Court of Appeal did not reach the issue of standard of review. It found that no extricable question of law had been raised on the appeal and that the issues of procedural fairness that had been raised on the set-aside application were simply "bootstrapped" merits arguments that the Court of Appeal rejected in relation to the appeal. Nevertheless, it is noteworthy that in making these determinations, the Court of Appeal relied on the Supreme Court of Canada decisions in *Sattva*, *supra* note 10, and *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, with no reference at all *Vavilov*, *supra* note 1. It is submitted that this absence of any reference to *Vavilov*, together with the other comments in the *Tall Ships* decision that emphasize the *arbitration* context of the statutory provisions relating to appeals and set-aside applications, is in keeping with the conclusion argued for in this article that *Vavilov* simply does not apply to arbitration.
43. *JEA v VJA*, *supra* note 34 at paras 37–47; Daly, "*Vavilov* on the Road", *supra* note 34; Graham, MacArthur-Stevens & Folk, *supra* note 34.
44. *Ottawa (City) v Coliseum Inc*, 2016 ONCA 363.
45. For example, in *Groia*, *supra* note 12, the dissent was critical of the majority decision and claimed that despite claiming to be using a reasonableness standard, the majority decision actually used the correctness standard to substitute their own opinion. Indeed, the *Groia* case produced an outcome with which most judicial opinions that were expressed over the history of the case disagreed.