

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver School District No. 39 v.
Kingsgate Property Ltd.,
2026 BCCA 98*

Date: 20260310
Dockets: CA49215; CA50395
Docket: CA49215

Between:

**The Board of Education of School District No. 39 (Vancouver),
formerly known as The Board of School Trustees of
School District No. 39**

Appellant
(Respondent)

And

Kingsgate Property Ltd. and Beedie Development LP

Respondents
(Petitioners)

- and -

Docket: CA50395

Between:

**The Board of Education of School District No. 39 (Vancouver),
formerly known as The Board of School Trustees of
School District No. 39**

Appellant
(Respondent)

And

Kingsgate Property Ltd. and Beedie Development LP

Respondents
(Appellants)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Winteringham
The Honourable Justice Fleming

On appeal from: Orders of the Supreme Court of British Columbia, dated
July 13, 2023 (*Kingsgate Property Ltd. v. The Board of Education of School District
No. 39*, 2023 BCSC 1266, Vancouver Docket S221885); and dated
September 28, 2023 (*Kingsgate Property Ltd. v. Vancouver School District No. 39*,
2023 BCSC 1803, Vancouver Docket S221885).

- and -

On appeal from: An order of the Supreme Court of British Columbia, dated December 20, 2024 (*Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2024 BCSC 2325, Vancouver Docket S240563).

Counsel for the Appellant: J.K. McEwan, K.C.
E.A. Kirkpatrick

Counsel for the Respondents: S.R. Schachter, K.C.
J. Lockhart

Place and Date of Hearing: Vancouver, British Columbia
September 25–26, 2025

Place and Date of Judgment: Vancouver, British Columbia
March 10, 2026

Written Reasons by: (p. 71, para. 200)
The Honourable Justice Winteringham
The Honourable Justice Fleming

Dissenting Reasons by:
The Honourable Mr. Justice Willcock

Summary:

This is an appeal from orders made staying and then setting aside awards made at arbitration. The appellant challenges the stay on the basis that the chambers judge erred by finding he had jurisdiction under s. 31(3) of the Arbitration Act, R.S.B.C. 1996, c. 55, to issue a “stay of obligations”, by misapplying the test for a stay, and by granting a stay that supplemented his prior leave to appeal order. The appellant challenges the award on the grounds the chambers judge failed to apply the appropriate standard of review and erred in law in concluding the award was not open to the arbitrators as a result of the application of issue estoppel.

Held: Appeal dismissed, Justice Willcock dissenting.

*Dissent (per Justice Willcock): Appeal allowed in part. The chambers judge did not err in granting the stay or in considering the potential miscarriage of justice that may arise from the arbitration award pending its appeal if not stayed. The standards of review for appeals under the Arbitration Act are the appellate standards described in *Housen v. Nikolaisen*, 2002 SCC 33. As only questions of law may be appealed under the Act, the applicable standard of review is correctness. Applied here, the 2022 arbitration panel did not err in interpreting the 1999 arbitration award, in exercising their discretion to not apply issue estoppel, or in interpreting the lease and determining the market value of the land for the purpose of establishing rent.*

*Majority (per Justice Winteringham and Justice Fleming): There is agreement with Justice Willcock on his disposition of the appeal of the first order, and on the applicable standard of review for appeals under the Arbitration Act. However, there is disagreement on the substantive issue on appeal from the second order. Applying the *Housen* standards, the majority decision of the 2022 arbitration panel was incorrect in refusing to apply issue estoppel. They misidentified the issue to which estoppel applied and considered irrelevant factors in refusing to apply issue estoppel. The chambers judge exercised discretion to not remit the calculation of rent to the 2022 arbitration panel. No error being shown, that discretionary decision is owed deference.*

Table of Contents	Paragraph Range
INTRODUCTION	[1] - [1]
BACKGROUND AND JUDICIAL HISTORY	[2] - [35]
The Lease	[2] - [3]
1999 Arbitration	[4] - [9]
2022 Arbitration	[10] - [20]
Proceedings Following the 2022 Arbitration	[21] - [35]
GROUND OF APPEAL	[36] - [45]
CA49215: The Procedural Appeal	[37] - [43]
CA50395: The Substantive Appeal	[44] - [45]
PARTIES' SUBMISSIONS	[46] - [97]
CA49215: The Procedural Appeal	[46] - [59]
CA50395: The Substantive Appeal	[60] - [97]
Standard of Review	[60] - [71]
Issue Estoppel	[72] - [79]
Consideration of Irrelevant Factors	[80] - [90]
Remitting of the Valuation	[91] - [97]
DISCUSSION AND ANALYSIS	[98] - [195]
CA49215: The Procedural Appeal	[98] - [103]
CA50395: The Substantive Appeal	[104] - [148]
Standard of Review	[104] - [148]
The Supreme Court of Canada on Appeals from Arbitration	[107] - [120]
Appellate Decisions	[121] - [135]
British Columbia Cases	[136] - [142]
Academic Commentary	[143] - [148]
Analysis	[149] - [195]
<i>Stare Decisis</i>	[149] - [170]
The Substantive Questions: Issue Estoppel	[171] - [186]
The Substantive Questions: Consideration of Irrelevant Factors	[187] - [194]
Remitting of the Valuation	[195] - [195]
CONCLUSION	[196] - [199]
INTRODUCTION	[200] - [204]
BACKGROUND	[205] - [218]

ANALYSIS	[219] - [269]
Did the 2022 Majority err in its interpretation of the 1999 Award and the identification of the issue to which estoppel applied?	[220] - [239]
Did the 2022 Majority consider irrelevant factors in determining not to apply issue estoppel?	[240] - [255]
Finality remains important in serial arbitrations	[245] - [249]
The intentions of the parties did not justify revisiting the 1999 Award	[250] - [255]
Did the chambers judge correctly exercise her discretion not to remit?	[256] - [269]
DISPOSITION	[270] - [270]

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] On November 20, 1972, the Board of Education of School District No. 39 (Vancouver) (“VSB”), as lessor, and Royal Oak Holdings Ltd. (“Royal Oak”), as lessee, entered a lease of lands located at the corner of East Broadway and Kingsway in Vancouver, once the site of Mount Pleasant School, upon which Royal Oak was to build the Kingsgate Mall. The lease was for a 25-year term with renewal provisions. This appeal turns on the interpretation of the renewal terms.

Background and Judicial History

The Lease

[2] The lessee was initially required to pay basic rent of \$101,062.50 (8¼% of the agreed market value of the lands when the lease was executed), plus additional rent of 33⅓% of the amount by which gross rental income generated by the lands exceeded \$440,000 in each lease year.

[3] Following the initial term, the lease included provisions for seven renewal terms of 10 years each, and a final eighth renewal for 4 years. The basic rent in each renewal term was to be determined as follows:

Sections 29.01–29.08

...

The rent payable by the LESSEE during the ... renewal term shall be the BASIC RENT ... and ADDITIONAL RENT, if any, except that the LESSOR may elect to have the BASIC RENT computed solely on the basis of market value of the SAID LANDS rather than as provided in ... this lease ... in such event the BASIC RENT during the ... renewal term shall be an annual amount computed on the basis of eight and one quarter percent (8- 1/4%) of the market value of the SAID LANDS as may be agreed upon in writing by and between the LESSOR and the LESSEE and failing such agreement such BASIC RENT shall be determined by arbitration as provided for in section 29.09.

...

Section 29.09 Determination of Renewal Lease Rent

If the LESSOR and the LESSEE do not agree in writing upon the BASIC RENT ... the BASIC RENT ... shall be an annual amount computed on the

basis of eight and one quarter (8-1/4%) percent of the market value of the SAID LANDS ... as the SAID LANDS would be valued at that time if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the SAID LANDS for that immediate use and such market value of the SAID LANDS shall be determined by arbitration ...

[Emphasis added.]

1999 Arbitration

[4] At the time of the first renewal, VSB and Royal Oak could not agree on the market value of the lands to establish the renewal lease rent. The question of market value, as of May 20, 1997, eventually went to arbitration before Keith Mitchell Q.C., Graham Allen, and Charles Locke Q.C. (the “1999 Panel”). The 1999 Panel, one arbitrator dissenting, issued an award in February 1999 (the “1999 Award”).

[5] The evidence before the 1999 Panel on the critical question — the interpretation of “immediate use” and “immediate development” in s. 29.09 — was described in the majority award issued by Messrs. Mitchell and Allen as follows:

... [T]he lands are zoned under schedule C-3A of the City of Vancouver’s Zoning and Development Bylaw ... this particular zoning provided for an outright approval use, which is a legal entitlement, and a conditional approval use, which involves the exercise of discretion by the City’s Development Permit Board. The former use entails a broad range of retail uses to a maximum development density floor space ration (“FSR”) of 1.0. From the evidence of both experts it would appear that a development permit for an outright use could be obtained within seven to twelve weeks. The conditional approval use would allow quite a comprehensive range of other uses, notably for manufacturing and residential, to a maximum permitted density of 3.0 FSR. Approval of a conditional use is discretionary, takes substantially longer to obtain and the process is subject to public notification.

[Emphasis added.]

[6] In interpreting “immediate”, the 1999 Panel adopted the view expressed in *The Queen v. Justices of Berkshire* (1878) 48 L.J.M.C. 137 at 471:

... It is impossible to lay down any hard and fast rule as to what is the meaning of the word “immediately” in all cases. The words “forthwith” and “immediately” have the same meaning. They are stronger than the expression “within a reasonable time”, and imply prompt, vigorous action,

without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case.

[7] Applying the holding in *Berkshire*, and the dictionary definition of “immediate”, the 1999 Panel held:

We do not consider that any proper review of the facts, the comment and the evidence that was agreed on by both experts would lead one to the conclusion that the more lengthy process to achieve the discretionary conditional use was a use that was “forthwith”, “without any delay” or “next adjacent”. Rather these descriptions apply to the outright approval use of Schedule C3A of the Zoning and Development By-Law.

In addition, the very fact that the conditional use is discretionary, and not a legal entitlement, defeats coming within the concept of “immediate development” or “that immediate use” ...

[8] The 1999 Panel concluded: “[I]n view of our finding above, the market value of the Lands must be based on an outright approval use with a maximum density of 1.0 FSR ...”. The market value was determined to be \$6,241,275.

[9] VSB applied for leave to appeal the 1999 Award. Justice Melnick dismissed the leave application on the basis that the 1999 Panel’s interpretation of s. 29.09 was not obviously wrong, in reasons indexed as *Vancouver District No. 39 v. Royal Oak Holdings Ltd.*, 1999 CanLII 5699 (the “1999 Leave Decision”). He described the 1999 Panel’s reasoning as follows:

[15] [The 1999 Panel] concluded that in using the natural meaning of immediate, s. 29.09 was referring to a development process that would use the outright approval scheme of Schedule C-3A of the Vancouver Zoning Bylaw, not the discretionary conditional use to 3.0 FSR. As I read the reasons of the majority, the latter process would be at odds with the concept of immediacy inherent in the wording of s. 29.09 ...

[Emphasis added.]

2022 Arbitration

[10] In December 2005, Kingsgate Property Ltd. took an assignment of Royal Oak’s rights and obligations under the lease. Kingsgate and Beedie Development LP (collectively “Beedie”) covenanted with VSB to observe the covenants of Royal Oak under the lease.

[11] In 2021, an arbitration panel consisting of John Logan Q.C., Gerald Ghikas Q.C., and Richard Olson (the “2022 Panel”) was appointed to determine the market value of the lands for the purpose of calculating the basic rent for the third renewal term, commencing on November 20, 2017. The 2022 Panel’s award was issued on January 19, 2022, with one arbitrator dissenting; it is referred to here as the “2022 Award”.

[12] In 2021, Beedie was paying a basic rent of \$750,000 per annum. It proposed a basic rent per annum of \$1,212,750 — being 8¼% of the market value of the lands of \$14,700,000. Market value was based on outright uses under C-3A zoning with a maximum FSR of 1.0. VSB proposed a basic rent of \$11,475,000 — being 8¼% of the market value of the lands of \$135,000,000. Market value was based on conditional uses under existing zoning of 3.0 FSR.

[13] Beedie took the position that the language of the lease required the 2022 Panel to set market value by determining what use the lands could be put to with the least delay. It further argued that issue estoppel, arising from the 1999 Award, compelled that result. Further, Beedie submitted, estoppel by convention and representation precluded VSB from pursuing a valuation greater than that based on a 1.0 FSR, because Beedie’s decision to exercise the right of renewal was based on the parties’ mutual acceptance of the result of the 1999 arbitration.

[14] For its part, VSB took the position that the issue before the 2022 Panel was narrowly defined, and it was not open to the arbitrators to rule on issue estoppel or estoppel by convention. Rather, the 2022 Panel’s task was to provide an answer to the valuation question submitted to it for determination.

[15] The 2022 Panel considered the proper interpretation of s. 29.09, including the words “immediate” and “lawful use”. It rejected Beedie’s submission that the word “immediate” should be read as meaning “most immediate”. It also rejected the submission that the words “lawful use” should be interpreted as the use that is

immediately available for development under the existing zoning, without the need for discretionary approval. The Panel concluded:

[83] In summary, we find that, properly interpreted, s. 29.09 provides the following instructions concerning the determination of market value of the unencumbered fee simple interest in the Lands, namely:

- (a) The Lands are assumed to be vacant;
- (b) The Lands are to be assumed to be ready for immediate development to their highest and best lawful use on the Valuation Date;
- (c) A use is “lawful” if it is permitted under the existing zoning, whether or not the actual issuance of a development permit is conditional or discretionary;
- (d) A use that might be permitted under a possible future zoning bylaw is not a “lawful use” as of the Valuation Date;
- (e) The market value is to be the value that would be given to the Lands by a hypothetical purchaser who was ready, willing and able to purchase the Lands on the Valuation Date and who was ready, willing and able to develop the Lands for the “immediate use” described in s. 29.09; and
- (f) The “immediate use” described in s. 29.09 is the highest and best use for which the Lands might lawfully be developed as of the Valuation Date, if the Lands are assumed to be vacant and ready for immediate development on that date.

[16] The “immediate use” described in s. 29.09 was found to be a conditional use permitted under the C-3A zoning.

[17] The 2022 Panel was of the view that issue estoppel might preclude it from adopting its preferred interpretation of the lease, and therefore turned to the 1999 Award to determine what issues had finally and necessarily been decided by the 1999 Panel. It determined the 1999 Panel had found:

- a) “immediate” as used in s. 29.09 means “present” or “next adjacent” or “taking effect without delay or lapse of time”;
- b) an “immediate use” as that phrase is used in s. 29.09 is a use for which a development permit can, with certainty, be obtained without delay;

- c) the word “use” in the phrase “if vacant and ready for immediate development to their highest and best lawful use” refers to an “immediate use”;
- d) based on the evidence, a conditional use was not an “immediate use” because a development permit for a conditional use could not be obtained without delay (it would take 60 weeks) and because the entitlement to a development permit was conditional;
- e) based on the evidence, an outright use was an “immediate use” because a development permit could be obtained without delay (it would take 7–12 weeks) and because the issuance of a development permit was a legal entitlement;
- f) as a result, the “highest and best lawful (immediate) use” of the lands on the relevant valuation date was an outright use under the existing zoning; and
- g) accordingly, the rent for the renewal term should be based on the market value of the lands as of the valuation date, if vacant and ready for immediate development for an outright use.

[18] The 2022 Panel considered the first three of these findings to be findings of mixed fact and law and, subject to its discretion not to apply the doctrine of issue estoppel, VSB and Beedie were bound by them for the purposes of the arbitration. However, the 2022 Panel was of the view that there was no express finding by the 1999 Panel that the lease required the rent to be based upon the highest and best use to which the lands could be put “most expeditiously” or “most immediately”. Accordingly, the 2022 Panel held it was required to determine whether one or more of the available uses was an “immediate use” as that phrase was defined in the 1999 Award. This question was not simply which alternative was “most immediate” but rather, of the uses for which a development permit could be obtained without delay, which was the highest and best use.

[19] The 2022 Panel concluded the lease did not preclude the application of the doctrine of issue estoppel, but exercised its discretion to not apply the doctrine because doing so would result in a serious injustice for the parties and would frustrate their intentions. The 1999 Panel had concluded that because a development permit for a conditional use could not be obtained without a 60-week delay such use was not immediate. However, the evidence before the 2022 Panel was that obtaining a development permit for an outright use in 2017 would take at least six to eight months. The 2022 Panel accepted the evidence of a planning consultant who testified that, while there was a greater likelihood a development permit would be issued for an outright use than for a conditional use, there was no guarantee that a development permit would be issued for an outright use in 2017, and the likelihood of obtaining such a permit decreased as the approval process became more complex. The 2022 Panel concluded no use could be considered “immediate” by the 1999 Panel’s definition.

[20] As a result, the 2022 Panel set the market value of the property on the basis that the lands could be put to either outright or conditional use, if vacant and ready for immediate development. As conditional use under the C-3A zoning was the highest and best lawful use of the lands on the valuation date, this was used to value the lands at \$116,500,000.

Proceedings Following the 2022 Arbitration

[21] In March 2022, Beedie filed a petition seeking leave to appeal the 2022 Award to the trial court under the *Arbitration Act*, R.S.B.C. 1996, c. 55 [*Former Arbitration Act*]. It had not, in the interim, paid VSB the increased annual rent: \$9,611,250 (8¼% of the market value of the lands of \$116,500,000) calculated with reference to the 2022 Award, but had paid a lower rent, \$1,212,750 annually, calculated with reference to its asserted lower market value of \$14,700,000. Although the dispute in this case arose under the *Former Arbitration Act*, that *Act* has since been replaced by the *Arbitration Act*, S.B.C. 2020, c. 2 [*Current Arbitration Act*].

[22] On April 12, 2023, for reasons indexed as *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 560 (the “BCSC 2022 Leave Decision”), Justice Stephens, in chambers, granted Beedie leave to appeal the 2022 Award on two questions of law at paras. 54, 76, 135:

- a) whether the 2022 Panel erred in its interpretation of the 1999 Award and identification of the issue to which estoppel applied; and
- b) whether the 2022 Panel considered irrelevant factors in exercising the discretion not to apply issue estoppel.

[23] In granting leave, the chambers judge concluded there was an arguable case that the 2022 Panel had erred when interpreting the 1999 Award for the purposes of applying issue estoppel, stating:

[104] There is arguable merit to the proposed first ground of appeal that the 2022 majority erred by interpreting the 1999 Award, in terms of inquiring whether a use was “present”, “next adjacent”, or “taking effect without delay or lapse of time”: *2022 Majority* at paras. 127(a), 171. The 2022 majority found this to be unworkable on the evidence before it since the outright uses would take six to eight months, leading the 2022 majority to not apply issue estoppel: paras. 169–172, 174. Whereas, it is arguable that the 2022 majority should have interpreted the 1999 majority as holding that s. 29.09 on its proper interpretation called for an outright (not conditional or discretionary) use of the lands under the Zoning By-Law leading to 1.0 FSR use, and applied that use. The zoning for the subject lands did not change from 1999 to 2022.

[Emphasis added.]

[24] Leave was granted on the condition that security would be provided on terms agreed by the parties or, if no agreement was reached, on terms determined by the court. Beedie’s application for a stay of the 2022 Award was before the chambers judge when the petition for leave to appeal was heard but was adjourned.

[25] On May 17, 2023, VSB issued a notice of default under the lease based upon Beedie’s failure to pay basic rent in accordance with the 2022 Award. It asserted the arrears of rent due plus GST amounted to \$49,883,770.06 and it

required Beedie to remedy the default within 60 days, failing which VSB would terminate the lease and re-enter and take possession of the lands.

[26] On July 7, 2023, the parties appeared again before Stephens J. to speak to security, and to Beedie’s application for a stay of its obligations “under the Award or in respect of the Award and the Notice of Default” pending determination of the arbitration appeal.

[27] For reasons indexed as *Kingsgate Property Ltd. v. The Board of Education of School District No. 39*, 2023 BCSC 1266, Stephens J. held that s. 31(3) of the *Former Arbitration Act* provides the court with the discretionary power to impose a condition preventing the legal and practical consequences of an award subject to appeal from coming to fruition while the validity of that award is under appeal. The discretion could be exercised in a manner consistent with the statutory objective embodied in s. 31(2)(a) which requires the court to consider if determining a point of law “may prevent a miscarriage of justice”. In doing so, he rejected VSB’s submission that the court’s authority under s. 31 was limited to imposing terms on the petitioner seeking leave. Given that conclusion, it was unnecessary for him to consider the alternative submission: that he had the authority to stay the effect of an arbitral award under s. 8 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, or the court’s inherent jurisdiction.

[28] Justice Stephens concluded a potential miscarriage of justice might occur if Beedie were required to pay the disputed amounts to VSB, or if they faced termination of the lease for the non-payment of the full amount of the increased rent, while an appeal of the validity of the award used to calculate the basic rent was pending.

[29] On December 8, 2023, in response to VSB’s application to vary or lift the stay order, Stephens J. concluded that s. 8 of the *Law and Equity Act* did not preclude the stay from having the effect of barring VSB from bringing proceedings to enforce the claim for rent, but he found it was in the interests of justice to lift the stay for the limited purpose of permitting VSB to file and serve a notice of civil

claim: *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 2253.

[30] On January 26, 2024, an appeal of the order granting leave to appeal was dismissed, for reasons indexed as *Vancouver School District No. 39 v. Kingsgate Property Ltd.*, 2024 BCCA 54 (the “BCCA 2022 Leave Decision”). Justice Dickson, speaking for this Court, said of the first identified legal issue, being whether the 1999 Award was correctly interpreted by the 2022 Panel:

[21] According to the VSB, the question of what a prior decision decided is a question of fact in a proceeding against which a court or tribunal applies a legal test. It follows, it says, that the 2022 majority’s findings as to what the 1999 majority decided were factual findings, or at best findings of mixed fact and law. Therefore, the VSB says, the judge erred in concluding that any alleged error in relation to those findings could ground an appeal pursuant to s. 31(1).

[Emphasis in original.]

...

[23] I am not persuaded by these submissions. I agree with the Beedie Group that they are inconsistent with established Supreme Court of Canada authority on issue estoppel in civil litigation, which is “a branch of *res judicata* ... which precludes the relitigation of issues previously decided in court in another proceeding”: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 23. As the Court explained in *Danyluk*, in the civil litigation context, issue estoppel is a flexible doctrine that prevents the relitigation of “constituent issues or material facts necessarily embraced” in an earlier decision, and it can extend to “the material facts and the conclusions of law or of mixed fact and law (“the questions”) that were necessarily (even if not explicitly) determined in the earlier proceedings”. The Court’s statement in *Mahalingam* [*R. v. Mahalingan*, 2008 SCC 63 at para. 26] to which the VSB points was made in the context of a criminal proceeding where reasons were not provided and has no application where the issue estoppel in question is determined based on the face of reasons for decision.

[Emphasis added.]

[31] Of the second issue, whether the 2022 Panel’s exercise of discretion was improper, she said:

[27] ... In my view, given the significance attributed to finality in commercial arbitration in authorities such as *Teal Cedar* and the absence of authority as to a diminished public interest in finality in an arbitral setting, the 2022 majority’s finding of a diminished interest in finality involves an arguably meritorious extricable legal error in connection with its consideration of the finality factor. Moreover, the 2022 majority’s apparent reference to its own

interpretation of s. 29.09 of the lease with respect to the parties’ “true intentions” as a relevant factor for consideration in the exercise of its discretion constitutes an arguable legal error.

[Emphasis added.]

[32] The appeal from the 2022 Award came on for hearing before Justice Chan on October 7–9, 2024. Judgment was reserved until December 20, 2024, when, for reasons indexed as *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2024 BCSC 2325 (the “2022 Arbitral Appeal”), Chan J. set aside the 2022 Award and held the market value of the lands for determining basic rent for the third renewal period should be based on 1.0 FSR, a value she set at \$20,000,000, resulting in a reassessment of the annual rent for the third renewal period at \$1,650,000. The order requiring Beedie to provide security for the disputed rent pending appeal was vacated, and costs of the appeal were awarded to Beedie.

[33] In making her orders, Chan J. held that the 2022 Award was incorrect and unreasonable as it was based on an erroneous conception of the issues to which estoppel applied. In particular, she held:

[47] With respect, the 2022 Majority erred in its identification of the issues to which estoppel applied. The 2022 Majority identified the findings of the 1999 Majority to which estoppel applied as the meaning of “immediate”; that an “immediate use” was a use for which a development permit can with certainty be obtained without delay; and the word “use” in the phrase “if vacant and ready for immediate development to their highest and best lawful use” refers to an “immediate use”. In my view, the issue to which estoppel applied was the interpretation that an “immediate use” was the use that was the most expeditious and certain. This finding was implicitly bound up in the 1999 Award.

[48] In my view, the 2022 Majority’s interpretation of the 1999 Award is unreasonable and incorrect. Applying the standard of reasonableness, I find the 2022 Majority’s interpretation of the 1999 Award does not fall within a range of possible, acceptable outcomes that is justified, transparent, intelligible, and defensible: *Teal* at para. 84. On the correctness standard, I find the interpretation of the 1999 Award by the 2022 Majority not consistent with the language of the 1999 Award read as a whole, where timelines were referenced and compared throughout.

[49] With respect, the 2022 Majority’s interpretation of the 1999 Award is both unreasonable and incorrect.

[Emphasis added.]

[34] Further, she held the 2022 Panel had erred in concluding that the finality of litigation would not be materially undermined by not applying issue estoppel. That view was “contrary to jurisprudential authority”, and she held:

[57] I find the 2022 Majority erred in considering irrelevant factors in the exercise of discretion in its decision not to apply issue estoppel. By finding a diminished public interest in finality in the lease arbitrations, and a public interest in enforcing private contracts to reflect the true intentions of the parties, the 2022 Majority exercised its discretion to not apply issue estoppel in an unreasonable and incorrect manner.

[Emphasis added.]

[35] Having found the 2022 Panel was incorrect and unreasonable in identifying the issues to which issue estoppel applied and the exercise of discretion to not apply estoppel, Chan J. rejected the submission that the valuation question should be remitted to arbitration. She concluded:

[63] In these circumstances, the Court has the legal interpretation of the valuation clause from the 1999 Tribunal and the factual findings of the 2022 Majority. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para. 142. I see no reason to not apply issue estoppel. As a result, the market value shall be based on the 1.0 FSR for outright use, which is \$20,000,000.

Grounds of Appeal

[36] There are two appeals before us. The first, the procedural appeal, was initiated before the substantive judgment of Chan J. was issued, and challenges the stay order pronounced by Stephens J. The second, the substantive appeal, challenges the order of Chan J. setting aside the arbitral award and substituting another, lower, valuation of the lands.

CA49215: The Procedural Appeal

[37] VSB submits Stephens J. erred in law in interpreting the *Former Arbitration Act* when granting the order for a stay by:

- a) construing the powers of the court under s. 31(3) of the *Former Arbitration Act* incorrectly by conducting a statutory interpretation of s. 31(3) without

construing the statute as a whole or referring to the established statutory objects;

- b) concluding that the *Former Arbitration Act* conferred the power to issue a stay in respect of rights other than those that were the subject of a dispute under an “arbitration agreement” or “award” (within the meaning of the statute); and
- c) concluding that the *Former Arbitration Act* authorized him to stay rights of, and preclude claims by, VSB that were not the subject of proceedings before him.

[38] It submits the chambers judge misapplied the test for a stay, concluding that the “fair issue” criterion was met because leave to appeal had been granted.

[39] Finally, it submits the chambers judge erred by “supplementing” the legal effect of his April 2023 order.

[40] Beedie, in response, submits that the chambers judge correctly interpreted s. 31(3), and the issuance of the stay was a proper exercise of his discretion.

[41] The appeal of the interim stay order will be rendered moot by our judgment. VSB suggests, however, that our judgment on the propriety of the stay will be of practical value. It contends that, if its appeal succeeds, the value of its claim for the additional rent may vary, depending upon whether the marginal increase in rent arising from the 2022 Award was properly or improperly withheld. It contends there is an argument that if the stay order was made in error, then the additional rent was wrongly withheld.

[42] In my view, there is no merit to that argument. Even if we were to find the chambers judge erred in law in ordering the stay, his order was effective until the hearing of this appeal. From the date of its pronouncement, until our hearing, the additional rent payable because of a higher valuation of the property was withheld pursuant to a valid court order. Our judgment will have no practical effect on the

rights of the parties. That being the case, the Court should decline to decide this issue unless there is reason to exercise the discretion to depart from its policy or practice: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123.

[43] In my view, we should exercise that discretion, but only to answer the question of a recurring nature but brief duration: what terms may a court impose when granting leave to appeal an arbitral award. This is an issue that might otherwise evade review. The other procedural issues are specific to the circumstances of the case and not of a recurring nature.

CA50395: The Substantive Appeal

[44] VSB asserts Chan J., in setting aside and substituting the 2022 Award, erred by:

- a) failing to identify the appropriate standard of review;
- b) asking what decision she would have made in the 2022 Panel's place rather than applying a reasonableness standard of review;
- c) failing to engage in an appropriate analysis of the 1999 Award to determine what issue estoppel arises from the 1999 Award;
- d) concluding the 2022 Panel considered irrelevant factors in exercising the discretion not to apply issue estoppel; and
- e) upon allowing the appeal, failing to remit the matter to the 2022 Panel.

[45] Beedie, in response, maintains that Chan J. did not err in finding the 2022 Award was unreasonable, and thus also incorrect, nor in not exercising her discretion to remit.

Parties' Submissions

CA49215: The Procedural Appeal

[46] At the material time, the relevant provisions of the *Former Arbitration Act*, now embodied in s. 59 of the *Current Arbitration Act*, were:

- 31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
 - (a) all the parties to the arbitration consent, or
 - (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
 - (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
 - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
 - (c) the point of law is of general or public importance.
- (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
- ...
- (4) On an appeal to the court, the court may
 - (a) confirm, amend, or set aside the award, or
 - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.
- 32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

[47] VSB contends Stephens J. failed to interpret s. 31(3) of the *Former Arbitration Act* in accordance with principles reflected in the *Interpretation Act*, R.S.B.C. 1996, c. 238, and *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837.

[48] First, it says the *Interpretation Act* does not call for a “large and liberal construction” of statutes in the abstract, nor does it direct the court to give the

most permissive reading possible to a statutory provision. Rather, s. 8 of the *Interpretation Act* requires the court to give a statute the most “large and liberal construction” as “best ensures the attainment of its objects”. VSB says the chambers judge made no reference to the well-established “objects” of the *Former Arbitration Act*: to “minimize” court involvement; to “limit and restrict judicial review”; and to “recognize the finality of commercial arbitration” and “give deference” to arbitral awards: citing *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 133; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 1.

[49] Second, VSB says the chambers judge’s analysis overly relies on the reference in s. 31(2)(a) of the *Former Arbitration Act* to leave to appeal being granted on a question of law where to fail to do so could result in a miscarriage of justice. VSB says in focusing on s. 31(2)(a), the judge overlooked the rest of the statute and particularly the prohibition in s. 32 of any interference with an award other than as provided for in the *Act*. VSB contends the reference in s. 31(2)(a) to preventing “miscarriages of justice” is not a general animating purpose of the *Former Arbitration Act*, but rather a constraint on judicial intervention. Section 31(2)(a) provides this constraint by setting out two conjunctive requirements for leave: 1) the result of the arbitration must be of importance to the parties such that court intervention is justified; and 2) the determination of the point of law of importance must be capable of preventing a miscarriage of justice. Even where the result of an arbitration is of such importance to the parties that court intervention might be justified, there must also be a point of law whose determination would prevent a miscarriage of justice.

[50] Third, VSB says s. 31(3), properly construed, empowers the court to set conditions a *prospective appellant* must meet. It says the judge erred in concluding it creates a generalized power for the court to interfere with the rights of an appeal *respondent*. The narrower reading, VSB submits, is consistent with the express statutory language of the original leave provision in the UK statute, upon which s. 31(3) was based. Section 1(4) of the *Arbitration Act 1979*, 1979,

c. 42, provided: “The High Court shall not grant leave ... unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to that arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate” [emphasis added].

[51] Fourth, and finally, VSB argues that the error in interpreting s. 31(3) was compounded by the judge’s implicit determination that his power to impose “conditions” was not limited to the matters in issue on the appeal. It says the chambers judge correctly noted that the obligations from which Beedie was seeking relief arose under the lease, not any right or obligation directly determined by the 2022 Award. Nonetheless, the chambers judge concluded s. 31(3) empowered him not only to impose conditions addressing rights directly determined by an award but “to impose a condition preventing the legal and practical consequences of an award subject to appeal from coming to fruition”. In response, VSB submits the court’s power under s. 31(3), and any other provision of the *Former Arbitration Act*, to grant relief is tied to a right or obligation determined in “arbitration” or an “award” as defined in s. 1. This does not preclude the court from exercising its inherent jurisdiction where appropriate. However, the chambers judge expressly granted a “stay of obligations” using the powers afforded under s. 31(3).

[52] VSB submits that even if Stephens J. relied upon the court’s inherent jurisdiction, a stay ought not to have been granted. It contends the chambers judge, in effect, found s. 31(3) to have revived a power expressly abolished by the *Judicature Acts*: the ability to enjoin a party from pursuing a claim at law.

[53] Beedie’s intention, it argues, was to preclude VSB from taking steps to exercise its rights in accordance with the lease, including acting in furtherance of the notice of default, pending appeal. The court, in effect, granted an interim injunction, an order properly made only to preserve the subject matter of the

litigation. The applicant for such an extraordinary remedy is required to establish there is a dispute about the existence of a legal wrong and the plaintiff's rights need to be preserved so that if they succeed at trial they will not have suffered irreparable harm. VSB says the absence of any pleading or argument by Beedie that the conduct sought to be enjoined, enforcement of the lease, is wrongful, is fatal to an application for an injunction or, in this case, a stay. Granting the stay was improper given that neither party disputed that the lease called for the arbitrated market value to take effect "forthwith" and for rent to be calculated and paid on that basis.

[54] VSB says this constituted an error of law and that Stephens J. erred in concluding that the stay did not offend s. 8(1) of the *Law and Equity Act*:

8 (1) A cause or proceeding pending the court must not be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of that cause or proceeding ... may be relied on by way of defence.

[55] In response, Beedie says Stephens J. correctly interpreted s. 31(3) of the *Former Arbitration Act* and was aware of the objectives of the *Act*, as he expressly identified those objectives. Beedie says the objectives, limiting court involvement and promoting finality of commercial arbitration, are served by the restrictive test governing leave to appeal but they have nothing to do with the jurisdiction of the court to prevent harm or preserve the subject matter of the dispute pending the hearing of an appeal when leave has been granted.

[56] Beedie notes that the UK legislation relied on by VSB (s. 1(4) *Arbitration Act 1979*) states the court can make leave conditional "upon *the applicant* complying with such conditions as it considers appropriate": No such language limiting the power to order conditions appears in the *Former Arbitration Act*. It argues this reflects a specific legislative choice not to impose such a restriction.

[57] Beedie says judges have broad equitable jurisdiction to grant a stay on terms and conditions they think just. It points out that VSB's claim to additional rent hinges upon the 2022 Award and the claim that has been stayed is directly

related to and dependent upon that same Award — the rent payable under the lease is determined by a formula, and the market value from the 2022 Award is an input. Beedie argues the authorities and principles cited by VSB do not support constraining the court’s power to stay rights under an arbitral award pending an appeal, particularly when doing so is otherwise in the interests of justice. Here, suspending the operation of the 2022 Award requires staying proceedings that are premised on the Award’s determination of market value on which rent is based.

[58] Beedie says VSB’s argument that “the rights sought to be enjoined by [Beedie] would not preserve the subject matter of any outstanding litigation between the parties” rests on the erroneous distinction between the 2022 Award and the contractual rights under the lease. As the “outstanding litigation between the parties” refers to Beedie’s appeal of the leave decision, which is tied to the 2022 Award and the lease, there is no distinction between them for the purposes of the stay.

[59] Finally, responding to VSB’s argument that the stay violated s. 17 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, because the order was made after the filing of a notice of appeal from the leave order, and it purported to add a term to that order, Beedie contends s. 17 is not an “iron clad rule”. The trial court retains the discretion to adjudicate “matters that flow directly from the original proceeding while an appeal on other grounds is pending”: *Dyk v. Protek Automotive Repairs Ltd.* (1999), 41 C.P.C. (4th) 317 at 322 (B.C.S.C.).

CA50395: The Substantive Appeal

Standard of Review

[60] Rather than determining the appropriate standard of review and then assessing the arbitrator’s decision on that basis, Chan J. reversed these steps. VSB says she should have determined the standard of review before assessing the arbitrator’s reasons: *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, 2004 SCC 23 at paras. 19–21.

[61] VSB contends the correct standard of review from an award at arbitration is reasonableness, even when reviewing the questions of law with respect to which leave to appeal has been granted. That standard is established in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. The subsequent elucidation of the standard of review from administrative tribunals in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, expressly left the standard of review from arbitration unchanged and VSB says *Sattva* remains binding authority in this province. VSB also relies upon *Teal Cedar*, which it describes as the most recent Supreme Court of Canada authority on the reasonableness standard of review under the *Former Arbitration Act*, and the acceptance of that standard in *Mann v. Grewal*, 2023 BCCA 88 at para. 29; and *Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.*, 2021 BCSC 1415 at paras. 58–59, aff’d in part 2022 BCCA 407.

[62] As VSB articulates, a reasonableness review requires a deferential effort, or “respectful attention”, to seek rationality and internal logic in the decision of an arbitral tribunal: citing *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 47–48; *Vavilov* at paras. 84–87, 93, and 288. A decision is unreasonable only if it cannot be justified, because of internal inconsistency, failure to articulate reasoning, or irreconcilability of its conclusion with evidence or law.

[63] The parties agree our role is to determine the correct standard of review from the arbitration and to determine whether the reviewing court properly applied that standard. This Court steps “into the shoes” of the reviewing court, as first described in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 247. Despite that agreement, VSB’s submissions are principally framed as criticism of the approach taken by the chambers judge.

[64] VSB says while the chambers judge made conclusory statements that she considered the 2022 Panel’s determinations to be “unreasonable”, she did not properly assess either the Panel’s interpretation of the 1999 Award and the identification of the issue to which estoppel applied, or whether the Panel had

considered irrelevant factors in exercising its discretion not to apply issue estoppel, by reviewing the reasoning of the 2022 Award for its rationality or its conclusions for discord with the facts or law. Rather, VSB submits, she did what was prohibited: she asked what decision she would have made in the 2022 Panel's place.

[65] VSB says the 2022 Panel conducted a careful and faithful analysis of the 1999 Award and what findings were essential to its determination. The 2022 Panel held that no interpretation of the 1999 Award was available other than that "immediate development" meant "a use for which a development permit can be obtained without delay and not as a matter of discretion". This flowed from a clear chain of analysis, without logic fallacies, and aligned with the record before it, including, the express findings of the 1999 Award. While the 2022 Panel rejected Beedie's submissions that the only available interpretation was that "immediate development" meant the "most expeditious" or "fastest" use to which the property could be put, it explained how this diverged from the express findings of the 1999 Panel and those it considered as necessarily flowing from its logic. Its conclusion is functionally indistinguishable from the language the 1999 Panel used: "immediate development' is one where a development permit legally entitling the occupant to proceed with development can be obtained without delay and there is certainty of entitlement ...".

[66] VSB says the chambers judge erred in failing to defer to the 2022 Panel's exercise of its discretion not to apply issue estoppel once it identified the issues that might be subject to estoppel. In this exercise, the 2022 Panel identified two factors militating against the application of the doctrine: 1) changes in circumstances between 1997 and 2017; and 2) its assessment of "potential injustice" of applying estoppel.

[67] VSB contends no fair review of the 2022 Panel's treatment of the "potential injustice" factor can lead to the conclusion that it was unreasonable. It says it was an error on the part of the chambers judge to conclude "[t]he 2022 Majority's

statement that the public interest in the finality of litigation would not be materially undermined by not applying issue estoppel is contrary to jurisprudential authority”. It says the cases relied upon by the judge identify “vertical” finality (appeals in the same proceeding) as a central aim of commercial arbitration but do not address “horizontal” finality over subsequent proceedings. A principled distinction may be drawn between these forms of finality, with the former reflecting deference to arbitrators, while the latter limits the discretion of sequential arbitrators.

[68] VSB says there is no support in the law for the proposition accepted by the chambers judge that the discretion not to apply issue estoppel set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, operates more narrowly in the arbitral context than in court litigation.

[69] Additionally, VSB argues the chambers judge misread the 2022 Award when she concluded it turned upon the Panel’s view that the 1999 Award was *wrong*. The 2022 Panel concluded that the 1999 Panel’s interpretation was now unworkable, not wrong, and if not displaced it would result in neither of the parties being able to resolve the market value question, contrary to their express contractual intentions.

[70] In contrast, Beedie contends the standard of review to be applied by this Court to the 2022 Award is correctness because the analysis of standard of review in *Sattva* has been overtaken by *Vavilov*. The Supreme Court of Canada in *Vavilov* made it clear that a statutory right of appeal is an expression of a legislative intention to apply the appellate standard of review. As the concurring judges in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, held, in the case of a statutory appeal from an arbitral award to a court, where all questions are questions of law, the consistent interpretation of legislative intention should result in a correctness review.

[71] Beedie says however that the 2022 Award was both incorrect and unreasonable and should be set aside on either standard of review, adopting the

approach taken by the majority in *Wastech*. VSB, in reply, contends that if this Court selects correctness as the standard, the 2022 Award is also correct.

Issue Estoppel

[72] VSB says the chambers judge erred in identifying issues to which estoppel applied. It contends her conclusion that the 1999 Panel had determined that “an ‘immediate use’ was the use that was the most expeditious and certain” was simply her preferred interpretation of the that Award. Relying on *Krishnapillai v. Canada*, 2001 FCA 378 at para. 9, VSB submits that issue estoppel arises only where a conclusion is express in a previous decision, or where there is “... no doubt that the decision could not have been made without that issue being addressed and actually decided”. Thus, where a conclusion is not expressed, and is only one of several avenues to the conclusion reached, no issue estoppel arises: (see also *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 36; *272649 Alberta Ltd. v. Alberta Auto Transport Ltd.* (1995), 170 A.R. 7 at para. 18).

[73] As Justice Décary wrote in *Krishnapillai* at para. 9 (citing as authority for the proposition *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, and *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, at page 38 ff.): “For the issue to have been fundamental to the earlier proceeding, there must be no doubt that the decision could not have been made without that issue being addressed and actually decided. There is no equivocal finding which can found issue estoppel”.

[74] VSB notes the chambers judge acknowledged the interpretation of “immediate use” she considered the 1999 Panel to have adopted was not expressed in the 1999 Award but was “implicitly bound up” in it. VSB contends that cannot be said in this case because, as is clear from the divergent views of Melnick J., Stephens J., the 2022 Panel, and Chan J., there is no consistent interpretation of the 1999 Award.

[75] In response, Beedie says the 2022 Panel did not have regard to the language of the 1999 Award as a whole; it failed to recognize the comparative

language in the 1999 Award or the 1999 Panel’s express consideration of which of the two available uses under the zoning bylaw was faster to obtain and certain.

[76] Beedie contends there is nothing in the 1999 Award that says outright use was immediate because approval could be obtained in seven to twelve weeks. Nor does the 1999 Award say that, if approval of an outright use were to take longer than twelve weeks, it would not be immediate. It says the 2022 Panel erred in concluding that, despite the references to relative timeliness and certainty, the 1999 Award “... did not find, expressly or implicitly, that the “immediate use” is the lawful use for which approval can be obtained most expeditiously”.

[77] Beedie also notes that the 2022 Panel ignored the important question of certainty, in particular, the 1999 Panel’s view that “the very fact that conditional use is discretionary, and not a legal entitlement, defeats coming within the concept of ‘immediate development’”. Beedie argues that certainty of use and timeliness are related concepts and submits it is unsurprising that a conditional use, which is discretionary, would take longer to approve than a use that is a “legal entitlement”.

[78] Beedie says the 2022 Panel failed to address the lack of reference in the 1999 Award to the absolute time required to obtain a permit as a material factor. If the only issue was whether the actual time to obtain a development permit was too long to be “immediate”, the 1999 Award could simply have stated that twelve weeks or less was “without delay”, or conversely that more than twelve weeks was not, and stopped there.

[79] Beedie says in principle that an interpretation of the 1999 Award that allows for repeated interpretations of the lease, or for a finding that there is no immediate use for the lands at all, as the 2022 Panel has proposed, is unreasonable and incorrect.

Consideration of Irrelevant Factors

[80] The 2022 Panel considered the non-exhaustive list of factors identified in *Danyluk*, with appropriate contextual modification, when deciding whether to apply the doctrine of issue estoppel. It rejected VSB’s submission that it could consider the correctness of the 1999 Award when deciding whether to apply the doctrine, holding: “... the authorities make clear that the mere fact that a subsequent decision-maker finds the prior decision to be incorrect does not justify the exercise of the discretion not to apply issue estoppel”.

[81] The 2022 Panel determined that “nothing in the wording of the arbitration agreement [precluded] the application of issue estoppel”. Similarly, it rejected VSB’s suggestion that “as general rule, the doctrine of issue estoppel should be applied differently in arbitrations than in proceedings such as *Danyluk*”. The Panel then went on to conclude that the right of VSB to appeal the 1999 Award, the safeguards in the process, and the expertise of the arbitrators were all factors that weighed in favour of the application of the doctrine.

[82] In considering the change of circumstances, the 2022 Panel had already accepted VSB’s point that “if the disagreement with the prior decision is attributable to a change or clarification of the law this might be a factor militating against a strict application of issue estoppel”. The Panel found no such significant change or clarification of the law had occurred since the 1999 Award. However, it found the circumstances in which the 2017 dispute arose differed from those considered by the 1999 Panel from an evidentiary perspective. In particular, the 2022 Panel noted the fastest approval timeline was now six to eight months for outright use, compared to seven to twelve weeks in 1999. With this change, none of the available uses for the lands would be “immediate” within the 1999 Panel’s definition. Therefore, for reasons beyond the parties’ control, strictly applying issue estoppel and the 1999 Panel’s definition would make it impossible to determine market value and would frustrate the parties’ intentions. As this outcome could be avoided by not applying issue estoppel and instead applying

the 2022 Panel’s interpretation of the lease, it found this strongly supported the exercise of discretion.

[83] After coming to that conclusion, the Panel turned to the final factor of whether the application of issue estoppel would work an injustice, and expressed the opinion from which the second legal question before us arises:

[176] We do not consider that the public interest in the finality of litigation would be materially undermined by declining to apply the doctrine of issue estoppel in this instance. The Lease represents a private commercial relationship. It provides for serial “litigation” of the question of “market value” at various points in time. The agreed process is private arbitration, not court litigation. Although this award may possibly be challenged on the grounds that the Tribunal has made an error of law, and although - if leave to appeal were granted - a court decision might establish a legal precedent with broader public implications, the award itself does not establish a legal precedent that might impact persons other than the parties to the Lease. There is also a public interest in enforcing private contracts to reflect the true intentions of the parties. This is why, as stated in *Sattva*, the interpretation of contracts “has evolved towards a practical, common-sense approach not dominated by technical rules of construction”.

[177] In our view, it would work an injustice in this particular case to strictly apply the equitable doctrine of issue estoppel. The Lease clearly intends that Beedie should have options to renew at rents based on values that either would be agreed or determined by arbitration. If the agreed arbitration mechanism cannot operate to determine the value because - as has now been proven to be the case - the 1999 Award’s interpretation of the Lease is unworkable, the express contractual intentions of both parties are frustrated. To perpetuate the 1999 Award’s interpretation in these circumstances would result in a serious injustice to both parties.

[84] Beedie submits the 2022 Panel here clearly relied upon irrelevant and what it describes as “incorrect factors”, noting that in *Vavilov* the majority wrote: “a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion”.

[85] Beedie argues, and the chambers judge accepted, that the 2022 Panel wrongly considered two irrelevant factors in declining to apply issue estoppel:

- a) a “diminished” interest in finality in private arbitrations; and

- b) a public interest in enforcing contracts to reflect the “true intentions” of the parties.

[86] It asserts that both factors “run directly contrary to established authority” and neither falls within the list of factors from *Danyluk*.

[87] Beedie submits it was unreasonable for the 2022 Panel to conclude the “public interest in the finality of litigation” would not be materially undermined by a decision not to apply the doctrine of issue estoppel. In coming to this conclusion, it says the Panel misunderstood “public interest” in relation to issue estoppel as being the public’s interest in having the matter finally resolved, rather than the public’s interest in maintaining the rule that litigants should be vexed only once with the same cause. Beedie noted that, in other arbitrations arising from lease disputes, the “interpretation of the leases should as a matter of principle be caught by issue estoppel” and the presence of a subsequent rent determination under a lease should “not mean that litigation on the same issue between the same parties should be permitted”: citing *Victoria University (Board of Regents) v. GE Canada Real*, 2016 ONCA 646 at para. 134.

[88] Further, it argues, the 2022 Panel erroneously proceeded on the basis that finality is less important in arbitration. It contends there is no principled basis for applying issue estoppel differently simply because the proceeding is an arbitration. Beedie contends VSB is now attempting to justify the 2022 Panel’s discussion of finality by drawing an unwarranted distinction between appellate “vertical” finality and sequential “horizontal” finality and arguing that what *Teal Cedar* says about finality is applicable only to the former and not the latter. Instead, the 2022 Award, in effect, creates two interpretations of the same provision, and it is now unclear how issue estoppel might operate on a subsequent arbitration. The significance of certainty and finality in the interpretation of a long-term lease was addressed in *Victoria University*, which involved a prior interpretation of a rent review provision in a long-term lease. The Ontario Court of Appeal refused to endorse a *de novo* interpretation of the lease

on a subsequent arbitration and affirmed the importance of finality and certainty, noting (at para. 135) that preventing relitigation of the same issue is “the foundational purpose that supports the doctrine of issue estoppel”.

[89] Insofar as the parties “true intentions” are concerned, Beedie says that, while the 2022 Panel acknowledged the law did not permit it to refuse to be bound by a previous award because it was “wrong”, when it asked whether applying issue estoppel would produce a result that would accord with the “true intentions” of the parties, it was doing just that. It submits: “[t]here is no difference between these exercises”, and:

A subsequent decision maker is only permitted to consider the “wrongness” of a prior decision as a factor in issue estoppel where that prior decision is found to be “patently perverse”, because to accept otherwise would be to eliminate the doctrine of issue estoppel entirely: *MacDougall v. Lake Country (District)*, 2012 BCCA 408 at para. 36.

[90] It disputes VSB’s submission that the reference to the “true intentions” of the parties in the 2022 Award refers to the unworkability of the lease that would result from the application of the doctrine of issue estoppel. It says the reference in the 2022 Award to “true intentions” was a reference to the 2022 Panel’s own interpretation of the lease.

Remitting of the Valuation

[91] VSB says that, even where a court on appeal determines not to confirm an award, referring the matter back to the arbitration panel is the approach most consistent with the judicial restraint called for in arbitral matters, recognizing the parties’ mutual choice to submit to the process and to select suitable neutrals: citing *Coastal Contacts Inc. v. Elastic Path Software Inc.*, 2013 BCCA 541 at para. 36; *Appleton & Associates v. Branch MacMaster LLP*, 2020 BCCA 187 at paras. 26–29; *Sattva* at paras. 104–105.

[92] VSB contends the chambers judge erred in concluding it was “unnecessary to remit the matter to the arbitration panel” as there “is no basis not to apply issue estoppel”. It says the judge’s approach reflects a misapprehension of her proper

role on an appeal from an arbitral award, and an unjustifiable determination of facts and weighing of discretionary factors properly in the purview of the Panel. Specifically, those factors that might be weighed in exercising the discretion to apply the doctrine of issue estoppel include whether the textual approach adopted by the 1999 Panel was later held to be incorrect in law; and whether VSB was precluded from appealing on a leave test that has since been confirmed to be incorrect.

[93] Beedie says, having regard to the deferential standard of review applicable to the chambers judge’s decision to decline to remit the matter to the tribunal, none of the errors alleged by VSB merit appellate intervention. It says, citing *Vavilov* (at para. 142): “... [d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose”.

[94] It says, if it is accepted that the correct interpretation of the 1999 Award was it was founded upon the view that the word “immediate” should be read as meaning “most immediate”, and that finding binds the parties, then the lease is workable and the result in 2017 would be market value based on outright use, as it was in 1999. Put another way, there was no material change in the circumstances between 1999 and 2017, and it would have been a pointless exercise to remit the valuation to the 2022 Panel because the result is obvious.

[95] Beedie contends there were no additional findings of fact needed for the chambers judge to re-evaluate the market value, because the 2022 Panel determined on the evidence that the outright use in 2017 was still faster and more certain. Beedie does not address the points made by VSB with respect to factors that might affect the exercise of discretion.

[96] Beedie bases their “correct” interpretation of the 1999 Award on the proper approach to issue estoppel, as stated in *Danyluk*, being to identify: “the material facts and the conclusions of law or of mixed fact and law ... that were necessarily

(even if not explicitly) determined in the earlier proceedings”: at para. 24. It calls upon us to reject any suggestion that issue estoppel requires more than this.

[97] Beedie says applying this approach there are only two interpretations of the 1999 Award before this Court: 1) the 2022 Award’s finding that “immediate use” is based on the actual, absolute time it takes to obtain a permit from the city; and, 2) the chambers judge’s finding, and Beedie’s interpretation, that immediate use is based upon which use is certain and faster to obtain. As Beedie contends the 2022 Award’s interpretation was unreasonable, the chambers judge’s interpretation is the only reasonable, and correct, interpretation of the 1999 Award.

Discussion and Analysis

CA49215: The Procedural Appeal

[98] In my opinion, Beedie is correct that, while the well-established objects of the *Former Arbitration Act*: minimizing court involvement, limiting the scope of judicial review and recognizing the finality of commercial arbitration, should colour the court’s assessment of leave applications, different considerations apply to interlocutory relief pending the hearing of an appeal once leave is granted. Leave having been granted, the court must proceed on the assumption that there has been a judicial determination that an injustice may potentially arise from the enforcement of the award. Therefore, it was not an error for Stephens J. to consider the potential for a miscarriage of justice in exercising his discretion to stay the arbitral award.

[99] I would not accede to VSB’s argument that s. 31(3) only empowers the court to set conditions that a *prospective appellant* must meet when granting leave to appeal. In my view, the omission from the statutory language used in the *UK Arbitration Act 1979*, on which s. 31(3) was based, speaks to a legislative decision not to so limit the court’s discretion.

[100] Nor would I accede to the argument that the chambers judge imposed conditions “unbounded by any relationship to the subject matter of the appeal”. The judge’s intention was clearly to avoid giving effect to the decision under appeal. VSB submits the court cannot have power under s. 31(3) to grant relief in respect of a right or obligation other than one determined in “arbitration” or an “award”. However, if the chambers judge had simply stayed the 2022 Panel’s award setting the value of the lands and said nothing further with respect to rent, there would have been no effective determination of market value of the lands and no foundation for the May 17, 2023 notice of default. I agree with Beedie that suspending the operation of the 2022 Award requires staying proceedings that are premised on the Award’s determination of market value on which rent is based.

[101] In any event, VSB concedes that the chambers judge had inherent jurisdiction to stay the effect of the 2022 Award. VSB says that jurisdiction does not extend to precluding it from taking steps to exercise its rights in accordance with the lease pending appeal. VSB says such an order would amount to injunctive relief that can only be granted to preserve the subject matter of a dispute before the court. It argues that the absence of any pleading or argument that the conduct sought to be enjoined is unlawful is fatal to an application for an injunction. In my view, it is an answer to that argument to say Beedie might have simply commenced an action seeking a declaration that its non-payment of rent determined as a percentage of the 2022 Award did not amount to a breach of the lease, and sought a stay of proceedings on a notice of default in those proceedings. Requiring Beedie to argue in separate proceedings that the valuation was faulty and that the provision of the lease that an arbitral award with respect to “market value” is to take effect “forthwith” must be read as “forthwith subject to court orders”, seems to me to be imposing unnecessary procedural hurdles upon Beedie. Such hurdles would be inefficient and contradict the objectives of the *Former Arbitration Act* which VSB looked to rely upon.

[102] In my view, the chambers judge did not err in staying the effect of the 2022 Award upon granting leave to appeal. It was not an error for him to weigh the potential injustice that might result if the 2022 Award were not set aside, nor to consider that potential miscarriage in exercising the discretion to stay its effect pending the hearing of the appeal.

[103] As I have noted above, I am of the view that all other procedural questions raised by VSB are moot and do not involve questions of general importance.

CA50395: The Substantive Appeal

Standard of Review

[104] As I have noted, the parties agree that we are required to determine whether Chan J. identified and correctly applied the standard of review on the appeal of the 2022 Award, thereby stepping into her shoes. As this Court noted in *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021

BCCA 428:

[24] On questions of law, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33. In this case, the chambers judge's decision regarding the standard of review to apply to an application under s. 34(2)(a)(iv) of the *ICAA* is a question of law, which is itself subject to a correctness standard of review.

[105] Our first task, then, is to determine what standard of review applies to the two questions of law with respect to which leave was granted:

- a) whether the 2022 Panel erred in law in its interpretation of the prior award and identification of the issue to which estoppel applied; and
- b) whether the 2022 Panel considered irrelevant factors in exercising their discretion not to apply issue estoppel.

[106] If, after applying the selected standard, we are of the opinion that the 2022 Award should be set aside, we must determine what standard of review applies to the challenge of the chambers judge's decision not to remit the valuation to the 2022 Panel. In comparison with selecting the standard of review

for the 2022 Panel's actions, the standard for the chambers judge's decision is clear. In *Victoria University*, the Ontario Court of Appeal held:

[137] The Appeal Judge's decision declining the request to remit the dispute to a new arbitral panel was discretionary in nature: see, for example, *Popack v. Lipszyc*, 2016 ONCA 135, 129 O.R. (3d) 321. Indeed, this is conceded by Revenue Properties. Absent an error of law, a material misrepresentation or a clearly wrong result, a discretionary decision attracts deference.

The Supreme Court of Canada on Appeals from Arbitration

[107] In *Sattva*, the Supreme Court of Canada addressed the standard of review on an appeal under the *Former Arbitration Act*. The judgment is a clear statement of two principles:

- a) arbitral awards differ in nature from the decisions of statutory tribunals;
and
- b) arbitral awards are presumptively reviewed on a reasonableness standard.

[108] In support of the first principle, Justice Rothstein writing for the Court noted that appellate review of arbitration awards takes place under "a tightly defined regime specifically tailored to the objectives" of commercial arbitration, and for that reason may be differentiated from judicial review of tribunal decisions. Further, the parties to arbitration select the number and identity of the arbitrators. Hence, the judicial review framework developed in *Dunsmuir* is "not entirely applicable to the commercial arbitration context": *Sattva* at para. 104.

[109] Having said that, the Court then set out the rationale for adopting the *Dunsmuir* framework in part. For both arbitration and administrative tribunals, decisions are subject to a court's review, where the expertise of the decision maker is a factor. For commercial arbitration, this expertise arises from the parties having selected a decision maker who is presumed to be qualified. Therefore, "aspects of the *Dunsmuir* framework are helpful in determining the appropriate

standard of review to apply in the case of commercial arbitration awards”: *Sattva* at para. 105.

[110] Justice Rothstein went on to note that *Dunsmuir*, and the subsequent case law, confirms the “nature of the question at issue” is the focus for determining the applicable standard of review. For commercial arbitration “... appeals are restricted to questions of law, [and thus] 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”: *Sattva* at para. 106.

[111] The underlying framework referred to in *Sattva*, as established in *Dunsmuir*, is no longer the prevailing paradigm. The majority in *Vavilov* identified a new framework for determining the standard of review of administrative decisions. That framework establishes reasonableness as the standard applicable in all cases, except where a clear indication of legislative intent or the rule of law compels a departure from that standard: *Vavilov* at para. 17. The exception arising from clear expressions of legislative intent is described in unambiguous terms in the passages below, which I cite at length as much of what is said is applicable in the case at bar:

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature’s intent that appellate standards apply when a court reviews the decision

...

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012]

3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied ... We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

[36] We have reaffirmed that, to the extent possible, the 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. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in her factum, [translation] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] 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. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. ... Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[Emphasis added.]

[112] The majority in *Vavilov* held that the presumption of consistent expression favoured interpreting all statutory provisions establishing a right to appeal from administrative decisions consistently, and as importing the appellate standards described in *Housen v. Nikolaisen*, 2002 SCC 33. The majority found no reason was presented to support interpreting “appeal” as having a different meaning in the context of commercial, criminal, or administrative law. In particular:

[44] ... [A]ccepting that the word “appeal” refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word “appeal” also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues’ suggestion that our position in this regard “hinges” on what they call a “textualist argument” (at para. 246) is inaccurate.

[Emphasis added.]

[113] Where a statute provides a leave requirement for appeals, such as in our *Former Arbitration Act*, the majority expressly noted “it does not affect the standard to be applied if leave is given and the appeal is heard”: *Vavilov* at para. 50.

[114] The “textualist” criticism of the majority’s reasoning referred to in the above excerpt from the majority judgment in *Vavilov* is the dissenting judgment of Justice Abella and Justice Karakatsanis. That criticism begins from the position that a statute contemplating a role for the courts cannot be taken as impacting the degree of deference owed to decisions. Appeal provisions serve a range of functions unrelated to the standard of review, and the mere presence of the word “appeal”, without a consideration of the statute as a whole, disregards the jurisprudence that has distinguished courts and administrative decision makers. Since *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 1994 CanLII 103, courts have consistently held that a statutory right to appeal a decision to a court is not determinative of legislative intent to describe

appellate standards of review. For that reason, the majority's approach was said to diverge from established jurisprudence without sufficient analysis to support this divergence: *Vavilov* at paras. 245–247, 249.

[115] Everything said in *Vavilov* is said in the context of appeals from administrative tribunals, and the judgment resolves questions in that context. The Court did not address standards of review on appeals from arbitral awards. The Court neither restated the law as described in *Sattva* and *Teal Cedar*, nor addressed standards of review outside the context of judicial review of administrative decision making. By expressly reserving the question for further consideration, in my view, the Court has signaled that appellate courts should not regard this as a question of settled law.

[116] Following *Vavilov*, *Wastech* came on appeal from the British Columbia International Commercial Arbitration Centre (via this Court). Leave had been granted by the trial court under s. 31 of the *Former Arbitration Act*, now under s. 58 of the *Current Arbitration Act*, to appeal two questions of law arising from the award. *Wastech* submitted that the questions of law were subject to review on a reasonableness standard, but also said the arbitrator committed no reviewable errors even on a correctness standard.

[117] Justice Kasirer, writing for the majority, acknowledged that the findings in *Sattva* and *Teal Cedar*, that reasonableness is the standard under our *Former Arbitration Act*, were not altered expressly by *Vavilov*. In *Sattva* and *Teal Cedar* the Court had “emphasize[d] that deference serves the particular objectives of commercial arbitration” in selecting the standard: *Wastech* at para. 45, citing *Sattva* at para. 104 and *Teal Cedar* at paras. 81, 83. With the parties' agreement, he went on to hold that:

[46] ... 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.

[118] The concurring judges, Brown and Rowe JJ., joined by Côté J., were of the view the court should identify the applicable standard of review and, in doing so, apply the logic of the judgment in *Vavilov* to clarify the law. The reasoning of the concurring judges has since been adopted elsewhere as justification for a departure from the *Sattva* standards of review. They began by acknowledging that certain trial courts have been reluctant to apply *Vavilov* to arbitration for the following reasons:

[118] First, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, do not support the application of appellate standards of review to arbitration appeals, and *Vavilov* did not expressly overrule those decisions (*Ontario First Nations*, at para. 71; *Cove Contracting Ltd.*, at paras. 10-12). Secondly, *Vavilov* was driven by “constitutional considerations that justify deference by the judiciary to the legislature” (*Ontario First Nations*, at para. 72). In contrast, the standard of review that applies to appeals from private arbitration awards is “guided by commercial considerations about respect for the decision-makers chosen by the parties. As a result, deference is justified by the parties’ contractual intent” (*Ontario First Nations*, at para. 72).

[119] However, the concurring judges found that, where a legislative appeal provision is present, the standard of review does not turn on distinctions between arbitral and administrative decisions. The standard is determined as “a matter of statutory interpretation”. The presumption of consistent expression relied on by the majority in *Vavilov* may be determinative: “What matters are the words chosen by the legislature, and giving effect to the intention incorporated within those words” (at para. 120).

[120] The concurring judges observed:

[119] There are important differences between commercial arbitration and administrative decision making (*Sattva*, at para. 104). Those differences do not, however, affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov*, “a legislative choice to enact a statutory right of appeal signals an intention to ascribe an

appellate role to reviewing courts” (para. 39). This interpretive principle applies in similar manner to statutory rights of appeal from arbitral awards ...

[120] ... where a statute provides for an “appeal” from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*. Concluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein.

[121] The appeal in this case was brought pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, which provides that, either by consent of the parties or with leave of the Supreme Court of British Columbia, a party to an arbitration “may appeal to the court on any question of law arising out of the award”. In light of *Vavilov*, it follows that the standard of review to be applied by this Court in this case is correctness (*Housen*, at para. 8) ...

[Emphasis added; footnote omitted.]

Appellate Decisions

[121] Since *Wastech*, courts have struggled with the fact that, while *Sattva* has not been expressly overruled, its continued application seems to be at odds with the view expressed by the majority in *Vavilov* that “where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied”: *Vavilov* at para. 35.

[122] In *Travelers Insurance Company of Canada v. CAA Insurance Company*, 2020 ONCA 382 at para. 14, the Ontario Court of Appeal applied a correctness standard of review to a question of law decided by an arbitrator. While the court relied on the reasoning of *Vavilov*, it also held the errors identified were constitutional, jurisdictional, and exceptional — in respect of which deference would not be due in any event. There was, however, no suggestion in the judgment of Justice Lauwers that the standard of review was settled by *Sattva* nor that the court was bound by *stare decisis*.

[123] In *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Commission*, 2021 ONCA 592, an appeal from domestic arbitration, a judge of the Superior Court of Ontario had ruled that the reasonableness standard of review applied to the panel’s interpretation of a contract, relying on *Sattva* and *Teal Cedar*. However, the judge found the panel’s interpretation of the contract in issue to be both reasonable and correct. On appeal, Justice Jamal, as he was,

writing for the court, held it was unnecessary to address whether *Vavilov* undermined the standard of review analysis in *Sattva* and *Teal Cedar*, because the judge did not err in upholding the majority's decision on either standard of review. In any event, the appeal turned on questions of contractual interpretation which attract a deferential standard of review, and there was no suggestion that *Vavilov* changed the law on this point: *Ontario First Nations* at paras. 37–40.

[124] Since then, another panel of the Ontario Court of Appeal has dismissed an appeal from an arbitral award where it was of the view that the arbitrator's interpretation of a contract had erroneously been considered by a reviewing judge to be a question of law, reviewable on a standard of correctness: *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861 at para. 40. Neither this case, nor *Ontario First Nations*, engaged with the analysis in *Travelers Insurance* where the court relied in part on *Vavilov*.

[125] While the court in *Tall Ships* found the arbitrator's judgment was reasonable, the finding that the arbitrator's impugned decision was a finding of mixed fact and law, and not an extricable error of law, nor subject to interference on appeal, appears to me to be simply, like *Ontario First Nations*, an application of the standards in *Housen*.

[126] The standard of review from arbitration was directly addressed in *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1. Justice Bielby, writing for the court, noted the chambers judge had applied a reasonableness standard of review to the arbitral award in issue. In doing so, the chambers judge considered whether the award fell within the range of possible, acceptable outcomes and whether it was transparent, intelligible, and defensible: *Northland Utilities* at para. 20. Justice Bielby considered it necessary to address whether the chambers judge was correct in the selection of that standard of review. She observed that, prior to *Vavilov*, "courts regularly relied on the approach established in *Dunsmuir*, to conclude that the reasonableness standard applied to

commercial arbitration decisions as well as to the decisions of administrative tribunals, even on questions of law”: *Northland Utilities* at para. 21. However:

[22] In *Vavilov* at para. 10, the Court held that while reasonableness remains the presumptively applicable standard of review, that presumption is rebutted “by a clear indication of legislative intent to the contrary or where required by the rule of law.” The Supreme Court stated that one of the ways the legislature can indicate that it intends to derogate from a reasonableness review, is by providing a “statutory appeal mechanism from an administrative decision to a court”: *Vavilov* at para. 17.

[127] Justice Bielby went on to note that the Supreme Court of Canada had not answered the question whether the new standard of review framework in *Vavilov* applied to commercial arbitration, and trial courts were divided on the question. After discussing the trial court decisions in *Buffalo Point First Nation et al. v. Cottage Owners Association*, 2020 MBQB 20; *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830; *Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 (Ravine Park)*, 2020 ABQB 106; and *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516, and the appellate decisions in which the issue had been avoided, *Nolin v. Ramirez*, 2020 BCCA 274, and *Travelers Insurance*, she held:

[36] We conclude that the Supreme Court of Canada’s choice not to expressly exclude commercial arbitration decisions from the new framework laid down in *Vavilov*, does not compel the conclusion that the Court intended the reasonableness standard of review to continue to apply any more than the opposite – that the Court intended *Vavilov* to apply to commercial arbitration. Silence cuts both ways.

[Emphasis added.]

[128] For that reason, Bielby J.A. was of the view that the reasons given in *Vavilov* for developing a new framework had to be examined to determine whether the same reasoning would apply to a statutory appeal from an arbitrator’s decision. *Northland* had come before the courts pursuant to the statutory appeal mechanism in the relevant *Arbitration Act*, and the question the court was asked was whether, applying the “presumption of consistent expression”, the word

“appeal” used in the statute should mean the same thing in an administrative law context as in a commercial law context: *Northland* at para. 39. She held:

- a) In *Vavilov*, the Court did away with the presumption of reasonableness review being premised on notions of relative expertise, therefore, a commercial arbitrator’s presumed expertise does not justify an exemption from an appellate standard of review any more than does the expertise of administrative tribunals: *Northland* at para. 40.
- b) There is no reason to have an otherwise diverging standard of review that applies only to arbitration decisions when all other decisions where statutory appeal is provided are reviewable on the appellate standard: *Northland* at para. 40.
- c) There is no basis to believe maintaining reasonableness as the standard of review for commercial arbitration decisions is necessary to prevent overwhelming the courts with appeals: *Northland* at para. 41.
- d) The commercial attractiveness of Canada as a forum for resolution of local and global business disputes may be enhanced, rather than reduced, by adopting uniform, *Housen* appellate standards of review on questions of law: *Northland* at para. 42.
- e) The ability of parties to consensually participate in arbitration will not be affected by adopting an appellate standard of review where legislation allows parties to opt out of the statutory appeal process: *Northland* at para. 43.

[129] Justice Bielby therefore concluded the standard of review framework described in *Vavilov* applies to commercial arbitration decisions reviewed under a statutory right of appeal: *Northland* at para. 44.

[130] *Northland* was followed in *Burwell et al. v. Wozniak*, 2024 ONSC 5851; and, recently, in *Ontario Minister of Transportation v. Link 427 General*

Partnership, 2025 ONSC 2375, where Justice Kimmel helpfully reviewed the landscape and concluded:

[47] Applying a correctness standard of review to ... extricable questions of law is conceptually aligned with the reasoning of the Supreme Court in *Vavilov*, and of other courts in *D Lands*, *Burwell* and *Northland Utilities* ... It not only respects the origins and evolution of the parallel appeal standards from decisions of administrative tribunals and commercial arbitrators, but is also the only logical standard that can be applied to a review of extricable questions of law in this context. ...

[131] Justice Kimmel found some support for the application of *Housen* standards of appeal from a comment made by Chief Justice Wagner in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 27. The question in that appeal was what standard of review applies in statutory appeals founded upon questions of procedural fairness and abuse of process. The Court held that the proposition in *Vavilov*, that appellate standards are to apply when the legislature provides for a statutory appeal mechanism from an administrative decision maker to a court, was not of limited application:

[27] ... While this proposition was stated in the context of substantive review, the direction that appeals are to be decided according to the appellate standards of review was categorical. Thus, where questions of procedural fairness are dealt with through a statutory appeal mechanism, they are subject to appellate standards of review.

[Emphasis added.]

[132] A contrary view is expressed in *Buffalo Point First Nation v. Buffalo Point Cottage Owners Association Inc.*, 2025 MBCA 72, by the Manitoba Court of Appeal. Justice Monnin, writing for the court in that case, found the reasonableness standard articulated in *Sattva* and affirmed in *Teal Cedar* remained applicable. He noted that trial court decisions in Manitoba had “gone each way” in the debate and the only appellate decision to squarely address the standard of review, *Northland*, turned on the view that the Supreme Court of Canada’s silence on the question in *Vavilov* and *Wastech* “cut both ways”: *Buffalo Point* at paras. 41, 45. Justice Monnin rejected that view, noting *Vavilov* did not expressly or impliedly overturn *Sattva* or *Teal Cedar*, and concluding those judgments “are still good law until directed otherwise”: *Buffalo Point* at para. 44.

He found support for this conclusion in the comments of Kasirer J. in *Wastech* that the Court chose not to address *Teal Cedar* and *Sattva*, and this silence did not mean the cases became invalid precedents: *Buffalo Point* at para. 45. He went on to note the unique features of commercial arbitration as being further support for retaining the reasonableness standard:

[45] ... 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.

[133] Justice Monnin addressed the argument that the references to appeals in statutes must be read consistently, after describing the logic underlying the majority’s application of the presumption of consistent expression, and observed:

[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).

[134] The Alberta Court of Appeal commented on the divergent authorities in *Moffat v. Edmonton (City) Police Service*, 2021 ABCA 183. The court drew a distinction between statutory provisions for appeals *to courts*, which implicitly

evidence an intent to apply the appellate standards from *Housen*, and provisions for appeals to *other tribunals*, which do not, writing:

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

[Emphasis added.]

[135] While this review of the jurisprudence shows certain courts remain reluctant to take a position on the implications of *Vavilov* for the standard of review for commercial arbitrations, in *Northland*, Bielby J.A. provides a principled approach to applying the *Vavilov* framework to commercial arbitration. This approach responds not only to the shift in the law brought in by *Vavilov*, but alongside *Wastech*, it responds to the critiques raised in *Buffalo Point* for adopting the *Housen* standards.

British Columbia Cases

[136] This Court considered the applicability of the reasoning in *Vavilov* to appeals from arbitration, prior to *Wastech*, in *Nolin v. Ramirez*, 2020 BCCA 274. Justice Bennett, writing for the majority, noted that the Court in *Vavilov* made no mention of *Sattva* or *Teal Cedar*, which were then “relatively recent cases”, establishing that the standard of review from an arbitral award is “almost always” reasonableness and that the presence of a legal question does not preclude the application of that standard: *Nolin* at para. 34. She observed, as others have, that, despite the fact the British Columbia International Commercial Arbitration Centre Foundation intervened in *Vavilov* advocating for the preservation of deferential

standards of review, the Court did not address standards of review from arbitral awards: *Nolin* at para. 35. This led to the “issue percolating in courts across the country” that continues to percolate: *Nolin* at para. 36. The judgment in *Nolin* did not contribute to its resolution:

[37] In this case, if the statutory appeal mechanism contemplated in *Vavilov* captures s. 31(3.1) of the *Arbitration Act*, the standard of review is palpable and overriding error for questions of mixed fact and law where the legal principle is not readily extricable: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26–37. If *Vavilov* does not apply, the standard of review is reasonableness: see *McMillan v. McMillan*, 2015 BCSC 2177, aff'd 2016 BCCA 441, where Punnett J. relies on *Sattva*.

...

[39] In my opinion, it makes no difference in this case whether the standard of review is reasonableness or palpable and overriding error, as the result would be the same. Since it is unnecessary to decide the obviously complex question, I will leave it to another day.

[137] In *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294, Justice Voith writing for this Court, noted:

[98] ...[T]his Court has not decided whether *Canada (Minister of Citizenship and Immigration) v. Vavilov*, ... a decision that post-dates *Sattva* and *Teal Cedar*, applies to commercial arbitration decisions reviewed as a result of a statutory right of appeal. In *Vavilov*, the majority ruled that an administrative decision subject to a statutory right of appeal should be reviewed under the appellate standard. This would be correctness for questions of law: at paras. 36–37.

...

[101] In my view, there is no need to address this question. This is because the parties to this appeal have not done so and because the application of a “reasonableness” standard does not serve to uphold the Award.

[138] Notably, in my view, in neither case did this Court conclude that the standard of review question in arbitration appeals is settled by *stare decisis*.

[139] In *Iululemon athletica*, this Court considered the standard of review on applications to set aside domestic or international arbitral awards on jurisdictional grounds. Justice Marchand, as he was, noted *Vavilov* does not address the standard of review on an appeal from a domestic commercial arbitration, described in *Sattva* as reasonableness: *Iululemon athletica* at paras. 45–46.

However, that observation formed no part of the ratio of the case, which turned on the view that the judgment in *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, continues to stand for the proposition that administrative law standards should not be used to create a standard of review other than that provided for in the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233: *Iululemon atletica* at paras. 46–47.

[140] The trial courts in BC have, however, adopted the *Housen* standards in family law arbitration appeals, which were formerly under the *Former Arbitration Act*, but are more recently under s. 19.19 of the *Family Law Act*, S.B.C. 2011, c. 25, in a number of well-reasoned judgments, including *Zemtsova v. Shevalev Estate*, 2023 BCSC 1375, aff'd 2025 BCCA 114; *Pearce v. Napier*, 2024 BCSC 1655; *Botten v. Botten*, 2024 BCSC 39, aff'd *Botten v. Dupuis*, 2024 BCCA 284.

[141] In *Zemtsova*, Stephens J. held:

[80] In short, considering legislative intention—mainly the *Arbitration Act*'s provision of a statutory appeal to the court and associated comments in *Vavilov*—appellate standards apply to a s. 31(3.1) family law arbitration appeal.

[142] In *Botten BCSC*, Brongers J. held he was bound by *stare decisis* to follow *Zemtsova*, and apply the *Housen* appellate standards of review, despite *Zemtsova* being decided under the *Former Arbitration Act* and his appeal falling under s. 19.19 of the *Family Law Act*, because the wording of the statutory provisions were identical: *Botten BCSC* at para. 42. When this Court upheld the judgment of Brongers J., it expressly did not decide whether he was correct to apply the more stringent appellate standard of review: *Botten BCCA* at para. 35.

Academic Commentary

[143] There has been considerable commentary on the diverging opinions with respect to the standard of review in commercial arbitration, including:

- a) 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 1.
- b) Jennifer K. Choi & Hon. Thomas A. Cromwell, “A Question for Another Day: Vavilov and Appeals from Commercial Arbitration” (2022) 3:1 Can. J. Commercial Arbitration 42.
- c) Ivy Tengge Xu, “Contractual Interpretation of the Standard of Review in International Commercial Arbitrations: an Alternative to Transplanting Administrative Law” (2024) 102:3 Can. Bar Rev. 673; and
- d) William G. Horton & Terence F. Young, “The Inapplicability of Vavilov’s Presumption of Consistent Expression in Commercial Arbitration” (2025) 56:1 Advocate Q. 1.

[144] In their early review, Plotkin and Mancini suggest that a consistent assessment of legislative intent in the administrative law and arbitration law contexts, “makes Sattva a questionable precedent” and that applying the appellate standard of review framework in Vavilov to private arbitration is “consistent with the underlying principles nourishing arbitration law in Canada”. In support of their view, they point to the model uniform statutory language adopted in most provinces as indicating an intent to apply the appellate review framework described in *Housen*. The language uses appellate nomenclature rather than outcome-based language or language suggestive of a reasonableness standard, such as “rational” or “transparent”. Statutory provisions typically provide for arbitration “in accordance with law,” which suggests that applying the law incorrectly invites scrutiny. They argue that respect for party autonomy favours

reading legislative provisions permitting appeals to the trial courts in arbitration legislation as enabling parties to opt for an appeal on *Housen* standards, while knowing they retain unfettered discretion to modify or exclude that regime.

[145] Choi and Cromwell argue that, if the Court in *Vavilov* had intended to overrule *Sattva*, it would have done so expressly. Citing *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2021 MBQB 77 at para. 75, and *Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.*, 2021 BCSC 1415, their conclusion is that *stare decisis* requires *Sattva* to be followed until it is expressly overruled.

[146] Xu distinguishes arbitration appeals from administrative appeals on the ground that the Court is not, in arbitrations, seeking “to legitimize or scrutinize the exercise of public power”. It is seeking to enforce a private contract that refers disputes to a chosen decision maker. In interpreting such contracts, she contends the court should look to contract law principles rather than “transplant *Dunsmuir* or *Vavilov*”, as the starting place is the parties’ contract, and then the impact of legislative intent and doctrines such as unconscionability. This argument, in my view, fails to address the fact that the legislature has constrained or displaced the contractual arrangement by describing a statutory appeal process. The choice of the standard of review engages the uniform public law framework described in *Vavilov*.

[147] Horton and Young advance the arguments found to be persuasive in *Buffalo Point*: first that *Sattva* has not been displaced as governing law, and second, that the “consistent expression” logic is weak. They write “the ‘reasonableness’ standard supports the contractual expectations of parties when they agree to arbitration whereas the ‘correctness standard’, despite its ostensible goal of producing ‘correct’ results, defeats those expectations”. They suggest there is a stronger case for the presumption of consistent expression within statutes than across statutes. When drafting new legislation, they argue, the legislature may not consider the meaning of a word in other statutes, and instead

may leave matters within court's unique expertise, like standard of review, for them to determine the meaning. They contend the presumption of consistency may be subject to competing considerations in different contexts, pointing to the Supreme Court of Canada's deviation from the presumption of consistency in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 1990 CanLII 117. In my opinion, this is criticism of the presumption of consistent expression, while the question for our purposes is whether it should be extended as in *Vavilov* to our case.

[148] Horton & Young contend that private commercial arbitration lacks the public law dimension of administrative law, as arbitrators do not determine the public law rights of parties; consistency on substantive issues is not important in arbitration; and arbitrators have no obligation to provide reasons, which form the basis for the reasonableness review described in *Vavilov*. They say (at 12): “ensuring ... arbitral decisions are ‘correct’ is not one of the stated purposes for which court intervention is permitted in any Canadian arbitration statute” that provides for appeals. I am uncertain that is correct because, as discussed below, the *Former Arbitration Act* requires judges to consider whether leave should be granted to “determine” points of law with the aim of preventing miscarriages of justice. In summary, they conclude (at 18):

Vavilov did not, and should not be understood to, dispense with the principle of contextual statutory interpretation. Quite the contrary, in interpreting administrative law statutes to determine the standard of review, the majority in *Vavilov* engaged in a highly contextual analysis that accounted for the common constitutional underpinnings of administrative statutes and the particular legislative and judicial roles involved in appeals from administrative decisions. On that basis, the majority decided to depart from its previous administrative law jurisprudence and held that statutory appeal rights were to be given determinative meaning in terms of standards of review. Its fleeting references to the “commercial law context” and to the “presumption of consistent expression” cannot foist *Vavilov* onto the arbitration context. This is especially so given the strongly reasoned, contextually justified, and unanimous decisions of the Supreme Court in *Sattva* and *Teal*⁶⁷ and the admonitions of the majority in *Wastech*.

Analysis

Stare Decisis

[149] Having considered the jurisprudence and commentary, it is my opinion that we are not compelled by *stare decisis* to follow *Sattva*. This is one of the rare cases where an appellate court can revisit an issue that appears to have been settled by the Supreme Court of Canada. Here, as in *Lanfer v. Eilers*, 2021 BCCA 241, we are faced with a statement of principle by the Supreme Court of Canada that appears irreconcilable with prior jurisprudence said to be binding upon us. In *Vavilov*, statutory rights of appeal to a court were held to presumptively import appellate standards of review, however, in *Sattva* and *Teal Cedar*, commercial arbitration appeals were held to almost always import a reasonableness standard of review.

[150] As this Court concluded in *Lanfer* and *Rosas v. Toca*, 2018 BCCA 191, a “matter may be revisited if new legal issues are raised as a consequence of significant developments in the law”: *Lanfer* at para. 44; *Rosas* at para. 172, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44; and *R. v. Comeau*, 2018 SCC 15 at para. 29.

[151] The minority in *R. v. Kirkpatrick*, 2022 SCC 33, (Côté, Brown and Rowe JJ.), who wrote on *stare decisis*, stated a legal change warranting a departure from the rule may arise from the release of subsequent decisions “attenuating” the precedent: at paras. 233–235. While this point of attenuation is difficult to define, the jurisprudence reveals a theme: a departure from precedent is justified where the precedent “relies on principles or gives effect to purposes inconsistent with those underlying the Court’s subsequent decisions”: *Kirkpatrick* at para. 235.

[152] I do not share the view expressed by Monnin J.A. in *Buffalo Point*, that *Sattva* was not impliedly overturned in *Vavilov*. *Sattva* relies on principles

inconsistent with those underlying *Vavilov* and thus justifies a departure from its approach.

[153] As *Northland* and Plotkin and Mancini’s commentary articulated, Rothstein J.’s analysis in *Sattva* hinged upon the application of the factors identified in *Dunsmuir* as a means of determining the appropriate standard of review. In concluding his analysis, Rothstein J. observed that “[t]he relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case”: *Sattva* at para. 106. That now-superseded *Dunsmuir* analysis called on the reviewing court to consider, among other factors, whether the enabling statute included a privative clause, whether the decision maker had special expertise, and the nature of the question before the decision maker, for example, whether the question was of central importance to the legal system and/or outside the decision maker’s expertise: *Dunsmuir* at paras. 55, 64. It did not give effect to the legislative intention implicit in the statutory right of appeal from the tribunal.

[154] In *Vavilov*, the Court described a “revised framework” in response to the fact that, while the application of the reasonableness standard was grounded in the necessity of avoiding “undue interference” in the face of the legislature’s intention to leave certain questions with administrative bodies, the standard had come to be routinely applied *even where the legislature had provided for a different institutional structure through a statutory appeal mechanism*: at para. 8. That failure to uphold legislative intent was, in part, the mischief the revised framework was intended to address.

[155] *Vavilov*’s revised framework, as discussed above, begins with a presumption that reasonableness is the applicable standard for all appeals from administrative tribunals. This presumption is rebutted where the legislature has expressly prescribed a different standard *or implicitly done so by providing a statutory appeal mechanism to a court*. The majority explained this rebuttal as follows:

[36] ... Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has

subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in her factum, [TRANSLATION] “[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place”: para. 2.

[Emphasis added.]

[156] While, as noted above, the findings in *Vavilov* arose in the context of administrative law, as no statement was made regarding *Sattva* or *Teal Cedar*, the Court signaled there remained an outstanding question of law. This question remained live when *Wastech* came before the Supreme Court of Canada, with the majority stating they were “mindful” of *Vavilov* but they would leave the question for another day. In doing so, they chose to neither affirm nor overturn *Sattva*. In leaving this question, Kasirer J. noted the Court did not have “the benefit of submissions on that question, nor ... the assistance of reasons on point from the courts below”, thereby inviting appellate courts to address the standard of review in these circumstances and make a reasoned decision rather than regarding the question as settled: *Sattva* at paras. 45–46.

[157] This case provides an opportunity to make such a reasoned decision. For the following reasons, I find the *Former Arbitration Act* should be read as requiring questions of law on appeal to be determined by applying the appellate standards described in *Housen*.

[158] While those in favour of retaining the standard of review described in *Sattva* emphasise the distinction between arbitration and administrative decision making, it is difficult to discern in this distinction a good reason for adopting differing standards of review.

[159] The fact that arbitrators are selected for expertise is not justification for greater deference to their adjudication of legal questions. Administrative tribunals are presumed to have expertise and have been delegated authority according to

that expertise. Nevertheless, their judgments on legal questions are not immune from review on a correctness standard. Similarly, arbitrators provide an alternative forum for dispute resolution, which may employ their commercial or technical expertise, but this expertise does not support a deferential review on legal questions where their expertise does not exceed that of the court. In *Vavilov*, the Court clarified that, where deference is owed to decision makers, it is not because of their expertise, but because of their delegated authority: *Vavilov* at para. 46; *Northland* at para. 40. The focus of the Court’s attention in defining the applicable standard of review thus shifted from examination of the expertise of the decision makers to consideration of the extent and nature of the authority delegated and the statutory appeal mechanism afforded to the litigants. This shift does not prevent the parties from continuing to select arbitrators based on their technical expertise, but where they have not contracted out of the right of appeal, the review will not be afforded more deference because of that expertise.

[160] While private commercial arbitration does not result from the coercive power of the state, it is unclear why that justifies a more or less deferential standard of review. It is particularly unclear given that parties can opt out of appellate review. Under the *Former Arbitration Act*, s. 35 provided:

35 (1) If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31, [appeal with leave on questions of law] 33 [applications for arbitral reasons] and 34, [applications to a court for the determination of a question of law] the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.

[Emphasis added.]

[161] As the Law Reform Commission explained in their 1982 Report on Arbitration, the inclusion of a provision like s. 35 allows parties to decide that arbitration’s aims of speed and finality are sufficiently important that they are willing to exclude the remedy of an appeal, even if the arbitrator is wrong: Law Reform Commission of British Columbia, *Report on Arbitration* (Vancouver: Law Reform Commission of British Columbia, 1982) at 68 [“LRC Report”]. This

provision supports the argument that a deferential standard of review is not required to respect parties' desire for speed and finality, as they have a provision that already responds to that desire.

[162] Where parties have not exercised their authority under s. 35, and an appeal is sought, their decision should be respected with the understanding that parties know the meaning of the term "appeal", including that the *Housen* standards of review apply. In such cases, the parties have decided that the aims of finality and speed do not override their interest in certainty and legal accuracy from their arbitration.

[163] Under the *Current Arbitration Act*, the ability of parties to exclude the courts from reviewing their arbitral awards has become even broader, with s. 59(3) providing:

Appeals on questions of law

59 ...

(3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.

[Emphasis added.]

[164] Horton and Young's argument that arbitral awards are unsuited for review on the standards described in *Vavilov* because arbitration does not necessarily require reasons, and therefore cannot be reconciled with review for transparency, intelligibility and defensibility, is not helpful in this case. Here we are concerned with the applicable standard of review where a party has identified a question of law amenable to appeal. It should also be borne in mind that the *Current Arbitration Act* now ensures parties have a right to obtain reasons for arbitral awards:

48 (1) An arbitral award must be in writing and must be delivered to the parties.

...

- (3) An arbitral tribunal must provide reasons for an arbitral award, unless
 - (a) the parties to the arbitral proceeding have agreed that no reasons are to be provided, or
 - (b) the award is an arbitral award on agreed terms under section 47 (2).

[165] These provisions are an expansion on the provisions under the *Former Arbitration Act*, which only provided that the court could order an arbitrator to provide a “reasoned award” where the parties had opted out of the applicable statutory provision:

- 33 (1) A party to an arbitration may apply to the court for an order that the arbitrator give more detailed reasons for an award.
- (2) On an application under subsection (1), the court may 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.

[166] I do not ascribe to the view expressed in *Buffalo Point*, and by Horton and Young, that the “consistent expression” logic from *Vavilov* is weak. The Manitoba Court of Appeal found some support for its position that the rule of consistent expression is not persuasive in the dissenting judgment in *Vavilov*. The fact that the majority relied upon the rule in arriving at its conclusion determines the question. The rule is a useful tool in interpreting what is meant when the legislature affords a party a right of “appeal”. The Supreme Court of Canada has held that, where a statute affords a right to appeal a decision to a court, that presumptively invokes a review on the appellate standards described in *Housen*. That is the clear logic of *Vavilov*, notwithstanding what Monnin J.A. refers to as the “convincing” dissent.

[167] Further, as I have noted, the language of the relevant statute supports the interpretation urged upon us by Beedie. On an application for leave, s. 31(2)(a) of the *Former Arbitration Act* calls upon the court to consider, among other factors, whether “the determination of the point of law may prevent a miscarriage of justice”. This provision suggests that the point of law will be “determined”, which is difficult to reconcile with a review of a decision on a standard of reasonableness.

This is particularly true considering the direction in s. 31(2)(c) of the *Former Arbitration Act* to consider the general or public importance of the point of law.

[168] Section 31(4)(b) of the *Former Arbitration Act* also provides that the court may “remit the award to the arbitrator together with the court’s opinion on the question of law that was the subject of the appeal”. If that opinion is simply that the arbitrator’s conclusion was unreasonable, a judgment of this Court will not be determinative except in cases where there is only one reasonable result. For that reason, in my view, the statute suggests review on a correctness standard.

[169] By providing for appeals under s. 31, the legislature made a deliberate choice that the application of legal principles of arbitrators, as required by s. 23(1), should be subject to court supervision. This supervision serves the aim of certainty within arbitration as it ensures that arbitrators, despite providing an alternative form of dispute resolution, are applying legal principles as they would apply in court: LRC Report at 21.

[170] As the concurrence in *Wastech* highlighted, in determining the standard of review, the overriding concern is the wording of the provision, not the unique features of arbitrations: at para. 120. In considering the appeal provisions in the *Former Arbitration Act* and the available jurisprudence, it is my opinion that we are required to ask whether the 2022 Panel erred in law in determining what issues it was estopped from reconsidering and, if so, whether its award is undermined by that error. A standard of correctness is applicable. If the Panel erred in law, we must then turn to the question of whether the chambers judge erred in exercising her discretion to substitute the valuation for her own, rather than remitting the question so as to permit the Panel to reconsider whether it should exercise its discretion not to apply the doctrine of issue estoppel.

The Substantive Questions: Issue Estoppel

[171] The VSB’s first argument is that the 2022 Panel’s award should be reviewed on a standard of reasonableness, and it should be upheld unless it cannot be justified, either because of internal inconsistency, failure to articulate

reasoning, or irreconcilability of its conclusion with evidence or law. In the alternative, VSB submits the 2022 Panel correctly considered the 1999 Award to turn upon the Panel's assessment of what options were "immediate", a question of fact that relied on the ordinary meaning of the term: without delay and next adjacent.

[172] Given my conclusion that we are to apply the correctness standard of review to the questions of law with respect to which leave to appeal was granted, the first substantive question before us is whether the 2022 Panel correctly identified the constituent issues or material facts necessarily embraced in the 1999 Award.

[173] In my view, the helpful analysis of the issue in *Victoria University* may be used in this case. The Ontario Court of Appeal (at para. 96) began by posing the threshold questions identified in *Danyluk* to determine whether the preconditions to the operation of issue estoppel were present:

1. Was the same question being decided in a second forum?
2. Was the judicial decision which is said to create the estoppel final? and
3. Were the parties to the judicial decision the same persons as the parties to the proceedings in which the estoppel is raised or their privies?

[174] As in the case at bar, the preconditions were met and the court moved, as we must, to further questions: what did the first decision maker, the 1999 Panel, decide, and was there any basis, or special circumstances, for departing from that decision?

[175] In *Victoria University*, the court held:

[134] ... I would not interfere with the Appeal Judge's discretionary decision to apply issue estoppel. The test for the application of issue estoppel was met and the doctrine was applicable. No special or changed circumstances arose nor was there any injustice in this outcome. While it is true that the rent was to be reset every twenty or thirty years, the interpretation of the leases should as a matter of principle be caught by issue estoppel and an encore should be

prevented: see *Minott*, at p. 329. Just because the rent payable under the Leases will be reset again in the future does not mean that litigation on the same issue between the same parties should be permitted.

[176] It will be recalled that, on the application for leave to appeal the 1999 Award in this case, Melnick J. held that the 1999 Panel’s majority had concluded:

[15] ... [I]n using the natural meaning of immediate, s. 29.09 was referring to a development process that would use the outright approval scheme of Schedule C-3A of the Vancouver Zoning Bylaw, not the discretionary conditional use to 3.0 FSR. As I read the reasons of the majority, the latter process would be at odds with the concept of immediacy inherent in the wording of s. 29.09 ...

[177] He did not regard the decision as hinging upon the *relative speed* of either process but rather on the absolute timing, and the fact the permits for outright use were non-discretionary.

[178] In my view, it is not possible to say that the relative speediness of one process compared to the other was a “constituent issue” or “material fact” necessarily embraced by the 1999 Award. Therefore, these relative assessments are not captured within the scope of matters determined for the purpose of issue estoppel.

[179] References in the 1999 Award to the outright use as “much faster” and “more immediate”, and conditional use as “substantially longer” or “five times longer to achieve”, might have been intended to reflect the view that relative speed is important in determining what use or uses should be considered to be immediate, as Beedie suggests. But, in my view, that is not reasoning “necessarily embraced” in the 1999 Award. In fact, there are compelling reasons to conclude the 1999 Award turned on *absolute* rather than *relative* timeliness, and the terms to which I have referred were simply used to distinguish outright and conditional uses.

[180] First, the 1999 Panel expressly stated that it intended to give the word “immediate” its natural meaning. Immediate does not usually mean “comparatively

faster”. In its recitation of dictionary definitions, the Panel identified no such expression or intention. None of the analogous terms they identified, “present or next adjacent”, “occurring or taking effect without delay, or lapse of time”, “done at once”, “instant” and “forthwith” are comparative or relative.

[181] Second, the Panel expressly concluded those terms applied to outright use and did not apply to conditional use. It did not say that the terms applied to both uses, or neither of them, but because one was relatively faster than the other it was “immediate”. Rather the Panel concluded that outright use fit the definition of a use that was available “forthwith” or “without delay” and conditional use did not.

[182] Third, reference to dictionary definitions and the search for the natural meaning of the word “immediate” would not have been necessary if the Panel was simply of the view that “immediate use” meant earliest or “most immediate” use.

[183] I am of the view, as was Melnick J., that the 1999 Panel simply and necessarily concluded that the process of obtaining approval for conditional use, as it stood in 1999, would be “at odds with the concept of immediacy inherent in the wording” of the lease.

[184] I would not accede to Beedie’s argument that the 1999 Panel’s decision turned on both the timeliness and legal entitlement of the outright use permit. In my view, the Panel’s consideration of the certainty of outright use permits was used only to establish that those permits were available immediately.

[185] The 2022 Panel accepted the evidence of Mr. Jackson, a planning consultant and urban planning expert, that there was “no guarantee” of getting approval for an outright use permit. There does not appear to have been such evidence before the 1999 Panel, which simply accepted that outright use was a legal entitlement.

[186] While Beedie is correct to say s. 2.1 of the C-3A zoning provides: outright use “shall be permitted in [Vancouver]” and the permit “shall be issued”, the 2022 Panel clearly accepted and placed weight upon evidence that, in practice,

there is some discretion in the granting of permits for outright use, and the process is time consuming and inconsistent with the 1999 Panel's conception of "immediate". On the evidence before it, the 2022 Panel concluded there was no permit option before them that would provide the certainty that the 1999 Panel considered to be determinative of which uses were immediately permissible. I see no basis upon which we can say that conclusion was not available to the 2022 Panel.

The Substantive Questions: Consideration of Irrelevant Factors

[187] Beedie was granted leave to appeal on the further ground that the 2022 Panel erred in law by considering irrelevant factors in exercising its discretion not to be bound by issue estoppel: the finding of "a diminished interest in finality"; and consideration of the parties' "true intentions". The alleged reasoning errors had been identified by Chan J., who held:

[55] The 2022 Majority's statement that the public interest in the finality of litigation would not be materially undermined by not applying issue estoppel is contrary to jurisprudential authority. The central aims of commercial arbitration are finality and efficiency: *Teal Cedar* at paras. 1, 45, 74. The 2022 Majority's consideration of a lesser interest in finality due to this being a private commercial relationship governed by arbitration is not a correct statement of the importance of finality in commercial arbitrations. This is reflected in a limited right of appeal of arbitral awards and the deference due to arbitrators: *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 40, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 52, 104–106; *Arbitration Act*, s. 31. In arbitrations concerning the same lease with the same parties and the same issue, much is gained from applying issue estoppel to create certainty.

[56] Further, the 2022 Majority's statement that there is a public interest in enforcing private contracts to reflect the true intentions of the parties is in error. I find that the 2022 Majority allowed their view of the correct interpretation of s. 29.09 to overwhelm the analysis. The 2022 Majority cannot refuse to apply the interpretation of the valuation clause found by the 1999 Majority simply because they disagreed with it: *MacDougall v. Lake Country (District)*, 2012 BCCA 408 at paras. 32–36. In any event, it was the 2022 Majority's erroneous interpretation of the 1999 Award that led to the 2022 Majority not being able to determine market value, thus not being able to set rent for the next term. If the 2022 Majority had not erred in their interpretation of the 1999 Award, the parties can continue with the next term of their lease.

[188] In my view, while the 2022 Panel considered the fact that arbitral decisions do not establish binding precedents in the same manner as decisions of the court, it did not ignore the jurisprudential authority for the proposition that finality is important, and issue estoppel applies generally in commercial arbitration. The Panel was not of the view that the 1999 Award was less binding upon it than a judicial decision would have been, rather, the Panel was weighing whether its refusal to apply the rule would materially undermine the doctrine by establishing an unhappy precedent.

[189] The principal public interest served by the doctrine of issue estoppel is, as Beedie contends, the public interest in enforcing the rule that parties should not be “twice vexed”. Issue estoppel is inapplicable unless the parties to the proceedings in which the estoppel is raised are the same as the parties to the first judicial decision. The doctrine does not serve the purpose of preventing issues being relitigated by third parties as other doctrines, such as comity and *res judicata*, can serve that purpose.

[190] However, as I read the 2022 Award, when the majority wrote: “the award itself does not establish a legal precedent that might impact persons other than the parties to the Lease”, it was referring to the effect of *its* departure from the general rule in this case. The Panel did not conclude there was less interest in finality in arbitration than in commercial litigation. To the contrary, it clearly rejected the suggestion that the doctrine of issue estoppel should be applied differently in arbitrations than in proceedings such as *Danyluk*. The Panel did not define the public interest exhaustively in such a way as to ignore the objective that parties should not be twice vexed.

[191] The arbitrators would have been wrong to say the doctrine of issue estoppel does not stand as a bar to serial re-interpretation of a lease at arbitration. However, they were not wrong in law to say that, if they concluded their discretion should be exercised against the application of the doctrine, doing

so would not establish a precedent in the same way as a judicial determination would. What they said in this regard was correct.

[192] Further, the 2022 Panel, when making its comments regarding finality of the 1999 Award, had already determined that there were “strong factors militating in favour of exercising [their] discretion not to apply the doctrine of issue estoppel”. The comments should be read in light of that prior determination. The Panel’s consideration of the limited precedential value of the exercise of their discretion not to be bound by issue estoppel did not inform their analysis or undermine their award.

[193] Nor would I accede to Beedie’s argument that, when the 2022 Panel asked whether applying issue estoppel would produce a result that would accord with the “true intentions” of the parties, it erroneously refused to be bound by the 1999 Award because it was wrong, thus committing the error described in *MacDougall v. Lake Country (District)*, 2012 BCCA 408, and eliminating the doctrine of issue estoppel entirely. In my opinion, VSB is correct to say the Panel expressly described its rationale for not applying issue estoppel in light of the parties’ intentions: “... If the agreed arbitration mechanism cannot operate to determine the value because — as has now been proven to be the case — the 1999 Award's interpretation of the Lease is unworkable, the express contractual intentions of both parties are frustrated”.

[194] In conclusion, it is my view that the 2022 Panel did not err in law when assessing how the public interest would be affected by a departure from the result dictated by issue estoppel or in their consideration of the unworkable nature of the 1999 Panel’s definition of immediate use.

Remitting of the Valuation

[195] It is unnecessary for me to address the question of whether the chambers judge erred in refusing to remit the case to the arbitrators, as I am of the opinion the 2022 Panel did not err in law in: its interpretation of the lease; its description of the “constituent issue” or “material fact” necessarily embraced by the 1999 Award

and, thus, the extent to which it was estopped from reconsidering that award; or exercising its discretion not to apply the doctrine of issue estoppel.

Conclusion

[196] In summary, for the procedural appeal, I reach the following conclusions:

- a) Justice Stephens did not err in staying the effect of the 2022 Award upon granting leave to appeal.
- b) It is not an error to weigh the potential miscarriage of justice that might result if an arbitral award is not set aside, and to consider that potential miscarriage in exercising the discretion to stay its effect pending the hearing of the appeal.

[197] For the substantive appeal, I reach the following conclusions:

- a) The standard of review applicable on statutory appeals from arbitral awards brought pursuant to s. 31 of the *Former Arbitration Act* are the standards described in *Housen*. Specifically, the *Former Arbitration Act* calls for the application of a correctness standard to questions of law.
- b) The 2022 Panel did not err in its interpretation of the 1999 Award and identification of the issue to which estoppel applied.
- c) The 2022 Panel did not err in law in exercising the discretion not to apply issue estoppel.
- d) The 2022 Panel did not err in law in its interpretation of the lease and in determining the market value of the lands.

[198] I would allow the appeal and set aside the order quashing the 2022 Award. I would restore that Award.

[199] I would express no opinion on the question whether the chambers judge, having found the 2022 Panel to have erred, ought to have remitted the case to the arbitrator.

“The Honourable Mr. Justice Willcock”

Reasons for Judgment of the Honourable Justice Winteringham:

Introduction

[200] I have had the privilege of reading a draft of the reasons for judgment of my colleague, Justice Willcock. I agree, for the reasons he states, with his proposed disposition of the appeal from the order of Justice Stephens (CA49215). Regarding the appeal from the order of the chambers judge (CA50395), I agree with Justice Willcock that the appellate standards of review from *Housen* are engaged. That is, with respect to the two legal questions for which leave was granted, the standard of review is correctness. With respect to the chambers judge’s discretionary decision not to remit the case to the arbitrators, the standard of review is deferential.

[201] Where my view differs from Justice Willcock is with respect to his conclusion on the substantive issue on appeal. Stepping into the shoes of the chambers judge and applying the correctness standard to the first legal issue, it is my view that the 2022 Panel erred when it conducted a fresh interpretation of the lease renewal term, unconstrained by the findings of the 1999 Award. As a result, the 2022 Panel erred in its identification of the issue to which issue estoppel applied. Separately, it is my view that the 2022 Panel erred by considering irrelevant factors in determining not to apply issue estoppel. Just because the rent payable under the lease will be reset again in the future does not mean that litigation on the same issue between the same parties should be permitted: *Victoria University*, para. 134. In this case, the 2022 Award created a second interpretation of the same lease provision in circumstances where the parties should be entitled to expect certainty.

[202] The majority of the 2022 Panel (“2022 Majority”) found the 1999 Panel’s interpretation of the lease to be “unworkable” because (based on different evidence from that before the earlier tribunal), there was now no use to which the property could be put that was “immediate” and “unconditional” as the 1999 Tribunal had interpreted the lease to require. The 2022 Majority thus reasoned its “proper” interpretation of the lease renewal term allowed it to exercise its discretion against applying issue estoppel.

[203] Justice Willcock stated he could see no basis upon which we can say that conclusion was not available to the 2022 Panel. Respectfully, on a correctness review, I do not agree with this determination. In my view, the 2022 Majority erred by conducting a fresh interpretation of the lease renewal term without proper consideration of the 1999 Panel’s interpretation of the same term. This approach impacted the issue estoppel analysis. The chambers judge, correctly in my view, found that this failure constituted a legal error warranting appellate intervention.

[204] My colleague does not address the chambers judge’s decision not to remit the proceeding back to the arbitrator. Such an analysis was not necessary because of his conclusion that the 2022 Panel was correct in determining that there was no longer an available permit option that constituted an “immediate use” under the 1999 Award. My contrary position on the substantive point compels me to address the chambers judge’s refusal to remit the decision to the arbitrators. For the reasons set out more fully below, deference is owed to the chambers judge’s discretionary decision, and I would not interfere with it.

Background

[205] It is unnecessary for me to repeat my colleague’s thorough review of the background facts, the law, and the reasons of the 2022 Majority. I will address the underlying facts and law only to the extent necessary to explain the reasons for my differing views on the substantive issue. My views rest, in part, on the 2022 Majority’s re-interpretation of the rent renewal provision in the lease. I will begin there.

[206] At its core, this appeal concerns the doctrine of issue estoppel in the context of successive arbitration awards to determine the rent payable in a long-term commercial tenancy: BCCA 2022 Leave Decision at para. 1. The appeal focuses on the interpretation of a lease which provides for arbitration to resolve the market value of the leased property (which, in turn determines the rent payable under the lease) for consecutive renewal terms. By a two-members-to-one majority, the 2022 Panel interpreted a key provision of the lease differently than the 1999 Panel had

previously interpreted the same provision. In their reasons, the 2022 Majority declined to apply issue estoppel in determining the market value of the property.

[207] As Beedie points out, this change in interpretation is material. Using the values adopted by the 2022 Majority, the market value of the lands based on outright uses was \$20,000,000, meaning Beedie must pay annual rent of \$1,650,000. Allowing for a valuation based on conditional use, as found by the 2022 Majority, the market value of the lands was \$116,500,000, meaning Beedie must pay annual rent of approximately \$9,611,250.00.

[208] The Leave Decision identified two legal questions:

- a) Did the 2022 Majority err in their interpretation of the 1999 Award and identification of the issue to which estoppel applied?
- b) Did the 2022 Majority consider irrelevant factors in determining not to apply issue estoppel, in particular, by relying on their findings that there is:
 - i. a diminished public interest in the finality of commercial arbitration;
and
 - ii. a public interest in enforcing private contracts to reflect the true intentions of the parties?

[209] Before turning to the legal questions, I briefly summarize the two interpretations of the lease. For ease of reference, I will restate the provision at issue:

Section 29.09 Determination of Renewal Lease Rent

If the LESSOR and the LESSEE do not agree in writing upon the BASIC RENT ...the BASIC RENT ... shall be an annual amount computed on the basis of eight and one quarter (8-1/4%) percent of the market value of the SAID LANDS ... as the SAID LANDS would be valued at that time if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the SAID LANDS for that immediate use and such market value of the SAID LANDS shall be determined by arbitration ...

[210] The 1999 Panel interpreted s. 29.09 of the lease and determined market value of the property for the 1997–2007 term based on the 1.0 FSR “outright approval use” scheme of the City of Vancouver, by-law No. 3575, *Zoning and Development Bylaw*, Schedule C-3A (the “Bylaw”). In doing so, the 1999 Panel focused on the words “ready for immediate development ... for that immediate use” in s. 29.09: 1999 Award at 4–5. The 1999 Panel observed the word “immediate” appeared twice in s. 29.09 and therefore was of some importance: 1999 Award at 6. The 1999 Panel held that it was required to determine which of two available zoning categories — outright use (which is not discretionary) or conditional use (which is discretionary) — fell within the meaning of “immediate”: 1999 Award at 5.

[211] The evidence before the 1999 Panel showed that the outright use could be obtained more quickly than the conditional use. The majority also stated, “it is the additional fact of certainty in being able to develop for the outright use that tells the ‘person or persons ready, willing and able to purchase and develop the SAID LANDS’ what the ‘immediate use’ is”: 1999 Award at 7. The 1999 Panel noted: “[i]n addition, the very fact that the conditional use is discretionary, and not a legal entitlement, defeats coming within the concept of ‘immediate development’ or ‘that immediate use’”: 1999 Award at 8.

[212] Justice Melnick dismissed VSB’s application for leave to appeal the 1999 Award, holding the 1999 Panel’s interpretation of s. 29.09 was not obviously wrong.

[213] Beedie exercised its option to renew the lease for the period 2007 to 2017. The parties agreed on the amount of the rent (based on the value of the lands for their outright use). “Outright use” meant the value of the lands for the second renewal period would be based on 1.0 FSR, as the Bylaw had not changed.

[214] For the next renewal period, occurring between 2017–2027, Beedie again exercised its option to renew. This time, VSB opted to arbitrate the rent price, as permitted by the lease. It asserted that the land should be valued based on its

highest and best use, not its outright use. The zoning of the lands, and the uses in the Bylaw had not changed between the second and third renewal.

[215] The 2022 Majority began its analysis with a *de novo* interpretation of s. 29.09 and arrived at what they acknowledged was a different interpretation than the 1999 Panel. They found that, properly interpreted, s. 29.09 led to the conclusion that the “highest and best use for which the Lands lawfully could be developed as of the Valuation Date ... was a conditional use permitted under the C-3A zoning”, which permitted a 3.0 FSR: 2022 Award at para. 84. In general terms, the 2022 Majority declared a market value that substantially increased the rent from the preceding term.

[216] The 2022 Majority then moved to consider issue estoppel, and proceeded to interpret the 1999 Award. They held that, if issue estoppel applied, they had to examine the evidence to determine whether one or more of the available uses in 2017 was an “immediate use”. As in 1999, the available uses were categorized as “outright” or “conditional” — the Bylaw had not changed. However, the evidence indicated the time to obtain development approval for an outright use was longer in 2017 than it had been in 1999. The question, in their view, was not the value of the “most immediate” use of the land (which remained outright use), it was the value of the “immediate” use of the land. The time to obtain development approval of outright use was no longer “immediate”, as it had inched closer to the 60-week timeline for development approval of conditional uses that was held not to be “immediate” in the 1999 Award. As a result, there was no “immediate” use to which the lands could be put in 2017, based on the 2022 Majority’s interpretation of the 1999 Award’s definition of the term.

[217] Based on this reasoning, the 2022 Majority found the 1999 Panel’s interpretation of the lease to be unworkable and concluded that applying issue estoppel would frustrate the contractual intentions of the parties. According to the 2022 Majority, this result could be avoided by applying its interpretation of the lease — the “correct interpretation”: 2022 Award at para. 174.

[218] The 2022 Majority went on to state that there were two strong factors militating against applying issue estoppel: (1) diminished public interest in the finality of commercial arbitration; and (2) public interest in enforcing private contracts to reflect the true intentions of the parties. The 2022 Majority thus declined to apply the doctrine of issue estoppel, reasoning that, to “perpetuate the 1999 Award’s interpretation in these circumstances would result in a serious injustice to both parties”: 2022 Award at para. 177.

Analysis

[219] It is my view that the 2022 Majority made two legal errors. First, the 2022 Majority erred when it conducted a fresh interpretation of the lease renewal term, unconstrained by the findings of the 1999 Award. As a result, the 2022 Majority erred in its identification of the issue to which issue estoppel applied. Second, the 2022 Majority erred with respect to its consideration of factors militating against the application of issue estoppel. I address both errors now.

Did the 2022 Majority err in its interpretation of the 1999 Award and the identification of the issue to which estoppel applied?

[220] It is my view that the 2022 Majority should have interpreted the 1999 Award as holding that s. 29.09, on its proper interpretation, called for market value (and thereby, rent payable) to be determined based on outright use of the lands under the Bylaw — meaning a 1.0 FSR use. The zoning for the lands did not change from 1999 to 2022.

[221] The 2022 Majority was required to interpret the 1999 Panel’s interpretation of s. 29.09 having regard to the 1999 Award as a whole, grounded in the reasons. However, that is not what occurred. Instead, the 2022 Majority began by conducting its own “proper” interpretation of the lease, unbound by the constraints of the 1999 Award or the 1999 Panel’s interpretation. The 2022 Majority stated, “[w]e have carefully considered the text of the 1999 Award to identify what decision was made by the 1999 Panel concerning the interpretation of the Lease”: 2022 Award at para. 109. Yet they started their analysis by interpreting s. 29.09 afresh.

[222] In the BCSC 2022 Leave Decision, Stephens J. suggested, for the purpose of assessing the question of leave, the interpretation of a prior commercial arbitration award is similar to the interpretation of a statute:

[69] ... [T]he questions of interpreting an award and identifying issues to which issue estoppel applies can be analogized more readily to a question of statutory interpretation—which is a question of law—being the interpretation of legal text with binding force (an award) to determine the parties’ governing obligations under a legal doctrine (issue estoppel).

[223] In my view, Stephens J.’s comments are relevant to the legal question now before us. I agree with Beedie that the 1999 Award represented a legal constraint on the 2022 Panel. Paragraphs 101 and 106 of *Vavilov* support this proposition — decision makers must be alive to the legal constraints upon them when rendering their decisions. The 2022 Majority’s rejection of the 1999 Panel’s interpretation of s. 29.09 was based on an interpretation of the lease that failed to consider the entirety of the reasons given for the conclusions in the 1999 Award. This interpretation was arrived at without due regard to the constraints upon the 2022 Panel.

[224] Notably, the 2022 Majority’s rejection of the 1999 Award arose only after it had performed (afresh) its own “proper” interpretation of the lease. In my view, proceeding in this way tainted the issue estoppel analysis.

[225] The 1999 Panel decided that the language of s. 29.09 required the “market value” of the lands to be determined by the uses permitted as “outright” approvals at the date of valuation under the then-current zoning (as opposed to a discretionary use, which required discretionary approvals from the City of Vancouver). As noted by the dissenting arbitrator on the 2022 Panel (the “2022 Dissent”), this decision was fundamental to the 1999 Award. Page 4 of the 1999 Award states:

... [T]he lands are zoned under schedule C-3A of the City of Vancouver’s Zoning and Development Bylaw ... this particular zoning provided for an outright approval use, which is a legal entitlement, and a conditional approval use, which involves the exercise of discretion by the City’s Development Permit Board. The former use entails a broad range of retail uses to a maximum development density floor space ration (“FSR”) of 1.0. From the evidence of both experts it would appear that a development permit for an

outright use could be obtained within seven to twelve weeks. The conditional approval use would allow quite a comprehensive range of other uses, notably for manufacturing and residential, to a maximum permitted density of 3.0 FSR. Approval of a conditional use is discretionary, takes substantially longer to obtain and the process is subject to public notification.

[Emphasis added.]

This determination — that the outright use was a legal entitlement, as compared to the conditional use, which was discretionary — was an essential logical step in the 1999 Panel’s ultimate decision that the “market value” of the land was based on the outright uses of the land.

[226] The 1999 Panel considered the evidence about approval times, and found at pages 5–6, “the clear responses from both experts indicated without question that the 1.0 FSR outright approval use was much faster and had legal certainty in contrast to the discretionary nature of the conditional approval use. On the evidence, the latter took at least five times longer to achieve than the non-discretionary processing of the 1.0 FSR outright approval use”.

[227] The 1999 Panel interpreted s. 29.09 as requiring a valuation of the lands based on the current zoning as the lands might be developed for an outright use — not under a re-zoning, or under discretionary approvals. In other words, the language of s. 29.09, the structure of the lease, and the surrounding circumstances all demonstrate that the 2022 Panel was bound by the constraint that the “market value” is based on the zoning in effect at the valuation date for the renewal term. It does not take into account the potential for re-zoning or discretionary approvals.

[228] The 2022 Majority concluded that the 1999 Panel “did not find, expressly or implicitly, that the ‘immediate use’ is the lawful use for which approval can be obtained most expeditiously”: 2022 Award at para. 131. In my view, this conclusion ignores aspects of the 1999 Award dealing with relative timeliness and certainty. The 1999 Award includes comparative language and refers to the two available uses under the Bylaw. It then explains that one use, as compared to the other, was both faster to obtain and could be acted upon with certainty. The 1999 Award does not

say that if approval of an outright use took longer than 12 weeks (or even longer than 60 weeks), then it would not be immediate.

[229] On appeal, the chambers judge analyzed the flaws with the 2022 Majority’s interpretation:

[45] The 1999 Majority found s. 29.09 ought to be interpreted such that “immediate use” is to be based on the use that was the most expeditious and certain, meaning legal entitlement to approval. In my view, the 1999 Majority did not find that an “immediate use” was one for which a development permit can be obtained without delay and not as a matter of discretion: 2022 Majority at para. 133. This interpretation of the 1999 Award ignores the comparative aspect of the uses, and focuses only on the actual timelines to obtain a development permit. As I read the 1999 Award, the 1999 Majority was not analyzing whether seven to 12 weeks was quick enough to be immediate and without delay. There is no discussion of that issue at all—whether seven to 12 weeks qualifies as immediate—which one would have expected if that is in fact what the 1999 Majority found. The 1999 Majority made no findings about whether seven to 12 weeks qualify as “without delay”. Throughout, the 1999 Majority was considering which of the two uses was the most immediate and had legal certainty, as being not discretionary.

[Emphasis in original.]

[230] I agree with her analysis.

[231] As she noted, the 2022 Majority does not address the certainty aspect of the 1999 Award. For example, the 1999 Award sets out at page 7:

[A]n outright use can be secured far more quickly than a conditional one, thus being more “immediate” in terms of time. But it is the additional fact of certainty in being able to develop for the outright use that tells the “person or persons ready, willing and able to purchase and develop the SAID LANDS” what the “immediate use” is.

[232] On the importance of certainty, the 1999 Panel stated, “the very fact that the conditional use is discretionary, and not a legal entitlement, defeats coming within the concept of ‘immediate development’”: 1999 Award at page 8. These statements support the view that the focus of the 1999 Panel was not on the actual time to obtain a permit. That factor was not relevant to the 1999 Panel’s interpretation of s. 29.09. Rather, the 1999 Panel’s focus was upon which use under the applicable Bylaw was both certain and faster to obtain. I agree then with Beedie that the

1999 Panel’s decision turned on both the timeliness and legal entitlement of the outright use permit.

[233] As I have said, the limitations placed by the 2022 Majority on the scope of the 1999 Award fail to take into account the whole of the decision and the basis for it. Rather, the 2022 Majority focused on the 1999 Panel’s efforts to define immediacy. However, it ignored the aspects of the decision that explained why the 1999 Panel distinguished between outright and conditional uses and why they determined that only outright uses were “immediate” uses.

[234] With its preferred interpretation in hand, the 2022 Majority moved to consider issue estoppel, stating that if it applied, the 2022 Panel was required to examine the evidence to determine if one or more of the available uses in 2017 was an “immediate use”. I reiterate: the zoning and the Bylaw had not changed. As in 1999, the available uses were outright uses and conditional uses. The evidence showed, however, that the time to obtain development approval for an outright use was longer in 2017 than it was in 1999. The 2022 Majority found, with that evidence in mind, that there was no immediate use to which the lands could be put in 2017 — based, of course, on their own interpretation of the 1999 Panel’s definition of “immediate” in s. 29.09. As a result, the 2022 Majority concluded the lease was unworkable; and strictly applying issue estoppel would frustrate the contractual intentions of the parties.

[235] I agree with the chambers judge’s conclusion, that the 2022 Majority erred in its identification of the issues to which estoppel applied. She aptly described the error this way:

[47] With respect, the 2022 Majority erred in its identification of the issues to which estoppel applied. The 2022 Majority identified the findings of the 1999 Majority to which estoppel applied as the meaning of “immediate”; that an “immediate use” was a use for which a development permit can with certainty be obtained without delay; and the word “use” in the phrase “if vacant and ready for immediate development to their highest and best lawful use” refers to an “immediate use”. In my view, the issue to which estoppel applied was the interpretation that an “immediate use” was the use that was the most expeditious and certain. This finding was implicitly bound up in the 1999 Award.

[236] It bears repeating the purpose of the arbitration before the 1999 Panel. The parties tasked the 1999 Panel with determining which of the two available uses under the Bylaw fell within the meaning of “immediate” in s. 29.09 of the lease. In 1997, there were two available uses under the Bylaw: (1) an outright or legally entitled use for a broad range of retail uses up to an FSR of 1.0; and (2) a conditional use, which the city had a discretion to approve, for a range of other uses up to an FSR of 3.0. In 1997, a permit for an outright use was a legal entitlement. It could be obtained faster and with more certainty than a permit for conditional use, which was discretionary.

[237] The 1999 Panel was thus required to interpret the language of the lease renewal provision and the meaning to be given to “immediate use”. To determine what is categorized as an immediate use, they first had to define an immediate use.

[238] In the result, the 1999 Panel interpreted the rental renewal provisions to mean the immediate use of the lands was equal to the outright, legally entitled uses under the Bylaw.

[239] Neither the zoning for the lands nor the Bylaw had changed between the 1999 Award and the 2022 Award. Yet the 2022 Majority undertook a new interpretation of the same provision, based on the same Bylaw. This resulted in their refusal to apply issue estoppel. On my reading of the 1999 Award contextually and as a whole, the issue to which estoppel applied was the interpretation that an “immediate use” was the use that was both the most expeditious and certain. This finding was implicitly bound up in the 1999 Award. In my view, and for the reasons cited by the chambers judge, I would not accede to this ground of appeal.

Did the 2022 Majority consider irrelevant factors in determining not to apply issue estoppel?

[240] The 2022 Majority stated that there were strong factors militating against applying issue estoppel. They pointed to two: (1) a diminished public interest in the finality of commercial arbitration; and (2) a public interest in enforcing private contracts to reflect the true intentions of the parties. The 2022 Majority thus declined

to apply the doctrine of issue estoppel, reasoning that, to “perpetuate the 1999 Award’s interpretation in these circumstances would result in a serious injustice to both parties”: 2022 Award at para. 177.

[241] The chambers judge found both these factors to be irrelevant to whether issue estoppel applies. It is an error of law to exercise discretion based on irrelevant factors: *Cliffs Over Maple Bay (Re)* at para. 24; *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8 at para. 41. I agree with the chambers judge on this point.

[242] In *Danyluk* at para. 67, the Supreme Court of Canada provided a non-exhaustive list of considerations for exercising the discretion not to apply issue estoppel:

- a) The wording of the statute from which the power to issue the order derives.
- b) The purpose of the legislation.
- c) The availability of an appeal.
- d) The safeguards provided to the parties in the administrative procedure.
- e) The expertise of the administrative decision-maker.
- f) The circumstances giving rise to the prior administrative proceedings.
- g) The potential injustice.

[243] The 2022 Majority identified its two reasons for not applying issue estoppel — finality of arbitral proceedings and the public interest in enforcing contracts to reflect “true intentions” of the parties — as part of its analysis of the “potential injustice” factor, stating:

[175] As stated in *Danyluk* as being “a final and most important factor”, we must “stand back”, take into account the entirety of the circumstances, and consider whether the application of issue estoppel in this case would work an injustice. This is appropriate because the underlying purpose of issue estoppel is “to balance the public interest in the finality of litigation with the

public interest in ensuring that justice is done on the facts of a particular case”.

[244] Then, the 2022 Majority considered their reasons for refusing to apply issue estoppel. I will address each of these reasons.

Finality remains important in serial arbitrations

[245] The 2022 Majority determined that, because the dispute arose in arbitration, the “public interest in the finality of litigation” would not be materially undermined: 2022 Award at para. 176. The 2022 Majority stated that the “lease represents a private commercial relationship” and “[i]t provides for serial ‘litigation’ of the question of ‘market value’ at various points in time”: 2022 Award at para. 176. They noted that neither the 1999 Award nor the 2022 Award establish legal precedents that might impact persons other than the parties to the lease: 2022 Award at para. 176.

[246] With respect, the 2022 Majority, incorrectly in my view, unduly narrowed the public interest component in the outcome of private arbitration. The public interest is not only about the precedential effect of a judgment, as suggested by the 2022 Majority. The public interest referred to in *Danyluk* also includes the interests of the litigants themselves. This is reflected in the Court’s statement that individual litigants should be vexed only once with the same cause (para. 18).

[247] I agree that there may be a principled basis in a particular arbitration for not applying issue estoppel. However, that does not mean issue estoppel should be applied differently because the proceeding is an arbitration. In my view, the 2022 Majority erred in deciding that finality is less important in arbitration proceedings. Finality is, in fact, one of the central aims of commercial arbitration: *Teal Cedar* at para. 1.

[248] *Victoria University* further supports this conclusion. In that case, the Ontario Court of Appeal refused to endorse a *de novo* interpretation of a lease on a

subsequent arbitration and declined to interfere with the lower court's discretionary decision to apply issue estoppel in a serial arbitration, writing:

[134] ... While it is true that the rent was to be reset every twenty or thirty years, the interpretation of the leases should as a matter of principle be caught by issue estoppel and an encore should be prevented: see *Minott*, at p. 329. Just because the rent payable under the Leases will be reset again in the future does not mean that litigation on the same issue between the same parties should be permitted.

The court went on to affirm the importance of finality and certainty in subsequent arbitrations noting that preventing re-litigation of the same issue is the “foundational purpose that supports the doctrine of issue estoppel”: *Victoria University* at paras. 97 and 135.

[249] The reasoning of the Ontario Court of Appeal is particularly salient given the comparable circumstances here.

The intentions of the parties did not justify revisiting the 1999 Award

[250] Regarding the second factor, the 2022 Majority found that “there is also a public interest in enforcing private contracts to reflect the true intentions of the parties”: 2022 Award at para. 176, citing *Sattva*.

[251] Here, the 2022 Majority disagreed with the 1999 Award. It saw the 1999 Award as contrary to the parties' true intentions. In my view, it was an error for the 2022 Majority to reference its own interpretation of s. 29.09 of the lease with respect to the parties' “true intentions”.

[252] In *MacDougall v. Lake Country (District)*, 2012 BCCA 408, at para. 36, this Court determined that a subsequent decision maker should only consider whether a prior decision is “wrong” as a factor in issue estoppel where that prior decision is found to be “patently perverse”. To accept otherwise would be to eliminate the doctrine of issue estoppel entirely. Here, the 2022 Majority acknowledged they were not permitted to refuse to be bound by the 1999 Award for the reason that it was wrong: 2022 Award at para. 150. However, the 2022 Majority went on to find that it

would be unjust to refuse to apply issue estoppel because if not, the contract would not accord with the “true intentions” of the parties.

[253] In my view, the 2022 Majority engaged in exactly the same exercise described by Justice Groberman in *MacDougall*:

[36] As I analyse the appellants’ argument, it is simply that the 1963 decision was wrong, and that it would therefore be unjust to follow it. To accept that as a basis for refusing to apply the doctrine of *res judicata* would be to eliminate the doctrine entirely. The doctrine of *res judicata* exists precisely to obviate the re-litigation of issues. At least where a previous decision is not patently perverse, the question of whether the court, in the end, reached the right conclusion is not one which should be addressed in exercising discretion to apply or not apply the doctrine.

[254] In sum, the 2022 Majority re-defined the meaning of “immediate” in s. 29.09. They did not find the 1999 Panel’s alternative decision to be patently perverse. They simply came to a different conclusion. Respectfully, such reasoning is circular, and defeats the purpose of issue estoppel.

[255] I would not accede to this ground of appeal.

Did the chambers judge correctly exercise her discretion not to remit?

[256] VSB argues the chambers judge erred when she concluded the 2022 Award was unreasonable and incorrect. They argue that this error led her to conclude that it was unnecessary to remit the matter to the arbitration panel, as there was “no basis not to apply issue estoppel”. VSB contends the chambers judge erred when she assessed the market value of the property because she failed to consider:

- (1) whether issue estoppel could apply to her interpretation of the 1999 Award;
- (2) that the 1999 Award had been overtaken by the interpretive approach in *Sattva*;
- and (3) that issue estoppel ought not to apply to the 1999 Award because there had never been a “proper opportunity to subject the 1999 Award to appellate scrutiny”.

[257] As stated, the standard of review of the chambers judge’s decision to remit is deferential. I see no error in her exercise of discretion that she could determine the market value of the property and not remit to the arbitration panel. In my view, she considered and properly disposed of each of the submissions advanced by VSB.

[258] First, VSB submits the chambers judge erred because the application of issue estoppel was linked to the identification of the “issue” said to be operative from the 1999 Award. VSB argues that once the chambers judge rejected the 2022 Majority’s interpretation and imposed her own interpretation, there was no basis for her to conclude that the application of issue estoppel was inevitable: 2022 Arbitral Appeal at para. 63. VSB submits the chambers judge should have remitted the determination of whether issue estoppel applied to the arbitrators. Citing *Sattva*, VSB contends that even where a court on appeal does not confirm an award, the matter should typically be referred back to the arbitration panel. This, they argue, is the approach most consistent with the judicial restraint called for in arbitral matters, recognizing the parties’ mutual choice to submit to the process and to select suitable neutral decision makers.

[259] Beedie submits that remitting was unnecessary in the circumstances.

[260] I agree. Having regard to the deferential standard of review applicable to the chambers judge’s decision in these circumstances, I see no error by the chambers judge with respect to her decision not to remit. She concluded that it was unnecessary to remit the matter to the arbitration panel in these circumstances, stating:

[60] ... The 2022 majority considered all the factors cited in *Danyluk*. It found the 1999 Award unworkable and that it could not be applied based on an erroneous interpretation. Once that erroneous interpretation and the two irrelevant factors discussed above are set aside, there is no basis not to apply issue estoppel. The 2022 Majority did not cite any other reason not to apply issue estoppel.

[261] The chambers judge concluded that remitting the decision was also unnecessary because she did not need to decide any factual matters: 2022 Arbitral Appeal at para. 61. The 2022 Majority found the market value of the property using 1.0 FSR to be \$20,000,000: 2022 Award at para. 235. The dissenting arbitrator agreed: 2022 Dissent at para. 50. Therefore, the factual issues of determining market value and rent were already determined.

[262] In my view, the chambers judge made no error in the exercise of her discretion. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para. 142.

[263] In this case, I also note an acute concern about delay. I would put some weight on the importance of providing an answer to the parties, especially given the fact that the 2022 Panel had a genuine opportunity to consider the issue. As Beedie notes, it must decide whether to exercise its option for the fourth renewal period by November 19, 2026. A decision that finally determines the amount it must pay in rent is obviously required for Beedie to make an informed decision about renewal.

[264] Next, VSB argues that the chambers judge failed to consider that the 1999 Award had been overtaken by the interpretative approach in *Sattva*, requiring decision makers to consider the factual matrix in contract interpretation. As with VSB’s first submission, the 2022 Majority engaged with, and provided their interpretation on the factual matrix submission: 2022 Award at paras. 165–167. There is no basis to remit for this question to be considered again.

[265] Finally, VSB submits the chambers judge failed to consider that issue estoppel ought not to apply to the 1999 Award because there had never been a “proper opportunity” to subject that award to appellate scrutiny. Here, VSB points to the 1999 Leave Decision, which denied leave to appeal the 1999 Award. Because the test for granting leave to appeal changed after leave was refused, VSB argues that remitting the decision to the arbitrators is appropriate because the 1999 Award was never actually subject to appellate review.

[266] Although the test for leave may have changed, there was nonetheless an avenue for appellate review open to VSB on the 1999 Award. The chambers judge, at para. 62 of the 2022 Arbitral Appeal, considered this submission and determined it was not relevant to her exercise of discretion when considering whether issue

estoppel should be applied in the circumstances before her. I see no error in this part of her analysis.

[267] In sum, the chambers judge did not err in her exercise of discretion. She was satisfied that she had the two pieces of information she needed to issue a remedy: (1) the legal interpretation of s. 29.09 from the 1999 Award; and (2) the factual findings of the 2022 Majority. She concluded the 2022 Majority lacked a good reason to not apply issue estoppel, stating, “declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court that a particular outcome is inevitable and that remitting the case would ... serve no useful purpose”: 2022 Arbitral Appeal, citing *Vavilov* at para. 142. As a result, she found the market value of the property should be \$20,000,000, based on the 1.0 FSR for outright use, and therefore Beedie is required to pay \$1,650,000 in annual rent.

[268] VSB has not established that the chambers judge erred in her exercise of discretion to reach this disposition.

[269] I would not accede to this ground of appeal.

Disposition

[270] In the result, I would dismiss the appeal (CA50395). The chambers judge was correct in her analysis of the 1999 Panel’s interpretation of the lease and in her decision regarding the application of issue estoppel, and I would not overturn her discretion with respect to the remedy she chose.

“The Honourable Justice Winteringham”

I AGREE:

“The Honourable Justice Fleming”