

Citation: Buffalo Point First Nation v Buffalo Point Cottage Owners Association Inc,  
2025 MBCA 72  
Date: 20250812  
Docket: AI23-30-10007

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Marc M. Monnin  
Madam Justice Jennifer A. Pfuetzner  
Madam Justice Anne M. E. Turner

***BETWEEN:***

<b><i>BUFFALO POINT FIRST NATION and</i></b>	)	<b><i>P. D. Edwards and</i></b>
<b><i>BUFFALO POINT FIRST NATION</i></b>	)	<b><i>E. L. M. Edwards</i></b>
<b><i>DEVELOPMENT CORP LTD.</i></b>	)	<b><i>for the Appellant</i></b>
	)	
(Applicants) Respondents	)	<b><i>B. D. Regehr, K.C.,</i></b>
	)	<b><i>R. M. Lake and</i></b>
- and -	)	<b><i>K. Humber</i></b>
	)	<b><i>for the Respondents</i></b>
	)	
<b><i>BUFFALO POINT COTTAGE OWNERS</i></b>	)	<b><i>Appeal heard:</i></b>
<b><i>ASSOCIATION INC.</i></b>	)	<b><i>October 11, 2024</i></b>
	)	
(Respondent) Appellant	)	<b><i>Judgment delivered:</i></b>
	)	<b><i>August 12, 2025</i></b>

On appeal from *Buffalo Point First Nation v Cottage Owners Association*, 2023 MBKB 141 [KB appeal decision]

**MONNIN JA**

**Introduction**

[1] This appeal raises the issue of whether the standard of review for appeals of commercial arbitration awards remains as set out in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*] and *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 [*Teal Cedar*], or is to be governed by

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. For the reasons that follow, I have concluded that *Sattva* remains good law and still governs commercial arbitration appeals.

### The Settlement Agreement and What Led to It

[2] The arbitral award under review arises from a settlement agreement reached between the parties and reflected in minutes of settlement dated May 18, 2015, which were incorporated into a consent arbitration award issued on June 19, 2015 and entered as a judgment of the Court of King’s Bench.

[3] The settlement was reached following many years of ongoing disputes between the parties. It is important to understand the origin and the progression of these disputes, as well as their culmination in the agreement, as they set the factual matrix under which the agreement and subsequent arbitral awards must be interpreted.

[4] In 1974, the Buffalo Point Band of Indians (now Buffalo Point First Nation) (the First Nation), located on the shore of the Lake of the Woods in southeastern Manitoba, surrendered land from its reserve to the Crown to allow the entering into of a lease with Buffalo Point Development Corp. Ltd. (the corporation) and the development of a recreational community through long-term sublease agreements with individual cottagers. It was successful and led to the building of a number of amenities and the leasing of many cottage properties. It also led to the creation of the Buffalo Point Cottage Owners Association, Inc. (the Association) representing the nearly 300 cottage lot leaseholders. Over the ensuing years, despite some disagreements, the parties managed to agree on acceptable fee levels for

annual maintenance, which were paid to the corporation by cottagers to meet the costs of local services.

[5] In the spring of 2000, a co-management agreement was entered into between the Association, the corporation and local businesses, establishing a joint planning committee and a process to determine the cost of necessary services. The annual budget was to be cost shared on a 50/50 basis by the Association and the corporation with businesses participating in the First Nation's portion.

[6] In 2008, when an issue arose over assessments to cover the cost of a new sewage lagoon, a revised agreement was negotiated between the Association, the corporation and the First Nation. While the structure of the agreement was similar to the previous one, the cost-sharing split was revised to fifty-five per cent for cottagers and forty-five per cent for businesses and the First Nation. It also included, for the first time, a broadly framed arbitration clause. It did not include a termination or a notice clause.

[7] Over the next few years, the committee met irregularly and eventually settled on calculating the annual fees. However, in 2011, the First Nation decided to pursue a transition to the taxation of local property pursuant to the *First Nations Fiscal Management Act*, SC 2005, c 9 [the *FMA*]. On June 25, 2012, the First Nations Tax Commission (the Commission), exercising its authority pursuant to the *FMA*, approved a series of First Nation laws enacting a property tax regime. The First Nation then proceeded to issue real property assessment notices, created an assessment roll, enacted an annual expenditure law, and issued property tax notices to members of the Association and other local property interest holders starting in 2012. No

annual maintenance fees were assessed to cottagers thereafter. Neither the First Nation nor the corporation gave notice to amend or terminate the agreement.

[8] In 2012, some 279 leaseholders, pursuant to the terms of their subleases, referred the issue of the taxation purported to be levied by the real property assessment notices and tax notices to arbitration. The corporation applied to the then Court of Queen's Bench (which will subsequently be referred to as the King's Bench) for an order staying the proposed arbitration on the grounds that the dispute was outside the ambit of the cottagers' subleases and that the arbitration clause was inapplicable, as it was the First Nation, not the corporation, who had levied the taxes. The corporation also applied for an injunction and declaratory relief with respect to the arbitration referrals. That application was denied (see *Buffalo Point Development Corp Ltd v Alexander*, 2012 MBQB 341), with the Court leaving to the arbitrator to determine jurisdiction to hear and determine the issue. No appeal was filed from that decision and no individual arbitrations have been pursued to date.

[9] In the meantime, the Association filed a judicial review application in the Federal Court, naming both the First Nation and the corporation as respondents, with notice to the Commission, seeking to quash the Commission's decisions approving the laws enacted by the First Nation. The First Nation and the corporation moved to strike the application based on the Association's lack of standing, given that the Association did not pay the taxes and was not directly affected by the decisions. The Federal Court, in an initial decision on October 10, 2012, gave the Association standing. On December 5, 2014, on the merits of the judicial review, the Court dismissed the Association's application (see *Buffalo Point Cottagers Association Inc v*

*Buffalo Point First Nation*, 2014 FC 1173). The Federal Court left the issue of the legal impact on the 2008 agreement of the tax regime imposed by the *FMA* to the Manitoba Courts. The Association appealed the judicial review decision but, for reasons that will be explained, the appeal never proceeded further.

[10] On July 31, 2012, the Association filed a referral to arbitration under the agreement, arguing a breach of the agreement by the implementation of the property tax regime. The First Nation and the corporation refused to consent to the appointment of an arbitrator. The Association applied to the King's Bench for an order appointing a sole arbitrator to hear the dispute, which was met by a request for a declaration that the referral was void and an injunction against the commencement of the arbitration.

[11] By an oral decision on May 14, 2014, a King's Bench judge determined that the matter should proceed to arbitration. The First Nation and the corporation were ordered to appoint an arbitrator. While a notice of appeal challenging the decision was filed, the appeal was never pursued.

[12] On May 30, 2014, Mr. Arne Peltz (the arbitrator) was appointed sole arbitrator. The First Nation and the corporation objected to the arbitrability of the dispute and the hearing proceeded as a bifurcated one, with arbitrability heard and decided first.

[13] A lengthy award issued on March 25, 2015 (the first award), where the arbitrator found that the dispute was arbitrable. Of note, he concluded that the arguments raised by the First Nation and the corporation respecting the legal validity of the agreement, by reason of lack of authority or failure to execute the required documentation, were not valid. As well, he found that

equitable estoppel would have prevented the corporation and the First Nation from denying the validity of the agreement. As to the argument that the property tax regime prevented the agreement from having continuing life, the arbitrator found that the issue should be decided as part of the merits and not by way of a preliminary objection. He also found that the inherent right of self-government possessed by the First Nation may well have allowed for legislative action to limit the application of an agreement such as this one with the Association but that it was not found in the legislation passed by the First Nation. As he stated in his decision:

Having left the Agreement in place, the risk remains that the Association can establish breach and entitlement to a remedy for breach.

...

Counsel for the First Nation and the [c]orporation conceded, in light of the *Wells* decision and similar authority, that a contractual liability might remain even though the [First] Nation has exercised its inherent right, or its statutory right, to enact a tax regime. In the present case, the remedy would be limited to potential damages, but there could be a remedy, said counsel, without admitting any such liability.

[14] Finally, he concluded that the Association had standing, noting that the agreement itself recognized the Association and the evidence indicated a long course of dealings between the parties during which the Association was accepted as acting on behalf of the cottage owners. As well, in a preliminary ruling on standing, the Federal Court had recognized the Association.

[15] The First Nation and the corporation applied for leave to appeal the first award, but the matter never proceeded to a hearing given that the parties arrived at a settlement on June 19, 2015 (the Settlement Agreement). The

salient points of the Settlement Agreement are set out in the minutes of settlement and include the following provisions:

- (1) The First Nation would enact a Taxpayer Representation to Council Law (TRL) pursuant to the provisions of the *FMA*, in the form and content agreed to in the minutes of settlement, and submit it to the Commission.
- (2) The parties agreed that the 2008 Agreement had been terminated, subject to the provisions of the Settlement Agreement.
- (3) The TRL would be maintained in effect and indefinitely but could be amended at the discretion of the First Nation from time to time, save for two items that could not be changed without the consent of the Association, namely:
  - (a) the recognition of the Association as the taxpayer association under the TRL; and
  - (b) binding expedited mediation to resolve disputes over budget expenditures the Association believed were clearly excessive or clearly unnecessary. In particular, section 13 in the TRL, which contained an ability to refer to binding mediation, was recognized as a “fundamental element of the settlement between the parties”.

[16] The balance of the minutes of settlement dealt with outstanding issues of taxes that had been charged for 2015 to 2017 and the release of claims and settlement of pending litigation. Clause 11 provided that the arbitrator retained jurisdiction to implement the Settlement Agreement and the award “in the event of any remaining remedial issues between the parties”. The Settlement Agreement also provided for the minutes of settlement to be incorporated into a consent award, which could be entered as a judgment of the King’s Bench. The consent award was issued on June 19, 2015 and enshrined in a judgment issued by the King’s Bench on April 27, 2016.

[17] The First Nation passed a TRL in accordance with the terms of the Settlement Agreement on September 28, 2015 and submitted it to the Commission. In a letter dated December 10, 2015, the Commission raised certain areas of non-compliance of a technical nature but, more importantly, identified an inconsistency between section 13 of the TRL and section 5 of the *FMA*. Section 13 of the TRL created a binding mediation process available to the Association to unilaterally require a binding mediation process under certain conditions. In the Commission’s view, this process created “the potential for a fettering of Council’s law-making powers by enabling a mediator to direct the content of the law”, which was inconsistent with the requirements of the *FMA* that the First Nation itself exercise the expenditure law-making power.

[18] The First Nation took the position that, with the refusal of the Commission to approve the TRL, its obligations under the Settlement Agreement with respect to that document were concluded. The Association requested arbitral assistance for an order that the First Nation use its best efforts to secure approval of the TRL with the necessary amendments or,

failing that, the First Nation adopt a delegation law giving an independent third party the ability to set expenditures or taxes.

[19] The First Nation opposed the issuance of the order and took the position that it was under no legal obligation to resubmit the TRL to the Commission. As to the delegation law, it argued it went further than necessary and was inconsistent with the right of self-government of the First Nation.

[20] While, as will be seen later, those issues in dispute at that time are no longer the subject of the litigation between the parties, I believe the reasoning of the arbitrator and the conclusions he reached help to illustrate the context of the issues that now need to be determined on this appeal.

[21] The arbitrator issued his first supplemental award on January 11, 2017 (the first supplementary award). In reaching his conclusion as to whether he would grant the order, the arbitrator said as follows:

Fundamental to the bargain between the parties was an enduring guarantee that for taxation year 2018 and afterwards, certain concerns respecting proposed [First Nation] expenditures in the annual budget could be referred by the Association to binding expedited mediation before the finalization of the particular year's taxation levels. This reflected a compromise between the parties on a core issue in the dispute. The Association agreed to terminate the 2008 Agreement under which, in its view, it was entitled to a meaningful role in setting the fees for local services and was only required to cover 55% of costs. The Association viewed the 2008 Agreement as an evergreen contract but by virtue of the settlement, it accepted the application of the [First] Nation's new property tax regime. For its part, the [First] Nation cleared away legal challenges to the exercise of its property taxation authority, while agreeing to independent third party review of some cost elements in the annual expenditure approval process, if requested by the Association.

[22] The arbitrator concluded that there was a requirement for the First Nation to take further steps to have the TRL approved by the Commission. In his view, the process that allowed for some contentious expenditures to be independently reviewed was a fundamental element of the settlement and rejected the First Nation's position that this required no more than a singular submission to the Commission of the TRL, whatever the outcome. He also found that a failure by the First Nation to take reasonable steps toward securing the Commission's approval "would constitute *prima facie* bad faith". He granted the Association's application and continued to retain jurisdiction to implement the settlement and the consent award, as well as the first supplementary award itself.

[23] The First Nation sought leave to appeal the first supplementary award to the King's Bench. The application for leave to appeal was adjourned so that the parties could continue discussions. They sought further clarification from the Commission as to its position. It became clear that there was no prospect that the Commission would approve the TRL as originally drafted. The Association's view was that the Commission advisors were misguided and wrong in law and urged the First Nation to obtain a formal decision refusing approval of the TRL so that judicial review in the Federal Court could be sought. The First Nation was of the view that the TRL would not be approved and that binding mediation should be deleted from the TRL. It had no appetite for further litigation. The First Nation was willing to enact and submit a revised TRL (the revised TRL), which provided for non-binding mediation, but the Association would only accept such a proposal if there was an amendment to provide a monetary remedy in any case where the First

Nation had refused to adopt the non-binding decision. That matter was then placed before the arbitrator.

[24] In his arbitral award dated November 22, 2018 (the second supplementary award), the arbitrator agreed that he had jurisdiction to amend paragraph 3 of the minutes of settlement to include a procedure (the debt mechanism) where, if a proposed expenditure has been determined to be clearly excessive or unnecessary by a binding mediator, the amount would become a debt due and owed to the Association from the First Nation payable as of the date the First Nation approved any such budget. Such a debt would be deemed “part of the settlement of the 2008 Agreement” and not part of the First Nation’s taxation laws under the *FMA*. He concluded that the Settlement Agreement afforded adequate scope to vary the wording for the purpose of preserving and implementing the bargain between the parties in accordance with basic contract law principles. The debt could not be paid from “local revenues”, as defined under the *FMA* regime, and had to come from the First Nation’s other revenues. He found that the First Nation was obligated to act in good faith and to take all reasonable steps to complete the terms of the Settlement Agreement. The revised TRL was to be submitted to the Commission for approval and the minutes of settlement were amended by adding a paragraph 3 recognizing the debt mechanism.

[25] The First Nation sought leave to appeal the second supplementary award. Leave to appeal both supplementary awards was granted by a King’s Bench judge (the appeal judge), who seized himself of the proceedings (see *Buffalo Point First Nation v Cottage Owners Association*, 2020 MBQB 20).

[26] The appeal judge set the points of law to be determined on appeal as being whether the arbitrator erred in amending the settlement terms (including the TRL) by ordering that in place of binding mediation in the TRL: (a) the First Nation pass a delegation law if necessary, or (b) there be an advisory mediation with enforcement through a debt mechanism. He properly stated that any consideration of these points of law was to be done considering the backdrop of the factual matrix found by the arbitrator.

[27] The appeal judge first considered what should be the appropriate standard of review. After considering the jurisprudential discussion following the Supreme Court of Canada's decision in *Vavilov*, he was of the view that the standard of review for the questions of law was correctness. He did so without addressing the First Nation's submission that the issues dealt with its constitutionally protected rights, also mandating a correctness standard of review.

[28] The appeal judge proceeded on the basis of the following factual background: (a) that, except for the approval of the TRL, all aspects of the Settlement Agreement had been implemented or were, for all practical purposes, irrevocable; (b) the Commission had the right to reject the TRL; (c) the parties agreed that they had a good faith responsibility to negotiate a resolution and the only remaining issue was the binding mediation mechanism or concept; (d) the binding mediation mechanism was the foundational or basic premise of the Settlement Agreement as stated by the minutes of settlement and, without that concept, there would not have been a settlement; (e) the arbitrator was given jurisdiction to implement the Settlement Agreement and the award; and (f) when the parties failed to reach a mutual resolution, the arbitrator imposed two alternate solutions.

[29] The appeal judge proceeded to deal with the substantive issues rather than the procedural jurisdictional issue. On the delegation law issue, he concluded that it was materially different than the agreed binding mediation and was therefore a substantive amendment or alteration of the Settlement Agreement. It was not within the arbitrator's purview to require it when viewed from a correctness analysis.

[30] He acknowledged that the addition of a concept and process requiring advisory mediation with enforcement through a debt mechanism was the real and narrow crux of the ongoing dispute. He held that the debt mechanism process substituted binding mediation for advisory mediation with essentially liquidated damages in the form of a debt that, in his view, was material and "a significant rewrite of the bargain" (*KB appeal decision* at para 64), which introduced "new concepts alien to the negotiated bargain" (*ibid*). This exceeded the reservation of jurisdiction authority granted to the arbitrator by paragraph 11 of the minutes of settlement.

[31] He therefore concluded on both grounds that the arbitrator had erred.

[32] Leave to appeal the appeal judge's decision to this Court was granted with the question being whether the appeal judge identified the correct standard of review and applied it properly.

### Standard of Review

[33] The first issue to be determined in this appeal is whether the appeal judge chose the correct standard of review to apply to the arbitrator's awards. He chose the standard of correctness. If that is correct, which I must assess on the basis of the correctness standard, then I would assess whether he

applied it correctly as well. However, if I were to conclude that the standard of review should have been one of reasonableness rather than correctness, then the appeal judge's analysis cannot stand and I must decide whether to review it on the basis of reasonableness or to return it for a rehearing on that basis in the King's Bench.

*What Is the Appropriate Standard of Review of a Commercial Arbitrator's Decision in Light of Vavilov?*

[34] In the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] era, the Supreme Court had considered and expressed its view as to the appropriate standard of review for commercial arbitrations. It was, for the most part, reasonableness. As succinctly stated by Rothstein J in *Sattva* at para 106:

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30).

[35] The choice of that standard of review for commercial arbitration awards was reinforced in the subsequent case of *Teal Cedar* at para 74, where Gascon J, for the majority, stated:

In an arbitral context like this one, where the decision under review is an award under the *Arbitration Act*, *Sattva* establishes that the standard of review is "almost always" reasonableness (para. 75). This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. In *Sattva*, Rothstein J. emphasizes that in "commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the

question is one that would attract the correctness standard” (para. 106). He suggests that this may arise only in rare circumstances, such as where a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator’s expertise is at issue (paras. 75 and 106).

[emphasis added]

[36] That direction was the prevailing view and was not the subject of challenge until after the next paradigm shift in the Supreme Court’s decision in *Vavilov*, where the Court expressed its views as to the proper approach to judicial review of administrative decisions. *Vavilov* dealt with the decision of the Registrar of Citizenship, who had cancelled the certificate of Canadian citizenship of the Canadian-born son of parents later revealed to be Russian spies.

[37] Essentially, in *Vavilov*, the Court moved away from the previous context-based test for determining the standard of review for administrative tribunals as set out in *Dunsmuir*, which considered factors such as whether there was a privative clause, a discrete and special administrative regime in which the decision maker has special expertise, and finally, the nature of the question of law that was under consideration. Instead, in *Vavilov*, the Court set reasonableness as the default standard of review unless the Legislature had indicated that a different standard should apply. It could do so in two ways. First, by prescribing it in a statute or secondly, providing for a statutory appeal from the decision maker to a court signalling the application of appellate standards of review as set out in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. In *Vavilov* at paras 36-37, the Court stated:

[T]he standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision.

It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review.

[38] It should be noted that there is no reference in *Vavilov* to the previous decisions of *Sattva* or *Teal Cedar* or to its applicability to commercial arbitration. It is also noteworthy that some of the interveners before the Court were the British Columbia International Commercial Arbitration Centre Foundation, as well as the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

[39] There is no doubt that *Vavilov* changed the approach to be taken to the review of administrative decisions. The question of whether it also applied to commercial arbitration appeals has since been the subject of debate, with views on both sides of the issue.

[40] Here in Manitoba, at the trial level, decisions have gone each way (see *KB appeal decision*; *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2022 MBKB 239).

[41] In *Escape 101 Ventures Inc v March of Dimes Canada*, 2022 BCCA 294 [*Escape 101*], the British Columbia Court of Appeal noted that, as of the date of those reasons, most appellate courts have avoided addressing the issue of whether *Vavilov* applied to commercial arbitration appeals (see *Escape 101* at paras 98-99). The sole appellate decision is that of *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1 [*Northland*], where the Court, commenting that the decision under review might not in fact be a commercial arbitration decision, also noted that “the reasons given in *Vavilov* for developing a new framework for review of administrative decisions must be examined to determine whether the same reasoning would apply to a statutory appeal from an arbitrator’s decision” (*Northland* at para 37). They concluded that it did, relying in part on the “presumption of consistent expression” (*ibid* at para 39) meaning that the word appeal should be taken to mean the same thing in an administrative law statute as it does in a commercial law context.

[42] The issue of the applicability of *Vavilov* to commercial arbitration arose in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para 46 [*Wastech*], where Kasirer J, speaking for the majority, chose not to decide the issue, stating:

In these circumstances, I would leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*. We have not had the benefit of submissions on that question, nor do we have the assistance of reasons on point from the courts below. Moreover, the parties here agree, rightly in my view, that the outcome of this appeal does not depend on the identification of the proper standard of review. Thus, although this Court would ordinarily be called upon to determine whether the Court of Appeal identified the correct standard of review and applied it

properly, in this case it is unnecessary to decide whether the standard is correctness or reasonableness (see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47). On either standard, the arbitrator's award cannot stand. Respectfully stated, the fact that I do not pursue discussion of this particular point raised in the opinion of my colleagues should not be understood as my agreeing with their view (see, similarly, *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 15).

In passing, he also observed that *Vavilov* did not make any mention of *Teal Cedar* or *Sattva*.

[43] The minority decision in *Wastech* took a contrary view stating that, from their vantage point, while recognizing important differences between commercial arbitration and administrative decision making, that did not affect the standard of review where a legislature had provided a statutory right of appeal. The minority concluded that appellate standards of review should apply.

[44] I start from the premise that *Vavilov* did not expressly or impliedly overturn *Sattva* or *Teal Cedar*. *Vavilov* was a decision with respect to a review of an administrative decision. Commercial arbitration awards are not administrative decisions, which are generally recognized as decisions emanating from a government entity. Commercial arbitration awards are the product of contractual agreements between parties who have chosen to reach a resolution of their own making. While there may be merit in considering the rationale of how to review an administrative decision when considering the review of decisions of commercial arbitrators, that was not the issue in *Vavilov*. It was, however, the issue in *Sattva* and *Teal Cedar* and, until a

different outcome is stipulated by the Supreme Court, I am of the view that *stare decisis* should guide us in reaching the proper conclusion as to what standard of review currently applies. Accordingly, the surest route to the answer to this question is that *Sattva* and *Teal Cedar* are still good law until directed otherwise.

[45] I am reinforced in that conclusion by the comments of Kasirer J in *Wastech*, to the effect that, even though the issue was raised with the Court in *Vavilov* by counsel for arbitrators who filed briefs, the Court, in its wisdom, chose not to deal with the precedents of *Teal Cedar* and *Sattva*. In my view, it does not “[cut] both ways”, as suggested in *Northland* (at para 36). Unless specifically or impliedly overturned, the previous decisions remain and the failure to address it by the Court should not be used as a means of invalidating precedent. Commercial arbitration awards take place “under a tightly defined regime specifically tailored to the objectives of commercial arbitrations” (*Sattva* at para 104). As well, “parties engage in arbitration by mutual choice, not by way of a statutory process” (*ibid*). The parties to an arbitration select the number and identity of the arbitrators. In *Teal Cedar*, this was described as being a “preference for a reasonableness standard . . . with the key policy objectives of commercial arbitration, namely efficiency and finality” (at para 74). Such factors militate in favour of retaining a reasonableness standard for reviewing commercial arbitration awards.

### *Consistent Meaning*

[46] In *Vavilov*, one of the considerations of the majority was the “presumption of consistent expression” (at para 44), an interpretive tool by which the Legislature is presumed to use language such that the same words

have the same meanings both within a statute and across statutes (see Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 217). This argument was criticized by the minority in *Vavilov* as being misplaced and disregarding the law on “long-accepted institutional distinctions between how courts and administrative decision-makers function” (at para 247). The minority stipulated that (*ibid*):

The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, must be inflexibly applied to every right of “appeal” within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[47] The minority’s argument is more convincing when one considers the differences between commercial arbitration and administrative decisions. The historic development of commercial arbitration through the centuries has been primarily as a result of contractual mechanisms to enable parties to resolve their disputes. This is contraposed with the development of administrative law and the review of governmental decisions, which have followed a different legal and jurisprudential path. When one considers both the jurisprudence and the institutional differences, the argument for less intervention or legalistic approach to the review of commercial arbitration is justified. A different approach to the meaning of the word appeal in *The Arbitration Act*, CCSM c A120, dovetails with the key policy objectives of commercial arbitration; namely, efficiency and finality. As noted by *Sullivan* (see section 8.04), the presumption of consistency is particularly applied to statutes dealing with the same subject matter and does not apply where the contrary is indicated by the context or rebutted by other principles of

interpretation (see *Urbanmine Inc v ELG Metals Inc*, 2022 MBCA 51 at para 26; *R v Steele*, 2014 SCC 61 at para 51; *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385, 1992 CanLII 121 (SCC)).

### *Constitutional Issue*

[48] In this appeal, the First Nation also argues that the standard of review should be that of correctness given that the appeal raises a constitutional issue. In the First Nation’s submission, the contents of the second supplementary award imposed a debt mechanism that “derogated from the First Nation’s inherent and constitutionally protected rights to self-government. The [Settlement] Agreement needed to be compliant with the *FMA*.” If it does raise a constitutional issue, then a standard of review of correctness applies.

[49] That argument was advanced before the appeal judge who declined to address the First Nation’s submission on that point. However, it is noteworthy that the First Nation argued a similar point before the arbitrator; namely, that the request from the Association “[usurped] the inherent right to self-government” of the First Nation. The arbitrator concluded that “meeting contractual obligations [was] not inconsistent with either the inherent right or *FMA*.”

[50] I agree that the issue before the arbitrator and before this Court does not affect the First Nation’s right to self-government or otherwise raise an issue touching on section 35 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. The question is whether a form of remedial action, which the arbitrator settled upon, was a reasonable one within the terms of the

Settlement Agreement between the parties. There is no constitutional issue in my view.

[51] Therefore, I conclude that the standard of review that should have been applied by the appeal judge was that set out in *Sattva* and *Teal Cedar* and was not determined by the decision of the Supreme Court in *Vavilov*. Accordingly, the arbitrator's second supplementary award, which is the only one before this Court, should have been reviewed on the basis of a reasonableness analysis. The appeal judge erred in reviewing it on the basis of correctness. Given the time that has elapsed and the seemingly incessant litigation process, this matter deserves some finality and I would not send it back to the King's Bench for a further review on the basis of reasonableness. I propose to conduct that review myself in accordance with the principles as set out in *Vavilov*.

### *Reasonableness Analysis*

#### Introduction

[52] As I have explained in the earlier part of my reasons, the review of the arbitrator's award should be done on the basis of reasonableness. While the matter could have been returned to the appeal judge to perform that analysis, I believe that this Court is in an equally capable position to do so. Given the benefit to the parties of not having to return this matter for another hearing and the length of time since the arbitration award, I believe it is advantageous to bring a conclusion to the litigation.

### Outline of Review

[53] How a court should perform a reasonableness review was discussed at length in *Vavilov* by the majority, having concluded that it was the default standard of review. There is nothing inconsistent in using the *Vavilov* discussion on the reasonableness analysis as a basis for conducting a review in the context of a commercial arbitration save only to remember that a greater deference might be owed to an arbitrator’s expertise given the avowed purpose of commercial arbitration; namely, giving effect to the parties’ desire for that method of dispute resolution.

[54] Conducting a reasonableness review includes the following underlying principles:

- (a) The review starts from the principle of judicial restraint and the recognition of the legitimacy and authority of administrative decision makers (see *Vavilov* at paras 12-14).
- (b) The reasonableness review will not be seen as a rubber stamp process nor as a means of sheltering the decision maker from accountability but as a robust evaluation of the decision (see *ibid* at paras 12-13).
- (c) The focus of the “reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*ibid* at para 83).

- (d) The review must begin “by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion” (*ibid* at para 84).
- (e) A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker (see *ibid* at para 85).
- (f) Reasonableness is a single standard that accounts for context; namely, what is reasonable in a given situation will depend on the constraints imposed by the legal and factual context of the particular decision under review (see *ibid* at paras 88-90). This means that reasons should not be assessed against the standard of perfection but, rather, should be read in light of the record and with sensitivity to the context in which the decision was made and to the decision maker’s demonstrated expertise and experience (see *ibid* at paras 91-94).
- (g) Ultimately, the decision maker’s decision must be justified, intelligible and transparent to the individual affected (see *ibid* at para 95).

[55] As stated in *Vavilov*, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (at para 100). To set aside a decision for unreasonableness, a reviewing court must be satisfied that there are serious shortcomings in the decision such that it does not exhibit the requisite degree of justification, intelligibility and transparency, and that any flaws are

sufficiently central or significant as opposed to being superficial or peripheral (see *ibid*).

[56] In *Vavilov*, the Court specifically considered what makes a decision unreasonable and concluded that there are two hallmarks of reasonable decisions; namely, (1) that a reasonable decision is based on an internally coherent reasoning, and (2) that a reasonable decision must be justifiable in light of the legal and factual constraints that bear upon a decision.

[57] A decision based on an internally coherent reasoning is a decision that is based on reasoning that is both rational and logical. There is no need for a line-by-line analysis, but the reviewing court should be able to trace the reasoning (in light of the record and with sensitivity to the context in which it was given) without encountering any fatal flaws in logic. There must be a line of analysis within the given reasons that could reasonably lead the decision maker from the evidence before it to the conclusion to which they arrived. In short, the reviewing court must be satisfied that the decision maker's reasoning "adds up" (*ibid* at para 104).

[58] As to whether or not the decision was justified in light of the legal and factual constraints, the Court, in *Vavilov*, provided a non-comprehensive list of some legal and factual elements that are generally relevant in determining reasonableness, each of which would vary in significance depending on the context. They include (a) the governing statutory scheme, (b) other statutory or common law, (c) principles of statutory interpretation, (d) evidence before the decision maker, (e) submissions of the parties, (f) past practices and past decisions, and (g) the impact of the decision on the affected

individual (see paras 105-35). Some of these may not be relevant to a review of a commercial arbitration award.

### Application to the Award

[59] Taking into consideration those principles and applying them to the award is the next step. A summary of the arbitrator's second supplementary award would be helpful.

[60] The arbitrator starts the second supplementary award by acknowledging that what is sought by the Association "must be understood in light of the complex history of the present dispute." The Association sought an order that the revised TRL would remain in effect indefinitely as a law of the First Nation in accordance with paragraph 3 of the minutes of settlement and, of more importance, that the Settlement Agreement be amended to implement the "debt mechanism".

[61] The arbitrator then reviewed the background leading up to the Association's request for those orders, including the first supplementary award. He confirmed that neither party had a desire for further litigation in order to force the Commission to accept the binding mediation contained in the initial TRL. He found as an undisputed fact that the TRL (with binding mediation of disputed budgetary expenditures) would "almost certainly not be approved by [the Commission] as contemplated in the Settlement." The First Nation had no proposal "to accommodate the missing fundamental element of the bargain, namely, Association access to a process that is *both* independent and binding" [emphasis in original]. Therefore, the essence of the application before the arbitrator, as noted in paragraph 20 of the second supplementary award, was to accept the revised TRL on the condition that the Settlement

Agreement be amended to provide a monetary remedy in any case where the First Nation refuses to adopt the mediator's decision. The remedy would lie outside the First Nation's tax regime and was part of the contracted Settlement Agreement between the parties.

[62] He confirmed that these new developments overtook the first supplementary award and therefore there was no need to deal with matters arising from that award and “[a] focus [was] required on steps that may actually resolve the dispute.”

[63] Noting that neither party viewed the Settlement Agreement as frustrated and wishing to avoid placing the parties in a position where they would become involved in protracted and expensive court litigation, the arbitrator construed his jurisdiction under the Settlement Agreement as being able to provide a remedy “by finding the most expeditious, least burdensome and most equitable solution, within the four corners of the fundamental bargain made by the parties themselves.” He was of the view that a binding and independent review of allegedly excessive or unnecessary expenditures was a “‘fundamental element’ of the bargain.”

[64] After reviewing the submissions made by both parties, he concluded that he had the jurisdiction to make the requested order on the basis of the grant of jurisdiction provided in the Settlement Agreement to resolve any remedial issues but was constrained by the basic principle that the bargain could not be amended. He relied upon the Supreme Court's decision in *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46, that a court or tribunal could modify a contract where good faith is at stake, as long as the

change did not violate the “equilibrium of a contract” and “impose a new bargain on the parties” (*ibid* at para 107).

[65] The arbitrator concluded that provisions in the Settlement Agreement gave him adequate scope to vary the wording of paragraph 3 (the binding mediation provision) for the purpose of preserving and implementing the bargain between the parties, supported in his view by basic contract law principles. While he noted that the argument of the First Nation was that there was no payment clause of this nature in the Settlement Agreement and that the words were different, he accepted the Association’s counter-argument that the financial impact of the proposed debt mechanism was precisely the same. He noted as follows: “In each case, the result flows from an excessive or unnecessary expenditure by the [First Nation] and its contractual promise to the Association that there would be a remedy if this should occur.” He commented on the fact that the debt could not be paid from “local revenues”, as defined under the *FMA* regime, and must come from the First Nation’s other revenues was problematic if those sources were insufficient, but this was a disadvantage for the Association and not the First Nation. He did not accept the argument that the debt mechanism would result in an unjust enrichment to the Association as the Association was essentially comprised of taxpayers and would use the funds for the benefit of its membership.

[66] He concluded that, while there would be a change in the Settlement Agreement wording, the change was not material considering all of the circumstances.

[67] He noted further: “On the evidence, I accept the Association’s argument that the [First] Nation is seeking ‘to derive an unwarranted

advantage' from the present situation, in a manner that deviates from the conduct of 'an honest, prudent contracting party'". This is a case where good faith performance of the settlement was at stake.

[68] He concluded that meeting contractual obligations was not inconsistent with either the inherent right to self-government of the First Nation or its statutory rights under the *FMA*. He found himself bound to make a supplementary order in response to the current application.

[69] He therefore ordered that (a) the revised TRL be submitted to the Commission for approval, (b) the first supplementary award be stayed, and (c) the minutes of settlement be amended by adding a third paragraph setting out the debt mechanism.

*Was That Decision Reasonable?*

[70] The gist of the review is to assess whether the second supplementary award's conclusion that the debt mechanism was a reasonable substitute for the binding mediation set out in the Settlement Agreement is reasonable.

[71] To follow the arbitrator's thought process, he appears to have considered the history of the dispute and how the events eventually led to the situation facing the parties. He considered the terms of the Settlement Agreement and the accepted fact that the binding mediation provisions of the Settlement Agreement could not be fulfilled given the stated position of the Commission with respect to their inclusion in the TRL, which neither party was ready to challenge. Whether or not that challenge would have been successful was also at issue.

[72] He considered the debt mechanism and compared it to the binding mediation that was previously provided for in the Settlement Agreement. He recognized the principles of contract law requiring good faith efforts of parties to comply with the terms of their agreements.

[73] His reasons are, in my view, internally consistent in that he explains both the context and the reasoning by which he reaches his conclusions, which are rational and logical in the circumstances.

[74] The appeal judge concluded that the changes brought about by the debt mechanism scenario were material and “introduce[ed] new concepts alien to the negotiated bargain” [*KB appeal decision* at para 64]. In his view, this exceeded the reservation of jurisdiction granted to the arbitrator in the terms of the minutes of settlement and amounted to more than implementation and clarification of the Settlement Agreement.

[75] Most, if not all, of those concerns can be addressed on the basis that they arise from a correctness analysis of the arbitrator’s award taking a much more literal approach to the scope of the Settlement Agreement than found by the arbitrator. When one looks at the arbitrator’s decision from a position of whether it amounts to a reasonable outcome, the same concerns do not arise. However, I will address a few for the sake of completeness.

[76] The appeal judge found that the obligation to pay the Association, which would be imposed only because the First Nation chose not to follow the mediator’s finding, was akin to penalizing them. On the contrary, the obligation arose because of the contractual agreement not to impose expenditures that are excessive or unnecessary, which has been one of the

essential elements of the Settlement Agreement between the parties since its origin. It is not reasonable to view it as a penalty.

[77] Similarly, the appeal judge found that section 13 of the TRL was silent about remedies or enforcement; the imposition of a debt mechanism was a new concept. On the contrary, the creation of the debt mechanism parallels the binding nature of a mediator’s finding, which was implied by section 13, to be an enforceable mechanism that the parties could litigate.

[78] The appeal judge found that the debt would be an after-the-fact payment rather than a bar to a specific tax being imposed and that it was a debt payable to the Association, not to the taxpayers, which were both material changes. The timing of the creation of the debt, in my view, is not a material matter, and the role of the Association is an issue that has not been a problem with any of the decision makers to date. It is not, in my view, material to the issues involved. I note that the admonition in *Vavilov* that, in a reasonableness review, a court should be wary to set aside a decision as being unreasonable unless it is “satisfied that there are sufficiently serious shortcomings in the decision” (at para 100) [emphasis added].

### Conclusion

[79] In short, I am of the view that the concerns expressed by the appeal judge do not reach the level to warrant a conclusion that the decision is unreasonable. In my view, the decision, while perhaps unorthodox and not within the traditional solutions that may have presented themselves, is sufficiently within the expectations of the parties under a reasonable reading of the terms of the Settlement Agreement.

[80] I would therefore conclude that, on a reasonableness analysis, the decision of the arbitrator in the second supplementary award should be upheld.

[81] I would grant the appeal and reinstate the arbitrator's second supplementary award with costs to the Association.

\_\_\_\_\_ JA

I agree: \_\_\_\_\_ JA

I agree: \_\_\_\_\_ JA