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Escaped Attention:

The law reform reports that shaped arbitration legislation but were overlooked in *Sattva*

By Michael A. Mulroney[*]

[*] Michael A. Mulroney graduated from McGill with a BCL/LLB (2014) after completing a BCom at the University of Victoria (2008). He articled and initially practiced at a small tax law firm in Vancouver before joining Mulroney Siver Law in Victoria, where his practice includes commercial arbitration. Recently, he and his father David S. Mulroney were co-counsel for the successful appellant in Escape 101 Ventures Inc v March of Dimes Canada, 2022 BCCA 294.

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In *Escape 101*, the BCCA relied on the BC Law Reform Commission's *Report on Arbitration* to conclude that a misapprehension of evidence affecting the outcome was an appealable question of law for the purposes of domestic commercial arbitration. According to this report, the classification of questions of contractual interpretation constituting questions of law appears integral to the design of BC's legislation. This report, alongside subsequent reports that guided arbitration reforms in other provinces, also apply language which seemingly proposes that most questions of law be appealable on a correctness standard and the evidentiary record be reviewable on an appeal. However, none of these reports are mentioned in *Sattva*, wherein the Court ruled that contractual interpretation is classified as a mixed question and prescribed a reasonableness standard for most questions of law, while also suggesting, in *obiter*, that a review of an arbitrator's factual findings be absolutely prohibited. *Vavilov*'s unsettlement of the standard of review applicable to statutory appeals from commercial arbitration necessitates a resolution by the SCC, which should either reconcile *Sattva*'s *ratio* with the recommendation reports that shaped relevant legislation or reconsider their prior determinations altogether.

I. Introduction

Escape 101 Ventures Inc v March of Dimes Canada ("*Escape 101*") was an appeal of a domestic commercial arbitration award that featured a rare misapprehension of evidence going to the core of the outcome.[1] Following the sale of a business, a dispute arose regarding an "earnout" clause. The vendor (Escape) was entitled to 10% of the gross revenue generated by a "Business" that included specified services during the first five years after the sale. The purchaser (MODC) did not provide these services in British Columbia (BC) prior to the acquisition. Escape claimed earnout payments from any contracts for the specified services in BC. MODC responded that the earnout excluded revenue from any new contracts it entered into after the acquisition. The arbitrator concluded that the parties intended the earnout to include new contracts but only within a small geographic limit. He found that Escape had accepted earnout reports, which excluded revenue from a particular contract outside the geographic limit, and that it was aware of this contract's existence when it accepted those reports. Thus, he concluded that at the time of the contracts' execution, Escape did not intend to include contracts outside the geographic limit. This finding of "informed acceptance" was critical to the decision. However, the arbitrator erred by misunderstanding that this new contract did not take effect until after the periods for which Escape had accepted earnout reports. Escape appealed the decision to the BC Court of Appeal (BCCA).

After DeWitt-Van Oosten JA found that the arbitrator's error raised an extricable error of law and granted leave to appeal,[2] a unanimous BCCA (per Voith JA) affirmed that this error was an extricable question of law "arising out of [the] arbitral award" that justified an appeal under BC's new *Arbitration Act* (the "*2020 BC Act*").[3] MODC did not dispute

[1] *Escape 101 Ventures Inc v March of Dimes Canada*, 2022 BCCA 294, leave to appeal to SCC refused, 40439 (13 April 2023) [*Escape 101*].
[2] *Escape 101 Ventures Inc v March of Dimes Canada*, 2021 BCCA 313 at paras 26–33.
[3] SBC 2020, c 2, s 59(2) [*2020 BC Act*]; *Escape 101*, *supra* note 1 at para 43.

that the arbitrator misapprehended the evidence, that the error affected the outcome, or that a misapprehension of evidence affecting the outcome could be an error of law.[4] Instead, it argued that appeals "on any question of law arising out of an arbitral award" were restricted to errors apparent solely within the written reasons for the award without reference to the evidentiary record.[5] Despite *Sattva*'s suggestion of an "absolute" restriction of review of an arbitrator's factual findings,[6] the Court rejected MODC's argument based on the BC Law Reform Commission's (BCLRC) *Report on Arbitration* (the "*BCLRC Report"*), which recommended that "whether [an] error appears on the face of the award would be irrelevant."[7] The BCCA remitted the award to the arbitrator for reconsideration. The SCC refused MODC's application for leave to appeal this decision.

Escape 101 did not resolve whether the standard of review on appeals from domestic commercial arbitration was that of correctness or reasonableness. This issue surfaced after *Vavilov* held that a correctness standard should generally apply for the review of administrative decisions pursuant to a statutory "appeal" mechanism,[8] which decision also unsettled *Sattva*'s holding that the reasonableness standard of review would "almost always apply" to appeals from commercial arbitration.[9] The majority of the SCC in *Wastech* declined to resolve this issue because the parties did not address it in their submissions and agreed that it would not affect the outcome.[10] Likewise, the BCCA declined to do so in *Escape*

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[4] *Escape 101, supra* note 1 at paras 44–49. See *Sharbern Holding Inc v Vancouver Airport Centre Ltd,* 2011 SCC 23 at para 71 [*Sharbern*].
[5] *Escape 101*, *supra* note 1 at paras 50, 69, 82.
[6] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 104 [*Sattva*].
[7] *Escape 101*, *supra* note 1 at paras 55–57; Law Reform Commission of British Columbia, Report on Arbitration, LRC 55 (Vancouver: LRCBC, May 1982) at 77, online: <canlii.ca/t/sg6h> [*BCLRC Report*]; *Commercial Arbitration Act,* SBC 1986, c 3, s 31 [*1986 BC Act*]; *Arbitration Act*, RSBC 1996, c 55, s 31 [*1996 BC Act*].
[8] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 17, 36–38 [*Vavilov*].
[9] *Sattva*, *supra* note 6 at para 75. See also *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 74 [*Teal Cedar 2017*].
[10] *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para 46 [*Wastech*].

101, as the parties did not address it and the BCCA concluded that the award could not survive a reasonableness review.[11]

Sattva's omission of any reference to the *BCLRC Report* and concern from professional arbitrators regarding *Escape 101* prompted the writer, Escape's co-counsel, to conduct the research that culminated in this article.[12] This research reveals that the *BCLRC Report* clearly presumes that "any question of law" specifically includes questions of contractual interpretation. The report's draft legislation, which BC adopted "nearly verbatim,"[13] apparently relies on this inclusion to have its intended effect. The *BCLRC Report* as well as reports from the Alberta Law Reform Institute (ALRI) and the Uniform Law Conference of Canada (ULCC),[14] which guided domestic commercial arbitration reform in other common law provinces but are also not mentioned in *Sattva*,[15] all suggest that the correctness standard apply for appeals on most questions of law.[16] Like the BCLRC, the ULCC recommended that an appellate review should not be restricted to the "face of the award."[17]

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[11] *Escape 101*, *supra* note 1 at para 101. The BCCA has still declined to decide this issue. See e.g. *1550 Alberni Limited Partnership v Northwest Community Enterprises Ltd*, 2023 BCCA 141 at para 77. However, the BCSC determined that an appellate standard applies to arbitrations regarding family law disputes in *Zemtsova v Shevalev Estate*, 2023 BCSC 1375 at para 78.

[12] See Joshua Karton et al, "Arbitration Appeals on Questions of Law in Canada: Stop Extricating the Inextricable!" (2023) 3:2 Can J Commercial Arbitration 138 at 147, 150 [Karton et al]; Lisa Munro, "A Year in Review of Canadian Commercial Arbitration Case Law (2022)" (2023), 3:2 Can J Commercial Arbitration 181 at 194–95 [Munro]; Tina Cicchetti, "Updating BC's Arbitration Act: Lessons Learned" (2023), 3:2 Can J Commercial Arbitration 84 at 90, n 13 [Cicchetti].

[13] *Kovacs v Insurance Corp. of British Columbia*, 1994 CarswellBC 1165 at para 25, 1994 CanLII 560 (BCSC) [*Kovacs*]. See also *Domtar Inc v Belkin Inc*, 1989 CanLII 238 at 8 (BCCA) [*Domtar*], and *MSI Methylation Sciences, Inc v Quark Venture Inc*, 2019 BCCA 448 at para 60 [*MSI*].

[14] See Alberta Institute of Law Research and Reform, *Proposals for a New Alberta Arbitration Act*, Report No 51 (Edmonton: AILRR, October, 1988), online: <canlii.ca/t/2dlj> [*ALRI Report*]; Uniform Law Conference of Canada, "Proceedings of the Seventy-First Annual Meeting" (1989) 71 Unif L Conf Proc 1 [*71st ULCC Report*]; Uniform Law Conference of Canada, "Proceedings of the Seventy-Second Annual Meeting" (1990) 72 Unif L Conf Proc 1 [*72nd ULCC Report*].

[15] See William H Hurlburt, "New Legislation for Domestic Arbitrations" (1992) 21:1 Can Bus LJ 1 at 4–6 [Hurlburt 1992]; *Esfahani v Samimi*, 2022 ABKB 795 at paras 37–48 [*Esfahani*].

[16] See *BCLRC Report*, *supra* note 7 at 86; *ALRI Report*, *supra* note 14 at 62; *71st ULCC Report*, *supra* note 14 at 120; 72*nd ULCC Report*, *supra* note 14 at 88–89; *Esfahani*, *supra* note 15 at para 43.

[17] See *BCLRC Report*, *supra* note 7 at 77; *71st ULCC Report*, *supra* note 14 at 169–71.

This article seeks to demonstrate the importance of these reports for their expressions or signals of legislative intent in relation to statutory appeals from commercial arbitration. Following the above indroduction, part II explores the historical context surrounding these reports and the ensuing legislation. Part III then examines how, prior to *Sattva,* these reports and courts addressed the classification of questions of contractual interpretation (the "Classification Issue"), the applicable standard of review, and the ability to review the evidentiary record on appeal. Part IV analyzes how the SCC reached contrary determinations in *Sattva*. Part V reviews the resistance to and erosion of *Sattva*'s *ratio* in decisions released during the past decade. Part VI concludes that *Vavilov*, by unsettling *Sattva*'s standard of review, calls for a reconsideration by the SCC, which should include a thorough examination of these reports in any determination of legislative intent.

II. What is the genesis of commercial arbitration appeals?

The determination of legislative intent should "begin with an examination of all relevant and admissible indicators of legislative meaning".[18] Thus, the advisory reports from which the wording of modern domestic commercial arbitration legislation originates should guide the interpretation of said legislation. Shortly before *Sattva*, the SCC had relied substantially on commentary from the *BCLRC Report* to interpret a provision relating to interest in the former *1996 BC Act*, finding that the provision was "virtually identical" to the draft provision in that report.[19] Similarly, the ABKB recently reviewed historical jurisprudence and reports from the ALRI and the ULCC and, thereby, concluded that these authorities support the appellate standard of review for the appeal provisions in Alberta's *Arbitration Act*.[20] Understanding these reports,

[18] *R v Hinchey*, [1996] 3 SCR 1128 at 1137–38, 1996 CanLII 157 at para 12.
[19] See *British Columbia (Forests) v Teal Cedar Products Ltd*, 2013 SCC 51 at para 15 [*Teal Cedar 2013*]; *1996 BC Act*, *supra* note 7, s 28; *BCLRC Report*, *supra* note 7 at 50–51, 146.
[20] See *Esfahani, supra* note 15 at paras 37–48; *Arbitration Act*, RSA 2000, c A-43, s 45 [*2000 AB Act*].

however, also requires an overview of the historical context surrounding them.[21]

A. Prior to reform, commercial arbitration was rarely used.

Prior to the enactment of the *1986 BC Act*, "common law provinces had fairly uniform statutes governing local arbitrations because they all copied the *Arbitration Act 1889* (UK)".[22] These statutes did not permit appeals of arbitration awards but parties could apply to set arbitral awards aside where an arbitrator had "misconducted himself."[23] The term "misconduct" was "given a very wide meaning going beyond any sense of moral culpability"[24] and included issues such as "ambiguity and uncertainty in the award" or mistake as to the scope of authority.[25] Additional remedies at common law permitted a court to set an award aside for errors of law "on the face of the award," for example.[26] Though an error could not be said to exist on the face of the award where it was necessary to review the evidence,[27] a legal challenge that there was "no evidence" to support a finding of fact could sustain an examination of the proceedings by an appellate court "to see whether there was in fact any evidence."[28] Due to the many prevailing grounds for setting awards aside, commercial arbitration was "infrequently utilized because it was seen as

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[21] See *Pollock v Manitoba*, 2006 MBCA 78 at paras 9–22, citing Ruth Sullivan & Elmer Driedger, Sullivan and Driedger on the Construction of Statutes, 4th ed (Markham: Butterworths, 2002) at 339–60; *Pearlman v University of Saskatchewan (College of Medicine)*, 2006 SKCA 105 at paras 103–04.

[22] *ALRI Report, supra* note 14 at 9. See also William H Hurlburt, "A New Bottle for Renewed Wine: The *Arbitration Act, 1991*" (1995) 34:1 Alta L Rev 86 at 88, online: <canlii.ca/t/sl31> [Hurlburt 1995].

[23] *Arbitration Act*, RSBC 1979, c 18, s 14 [*1979 BC Act*]; *Arbitration Act*, RSA 1980, c A-43, s 11; *The Arbitration Act*, RSS 1978, c A-24, s 10(2); *The Arbitration Act*, RSM 1987, c A120, s 21(2); *Arbitrations Act,* RSO 1980, c 25, s 12; *Arbitration Act*, RSNB 1952, c 9, s 17(2); *Arbitration Act*, RSPEI 1988, c A-16, s 12(2); *Arbitration Act*, RSNS 1989, c 19, s 15; *Arbitration Act*, RSNL 1990, c A-14, s 14 [*1990 NL Act*].

[24] *Mijon Holdings Ltd v Edmonton (City)*, 1980 ABCA 39 at paras 17–18.

[25] *Scotia Construction Co Ltd v Halifax (City of)*, [1935] SCR 124 at 129, 1934 CanLII 80.

[26] *Saint John (City of) v Irving Oil Co Ltd*, [1966] SCR 581 at 586–89, 1966 CanLII [*Saint John*]; William H Hurlburt, "Setting Aside Private Non-Labour Arbitration Awards for Errors of Law – Some Recent Decisions" (1988) 26:2 Alta L Rev 345 at 345.

[27] See *Westcoast Transmission Company Limited v Majestic Wiley Contractors Ltd*, 1982 CanLII 474 at para 14 (BCCA) [*Westcoast Transmission*], aff'g 1981 CanLII 674 (BCSC).

[28] *Saint John*, *supra* note 26 at 587; see also *Vancouver (City of) v Brandram-Henderson of BC Ltd*, [1960] SCR 539 at 550, 1960 CanLII 38 [*Brandram-Henderson*]; *Ramage v Vancouver (City of)*, 6 DLR (2d) 236 at 241, 1956 CanLII 454 (BCCA).

merely adding one more layer of litigation to the court process of trial and appeal."[29]

Confronted with issues relating to vast and ill-defined bases for setting arbitral awards aside, the UK Parliament overhauled England and Wales' arbitration legislation with the enactment of the *Arbitration Act 1979* (the "*1979 Act*").[30] This legislation replaced the court's power "to set an award aside because of errors of fact or law on the face of the award" with a provision that "an appeal shall lie to the High Court on any question of law arising out of an award made on an arbitration agreement".[31] An appeal required leave of the High Court, which could only be granted where "the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement".[32] Prior to an appeal, a party could first apply for an order that an arbitrator state reasons "in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising from the award" provided that one of the parties had given the arbitrator prior notice that it wanted a reasoned award or that there was "some special reason why such a notice was not given."[33] Further appeals to England and Wales' Court of Appeal (EWCA) were only permitted if (a) the High Court or EWCA gave leave and (b) the High Court had certified that the question of law was one of "general public importance."[34]

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[29] *BCIT (Student Association) v BCIT*, 2000 BCCA 496 at para 14 [*BCIT*]; see also Joseph Day, "Commercial Arbitration in Intellectual Property Matters" (1991) 25 CPR (3d) 145 at 149–50.
[30] *Arbitration Act, 1979*, c 42 (UK) [*1979 Act*].
[31] *Ibid*, s 1(1); *BCLRC Report*, *supra* note 7 at 75.
[32] *1979 Act*, *supra* note 30, s 1(4).
[33] *Ibid*, ss 1(5)–(6).
[34] *Ibid*, s 1(7) (emphasis added).

B. The *1986 BC Act*: BC leads in arbitration reform.

The 1982 *BCLRC Report*, which was the "first formal Canadian proposal for modern arbitration legislation",[35] recommended reforms and included draft legislation modelled after the *1979 Act*. It similarly proposed the elimination of applications to set awards aside for errors "on the face of the award," and that an "appeal should lie [to the BC Supreme Court] on any question of law arising out of an award."[36] The BCLRC also prescribed the availability of applications for orders that an arbitrator state reasons "in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising from the award", provided either that a party had given advance notice that a reasoned award would be required or that there was good reason why no such notice was given.[37]

The BCLRC proposed that BC eschew the *1979 Act*'s preclusion of appeals on questions that were not of "general public importance." In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The "Nema"*), an early authority applying the *1979 Act*, the EWCA and House of Lords (UKHL) held that the High Court should generally not grant leave to appeal an arbitrator's interpretation of "one-off" contractual clauses; otherwise, the High Court could overturn interpretations not warranting a certificate of general public importance without the possibility of further appeal.[38] A single Justice's interpretation could therefore ultimately prevail over that of the chosen arbitrator.[39] As Lord Denning MR explained, the arbitrator's interpretation should be preferred because "he, with his expertise, will interpret the clause in its commercial sense: whereas the judge, with no knowledge of the trade, may interpret the clause in its literal sense."[40] The

[35] Hurlburt 1995, *supra* note 22 at 88.
[36] *BCLRC Report*, *supra* note 7 at 77.
[37] *Ibid* at 85; *1979 Act*, *supra* note 30, ss 1(5)–(6).
[38] [1981] 2 All ER 1030, [1982] AC 724 (UKHL) [*The Nema UKHL*], aff'g [1980] 3 All ER 117, [1980] QB 547 (EWCA) [*The Nema EWCA*]. See also *1979 Act*, *supra* note 30, s 1(7).
[39] See *The Nema UKHL*, *supra* note 38 at 1034–42.
[40] *The Nema EWCA, supra* note 38 at 124, cited in the *BCLRC Report*, *supra* note 7 at 79.

UKHL agreed. Lord Diplock concluded that "leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong".[41]

The BCLRC concluded in response to *The "Nema"* that "local circumstances do not warrant as limited an approach to this question in this Province."[42] It opposed the *1979 Act*'s restrictions on further appeals to the Court of Appeal, opining that "once an award is brought into the judicial system, any rights of appeal from a determination by the Supreme Court should be governed in the same manner as any other decision of that Court."[43] It also recommended alternative leave criteria pursuant to which leave could be granted if the question of law was either of importance to the parties and the appeal could prevent a "substantial miscarriage of justice," or, otherwise, if the question of law was of importance to specified classes of persons or the general public.[44]

The BCLRC recommendations differed from the *1979 Act* in a few other respects. For example, while the *1979 Act* included no provision allowing an arbitrator to amend their reasons, the *BCLRC Report* suggested a provision that would allow a party to apply to the arbitrator to amend an award "in such manner as seems just and reasonable."[45] The BCLRC recommended the continued availability for applications to set awards aside for an "arbitral error," which included many of the bases then classified as "misconduct," but that the court be empowered to refuse to set the award aside if the error caused no "substantial wrong or miscarriage of justice."[46] It also recommended retaining a stipulation that an award be "final and binding," which "only expresses that which would

[41] *The Nema UKHL, supra* note 38 at 1039–40, cited in the *BCLRC Report*, *supra* note 7 at 81.
[42] *BCLRC Report*, *supra* note 7 at 82.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid* at 49.
[46] *Ibid* at 76–77. See also *Judicial Review Procedure Act*, RSBC 1979, c 209, s 9.

otherwise be implied in any event," namely that arbitration gives rise to estoppel "analogous to that created by a judgment" and an implied agreement by the parties to abide by the award.[47]

The release of the Model Law on International Commercial Arbitration (the "*Model Law*") by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 hastened the introduction of new legislation in Canada.[48] Eager to make their jurisdictions attractive for international arbitration, the governments of BC, Alberta, Manitoba, and New Brunswick quickly enacted new international commercial arbitration statutes based on the *UN Model*.[49] Armed with the *BCLRC Report* and its draft legislation, BC enacted the *1986 BC Act* for domestic arbitrations alongside its *International Commercial Arbitration Act*.[50]

The *1986 BC Act* "largely implement[ed] the recommendations of the [*BCLRC Report*]."[51] It provided that a party to an arbitration could: (1) appeal "any question of law arising out of the award" to the BC Supreme Court (BCSC) either by agreement or with leave, (2) seek leave to appeal either on a point of law of importance to the parties or a point of law important to the public or some class of persons, (3) apply for an order that the arbitrator provide more detailed reasons, and (4) seek to set awards aside for "arbitral errors," which a court could refuse to do if such errors caused no "substantial wrong or miscarriage of justice."[52] It also retained the *1979 BC Act*'s confirmation that an award was "final and

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[47] *BCLRC Report*, *supra* note 7 at 42; see *1979 BC Act*, *supra* note 23, s 4(h).
[48] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, Annex 1, UN Doc A/40/17 (1985) [*Model Law*]; *United Nations Commission on International Trade Law: Yearbook 1985*, vol 16 (New York: UN, 1988) at 53–141 (UNDOC. A/CN.9/SER.A/1985).
[49] See Hurlburt 1992, *supra* note 15 at 3; *International Commercial Arbitration Act,* SBC 1986, c 14; *International Commercial Arbitration Act*, SA 1986, c I-6.6; *The International Commercial Arbitration Act*, SM 1986-87, c 32, CCSM c C151; *International Commercial Arbitration Act*, SNB 1986, c I-12.2.
[50] See Katherine F Braid, "Arbitrate or Litigate: A Canadian Corporate Perspective" (1991), 17:2 Can-United States LJ 465 at 467; John C Carson QC, "Dispute Resolution: Negotiation, Mediation, and Arbitration in Ontario" (1992) 11:3 Adv J 10 at 18; *Cicchetti*, *supra* note 12 at 84.
[51] British Columbia, Legislative Assembly, Official Report of the Debates of the Legislative Assembly (Hansard), 33–34 (6 May 1986) at 8102 (Hon Brian Smith); See also *71st ULCC Report*, *supra* note 14 at 120; *Domtar*, *supra* note 13 at 8; *Kovacs*, *supra* note 13 at para 25.
[52] *1986 BC Act, supra* note 7, ss 30–32.

binding on all parties to the award."[53]

The *1986 BC Act* differed from the BCLRC's recommendations in a few respects. For example, on an appeal on a point of law of importance to the parties, the final legislation required a leave applicant to demonstrate a potential "miscarriage of justice" rather than a "*substantial* miscarriage of justice."[54] Against the recommendation of extensive powers for an arbitrator to correct an award,[55] the *1986 BC Act* also followed the *UN Model* in permitting amendments only for slips, omissions, or errors of a clerical, typographical, or arithmetic nature.[56]

BC's enactment of separate legislation for international arbitration is an important distinction from England & Wales' single statute for all arbitrations. Parties residing in different countries often choose arbitration to eliminate the disadvantage inherent in being subjected to the *lex arbitri* of an unfamiliar jurisdiction or to courts that are "not designed to resolve transnational commercial disputes fairly."[57] Changes introduced in the *1979 Act* were specifically "designed to assuage the dissatisfaction of foreign arbitration litigants with the existing English law and thus to remove threats to London's market share of international arbitrations."[58] In contrast, BC's separate legislation for international arbitration permits more judicial oversight for domestic arbitration without deterring international parties from conducting arbitrations in the jurisdiction. This distinction warrants the caution that the BCCA has exercised in applying English jurisprudence to interpret BC's legislation despite the *1986 BC*

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[53] *Ibid*, s 14.
[54] *Ibid,* s 31(2)(a); see *BCLRC Report, supra* note 7 at 82 (emphasis added).
[55] See *BCLRC Report, supra* note 7 at 49.
[56] See *1986 BC Act, supra* note 7, s 27; *Model Law, supra* note 48, art 33(1)(a).
[57] Lucy Reed, "International Dispute Resolution Courts: Retreat or Advance?" (2017) 4 McGill J Dispute Resolution 129 at 134, online: <canlii.ca/t/2cb1>. See also David R Haigh, Alicia K Kunetzki & Christine M Antony, "International Commercial Arbitration and the Canadian Experience" (1995) 34:1 Atla L Rev 137 at 145–53, online: <canlii.ca/t/sl32>.
[58] Hurlburt 1992*, supra* note 15 at 2; see also *The Nema UKHL, supra* note 38 at 1034.

Act's adoption of wording derived from the *1979 Act*.[59]

C. Other provinces follow the *Uniform Arbitration Act (1990)*.

Shortly after BC enacted the *1986 BC Act*, the ALRI began a review of Alberta's domestic arbitration regime and issued the *ALRI Report* in October 1988. This report recommended that draft legislation be patterned principally after the *Model Law*.[60] However, ALRI followed BC rather than the *Model Law* in proposing appeals "on any question of law arising out of the award."[61] The ALRI's draft provision for allowing an award to be set aside was based on both the *Model Law* and the *1986 BC Act*.[62]

Concerned about provinces adopting idiosyncratic domestic arbitration statutes, Alberta did not immediately enact new domestic commercial arbitration legislation based on the *ALRI Report*. Instead, at the 71st Annual Meeting of the ULCC in August 1989, Alberta's delegation suggested the preparation and adoption of uniform domestic arbitration legislation.[63] The ULCC finalized a *Uniform Arbitration Act* (the "*1990 UAA*") the following year.[64]

The *1990 UAA* was primarily based on the *Model Law*, but included many provisions modeled after the *1986 BC Act*. For example, it permitted appeals to a superior court either with leave or by agreement. Parties could also apply to the court for an order requiring the arbitrator to "explain any matter" related to an appeal or to set an award aside for various grounds, including fraud, corruption, bias, or failure to observe rules of natural justice.[65] Arbitrators would have the power to correct typographical,

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[59] See *BCIT*, *supra* note 29 at paras 17–18; *Domtar*, *supra* note 13 at 9.
[60] See *ALRI Report, supra* note 14 at 1, 9, 10, 45, 77, 106; Hurlburt 1992, *supra* note 15 at 5; *71st ULCC Report, supra* note 14 at 121.
[61] *ALRI Report, supra* note 14 at 104; see *1986 BC Act, supra* note 7, s 31(1).
[62] See *Ibid* at 102–03; *Model Law*, *supra* note 48, art 34(1); *1986 BC Act, supra* note 7, ss 1, 30.
[63] *71st ULCC Report*, *supra* note 14 at 117.
[64] See Uniform Law Commission of Canada, "Appendix A - Uniform Arbitration Act 1990" in Uniform Law Conference of Canada, "Proceedings of the Seventy-Second Annual Meeting" (1990) 72 Unif L Conf Proc 1 [*1990 UAA*].
[65] *Ibid*, ss 45, 46(1).

arithmetic, and other similar errors, as well as to amend the award to "correct an injustice caused by an oversight on the part of the arbitral tribunal."[66] Unlike the *1986 BC Act,* however, the *1990 UAA* provides for leave only where the court concludes both that "the importance to the parties of the matters at stake in the arbitration justifies an appeal" and that "determination of the question of law at issue will significantly affect the rights of the parties."[67]

Most common law provinces enacted domestic commercial arbitration legislation based on the *1990 UAA* during the decade that followed.[68] Appeal provisions in these provinces reflect the *1990 UAA*'s language allowing parties to "appeal an award to the court on a question of law" rather than to "appeal to the court on any question of law arising out of the award" as the *1986 BC Act* permitted.[69] Like BC, all provinces that followed the *1990 UAA,* except Nova Scotia, permit appeals either where the parties have so agreed or where the court grants leave.[70] Among the common law provinces, only Newfoundland and Labrador has not reformed its commercial arbitration legislation.[71] Prince Edward Island's

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[66] *Ibid*, s 44(1).
[67] See *1990 UAA, supra* note 64, s 45(2).
[68] See Hurlburt 1992, *supra* note 15 at 6; Hurlburt 1995, *supra* note 22 at 88; Manitoba Law Reform Commission, *Report on Arbitration*, Report 85 (Winnipeg: MLRC, 1994); *Arbitration Act, 1991*, SO 1991, c 17 [*ON Act*]; *Arbitration Act*, SA 1991, c A-43.1 [*1991 AB Act*]; *The Arbitration Act, 1992*, SS 1992, c A-24.1; *Arbitration Act*, SNB 1992, c A-10.1 [*1992 NB Act*]; *Arbitration Act*, SPEI 1996, c 4 (this legislation was never proclaimed); *The Arbitration Act and Consequential Amendments Act*, SM 1997, c 4; *Commercial Arbitration Act*, SNS 1999, c 5 [*NS Act*].
[69] *1990 UAA, supra* note 64, ss 45(1)–(2); see e.g. *ON Act*, *supra* note 68, s 45(1); but see *1986 BC Act*, *supra* note 7, s 31(1) (emphasis added).
[70] *1986 BC Act*, *supra* note 7, ss 31(1)(a)–(b); *1990 UAA, supra* note 64, ss 45(1)–(2); see e.g. *1992 NB Act*, *supra* note 68, s 45(1). Ontario permits appeals with leave only "[i]f the arbitration agreement does not deal with appeals on questions of law," meaning that an arbitration agreement can preclude appeals by stating, for example, that disputes be "finally settled" by arbitration: see *ON Act*, *supra* note 68, s 45(1); *Baffinland Iron Mines LP v Tower-EBC GP/SENC*, 2023 ONCA 245 at paras 1–2. Nova Scotia permits appeals only where the parties have so agreed: see *NS Act*, *supra* note 68, s 48(1). Yukon did not model its legislation after the *1990 UAA*, but similarly only permits appeals where the parties have agreed: see *Arbitration Act*, RSY 2002, c 8, s 26.
[71] See *1990 NL Act*, *supra* note 23.

(PEI) 1996 statute based on the *1990 UAA* never took effect before it enacted newer legislation in late 2023.[72]

D. The *2020 BC Act*: BC is again the first province to update.

Compared to the major domestic commercial arbitration reforms of the 1980s and 1990s, most subsequent amendments have been relatively minor. The *1996 BC Act*'s appeal provision was "substantially identical" to that in the *1986 BC* Act.[73] Other than providing for appeals to the BCCA rather than the BCSC, the *2020 BC Act* similarly leaves the rights of appeal "largely unchanged."[74] Likewise, both Alberta and New Brunswick revised their statutes in 2000 and 2014, with no substantive changes to the appeal provision.[75] Other provinces with statutes based on the *1990 UAA* have yet to substantially revise their legislation.

The ALRI and ULCC both recently proposed that appeals be on an "opt-in" rather than an "opt-out" basis, meaning that appeals would not be permitted unless the parties' arbitration agreement specifically permits appeals. The ALRI issued this recommendation in 2013, with feedback from consultation respondents indicating a near-even split on whether a party should still be able to seek leave to appeal absent an agreement providing for appeals.[76] In 2016, the ULCC adopted a revised *Uniform Arbitration Act* ("*2016 UAA*") that provided appeals to appellate rather than superior courts, eliminated appeals on questions of fact and mixed fact and law, and required both the agreement of the parties and leave to appeal even questions of law.[77] The ULCC noted that most members of

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[72] See Prince Edward Island, Legislative Assembly, *Table of Public Acts* (February 2024); *Arbitration Act*, SPEI 2023, c 15 [*2023 PEI Act*].
[73] *MSI*, *supra* note 13 at paras 57–60; See also *Hayes Forest Services Limited v Weyerhaeuser Company Limited*, 2008 BCCA 31 at paras 29–37 [*Hayes*]; *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2018 BCCA 468 at paras 17–20; *Escape 101*, *supra* note 1 at paras 55, 67, 80–81.
[74] *Escape 101*, *supra* note 1 at para 57.
[75] *2000 AB Act, supra* note 20, split the appeal provision in the *1991 AB Act*, *supra* note 68, into separate subsections. The *Arbitration Act*, RSNB 2014, c 100 did not change the appeal provision from the *1992 NB Act*, *supra* note 68.
[76] See Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues*, Report No 103 (Edmonton: ALRI, September 2013) at paras 133–38.
[77] See Uniform Law Conference of Canada, *Uniform Arbitration Act* (2016), 2016 ULCC 0017, s 65 [*2016 UAA*].

its working group and survey respondents favoured eliminating appeals altogether, but that "the preponderant view" was that if appeals be permitted at all, they be on an "opt-in" basis.[78]

PEI is the only province to have implemented the ULCC's recent recommendations regarding appeals. Its new domestic commercial arbitration statute closely resembles the *2016 UAA*, and permits appeals only if the parties agree and if they obtain leave from the Court of Appeal.[79] In contrast, BC's new legislation permits parties to "opt out" by agreement before a dispute arises, but they may otherwise appeal to the BCCA either by agreement or with leave of that court.[80] Contrary to the *2016 UAA*, the *2020 BC Act* also permits appeals of questions of law "arising out of an arbitral award" rather than "the award", thus permitting appeals from interim, partial or cost awards .[81] However, the *2020 BC Act* did follow the ULCC in abandoning applications for orders that an arbitrator provide more detailed reasons for an award in order to facilitate an appeal,[82] which applications were used infrequently and improperly.[83]

Given that the *2020 BC Act* leaves the rights of appeal "largely unchanged,"[84] the *BCLRC Report* continues to inform the interpretation of the language originating from this report and survives in the *2020 BC Act*. The ULCC's commentary and recommendations surrounding the *1990 UAA* and *2016 UAA* likewise remain relevant to the interpretation of

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[78] *Ibid*, s 65.
[79] See *2023 PEI Act*, *supra* note 72, s 64.
[80] See *2020 BC Act*, *supra* note 3, ss 59(2)–(3). Legislation recently introduced in the Northwest Territories and Nunavut similarly permits appeals with leave of the Court of Appeal: see *Arbitration Act*, SNWT 2022, c 14, s 61(2).
[81] See *2016 UAA*, *supra* note 77 ss 2 (definition of "award"), 65(1); *2020 BC Act*, *supra* note 3, s 59(2). Where the *2016 UAA* defines "award" to be a "a final decision of an arbitral tribunal concerning all or part of the dispute" thereby excluding appeals from interim awards, s 1 of the *2020 BC Act* defines an "interim measure" to be potentially in the form of "an arbitral award" and thus potentially appealable.
[82] See *1986 BC Act*, *supra* note 7, s 32; *1990 UAA*, *supra* note 64, s 45(4); *1996 BC Act*, *supra* note 7, s 33.
[83] See e.g. *Conmac Enterprises Ltd. v 0928818 BC Ltd*, 2018 BCSC 360 at paras 74–78; *Allard v The University of British Columbia*, 2021 BCSC 60 at para 46; *Economical Mutual Insurance Company v Intact Insurance Company*, 2021 BCSC 1772; *Anins v Anins*, 2022 BCCA 441 at para 31, leave to appeal to SCC refused, 40612 (20 July 2023).
[84] *Escape 101*, *supra* note 1 at para 57.

legislation based thereon.

III. What was intended to be appealable and on what standard?

Though not cited in *Sattva*, the BCLRC, ALRI, and ULCC's reports regarding domestic commercial arbitration law reform offer indications of legislative intent regarding the issues decided in that case. The *BCLRC Report* apparently relies on the classification of questions of contractual interpretation as questions of law. All these reports imply a correctness standard of review, except for questions of law requiring a party to demonstrate a potential "miscarriage of justice" in BC, and recommend against restricting appellate review to the face of the award. Courts generally interpreted legislation accordingly until shortly before *Sattva*.

A. "Any question of law" includes a contractual interpretation.

The *BCLRC Report* does not address the Classification Issue explicitly but evinces a presumption that contractual interpretation be classified as a question of law. For example, it refers to a question that is "strictly and purely one of construction of an agreement" as a "specific question of law."[85] This reflects the prevailing view at the time of the report's publication that "no doubt a question of construction is (generally speaking) a question of law."[86]

The report also includes extensive quotations from *The "Nema"*, which concluded that contractual interpretation needed to be classified as a question of law to properly interpret the *1979 Act*. The quotations in the *BCLRC Report* related to the holding that interpretations of "one-off" clauses should generally not be permitted under the *1979 Act*, as the

[85] *BCLRC Report*, *supra* note 7 at 65–66.
[86] *Bell Canada v Office & Professional Employees' Union* (1973), [1974] SCR 335 at 349, 1973 CanLII 18 [*Bell 1973*] and *Volvo Canada Ltd. v U.A.W., Local 720* (1979), [1980] 1 SCR 178 at 216-17, 1979 CanLII 4 [*Volvo*], citing *Government of Kelantan v Duff Development Co Ltd*, [1923] AC 395 at 409 (UKHL); See also *Domtar*, *supra* note 13 at 7.

BCLRC recommended against such a restriction for BC.[87] In *The "Nema"*, Lord Diplock also addresses the Classification Issue. He explains that the historical reason for contractual interpretation being classified as a question of law was a "legacy of the system of trial by juries who might not all be literate".[88] While he accepted that this historical reason was no longer relevant, he determined that:

> … it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being 'a question of law' for the purposes of judicial review of awards of arbitrators or decisions of administrative tribunals from which an appeal to a court of justice is restricted by statute to an appeal on a question of law.[89]

Although Lord Diplock's definitive, then-recent conclusion does not appear in the *BCLRC Report*, quaere whether the BCLRC in 1982 contemplated the possibility that courts might reach a different conclusion in interpreting the words "any question of law" taken from the *1979 Act*.[90]

Further, the classification of contractual interpretations as questions of law is essential for the BCLRC's draft legislation to achieve its intended effect of eliciting precedents regarding common contractual clauses. The *BCLRC Report* recognizes concerns about arbitration's disadvantages compared to litigation in its introduction:

> … litigation produces reported cases, but the decisions of arbitrators (other than in labour matters) are not reported. This could inhibit growth of the common law in particular fields of business and retard

[87] See *BCLRC Report*, *supra* note 7 at 79–82, citing *The Nema EWCA*, *supra* note 38 at 124 and *The Nema UKHL* *supra* note 38 at 1037, 1039–40, 1042.
[88] *The Nema UKHL*, *supra* note 38 at 1035.
[89] *Ibid.*
[90] *Ibid*. See *1979 Act*, *supra* note 30, s 1(2); *BCLRC Report*, *supra* note 7 at 79–82; see also *Bell 1973*, *supra* note 86 at 349 and *Volvo*, *supra* note 86 at 216–17.

> the process whereby standard terms in contracts acquire a settled interpretation.[91]

The BCLRC undertakes to "explore ways to reduce the disadvantages of arbitration", then recommends "alternative criteria for granting leave" to appeal in order "to prevent substantial miscarriages of justice, and to also ensure that there is some systematic development of law in arbitrations."[92] The first leave provision, which requires importance of the point of law to the parties and the potential to prevent a miscarriage of justice, permits appeals which have little precedential value.[93] However, the second and third provisions, requiring importance of the point of law either to a class or body of persons or to the public, allow for appeals of contractual clauses commonly used "in particular fields of business" or in consumer contracts.[94] The exclusion of contractual interpretation from appellate jurisdiction inhibits the settlement of interpretations regarding common contractual clauses.

The ALRI and ULCC reports are less clear regarding any intention in respect of the Classification Issue. The construction of an agreement was considered a question of law at the time of their release, but they do not discuss questions of law in such a way as to clearly reflect that classification. However, the ULCC did suggest that its proposals for appellate review "are narrower than the [*1986 BC Act*] in one respect: they do not recognize as grounds for entertaining an appeal that the question is of importance to a class of which the applicant is a member or to the public," which BC's legislation permitted pursuant to its second and third alternative leave criteria.[95] Thus, assuming that the ULCC reviewed the *BCLRC Report* and correctly understood that the purpose of BC's first

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[91] *BCLRC Report*, *supra* note 7 at 4 (emphasis added).
[92] *Ibid* at 5, 82.
[93] See *Ibid* at 82; *1986 BC Act*, *supra* note 7, s 31(2)(a).
[94] *BCLRC Report*, *supra* note 7 at 4, 82; see *1986 BC Act*, *supra* note 7, s 31(2)(b)–(c).
[95] *71st ULCC Report*, *supra* note 14 at 171 (emphasis added).

leave provision was to permit appeals of "one-off" contractual provisions, then it likely intended to permit them as well.

For the purposes of appeals from commercial arbitration, courts initially considered the construction of an agreement to constitute a question of law before wavering on this issue.[96] While insisting that the ultimate interpretation was a question of law,[97] courts began to hold that "taken broadly, the construction of a contract often is a question of mixed fact and law" that cannot sustain an appeal from commercial arbitration.[98] The SCC in *Sattva* explains the two developments in the common law, which prompted this change in approach.[99] First, consideration of "surrounding circumstances" was initially permissible if the words of a contract could support more than one meaning,[100] but then became a necessary part of the interpretation exercise.[101] Second, *Southam* and *Housen* held that "questions of law are about what the correct legal test is [while] questions of mixed law and fact are questions about whether the facts satisfy the legal tests";[102] within this framework, the construction of an agreement in light of surrounding circumstances falls into the latter category. Yet, recent judicial reasoning favouring reclassification does not address the issue of legislative reliance on the historical approach to the Classification Issue in relation to appeals restricted to questions of law.

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[96] See e.g. *Domtar*, *supra* note 13 at 6–7; *Oakford v Telemark Inc*, 2001 CarswellAlta 881 at para 7, [2001] AJ No 853 (ABQB); *AWS Engineers and Planners Corp v Deep River (Corp of the Town)*, 2005 CanLII 467 at paras 93–94, 96–98 (ONSC) [*AWS*].

[97] See *Bell Canada v The Plan Group*, 2009 ONCA 548 at para 31; *269893 Alberta Ltd v Otter Bay Developments Ltd*, 2009 BCCA 37 at paras 10–15 [*Otter Bay*]; *JEL Investments Ltd v Boxer Capital Corporation*, 2011 BCCA 142 at paras 13–27.

[98] See *Hayes*, *supra* note 73 at para 44. See also *Venneman v Mountain View (County No. 17)*, 2009 ABQB 540 at para 32 [*Venneman*]; *Farm Credit Canada v National Bank of Canada*, 2011 SKQB 321 at paras 24–28 [*Farm Credit*]; *Capital Power Corporation v Lehigh Hanson Materials Limited,* 2013 ABQB 413 at para 27.

[99] See *Sattva*, *supra* note 6 at paras 46–49.

[100] See e.g. *Toronto Gravel Road and Concrete Co v York (County)*, (1885) 12 SCR 517 at 523, 1885 CanLII 12; *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at 166, 1998 CanLII 791.

[101] See e.g. *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21 at para 27; *Tercon Contractors Ltd v BC (Transportation and Highways)*, 2010 SCC 4 at para 64.

[102] *Canada (Director of Investigation and Research) v Southam Inc,* [1997] 1 SCR 748 at paras 35–36, 1997 CanLII 385 [*Southam*]; *Housen v Nikolaisen*, 2002 SCC 33 at paras 33–37, 101 [*Housen*].

B. Appellate standards generally apply.

Although the BCLRC, ALRI, and ULCC reports do not prescribe a standard of review explicitly, all of them use language consistent with an expectation that a correctness standard would apply to appeals on questions of law. In recommending against giving effect to clauses in arbitration agreements that exclude appeals, the *BCLRC Report* recognized that, in some situations, parties "might be willing and prepared to accept the risk that the arbitrator's decision might be incorrect in law", but that such a willingness should be given effect only after the dispute had arisen.[103] The *ALRI Report* suggested that "[i]f an award is wrong in law, a party should be able to appeal against it to the Court of Queen's Bench".[104] Responding to the suggestion that parties choose arbitration to escape the judicial system, the ULCC similarly found that:

> … it is not by any means clear that parties to an arbitration want anything other than their legal rights - or, rather, it is likely that they want legal rights to be the basis of the decision, and a right to be treated according to law is nothing if there is no way of restricting arbitrators to law, which only the courts can do.[105]

The ULCC also suggested that, under the *1990 ULCC*, courts "can help ensure that the arbitral award applies with [sic] the law".[106]

For BC's legislation, the reasonableness standard is incompatible with the intended purpose of the second and third leave provisions. Where the reasonableness standard applies, commonly-used contractual provisions cannot "acquire a settled interpretation",[107] as multiple arguably reasonable interpretations could survive appellate review. This reasoning is equally applicable to interpretations of statutes or regulations. If leave is granted to address such issues, reaching a settled interpretation

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[103] *BCLRC Report*, *supra* note 7 at 86 (emphasis added).
[104] *ALRI Report*, *supra* note 14 at 62.
[105] *71st ULCC Report*, *supra* note 14 at 120.
[106] *72nd ULCC Report*, *supra* note 14 at 88–89. See *Esfahani*, *supra* note 15 at para 43.
[107] *BCLRC Report*, *supra* note 7 at 4–5.

requires correctness.

The "miscarriage of justice" requirement to appeal questions of law important to the parties was, when first introduced in the *1986 BC Act*,[108] modern in principle but archaic in language. Indeed, the phrase "miscarriage of justice" is mostly used in criminal law as a residual category for irregularities that are not necessarily errors of law but that, on a retrospective analysis, are serious enough to render a trial unfair.[109] The term "palpable and overriding error" was relatively new at the time of the *BCLRC Report*'s publication,[110] but such errors can be said to result in a miscarriage of justice.[111] Conversely, an appeal may be dismissed or a judicial review denied despite a technical or legal error if no "substantial wrong or miscarriage of justice" occurred.[112] A requirement to demonstrate a potential miscarriage of justice afforded more deference to an arbitrator than was afforded to a trial judge, whose interpretation of a contract could at the time of the report's publication be appealed on a correctness standard.[113] Unfortunately, the *BCLRC Report* was released one month before the BCCA dropped the term "substantial wrong or

[108] *Supra* note 7, s 31(2)(a). See also *1996 BC Act*, *supra* note 7, s 31(2)(a); *2020 BC Act*, *supra* note 3, s 59(4)(a).
[109] See *Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48 at para 36; *R v Khan*, 2001 SCC 86 at paras 60–87; *Criminal Code*, RSC 1985, c C-46, s 686(1)(a)(iii) [*CC*].
[110] The SCC only adopted the term "palpable and overriding error" as the standard of review for questions of fact shortly before the *BCLRC Report*'s release. See *Stein et al v 'Kathy K' et al (The Ship)* (1975), [1976] 2 SCR 802 at 808, 1975 CanLII 146, cited in *Schroth v Innes* (1976), 71 DLR (3d) 647 at 652, 1976 CanLII 1085 (BC CA); *Jaegli Enterprises v Taylor*, [1981] 2 SCR 2 at 4–5, 1981 CanLII 26.
[111] See e.g. *Menzies v. Harlos*, 1989 CanLII 2760 at paras 22, 31 (BC CA); *Igder v Heydarzad*, 2016 ONSC 3478 at para 36; *R v Lohrer*, 2004 SCC 80 at paras 2–4; citing *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).
[112] See *Pinet v St Thomas Psychiatric*, 2004 SCC 21 at para 25 (emphasis added); *CC*, *supra* note 103, s 686(1)(b)(iii); *Judicial Review Procedure Act*, RSBC 1996, c 241, s 9(1)(b); British Columbia, *Court of Appeal Rules*, *1959*, OIC 2573/1959, r 34; *Johnson v Laing*, 2004 BCCA 364 at paras 26–120 [*Johnson*]; See e.g. *Gray v Macallum*, [1892] 2 BCR 104, 1892 CarswellBC 14 (BCSC Div Ct); *Bennett v Buschgens*, 1979 CanLII 622 at paras 16–20, 14 BCLR 275 (BCCA).
[113] See e.g. *Prairie Petroleum Products Ltd v Husky Oil Ltd. et al.,* 2008 MBCA 87 at paras 34–35, citing Geoff R Hall, *Canadian Contractual Interpretation Law* (Toronto: LexisNexis Canada Inc, 2007) at 106–07; *Eron Financial Services Ltd v Slobogian*, 1999 BCCA 266 at paras 17–23; *Lawson v Lawson*, 2005 ABCA 253 at para 18.

miscarriage of justice" from its rules,[114] and a term rarely still used in private law remains in the *2020 BC Act*.[115]

The BCCA struggled to define a threshold for the first of its alternative leave provisions. Prior to *Sattva*, it interpreted the potential to prevent a "miscarriage of justice" as a requirement "that the point of law must be one that affects the result or that only the correct determination of the law will bring about a just result."[116] In *Domtar*, the BCCA initially imposed a further restriction on the BCSC's exercise of its residuary discretion, finding that an arbitrator's interpretation of a "one-off" clause needed to be "obviously wrong" in order to attract leave, before a five-justice division overturned this requirement in *BCIT* and concluded that a leave applicant only needed to demonstrate "more than an arguable point."[117] While both *Domtar* and *BCIT* establish that the "miscarriage of justice" requirement may be met by demonstrating either issues with the chain of analysis or injustice in the result, neither decision focuses on this requirement as the critical operative restriction of the leave provision or considers whether it should be necessary to demonstrate a palpable and overriding error or other unreasonableness underlying an award in order to obtain leave.

Legislation based on the *1990 UAA*, which does not include alternative leave provisions, offers no similar signals regarding standard of review. The ULCC did "not think that the respondent should be put to the cost of an appeal which, as between the parties, should not be heard: parties should not have to incur cost in order to confer a jurisprudential benefit on a class or on the public."[118] This reasoning does not acknowledge that the *1986 BC Act*'s alternative leave conditions were not intended to permit appeals on a legal questions that were *un*important to the parties but rather to relieve parties from the requirement to

[114] See *Johnson supra* note 112 at paras 40–43, 73–74, 119.
[115] See *1986 BC Act*, *supra* note 7, s 31(2)(a); *2020 BC Act*, *supra* note 3, s 59(4)(a).
[116] *BCIT*, *supra* note 29 at para 16; *Domtar*, *supra* note 13 at 11.
[117] See *Domtar*, *supra* note 13 at 13–16; *BCIT*, *supra* note 29 at paras 24, 30–31.
[118] *71st ULCC Report, supra* note 14 at 171.

demonstrate a potential "miscarriage of justice" when the legal question at issue was of broader importance. In any event, the *1990 UAA*'s leave criteria adopted in other provinces focuses on the significance of the question of law to the parties rather than on the fairness or reasonableness of the process or outcome. The lack of an explicit requirement to demonstrate a potential "miscarriage of justice" could therefore sustain appeals on a correctness standard, including appeals of an arbitrator's interpretation of a "one-off" clause.

Courts in BC and other provinces hearing appeals from commercial arbitration generally applied the correctness standard to questions of law, including questions of contractual interpretation,[119] before *Dunsmuir*'s reasoning challenged that approach.[120] *Dunsmuir* held that the standard of review for administrative decisions depended on whether the relevant legislation had a privative clause, the decision maker had special expertise, or the question of law was of central importance to the legal system.[121] Courts then reached divergent conclusions as to whether *Dunsmuir* prescribed reasonableness for appeals of an arbitrator's contractual interpretation or whether it even applied to commercial arbitration.[122] Applying *Dunsmuir*, the BCCA also held that the *1996 BC Act* gave no direction regarding deference and that the reasonableness standard should apply to an arbitrator's interpretation of a forestry regulation that was not of central importance to the legal system.[123] Respectfully, the court did not consider the importance of settling the

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[119] See e.g. *Altarose Construction Ltd. v Kornichuk,* 1997 CanLII 24666 at para 20 (AB KB); *Jevco Insurance Co v Pilot Insurance Co*, 2000 CanLII 22402 at para 9 (ON SC); *British Columbia v Surrey School District No 36*, 2005 BCCA 106 at para 7; *AWS*, *supra* note 96 at para 107.
[120] *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].
[121] *Ibid* at paras 54–55.
[122] See e.g. *InterLink Business Management Inc v Bennett Environmental Inc*, 2008 BCCA 104 at para 38 (applying reasonableness based on *Dunsmuir*); *Lafarge Canada Inc v JJM Construction Ltd,* 2010 BCSC 1851 at paras 26–31(applying correctness based on *Dunsmuir*); *Mericle v Basement Systems (Calgary) Inc*, 2010 ABQB 137 at para 17 (finding *Dunsmuir* did not apply to private arbitration); *Farm Credit*, *supra* note 98 at paras 28, 52 (SKQB found correctness but did not refer to *Dunsmuir*).
[123] See *Western Forest Products Inc v Hayes Forest Services Ltd*, 2009 BCCA 316 at paras 45–58, 68, citing *Dunsmuir*, *supra* note 120 at para 70.

interpretation of a regulation to "some class or body of persons" within a particular industry, or whether the lack of a requirement to demonstrate a potential "miscarriage of justice" to obtain leave to appeal such a question of law gave implicit direction as to the intended standard of review.[124]

C. Evidentiary errors affecting the outcome are appealable.

The *BCLRC Report* clearly recommended that an appellate review ought not to be restricted to questions of law "on the face of the award." It summarized common criticisms of applications to set arbitral awards aside for errors on the face of the award, including that "[t]he availability of judicial review is fortuitous in the sense that it depends not on the nature or extent of the alleged injustice but on the technical questions of what constitutes the face of the award, and whether the arbitrator has chosen to set out his reasons therein."[125] The BCLRC then recommended that:

> … Errors of law would be reviewable under a new right of appeal that would permit appeals to be brought on any question of law arising out of an award. Whether the error appears on the face of the award would be irrelevant. Where such an appeal is brought, the court should have the power to confirm, vary or set aside the award or to remit the award to the arbitrator.[126]

Though this new right of appeal was limited to points of law, it was less restrictive than the judicial review mechanism it replaced with respect to reviewing the record. This intention is more clearly reflected in the *2020 BC Act*, which differentiates between an "arbitral award" and "*reasons for* an arbitral award," as this distinction "suggest[s] that a question arising out of an arbitral award need not be based on the arbitrator's written reasons alone."[127]

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[124] See *1996 BC Act*, *supra* note 7, ss 31(2)(a)–(b); *BCLRC Report*, *supra* note 7 at 4–5, 82. The respondent notably did not even contest the application for leave in this decision: see *Western Forest Products Inc v Hayes Forest Services Limited*, 2007 BCSC 1469 at para 2.
[125] *BCLRC Report*, *supra* note 7 at 74.
[126] *Ibid* at 77 (emphasis added).
[127] *Escape 101, supra* note 1 at para 82; see *2020 BC Act*, *supra* note 3, s 48(3) (emphasis added).

In initially recommending a provision permitting appeals on "a question of law arising out of the award", the ULCC addressed this issue similarly:

> The next question is whether the error should have to be apparent on the face of the award. In most cases, it is likely that the error will be apparent on the face of the award, if arbitrators are obliged to give reasons, and it may be difficult for a party to show from what went on that an error in law was made if it doesn't appear in the reasons. However, there may be cases in which it is clear that an error in law was made but does not appear in the award, and, if the applicant can show that that happened, we do not see why he should not have his appeal.[128]

The *72nd ULCC Report* indicated no contrary opinion on this issue even though it included different language for the appeal provision in the *1990 UAA*. [129]

While the ULCC did not publish reasons for abandoning the phrase "arising out of the award", the timing of the release of *Domtar* provides a possible explanation. In *Universal Petroleum*, decided in 1987, the EWCA had found that a question of law subject to appeal from arbitration needed to arise from the reasons for an award, not just the arbitration, but also interpreted "arising out of the award" so as to "preserve[] the settled restrictions on challenges to primary findings [of fact] under the [UK's] former system."[130] Shortly after the ULCC convened in Yellowknife and recommended against such a restriction, the BCCA released *Domtar* wherein it considered whether to follow *Universal Petroleum*. The BCCA endorsed *Universal Petroleum*'s distinction between errors arising from the arbitrator's "award" and those arising from the "arbitration" (process),

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[128] *71st ULCC Report, supra* note 14 at 170–71 (emphasis added).
[129] See *72nd ULCC Report, supra* note 14 at 110–11; *1990 UAA*, *supra* note 64, s 45(1).
[130] *Universal Petroleum Co Ltd v Handels-und Transport-gesellschaft GmbH* [1987] 1 WLR 1178 at 1188–89; [1987] 2 All ER 737 (EWCA) [*Universal Petroleum*].

but it urged caution in otherwise following this English authority.[131] When the ULCC reconvened in Saint John in 1990, it had likely reviewed *Domtar* and considered the potential perils of influence from English jurisprudence, namely the risk that courts in common law provinces could diverge on its relevance or reach interpretations inconsistent with the ULCC's recommendations. Quaere whether the ULCC eschewed the language of the *1979 Act* to avoid such issues.

Notwithstanding *Southam*'s holding that "questions of law are questions about what the correct legal test is,"[132] evidentiary errors that can result in a "miscarriage of justice" may be classified as extricable errors of law. Where statutory rights of appeal are confined to questions of law, it is well established in the administrative law context that appellate courts may consider unreasonable findings of fact to be extricable errors of law:

> It is possible that a reviewable error of law may be extricated from a [tribunal's] finding of fact or application of law to the facts. For example, findings of fact must generally be supported by evidence, and making a finding of fact without any supporting evidence has often been characterized as an error of law, as opposed to one of fact… Thus an egregiously incorrect and unsupported finding of fact would be reviewable on a [statutory appeal restricted to any question of law].[133]

Such unreasonable findings of fact include those supported by no evidence or irrelevant evidence, disregarded relevant evidence, and fundamental misapprehensions of relevant evidence (collectively, "Evidentiary Errors of Law").[134] Courts and tribunals are constrained, for

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[131] See *Domtar*, *supra* note 13 at 8–9.
[132] *Southam, supra* note 102 at para 35.
[133] *Canada (Attorney General) v Best Buy Canada Ltd*, 2021 FCA 161 at para 25 (internal citations omitted). See also *Osmond v Newfoundland (Workers' Compensation Commission)*, 2001 NFCA 21 at para 73 [*Osmond*]; *Sharbern*, *supra* note 4 at para 71.
[134] See *PSS Professional Salon Services Inc v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at para 68, leave to appeal to SCC refused, 32480 (29 May 2008) (emphasis in original), cited e.g in *Micanovic v Intact Insurance*, 2022 ONSC 1566 at para 36. See also *Osmond*, *supra* note 133 at para 85; *Metropolitan Entertainment Group v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 30 at para 15; *Daysland (Town) v Daysland (Subdivision and Development Appeal Board)*, 2011 ABCA 33 at para 3.

example, by an often unstated but fundamental rule that "[f]indings of fact must be supported by credible evidence".[135]

At the very least, there is considerable overlap, if not complete overlap, between Evidentiary Errors of Law and palpable and overriding errors of fact.[136] Palpable factual errors include "findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence, and findings of fact drawn from primary facts that are the result of speculation rather than inference."[137] The Federal Court of Appeal explains:

> …"Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[138]

The distinction between Evidentiary Errors of Law and palpable and overriding errors of fact is less relevant to appeals from trial courts, as palpable and overriding errors need not be characterized as questions of law to support an appeal.

The common law that existed at the time of the enactment of modern domestic commercial arbitration legislation further supports the intention of legislatures to permit appeal based on Evidentiary Errors of Law. The SCC had found that a court could review the evidence that was before a commercial arbitrator where a party raised "the legal ground that there was "no evidence"" to support a finding.[139] In the context of judicial

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[135] *Kuziw v Kucheran Estate*, 2000 ABCA 226 at para 7. See also *Davis v Canada (Minister of Citizenship & Immigration)*, 2009 FC 1224 at para 24; *Weare and Northwest Construction Ltd v Anthony and Anthony*, 1981 CanLII 4889 at para 43 (NSCA).
[136] Determining whether palpable overriding errors of fact and Evidentiary Errors of Law are effectively the same is beyond the scope of this article.
[137] *Waxman v Waxman*, 2004 CanLII 39040 at para 296 (ONCA). Leave to appeal to SCC refused, 30418 (March 31, 2005).
[138] *Benhaim v St Germain*, 2016 SCC 48 at para 38, citing *South Yukon Forest Corp v R*, 2012 FCA 165 at para 46.
[139] *Saint John*, *supra* note 26 at 587.

review, the SCC had also held that ignoring relevant evidence was an error of law,[140] and that unreasonable error of fact is an error of law that affects the jurisdiction of the tribunal.[141] In the absence of any expression of contrary intention in the reports of the BCLRC, ALRI, or ULCC, a general presumption against alteration of the law supports the continued classification of findings wholly unsupported by evidence as a question of law.[142]

The wording of BC's legislation in particular supports questions of law involving review of evidence. The use of the word "any" before "question of law arising out of the award" in the appeal provision of BC's legislation favours broader inclusion.[143] The availability of appeals for questions of law of importance only to the parties suggests that appeals relating to Evidentiary Errors of Law be permissible.[144] A review of the evidentiary record may also be necessary to prevent a "miscarriage of justice" occasioned by Evidentiary Errors of Law.

Prior to *Sattva*, courts hearing appeals from commercial arbitration permitted appeals based on Evidentiary Errors of Law.[145] In considering an application for leave to appeal a commercial arbitrator award, courts found, for example, that "it is a question of law whether there is any evidence to support the finding of facts."[146]

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[140] See *Woolaston v Minister of Manpower and Immigration*, [1973] SCR 102 at 108.
[141] See *Blanchard v Control Data Canada Ltd,* [1984] 2 SCR 476 at 494–95.
[142] See *Bryan's Transfer Ltd. v Trail (City)*, 2010 BCCA 531 at para 45, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008) at 431.
[143] *1986 BC Act*, *supra* note 7 at s 31(1); *1996 BC Act*, *supra* note 7 at s 31(1); *2020 BC Act*, *supra* note 3, s 59(2).
[144] See *1986 BC Act*, *supra* note 7 at s 31(2)(a); see also e.g. *ON Act, supra* note 68, s 45(1).
[145] See *Specialist Physicians and Surgeons of BC v General Practitioners of BC*, 2007 BCSC 423 at paras 40–41 [*Specialist Physicians*]; *Domo Gasoline Corporation Ltd v 2129752 Manitoba Ltd*, 2013 MBQB 252 at para 24–25, aff'd in 2014 MBCA 76.
[146] *NM Paterson & Sons Ltd v A & B Rail Contractors Ltd*, 1997 CarswellSask 231 at para 8, 1997 CanLII 11230 (SKQB) [*NM Paterson*]; followed in *Jevco Insurance Co v Pilot Insurance Co*, 2003 CanLII 5265 (ONSC) at para 5, *UBC v Wong*, 2005 BCSC 1286 at para 30 [*UBC*]. *UBC* is followed in *Specialist Physicians*, *supra* note 145 at paras 40–41.

IV. How did the parties and SCC address these issues in *Sattva*?

Sattva is the leading case relating to appellate review from domestic commercial arbitration legislation and needs no introduction for most readers. It involved a contractual dispute about a finder's fee of $1.5 million payable by Creston Moly Corporation (Creston) to Sattva Capital Corporation (SattvaCo) and the date on which the share price, and, by extension, the number of shares equivalent to that price, should be determined. The parties submitted the matter to arbitration. The arbitrator enrdoresed SattvaCo's interpretation of the contract and awarded damages accordingly.

Numerous judicial proceedings followed. Creston sought leave to appeal pursuant to the *1996 BC Act*'s provision allowing a party to seek leave to appeal in respect of a point of law important to the parties in order to prevent a potential miscarriage of justice.[147] The BCSC denied leave after concluding that the dispute involved unappealable questions of mixed fact and law.[148] The BCCA reversed this decision and granted Creston leave to appeal the award to the BCSC, holding that the construction of the relevant part of the agreement did not require reference to the facts and was a question of law.[149] The BCSC then dismissed Creston's appeal of the award; it concluded that the correctness standard applied but affirmed the arbitrator's interpretation.[150] The BCCA reversed this decision and adopted Creston's interpretation based on a correctness standard.[151] The SCC granted SattvaCo leave to appeal both BCCA decisions,[152] then allowed its appeal. The Court held that questions of contractual interpretation are questions of mixed fact and law not appealable from commercial arbitration absent an "extricable question of

[147] *1996 BC Act*, *supra* note 7, s 31(2)(a).
[148] See *Creston Moly Corp v Sattva Capital Corp*, 2009 BCSC 1079 at para 34.
[149] See *Creston Moly Corp v Sattva Capital Corp*, 2010 BCCA 239 at para 26 [*Creston BCCA 2010*].
[150] See *Creston Moly Corp v Sattva Capital Corp,* 2011 BCSC 597 at paras 42, 81–82 [*Creston BCSC 2011*].
[151] See *Creston Moly Corp v Sattva Capital Corp,* 2012 BCCA 329 at para 25 [*Creston BCCA 2012*].
[152] See *Sattva Capital Corporation v Creston Moly Corporation,* 2013 CanLII 11315 (SCC) [*Sattva SCC Leave*].

law" and that the reasonableness standard applies to appeals of most questions of law from commercial arbitration.[153]

In *Sattva*, the parties and the SCC largely overlooked the *BCLRC Report* and the ALRI and ULCC's recommendations. The SCC had notably recognized the *BCLRC Report*'s importance in two judgments decided shortly before *Sattva*. In 2011, it observed that the *1986 BC Act* was "modelled primarily on the recommendations of [the *BCLRC Report*]."[154] Two months before hearing *Sattva*, it relied on the report to interpret provisions relating to an arbitrator's power to order interest, observing that the report included a draft provision "virtually identical" to that in the *1996 BC Act*.[155] Yet, only SattvaCo mentioned the report in its factum and no party or justice referred to it at the hearing.[156] The parties, including the Attorney General of BC (AGBC) and BC International Commercial Arbitration Centre (BCICAC) as interveners, understandably did not mention the ALRI and ULCC reports relevant to other jurisdictions. In the end, however, none of the reports that guided the enactment of commercial arbitration legislation were mentioned in the SCC's judgment.[157]

Two aspects of *Sattva*'s *ratio* and an *obiter* comment in the reasons appear inconsistent with the explicit or implicit intent as expressed in the *BCLRC Report* and the ULCC's reports, namely:

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[153] *Sattva*, *supra* note 6 at paras 54, 106.
[154] *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 104, LeBel and Deschamps JJ, dissenting [*Seidel*].
[155] *Teal Cedar 2013*, *supra* note 19 at paras 14–15, citing the *BCLRC Report*, *supra* note 7 at 51; *1996 BC Act*, *supra* note 7, s 28.
[156] See *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53 (Factum of Appellant, SattvaCo) at paras 51–52, 81 [FOAS]. See also *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Factum of the Respondent, Creston) [FORC]; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Factum of the Intervener BCICAC) [FOIBCICAC]; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Factum of the Intervener AGBC) [FOIAGBC]; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (Webcast of Hearing) [WOH].
[157] Since *Sattva*, the SCC has relied on the *ALRI Report* and ULCC reports in *TELUS Communications Inc v Wellman*, 2019 SCC 19 at para 132.

1. that a "[c]ontractual interpretation involves issues of mixed fact and law" and therefore cannot not be appealed absent an extricable error of law;[158]

2. that the reasonableness standard "will almost always apply" to appeals from commercial arbitration;[159] and

3. that the prohibition on the review of an arbitrator's factual findings is "absolute."[160]

The SCC's holding regarding the Classification Issue is attributable to the appellant SattvaCo's submissions,[161] while its conclusion regarding the reasonableness standard and its comment on factual findings are attributable to the interveners.[162]

A. *Southam* trumps English doctrine on the Classification Issue.

An unusual history of applications for leave and appeals before the BCSC and BCCA preceded the SCC's conclusion on the Classification Issue. At the leave stage in the BCSC and BCCA, SattvaCo had argued that the interpretation of the contractual provision at issue was not a pure question of law. The BCCA disagreed and SattvaCo did not initially appeal the BCCA's leave decision.[163] When Creston later appealed the BCSC's affirmation of the arbitrator's interpretation, the BCCA asserted that "[t]he parties agree the interpretation of the Agreement is a question of law alone, reviewable on a standard of correctness" before it determined that the arbitrator had erred in his interpretation.[164] Nevertheless, the SCC granted SattvaCo leave to appeal both BCCA

[158] *Sattva, supra* note 6 at paras 50, 54.
[159] *Ibid* at paras 75, 106.
[160] *Ibid* at para 104.
[161] See FOAS, *supra* note 156 at para 56.
[162] See FOIBCICAC, *supra* note 156 at para 6; FOIAGBC, *supra* note 156 at paras 12, 27.
[163] See *Creston BCCA 2010*, *supra* note 149 at para 26; WOH, *supra* note 156 at 00h:04m:50s.
[164] *Creston BCCA 2012*, *supra* note 151 at para 25.

decisions, including the 2010 judgment concluding that the appeal raised a question of law, for which SattvaCo had not initially sought leave to appeal within the 60 days, as is generally required.[165]

The weight of the written submissions favoured the exclusion of questions of contractual interpretation from questions of law subject to appeal. The appellant, SattvaCo, contended that the questions of law that could be appealed under the *1996 BC Act* were general questions with precedential value and did not include the construction of an agreement, as "this would defeat the Legislature's intent by creating the potential of an appeal of almost every commercial arbitration award[, as] almost all commercial arbitrations concern, at least in part, the interpretation of a contract."[166] The respondent, Creston, asserted that the construction of an agreement was properly a question of law and that this issue was not properly before the court given SattvaCo's prior concession, but did not clearly argue that the legislature intended to permit appeals of questions of contractual interpretation.[167] The BC International Commercial Arbitration Centre (BCICAC) endorsed SattvaCo's position but focused on the discretionary leave criteria and standard of review.[168] The Attorney General of BC (AGBC) took "no position as to whether a question of law concerning contractual interpretation was raised in this appeal."[169]

The justices' comments and the AGBC's submissions do not indicate any inclination to favour the preclusion of appeals of contractual interpretation from commercial arbitration. For example, Abella J understood that the "overriding focus" of the appeal provision was on alternative criteria for granting leave or "what kind of legal problem is meant to attract leave rather than what is a question of law."[170] The AGBC agreed that contractual interpretation was generally a matter of mixed fact

[165] See *Sattva SCC Leave*, *supra* note 152; *Supreme Court Act*, RSC 1985, c S-26, ss 58–59.
[166] FOAS, *supra* note 156 at paras 56–57.
[167] See FORC, *supra* note 156 at paras 21–22, 29–43.
[168] See FOIBCICAC, *supra* note 156 at para 26.
[169] FOIAGBC, *supra* note 156 at para 24.
[170] WOH, *supra* note 156 at 00h:11m:52s (emphasis added).

and law,[171] but endorsed the English approach that "an exercise of contractual interpretation by a commercial arbitrator should be accorded deference when the arbitrator has expertise and background in the subject matter":[172] this submission suggests that a commercial arbitrator's contractual interpretation should be subject to a higher standard of review, not beyond appellate jurisdiction.

The Court's ultimate prohibition of appeals of questions of contractual interpretation from commercial arbitration, absent an "extricable error of law," was a "striking departure from the English doctrine".[173] The classification of the construction of an agreement as a mixed question confirmed a higher "palpable and overriding" standard of appellate review prescribed by *Housen* for ordinary appeals from trial.[174] Such deference to the trier at first instance accords with the BC legislature's intention behind requiring a leave applicant to demonstrate a possible "miscarriage of justice" before appealing an arbitrator's interpretation of contractual provisions relevant only to the parties. However, the reclassification that aligned the common law standard of review for contractual interpretation with the standard prescribed in the *1996 BC Act* also defeated the BCSC's jurisdiction to hear appeals of the very questions that this legislation envisioned.

Respectfully, it is not apparent that the SCC contemplated the degree to which legislatures relied on the "historical approach" to the Classification Issue.[175] The *Sattva* judgment interprets "any question of law" based on the framework of *Southam* and *Housen*, which were decided after the release of the recommendation reports and the enactment

[171] See *ibid* at 00h:43m:16s–00h:44m:30s, referring to *Bell Canada v The Plan Group*, 2009 ONCA 548.
[172] WOH, *supra* note 156 at 00h:55m:45s–00h:56m:16s.
[173] John D McCamus, "The Supreme Court of Canada and the Development of a Canadian Common Law of Contract" (2022) 45:2 Man LJ 7 at 26–27 [McCamus].
[174] *Supra* note 102 at paras 36–37.
[175] *Sattva, supra* note 6 at para 50.

of relevant legislation.[176] It does not acknowledge that a key purpose of the statutory appeal mechanism was to ensure that the use of arbitration would not "inhibit growth of the common law in particular fields of business and retard the process whereby standard terms in contracts acquire a settled interpretation."[177] It also does not acknowledge that BC's legislation was designed to permit appeals of "one-off" contractual clauses where an appeal could prevent a miscarriage of justice. The SCC did not consider whether it was "far too late" to reclassify the construction of an agreement for the purposes of statutory appeals restricted to questions of law, as the UKHL had concluded in *The "Nema"*,[178] given that "respect for legislative intent is the "polar star" of judicial review".[179]

The SCC did not necessarily err regarding the Classification Issue. SattvaCo was the only party that referred to the *BCLRC Report,* and it did so only in its factum and solely to make general propositions about the "objectives of arbitration, namely early finality and a determination outside of the courts."[180] The report provides no explicit warning that the BCLRC relied on the *status quo* regarding the Classification Issue for the draft legislation to have its intended effect. Any legislative intent to permit appeals of questions of contractual interpretation is not manifest in the legislation itself, which does not define "any question of law" or specify inclusions. Legislative intent is, in any event, not "frozen for all time at the moment of a statute's enactment" and must be interpreted dynamically in order to respond to changing circumstances.[181] However, the SCC ought to have at least acknowledged that the legislature might have relied on or presumed the continuation of the "historical approach" regarding the Classification Issue. It ought then to have either reconciled the abandonment of this approach with the importance of respecting

[176] See *Sattva, supra* note 6 at paras 49–55.
[177] *BCLRC Report*, *supra* note 7 at 4–5.
[178] *The Nema UKHL, supra* note 38 at 1035, cited in *Domtar, supra* note 13 at 6–7.
[179] *Vavilov*, *supra* note 8 at para 33, citing *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.
[180] FOAS, *supra* note 156 at paras 51–52, citing *BCLRC Report*, *supra* note 7 at 72.
[181] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 38.

legislative intent,[182] or given effect to that intent by qualifying *Housen* and retaining contractual interpretation's technical classification, yet with a higher standard of review.

B. The BCICAC pushes reasonableness; the AGBC urges clarity.

Sattva determined that the reasonableness standard applied in most cases to appeals on questions of law despite neither of the litigants having joined issue regarding the standard of review. SattvaCo had argued in favour of a reasonableness standard before the BCSC but conceded before the BCCA that the correctness standard applied.[183] Neither of the litigants expressly addressed the standard of review in their factums.[184] Although interveners were "not entitled to raise new issues",[185] the BCICAC in its factum promoted the reasonableness standard, writing that "substantial deference must be paid to the decisions of arbitrators in order to respect legislative intent and the autonomy of the parties who have chosen commercial arbitration."[186] In contrast, the AGBC suggested in its factum that the standard of review was unsettled and urged the court to clarify.[187] It recommended, based either on *Dunsmuir* or on English law, that a deferential standard apply for questions of law within the arbitrator's area of expertise, such as contractual interpretations generally, but that correctness apply for questions about "a commercial arbitrator's application of a common law legal test."[188]

SattvaCo did not even advance the reasonableness standard of review at the hearing. Moldaver J noted that there had "been some movement away from" the correctness standard traditionally applicable to

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[182] See *Vavilov*, *supra* note 8 at para 33.
[183] See *Creston BCSC 2011*, *supra* note 150 at para 36; *Creston BCCA 2012*, *supra* note 151 at para 25.
[184] See FOAS, *supra* note 156; FORC, *supra* note 156.
[185] SCC Docket: 35026 at 2013-09-04.
[186] FOIBCICAC, *supra* note 156 at para 34.
[187] See FOIAGBC, *supra* note 156 at paras 25, 27.
[188] *Ibid* at paras 27–30.

contractual interpretation and asked SattvaCo whether the reasonableness standard should now apply to such appeals of such questions, either from trial or arbitration; SattvaCo responded that *if* such questions were indeed questions of law, "there is a compelling argument to be made" that an arbitrator should be afforded deference, but stressed its position that such questions were not reviewable at all.[189] To have advocated in favour of reasonableness at the hearing would have been potentially awkward for SattvaCo given that it had conceded before the BCCA that the correctness standard applied.[190]

In any case, the interveners dedicated much of their oral submissions towards advancing reasonableness as the standard of review. The AGBC endorsed reasonableness for questions of law withing an arbitrator's expertise.[191] In response to the late LeBel J's comment that "there seems to be a strong trend towards deference even in respect of questions of law," the AGBC responded that "pure, elevated" questions of law, such as basic common law tests, cannot properly be reviewable on a reasonableness standard but conceded that "in matters of contractual interpretation, most of those issues are going to be grounded in the reasonableness standard."[192] The BCICAC then spent most of its oral argument promoting the position that "the reasonableness standard should apply to all questions on appeal except for jurisdiction."[193]

Creston spent much of its oral submission defending the correctness standard, even where leave required a potential "miscarriage of justice," but was ultimately unsuccessful. It argued that correctness was necessary to ensure that appeals could "help develop and nourish the rule of law," that the leave requirement provided additional filters, and that the legislative intent behind a statutory power of "review" for questions of

[189] WOH, *supra* note 156 at 00h:24m:53s–00h:26m:50s.
[190] See *Creston BCCA 2012*, *supra* note 151 at para 25.
[191] See WOH, *supra* note 156 at 00h:54m:50s–00h:56m:16s.
[192] *Ibid* at 00h:56m:45s–00h:57m:43s.
[193] *Ibid* at 00h:58m:54s.

law is correctness.[194] Rothstein J suggested that these arguments could have been made in *Dunsmuir*, which prescribed reasonableness even where leave is sometimes required and where there is potentially more concern for precedential value than in a commercial arbitration, and "respectfully ask[ed]: has that train left the station?"[195] When Creston suggested that the miscarriage of justice was the award to SattvaCo of a much larger sum than the agreement provided, Abella J questioned whether a mere difference of opinion regarding the meaning of a contract satisfied the "miscarriage of justice" condition of the leave provision.[196]

Sattva applied *Dunsmuir* to conclude that the standard of review for appeals from commercial arbitration would be reasonableness in most cases.[197] It also maintained that the "miscarriage of justice" requirement of BC's first leave provision could be met where "an alleged legal error [] pertain[ed] to a material issue in the dispute which, if decided differently, would affect the result of the case."[198] Despite emphasizing the importance of the distinctions between the requirements of the alternative leave conditions,[199] the judgment does not address whether these distinct conditions for different types of questions of law indicated the degrees of deference that the legislature intended.

C. The AGBC asserts the unassailability of factual findings.

The SCC's *obiter* comment regarding the finality of an arbitrator's factual findings was not central to the decision and is apparently attributable to the AGBC's submissions alone. The judgment reads:

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[194] *Ibid* at 01h:35m:00s–01h:39m:25s. Creston used the word "review" and did not suggest that the word "appeal" suggested an intention that the correctness standard apply.
[195] *Ibid* at 01h:35m:40s–01h:36m:33s.
[196] See *Ibid* at 01h:39m:55s.
[197] See *Sattva*, *supra* note 6 at para 106.
[198] *Ibid* at para 70; *1996 BC Act*, *supra* note 7, s 31(2)(a).
[199] See *Sattva*, *supra* note 6 at paras 76–77, 102–06.

> For example, the [*1996 BC Act*] forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute.[200]

This understanding is not evident from the words of the *1996 BC Act*, which do not explicitly forbid a review of an arbitrator's factual findings, but, rather, permit appeals on "any question of law arising out of the award" without exclusion for evidentiary errors that may be considered questions of law.[201] Neither SattvaCo nor Creston argued that an arbitrator's factual findings were unassailable.[202] Seeking to restore the arbitrator's award, SattvaCo argued that factual findings warranted "complete deference absent palpable and overriding error" and were "unassailable unless wholly unsupported by evidence."[203] The BCICAC did not suggest factual findings were unreviewable.[204] Only the AGBC, as an intervener, argued that an arbitrator's factual findings were "immutable and beyond the court's jurisdiction on appeal."[205]

The author of this paper respectfully submits that the SCC's *obiter* comment based on the AGBC's submissions is grounded in error.

First, as explained above, the contention that factual findings are immutable is inconsistent with the BCLRC's recommendation that it be irrelevant whether questions of law appeared on the face of the award and with the common law that existed prior to the *BCLRC Report*.[206] The AGBC did not just neglect to mention the *BCLRC Report*, which it had itself commissioned and on which the Province had relied in a factum less

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[200] *Ibid* at para 104.
[201] *1996 BC Act, supra* note 7 at para 31(1).
[202] See FOAS, *supra* note 156 at paras 69–71; FORC, *supra* note 156; WOH, *supra* note 156.
[203] FOAS, *supra* note 156 at paras 69–70 (emphasis added), citing *Venneman, supra* note 98 at paras 31–33; *Western Forest Products Inc v Hayes Forest Services Ltd*, 2009 BCSC 424 at para 11; *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28 at paras 14–15; *Palmer v Palmer,* 2010 ONSC 1565 at paras 3, 7; *Bonazza v Forensic Investigations Canada Inc*, 2009 CanLII 32268 at para 1 (ONSC); *Liberty Mutual Insurance Co v Bank of Nova Scotia*, 2008 CanLII 37060 (ONSC) at para 32; *NM Paterson*, *supra* note 146 at para 8; WOH, *supra* note 156 at 00h:35m:22s.
[204] See FOIBCICAC, *supra* note 156; WOH, *supra* note 156 at 00h:58m:11s–01h:08m:36s.
[205] FOIAGBC, *supra* note 156 at para 12.
[206] See *BCLRC Report*, *supra* note 7 at 77; *Brandram-Henderson, supra* note 28 at 550.

than a year before *Sattva*;[207] it advanced a position that was apparently inconsistent with the report.

Second, the US and English authorities on which the AGBC relied in support of such a restriction, namely the *The "Baleares"* from the EWCA and *Oxford Health* from the US Supreme Court,[208] are of questionable relevance to Canadian legislation. In the former, Steyn LJ held that an appellate court "must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators";[209] in the latter, Kagan J reaffirmed that "courts have no business overruling" an arbitrator's contractual interpretation.[210] However, neither of these authorities or approaches had been adopted in Canadian jurisprudence. While BC's legislation adopted parts of the *1979 Act*, the BCCA has cautioned against reliance on UK authorities, which are "not easily transferable" to BC.[211] Authorities interpreting US legislation, which provides for only limited judicial review from commercial arbitration but no appeals,[212] are of no assistance in interpreting the meaning of appeal provisions in Canadian legislation.

Third, the only Canadian authority on which the AGBC relies in its factum, namely *Specialist Physicians*, is significantly misquoted. Garson J (as she then was) in *Specialist Physicians* noted, in reliance on an authority that predated the *1986 BC Act*, that "[w]here it is necessary to go to the evidence to make the argument that an error of law occurred, the

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[207] *British Columbia (Forests) v Teal Cedar Products Ltd*, 2013 SCC 51 (Factum of Appellant Her Majesty the Queen) at paras 83–84 [FOABC 2013].
[208] FOIAGBC, *supra* note 156 at paras 10–19, citing *Geogas SA v Trammo Gas Ltd,* [1993] 1 Lloyd's Rep 215 (EWCA) [*The "Baleares"*]; *Oxford Health Plans v Sutter*, 569 US 564 (2013) [*Oxford Health*].
[209] *The "Baleares"*, *supra* note 208 at 227–28 (EWCA).
[210] *Oxford Health*, *supra* note 208 at 573, citing *United Steelworkers of America v Enterprise Wheel & Car Corp*, 363 US 593 at 599 (1960).
[211] *BCIT, supra* note 29 at paras 17–18. See also *Domtar*, *supra* note 13 at 9.
[212] See *Federal Arbitration Act*, 9 USC § 10(a) (1947); Joel Richler, "The Reform of Appeals Provisions in Canadian Commercial Arbitration Statutes" (2023), 3:2 Can J Commercial Arbitration 34 at 40-41 [Richler].

error cannot be said to be on the face of the award."[213] By extension, any reliance on such a restriction would have been erroneous,[214] as the relevant statute restricted appeals to questions of law "arising out of the award."[215] However, Garson J did not ultimately conclude that the evidentiary record was beyond review because she granted leave to appeal an award based on an alleged absence of evidence to support a finding of fact.[216] Nevertheless, the AGBC's factum in *Sattva* included an apparent indented block quotation purporting to summarize parts of *Specialist Physicians*, which read:

> As the question of law must arise from the award, the appellate court deciding whether to grant leave or hearing the appeal itself, may not review the evidence that was presented to the Arbitrator: where it is necessary to go to the evidence to make the argument that an error of law occurred, the error cannot be said to be arise [(sic)] from the award. [*Specialist Physicians*], at paras 22-25.[217]

This summary of part of Garson J's decision obscured her erroneous application of an authority that was no longer applicable, does not reflect Garson J's words in paras 22-25, and is irreconcilable with her ultimate decision.

Fourth, in response to the Court's concerns expressed at the hearing relating to the AGBC's assertion that factual findings are unreviewable, the AGBC provided explanations which appear to be grounded in error. The issue of an alleged preclusion of any review of factual findings was not central to the appeal in *Sattva,* yet the AGBC nevertheless discussed it at length during the hearing. In response to SattvaCo's brief comment that issues of fact were unreviewable "absent palpable and overriding

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[213] *Specialist Physicians, supra* note 145 at para 22 (emphasis added), citing *Westcoast Transmission, supra* note 27 at para 14.
[214] See *Escape 101, supra* note 1 at paras 90–92.
[215] *1996 BC Act*, *supra* note 7, s 31(1) (emphasis added).
[216] See *Specialist Physicians, supra* note 145 at paras 40, 41, citing *UBC, supra* note 146 at para 30.
[217] FOIAGBC *supra* note 156 at para 17 (emphasis added), citing *Specialist Physicians, supra* note 145 at paras 22–25. It is apparent that someone replaced "on the face of the award" with "arise from the award" but left the word "be" in the sentence by mistake.

error",[218] the AGBC contended that findings of fact or mixed fact and law were completely unreviewable. This contention was met with surprise from the Court:

> **AGBC:** [Counsel for SattvaCo] suggested that facts could be reviewed on a palpable and overriding standard. We disagree on this point. There is no review for findings of fact or mixed fact and law. That ought not be controversial. And this isn't a hardline approach. The US goes further: no appeals for law. So that's a very, very important point. You're stuck with it. The best case on point is in our materials, it's called *The "Baleares"* from Justice Steyn of the English Court of Appeal [who went] on to the House of Lords talks about this at great length and says you're stuck with the findings of fact essentially, good or bad. And the US Court of Appeal has said the same thing in terms of law. That's not our law here, but it's the same rationale: bringing finality. He is the master of the facts.
>
> **Moldaver J:** Even if the finding is totally unreasonable, even if it's based on evidence that wasn't there or a misconstruing, a clear misconstruing, of evidence that we would say results in an unreasonable finding, you say it's unreviewable?
>
> **AGBC:** Yes, unreviewable. If there's a problem of that nature, go to section 33. It's a hardline approach. It was drawn to delimit this, to end this process, and end those arguments on fact. Period.
>
> **Rothstein J:** Don't we sometimes say though that if, for example, a court makes a finding of fact for which there is absolutely no evidence in the record whatsoever that that's really an error of law?
>
> **AGBC:** That is, there's law… I think that was developed for illiterate juries.[219] It makes no sense in commercial arbitration. We believe that's the wrong law here, and that's not what the statute wanted, cause then

[218] FOAS, *supra* note 156 at para 69. See also WOH, *supra* note 156 at 00h:35m:22s.

[219] The characterization of *questions of contractual interpretation* as questions of law is said to be "a legacy of the system of trial by juries who might not all be literate": *The Nema UKHL, supra* note 38 at 1035 and *Sattva, supra* note 6 at para 43. The writer is aware of no authority supporting the suggestion that the characterization of *findings wholly unsupported by evidence* as questions of law is attributable to illiterate juries.

> you get into this endless discussion of what the facts are. That's one of the hooks people use to try and undermine commercial arbitration awards. The key…
>
> **Rothstein J:** I understand that, but it does seem kind of strange that if the judge makes a finding of fact, an important finding of fact, for which there was absolutely no basis in the evidence whatsoever that that's not a legal error.
>
> **AGBC:** you would go back to section 33 and try and explain… ask the judge… the arbitrator to reexplain that portion of his award. That's how you'd deal with it. But you don't do it as a question of law. You don't elevate facts. And Justice Steyn talks about this extensively. Why is Justice Steyn important? Because the [*1979 Act*] is important. The leave provisions are the same as they are here. This was the basis of the [*1986 BC Act*].
>
> **Rothstein J:** I'd like to go back to something you said about section 33 [inaudible] let's hypothesize that there is a finding of fact [inaudible] in the evidence so you say that say to the arbitrator "can you explain this", well supposing that you're right that there was no basis in the evidence: do you expect him to reverse his decision?
>
> **AGBC:** That's a possibility. There's also section 30: "arbitral error." It could be a manifest disregard of process.[220] You'd have that option open to you as well, Justice Rothstein. That's another avenue. And that's how the US argues these issues. That's the proper way to argue about the problem that you're talking about.[221]

The AGBC urged the SCC to "strictly encourage [lower] courts to return to the award: that's what the [*1996 BC Act*] was created to do."[222]

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[220] In the US, "manifest disregard of *the law*" is a controversial common law basis to set an arbitrator's award aside. See Christopher R Drahozal, "Codifying Manifest Disregard" (2007-2008) 8 Nev LJ 234. See also J Brian Casey, "Setting Aside: Excess of Jurisdiction or Error of Law? – A Second Kick at the Can" (2020), 1:1 Can J Commercial Arbitration 37 at 47–48; Richler, *supra* note 212 at 40–41. However, the author found no Canadian authority endorsing "manifest disregard of the law" as a basis to set an arbitral award aside and no authority referring to "manifest disregard of *process*."

[221] WOH, *supra* note 156 at 00h:46m:33s–00h:49m:00s.

[222] *Ibid* at 00h:50m:45s.

The author submits that the AGBC's proposed avenues for addressing unreasonable findings of fact are not appropriate for such a purpose. The *1996 BC Act* allowed an arbitrator, either on application or on the arbitrator's own initiative, to amend or correct clerical, typographical, arithmetic errors or other similar accidental errors, slips, or omissions,[223] but not to make any "alteration that strays into the thought processes."[224] An arbitrator is not entitled to even amend an award to provide an alternate explanation, [225] let alone reverse the decision entirely. Section 33 of the *1996 BC Act* also expressly states its purpose, which is to permit an application for an "order that the arbitrator state the reasons for the award in detail that is sufficient to consider any question of law that arises out of the award, were an appeal to be brought under section 31."[226] It does not allow for an arbitrator to reverse a decision, and it is not intended to expose an "arbitral error" that would justify an application to set the award aside pursuant to section 30 on the basis of corruption, fraud, bias, excess of jurisdiction, or failure to observe rules of natural justice.[227] However, the AGBC's suggestion of such recourse to address unreasonable findings of fact apparently assuaged Rothstein J's concerns, as his unanimous judgment endorsed the absolute preclusion on factual review that the AGBC alone had advanced.

V. How has *Sattva*'s authority on these issues fared?

Sattva proved far from definitive in resolving the Classification Issue, settling the standard of review applicable to commercial arbitration, or precluding appeals based on Evidentiary Errors of Law. The abandonment of the "historical approach" necessitated a clarification and

[223] See *1996 BC Act*, *supra* note 7, s 27.
[224] *Westnav Container Services Ltd v Freeport Properties Ltd*, 2010 BCCA 33 at para 28.
[225] See *ibid* at para 47.
[226] *1996 BC Act*, *supra* note 7, s 33(2) (emphasis added).
[227] See *ibid*, ss 1, 30.

reaffirmation shortly after *Sattva*'s release.[228] Two prominent SCC decisions have left the standard of review for appeals from commercial arbitration unclear.[229] Meanwhile, courts have continued to entertain appeals regarding Evidentiary Errors of Law.[230]

A. *Ledcor* and *Teal Cedar 2017* revisit the Classification Issue.

In *Ledcor*, the SCC clarified that contractual interpretation is not always a mixed question. The court concluded that "where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review."[231] Unfortunately, this decision has left unresolved "the proper characterization of boiler-plate provisions in otherwise intensely negotiated agreements."[232]

When the BCCA maintained, despite *Sattva*'s *ratio*, that an arbitrator's contractual interpretation raised a question of law, the SCC in *Teal Cedar 2017* doubled down on *Sattva*'s *ratio* regarding the Classification Issue.[233] In 2015, a unanimous BCCA found that *Sattva*'s abandonment of the "historical approach" regarding the Classification Issue was an endorsement of the BCCA's preexisting approach regarding appeals from commercial arbitration,[234] which approach maintained that "the final determination of the meaning of a contractual provision is a question of law."[235] On appeal, the SCC reaffirmed that contractual interpretation is a mixed question that is not simply subject to a deferential

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[228] See *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.,* 2016 SCC 37 [*Ledcor*]; *Teal Cedar 2017, supra* note 9.
[229] See *Vavilov*, *supra* note 8; *Wastech*, *supra* note 10.
[230] See e.g. *Escape 101*, *supra* note 1.
[231] *Ledcor*, *supra* note 228 at para 24.
[232] McCamus, *supra* note 173 at 28.
[233] See *Teal Cedar 2017, supra* note 9.
[234] See *British Columbia (Ministry of Forests) v Teal Cedar Products Ltd*, 2015 BCCA 263 at para 49.
[235] *Otter Bay*, *supra* note 97 at para 15. See also *Hayes*, *supra* note 73 at para 43.

standard of review but, absent an extricable error of law, beyond the jurisdiction of appellate review pursuant to the *1996 BC Act.*[236]

The parties to *Teal Cedar 2017* briefly addressed the *BCLRC Report* in their factums, but did not rely on it in relation to the Classification Issue or standard of review. Teal Cedar Products Ltd. (Teal) included LeBel and Deschamps JJ's comment from *Seidel* that the *1986 BC Act* "was modelled primarily on the recommendations of the 1982 [*BCLRC Report*]" and provided a general summary of the "limited right of appeal" prescribed in the *BCLRC Report*:

> One of the innovations recommended in the [BC]LRC Report and adopted by the British Columbia Legislature was a limited right of appeal from an arbitration award. The right of appeal was limited in three ways. It was available only for questions of law arising out of the award; leave to appeal such questions of law was required; and leave was to be granted only for matters of importance as described in the statute. These limitations were included in the [*1986 BC Act*] and remain in the current [*1996 BC Act*] applicable to this appeal.[237]

The Province "[took] no issue with Teal's observation that s. 31 of the [*1996 BC Act*] provides for a more limited right of appeal from arbitration awards as compared to appeals from a trial judgment, consistent with the recommendations of the [BCLRC] in its 1982 Report."[238] However, any reliance on the *BCLRC Report* regarding the Classification Issue or standard of review would have potentially raised the uncomfortable matter of the AGBC having neither referred to this report nor taken a clear position on the Classification Issue when it was an intervener in *Sattva*.

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[236] See *Teal Cedar 2017, supra* note 9 at paras 41–47, 53–66.
[237] *Seidel, supra* note 154 at para 104; *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 (Factum of Appellant Teal) at para 74 [FOAT 2017].
[238] *Teal Cedar Products Ltd v British Columbia,* 2017 SCC 32 (Factum of Respondent Province of British Columbia) at para 65 [FORBC 2017].

Owing to the lack of debate regarding the *BCLRC Report*, the SCC's judgment does not refer to it.

B. *Vavilov* and *Wastech* leave the standard of review unsettled.

Vavilov changed the framework for determining the appropriate standard of review and unsettled *Sattva*'s conclusion that the reasonableness standard generally applied to appeals from commercial arbitration.[239] While the SCC concluded in *Sattva* that the power of the parties to choose their own decision maker creates a presumption that the decision maker was chosen for their expertise and should be accorded deference,[240] it suggested in *Vavilov* that an appellate standard should generally apply where the legislature has provided a statutory "appeal" mechanism.[241] This reasoning suggests, presumptively, that the standard of review for appeals on questions of law from commercial arbitration is one of correctness.

In *Wastech,* the SCC again considered an appeal pursuant to the *1996 BC Act* but did not resolve whether *Vavilov* displaced *Sattva*'s holding regarding the standard of review for appeals from commercial arbitration. Writing for the majority, Kasirer J declined to do so on the basis that the parties did not address it and agreed it would not affect the outcome.[242] Such circumspection is understandable, seeing as the reasonableness standard in *Sattva* had been advanced by interveners and not the litigants themselves. Brown and Rowe JJ nevertheless issued concurring reasons in which they concluded that, in light of *Vavilov* and the use of the word "appeal" in the *1996 BC Act*, the correctness standard should apply.[243] The issue remains unresolved across the country, as lower courts have diverged on *Vavilov*'s application to commercial arbitration

[239] See Jennifer K Choi & Thomas A Cromwell, "A Question for Another Day: *Vavilov* and Appeals From Commercial Arbitration" (2022), 3:1 Can J Commercial Arbitration 42 at 61–73 [Choi & Cromwell].
[240] See *Sattva, supra* note 6 at paras 105–06.
[241] See *Vavilov, supra* note 8 at paras 33, 36–37.
[242] See *Wastech, supra* note 10 at para 46.
[243] *Ibid,* at para 121.

or have declined to decide on it,[244] while legal scholars disagree on the applicable standard.[245] Uncertainty and potential disharmony now afflict common law provinces, who sought uniformity by following the *1990 UAA*.

C. Appeals regarding Evidentiary Errors of Law continue.

Sattva's *obiter* comment that the restriction of review of an arbitrator's factual findings is "absolute"[246] has not precluded appeals on Evidentiary Errors of Law. In decisions applying both *Sattva* and *Teal Cedar 2017*, courts in BC, Alberta, and Manitoba have continued to consider such appeals as permissible though they have rarely allowed appeals on that basis.[247] *Escape 101* is unique among these recent decisions in that the appellate court allowed the appeal and relied on the commentary that accompanied the draft provision on which the relevant appeal provision was based. In 2023, the SCC ultimately refused MODC's application for leave to appeal on the questions of the permissibility of appeals from commercial arbitration awards based on Evidentiary Errors of Law and of the applicable standard of review.[248]

VI. Conclusion

Escape 101 surprised many arbitration professionals, who have

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[244] See Choi & Cromwell, *supra* note 239 at 43–46; See e.g. *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106 at para 6 (maintains the reasonableness standard); *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 at para 44 (applies correctness); *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592 at para 37 (not deciding the issue).
[245] James Plotkin & Mark Mancini, "Inspired by Vavilov, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards" (2021) 2:1 Can J Commercial Arbitration; 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.
[246] *Sattva, supra* note 6 at para 104.
[247] See *Broadband Communications North Inc v I-Netlink Inc*, 2017 MBQB 146 at para 88; *Extreme Excavating And Backhoe Services Ltd v Scott*, 2018 ABQB 102 at paras 11–12; *Christie Building Holding Company Limited v Shelter Canadian Properties Limited*, 2021 MBQB 77 at para 89; *719491 Alberta Inc v The Canada Life Assurance Company*, 2021 ABQB 226 at para 45; *TR Canada Inc v Cahill Industrial Limited*, 2021 ABQB 274 at para 11; *Richmont Mines Inc v Teck Resources Limited*, 2018 BCCA 452 at paras 77–78; *Grewal v Mann*, 2021 BCSC 220 at paras 16, 21, aff'd in 2022 BCCA 30 at paras 17, 22, 42–43; *Escape 101*, *supra* note 1 at paras 63–65.
[248] See *March of Dimes Canada v Escape 101 Ventures Inc*, 2023 CanLII 28894 (SCC).

interpreted it as inconsistent with *Sattva*. Some have raised concerns that *Escape 101* has "eroded advancements in the jurisprudence that limited the scope of extricable errors of law", should not have treated a misapprehension of evidence as an extricable error of law, has created a potential inter-provincial split, relied on potentially inapplicable authorities, and is "hard to reconcile with the *ratio* in *Sattva*, in particular the policy objectives of finality and deference to factual findings in arbitration that were espoused in that decision."[249] Despite these concerns, at least one other Justice of the BCCA has followed *Escape 101* and endorsed its reasons.[250]

Escape 101 is consistent with the *ratio* in *Sattva*, which restricts appeals from commercial arbitration to extricable questions of law reviewable on a reasonableness standard, since a clear misconception of the evidence that affects the outcome is an extricable question of law.[251] *Sattva*'s requirement for a miscarriage of justice was met because there was no dispute that the arbitrator's misapprehension of evidence affected the outcome.[252] The arbitrator's award was therefore unreasonable, and an appeal was warranted. While *Escape 101* might be inconsistent with the SCC's comment in *Sattva* that, "[f]or example, the [*1996 BC Act*] forbids review of an arbitrator's factual findings", this statement was included in *Sattva* as an example of a distinction between judicial review and commercial arbitration.[253] This *obiter* comment is attributable to the AGBC's submissions on an issue that was not relevant to the appeal in *Sattva* and is erroneous.

Escape 101 is also consistent with the original intent behind the appeal mechanism in BC's legislation. Although *Escape 101* involved an appeal pursuant to the *2020 BC Act*, which was enacted after the release

[249] Cicchetti, *supra* note 12 at 90; Karton et al, *supra* note 12 at 147, 150; Munro, *supra* note 12 at 194–95.
[250] See *AL Sims and Son Ltd v British Columbia (Transportation and Infrastructure)* 2022 BCCA 440 at paras 77–82 (Dickson JA).
[251] See *Sharbern*, *supra* note 4 at para 71, citing *Van de Perre v Edwards*, 2001 SCC 60.
[252] See *Sattva*, *supra* note 6 at para 70; *Escape 101, supra* note 1 at paras 44–45.
[253] *Sattva, supra* note 6 at para 104.

of *Sattva* and *Teal Cedar 2017*, the material aspects of the appeal provisions remained "largely unchanged."[254] The BC Legislature in 2020 ultimately retained wording that the BCLRC had crafted in 1982 specifically to permit appeals of questions of contractual interpretation. Based on the originally intended meaning behind this language, Escape need not to have found an "extricable error of law" within the *Southam* conception; rather, it need only to have demonstrated a "miscarriage of justice" on a question of contractual interpretation that was of importance to the parties.[255] Escape ultimately established a miscarriage of justice by demonstrating that the arbitrator's interpretation rested on a misapprehension of evidence.[256]

Vavilov's unsettlement of the standard of review applicable to appeals from commercial arbitration leaves the degree of finality that commercial arbitration affords unclear. This uncertainty may discourage reliance on a dispute resolution mechanism that affords many benefits to the parties, such as the ability to choose the decision-maker and flexibility regarding procedure, while reducing the burden on the courts.[257] The SCC needs to decide this outstanding matter in order to foster reliance on arbitration and restore harmony between common law jurisdictions. Evidently, *Escape 101* was not the appropriate case to resolve this issue because the applicable standard did not affect the outcome.[258] The SCC may have also been reluctant to hear a further appeal pursuant to BC's uniquely-worded arbitration legislation after the *1996 BC Act* haunted their docket for a decade.[259]

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[254] *Escape 101, supra* note 1 at para 57.
[255] See *2020 BC Act*, *supra* note 3 s 59(4)(a).
[256] See *Escape 101, supra* note 1 at paras 103–05. See also *Vavilov, supra* note 8 at paras 101–03.
[257] See Choi & Cromwell, *supra* note 239 at 78–79; Joanne Goss, "An Introduction to Alternative Dispute Resolution" (1995) 34:1 Alta L Rev 1 at 13–14, online: <https://canlii.ca/t/sl2w>.
[258] See *Escape 101, supra* note 1 at para 101.
[259] See *Seidel*, *supra* note 154; *Teal Cedar 2013*, *supra* note 19; *Sattva*, *supra* note 6; *Teal Cedar 2017*, *supra* note 9; *Wastech*, *supra* note 10.

When the right opportunity presents itself to revisit the standard of review applicable to appeals from commercial arbitration, the Court should consider renewing its focus on the reports that guided the enactment of modern domestic commercial arbitration legislation. At the same time, the Court should either justify the continued exclusion of questions of contractual interpretation from appeals, notwithstanding the legislature's reliance on the "historical approach" to the Classification Issue when drafting the relevant statutory language, or reconsider *Sattva*'s *ratio* to reflect the legislature's intent.