**In the Court of Appeal for the Northwest Territories**

**Citation: *Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1.cor 2**

**Date Corrigendum Filed:** 2021 02 17

 **Date:** 2021 01 20

**Docket:** A1-AP-2019-000010

**Registry:** Yellowknife, NWT

**Between:**

**Northland Utilities (NWT) Limited**

 Respondent

 - and –

**The Town of Hay River**

 Appellant

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| **Corrected judgment:** A corrigendum was issued on February 17, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment. |

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| **Corrected judgment:** A corrigendum was issued on February 1, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment. |

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**The Court:**

**The Honourable Madam Justice Bielby**

**The Honourable Madam Justice Barbara Veldhuis**

**The Honourable Madam Justice Jo’Anne Strekaf**

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**Reasons for Judgment Reserved of The Honourable Madam Justice Bielby**

**Reasons for Judgment Reserved of The Honourable Madam Justice Veldhuis**

**and The Honourable Madam Justice Strekaf Concurring in the Result**

Appeal from the Decision of

The Honourable Justice A.M. Mahar

Dated the 23rd day of October, 2019

Filed the 23rd day of October, 2019

(Docket: S-1-CV-2018-000093)

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**Reasons for Judgment Reserved of**

**The Honourable Madam Justice Bielby**

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# Overview of Appeal

1. The Appellant, Northland Utilities (NWT) Limited (“NU”), appeals from a decision of a judge of the Supreme Court of the Northwest Territories reported at 2019 NWTSC 31 (the “Decision”).
2. The Decision dismissed NU’s appeal from the decision of an Arbitrator (the “Partial Final Award”) brought under the *Arbitration Act,* RSNWT 1988, c A-5 (the “*Arbitration Act”)*, and pursuant to the provisions of a contract, called a Franchise Agreement, executed by the parties on November 30, 2006. The Partial Final Award permitted the respondent, the Town of Hay River (“Hay River”), to purchase certain assets from NU used to supply, transmit and distribute electricity within the town limits for a price (subject to final adjustments) ranging from $13,064,262 to $14,754,429. NU does not object to the sale but challenges the inclusion of certain assets, and submits that the overall purchase price to be paid to it should be $39,974,082.
3. The Decision was issued shortly before the Supreme Court of Canada adjusted the framework to be applied to standards of review in ***Canada (Minister of Citizenship and Immigration) v Vavilov*** 2019 SCC 65, 441 DLR (4th) 1 [***Vavilov***], and ***Bell Canada v Canada (Attorney General)***, 2019 SCC 66, 441 DLR (4th) 155 [***Bell Canada***]. The judge who heard the appeal from the Partial Final Award (the “chambers judge”), concluded that the Arbitrator had made no reviewable error, and declined to interfere. NU argues before this Court that***Vavilov***and ***Bell Canada***now require that the chambers judge’s review be redone on the standard of correctness, and that the Partial Final Award was incorrect.
4. The Decision, in effect, concluded that the conclusions in the Partial Final Award which addressed questions of law were correct, and those which addressed questions of fact or mixed fact or law were reasonable. The chambers judge did not err in reaching these findings. As a result, the appeal is dismissed.
5. We note that this conclusion is dependent upon the existence of s 27 of the *Arbitration Act*, granting a right of appeal to a judge where, as here, the parties agreed to such a right of appeal as a term of the contract between them. It is not necessary to comment, and we do not comment, on the standard of review to be applied to an arbitration decision arising from a contract which does not contain such a right of appeal and where no statute otherwise provides such a right.

# Statement of Facts

1. Growing municipalities have not always been possessed of sufficient funds to build and operate the various utility systems needed by their residents in a timely fashion. A practice has developed whereby utility corporations would fund the construction of such systems pursuant to contracts, called franchise agreements, entered into with the municipality. The franchise agreements grant the corporation the right to operate the system and collect payments from users of it over a defined period of years, while granting the municipality the right to purchase the system at a certain future date, by which time it would presumably be in a position to fund such a significant purchase price.
2. That sequence of events occurred here. NU built and operated the electrical system in Hay River under the terms of a Franchise Agreement which provided that Hay River could, but was not required to, purchase that system on or before November 30, 2016. Hay River eventually gave notice of its intention to exercise that right of purchase from NU. NU did not object but the parties could not agree on a purchase price, with the result that the matter was referred to arbitration. In the Partial Final Award, the Arbitrator accepted Hay River’s valuation method. NU unsuccessfully appealed the Award to the Supreme Court of the Northwest Territories, and from there to this Court.
3. Specifically, on November 30, 2006, Hay River entered into a Franchise Agreement with NU for the distribution, supply and sale of electricity within Hay River, to expire November 30, 2016. Prior to that expiration date, Hay River gave notice of its intention to exercise its right under the Agreement and pursuant to the provisions of s 91(5) of the *Cities, Towns and Villages Act,* SNWT 2003, c 22, (the “*CTV Act*”), to purchase the rights and property contained in the Franchise Agreement. Section 91(5) provides:

**91(5)** If a public utility franchise is not renewed, a municipal corporation may, with the approval of the Minister, purchase any or all of the rights under the franchise and any or all property used in connection with the franchise on terms agreed upon by the parties or, failing agreement, on terms determined by a sole arbitrator under the Arbitration Act.

1. While the Franchise Agreement contained a provision allowing that purchase, neither it nor the *CTV Act* expressly listed the assets subject to purchase, set a purchase price, or set out a methodology for determining a purchase price. Section 15 of that Agreement provides
2. Termination

The Town may, upon written notice to the Company…purchase all the rights of the Company in all matters and things under this Agreement and in all apparatus and property used for the purposes thereof (such right collectively, the “Franchise Assets”)…for such price and on such terms as may be agreed upon with the Company, or failing such agreement, then for such price and subject to such terms as may be fixed and settled on by the application of either of the parties by a sole arbitrator under the Arbitration Act (Northwest Territories), as amended or replaced. The parties agree that any decision of the sole arbitrator shall be subject to appeal to a judge on a question of law or fact or mixed fact and law.

1. The parties were subsequently unable to agree on the assets to be purchased, as well as the proper valuation method to be used to determine the price Hay River was to pay for those assets. As a result, on July 21, 2016, in accordance with section 15 of the Franchise Agreement, the parties agreed to enter into arbitration to resolve these issues.
2. On February 16, 2018, the Arbitrator released the Partial Final Award, which was subsequently appealed by NU to the Supreme Court of the Northwest Territories pursuant to provisions of the *Arbitration Act* which provide:

**26.** Subject to sections 27 and 28, an award made by an arbitrator or by a majority of arbitrators or by an umpire is final and binding on all the parties to the reference and the persons claiming under them.

**27.** (1) Where it is agreed by the terms of a submission that there may be an appeal from the award, the reference shall be conducted and an appeal lies to a judge within the time stated in the submission or, if no time is stated, within six weeks after the delivery of the award to the appellant…

**28.** (1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under that party may apply to a judge to set aside an award on the grounds that

 (a) an arbitrator or umpire has misconducted himself or herself, or

 (b) an arbitration or an award has been improperly procured,

and the judge may, in the discretion of the judge, dismiss the application or set aside the award.

1. Clause 15 of the Franchise Agreement provided that the parties could appeal to a judge on any issue: “The parties agree that any decision of the sole arbitrator shall be subject to appeal to a judge on a question of law or fact or mixed law and fact.” Neither the Franchise Agreement nor the *Arbitration Act*, imposed a requirement to obtain leave to appeal prior to filing a notice of appeal.
2. The Partial Final Award determined that Hay River was entitled to purchase a number of diesel generation facilities that NU had argued were excluded from the franchise assets, along with other non-contentious assets. It also set the means of determining the purchase price based on a modified book value, rather than on the basis of replacement cost less depreciation (“RCN-D”). The Award reserved the right to further determine particular facts and issues needed to implement these decisions absent agreement between the parties.
3. The Arbitrator first concluded that he was to set the price of assets and terms of purchase on a basis determined to be fair and just to both parties. He then concluded that the RCN-D approach would not achieve a fair and just result to Hay River and that the modified book value would do so, because:
* the RCN-D method would produce a price payable to NU of approximately three times the current book value of the franchise assets;
* the RCN-D method was based on the price to buy and install a new system, but Hay River would receive a system that had been in use throughout the franchise period;
* the RCN-D method would over-compensate NU by protecting it against the effects of inflation and result in a valuation that greatly exceeded book value;
* the application of the modified book value method would see NU recover all of its capital costs, as well as having enjoyed a return on its capital during the term of the franchise at rates set by the regulator;
* application of the RCN-D approach would deter municipalities in other cases from ever exercising their right to purchase utility systems, and creating perpetual franchises inconsistent with the intent of the legislature in passing legislation allowing such franchise agreements to be created; and
* that the addition of a modest premium to the figure produced by the modified book value approach would be fair, such as was done in ***Re City of Airdrie***, AEUB Decision 2003-047 [***Airdrie #1***] and ***Re* *City of Airdrie***, AEUB Decision 2004-070 [***Airdrie #2***],where a 1.36 multiplier was applied; accordingly, the Arbitrator increased the figure produced by the modified book value method by 30%, to arrive at a purchase price in the range of $13,064,252 to $14,754,429.
1. The Arbitrator expressly found that the nature of the arbitration was not a “final offer” or “baseball” type arbitration, in which he was obliged to choose between two competing offers based on different methods of valuation without adjustment, and regardless of whether he “found that produced a fair and just result”: Partial Final Award at para 152.
2. The Arbitrator noted that NU did not directly challenge the expert evidence led by Hay River as to the fair value arrived at by using the modified book value approach, and tendered no conflicting evidence to rebut it. Conversely, Hay River did not directly challenge the expert evidence led by NU as to the value produced by the RCN-D valuation approach, and tendered no conflicting evidence to rebut it.
3. Rather NU had argued before the Arbitrator that the modified book value approach was simply the wrong method to employ, and that he should utilize the RCN-D valuation method which produced a purchase price of $39,974,082. While Hay River did not contest the accuracy of this figure, it disputed the use of the RCN-D method of valuation.
4. The chambers judge correctly observed under the law as it operated at the time, that the standard of review in commercial arbitration appeals was virtually always reasonableness on all issues. He concluded that the Arbitrator’s selection of the modified book value method of valuation of the assets to be sold was both reasonable and correct. The chambers judge also found that inclusion of certain diesel generators in the assets to be purchased was reasonable, and noted that while he did not need to decide if it was also correct, it appeared to him to be so.

# Issues

1. Should the Partial Final Award have been reviewed on an appellate standard or on a reasonableness standard?
2. Does the test for selecting the valuation method for determining the purchase price for a utility system raise a question of law? If so, is the Partial Final Award correct in its selection of the “fairness to both sides” test?
3. Did the chambers judge err in concluding that the Partial Final Award was reasonable in applying the modified book value method of valuation as being the most fair to both parties?
4. Did the chambers judge err in concluding that the Partial Final Award was reasonable in including the diesel generators in the assets to be sold?

# Standard of Review

1. This Court must employ a standard of correctness to the chambers judge’s choice and application of the appropriate standard of review in assessing the Arbitrator’s Partial Final Award. If this Court concludes that the standard employed by the chambers judge was incorrect, we are to assess the Partial Final Award in light of the appropriate standard: ***Dr Q v College of Physicians and Surgeons of British Columbia****,* 2003 SCC 19 at paras 42-43, [2003] 1 SCR 226.

# Analysis

## Should the Partial Final Award be reviewed on an appellate standard or on a reasonableness standard?

1. The chambers judge applied the reasonableness standard of review to the Partial Final Award, which he defined as requiring the Award to fall within the range of possible, acceptable outcomes and be transparent, intelligible and defensible: Decision at para 4. That choice of standard of review, was correct and in keeping with the law at the time he heard the appeal. The subsequent changes in the standard of review have required us to directly assess whether the Partial Final Award contains reviewable error, in addition to addressing whether the chambers judge was correct in his selection of the standard of review he was to apply.
2. Namely, just under two months after the Decision was released, the Supreme Court of Canada rendered its decisions in ***Bell Canada***and ***Vavilov*** which substantially revised the standard of review framework to be employed when reviewing administrative decisions where such decisions were subject to a statutory right of appeal and, to that extent, departed from the approach set out in the former leading decision of ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190 [***Dunsmuir***]. Previously, 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. So long as an arbitrator’s decision fell within a range of reasonable, acceptable outcomes and was transparent, intelligible and defensible, it would be upheld.
3. 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.
4. Once the presumption of a reasonableness standard is rebutted, an appellate standard of review is to be applied, under which questions of law are to be reviewed for correctness and questions of fact or of mixed fact and law, on the standard of palpable and overriding error: ***Vavilov*** at para 37; ***Housen v Nikolaisen*** 2002 SCC 3 at para 26-28 [***Housen***]. This approach is said to be justified by weighing the values of certainty and correctness, and respects the legislature’s institutional design choice in intending the application of an appellate standard of review when it uses the word “appeal” in a statute: ***Vavilov*** at paras 32-52.
5. In ***Vavilov***, the Supreme Court did not expressly state whether the new standard of review framework applied to commercial arbitration. The key issue here is whether the revised approach to standard of review set forth in ***Vavilov*** applies to the decisions of commercial arbitrators made under arbitration legislation. Pre-***Vavilov,*** in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, [2014] 2 SCR 633, the Supreme Court applied the ***Dunsmuir*** standard of review principles, developed in the context of decisions of administrative tribunals, to commercial arbitration. The Court stated at para 75 of ***Sattva*** that reasonableness would almost always apply to commercial arbitrations conducted under arbitration legislation, except in relatively rare circumstances involving “constitutional questions or a question of law of central importance to the legal system as a whole and outside the adjudicator’s expertise”.
6. We note that the Supreme Court also stated in ***Sattva***, at para 50, that contractual interpretation involves issues of mixed fact and law, being an exercise in which principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract. In the result, appeals from arbitrators’ decisions resolving contractual interpretation disputes would not be permitted under the British Columbia legislation at issue in ***Sattva***, which permits appeals only on questions of law. That would not have been the case had ***Sattva*** originated in the Northwest Territories, where the *Arbitration Act* permits appeals on all questions, in accordance with the agreement of the parties. We also observe that the legislation underpinning that appeal, the *Arbitration Act*, RSBC 1996, c 55, differed from the *Arbitration Act* under consideration in this case, in that it permitted appeals from an arbitrator’s decision only on questions of law.
7. The approach to standard of review for commercial arbitration adopted in ***Sattva*** was followed in ***Teal Cedar Products Ltd v British Columbia***, 2017 SCC 32. Again, the Supreme Court held that the standard of review to be applied to an award under the British Columbia *Arbitration Act* is almost always reasonableness, a result said to dovetail with the key policy objectives of commercial arbitration: efficiency and finality.
8. As noted, in ***Vavilov***, the Supreme Court did not expressly state whether the new standard of review framework applicable to statutory appeals that was established in that case, would apply to commercial arbitration. Neither ***Sattva*** nor ***Teal Cedar Products*** were mentioned.
9. Competing trial court level authorities have since developed on the issue of whether commercial arbitration decisions are exempt from the application of ***Vavilov****.* In ***Buffalo Point First Nation et al v Cottage Owners Association****,* 2020 MBQB 20 at para 46-48, the *Arbitration Act*, CCSM c A120, which governs appeals from arbitration decisions, requires that leave to appeal first be obtained, and that such leave can only be granted in relation to points of law, similar to the legislation addressed in ***Sattva***. The Manitoba Court of Queen’s Bench granted such leave and, in hearing the resulting appeal, concluded it was bound by ***Vavilov***, holding that the point of law before it would be determined on a standard of correctness.
10. Similarly, in ***Allstate Insurance Company v Her Majesty the Queen***, 2020 ONSC 830 at paras 16-17 [***Allstate***], the Ontario Superior Court held that ***Vavilov*** applied to insurance arbitration which was mandated by legislation. The legislation at issue in that case was the *Arbitration Act*, 1991, SO 1991, c 17, which states that unless an arbitration agreement provides otherwise, leave to appeal may only be granted on a question of law. The agreement in that case did provide for broader issues on appeal; however the Court found that while the legislation allowed the parties to agree on the scope of an appeal of an arbitrator’s decision, this did not change the fact that the appeal arose out of a statutory appeal mechanism, which resulted in the application of appellate standards to the decision: ***Allstate*** at para 21.
11. In contrast, the Alberta Court of Queen’s Bench in ***Cove Contracting Ltd v Condominium Corp No. 012 5598 (Ravine Park)***, 2020 ABQB 106 at paras 6-7 [***Cove Contracting***], and the Ontario Superior Court in ***Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation,*** 2020 ONSC 1516 at paras 69-73 [***Ontario***], found that ***Vavilov*** does not apply to commercial arbitrations.
12. In ***Cove Contracting***, the chambers judge addressed an appeal arising under the *Arbitration Act*, RSA 2000, c A-43, which does not limit the right to appeal to questions of law, or require leave to appeal first be obtained. He concluded that ***Vavilov*** could be distinguished from commercial arbitration cases because the former arose from judicial review of decisions by administrative bodies, rather than from a decision-maker chosen by the parties to the dispute, and because the Supreme Court in ***Vavilov*** did not make express reference to its earlier decisions in ***Sattva*** and ***Teal Cedar***. He further concluded that although the appeal before him arose as a result of a right to appeal in the provincial *Arbitration Act*, that did not bring it within the ***Vavilov*** ambit. He observed that the context in which ***Vavilov*** arose, where an inexperienced decision-maker was called upon to interpret a statutory provision for the first time in unique circumstances, is unlikely to arise in commercial arbitration where the parties control the choice of the decision-maker and are thus able to select experienced informed arbitrators.
13. The Court in ***Ontario*** adopted the analysis in ***Cove Contracting***, and also held that ***Vavilov***did not apply to commercial arbitration, albeit in circumstances where the appeal arose under a provision in the contract rather than by statute. The Court concluded that commercial and contractual considerations, such as “respect for the decision-makers chosen by the parties”, supported the conclusion in ***Sattva*** that “the judicial review framework for administrative decisions is not applicable in the commercial arbitration context”: ***Ontario*** at para 72. It stated that a change in the judicial review framework does not mean the standard of review for arbitration decisions automatically changed, and went on to observe that by not referring to ***Sattva*** or ***Teal Cedar***, it is “not reasonable to conclude that the Supreme Court [in ***Vavilov***] meant to overrule these important decisions without making any reference to them or the area of law to which they relate”: ***Ontario*** at paras 71, 73.
14. We observe that while s 27 of the *Arbitration Act* of the Northwest Territories is less detailed than the legislation at issue in ***Ontario***, it also expressly provides a right of appeal where agreed to in the contract that is the subject of the arbitration. In ***Vavilov*** at para 36, the Supreme Court described the legislative intent that is “signalled by the presence of a statutory appeal mechanism”, as an intent to subject the body appealed from “to appellate oversight”. Does, then, s 27 of the *Arbitration Act* signal that the legislature intended the Arbitrator in this case to be subject to appellate oversight?
15. No appellate authority has been produced which provides an analysis of the issue of whether an appellate standard of review now applies to commercial arbitration decisions as a result of ***Vavilov***. The British Columbia Court of Appeal concluded that it need not decide the issue on the facts before it in ***Nolin v Ramirez***, 2020 BCCA 274. Citing ***Vavilov***, the Ontario Court of Appeal in ***Travelers Insurance Company of Canada v CAA Insurance Company****,* 2020 ONCA 382 at para 14, simply applied the standard of correctness to an issue of law involving the interpretation of the *Insurance Act*, RSO 1190, c I.8, which arose from the statutory appeal of an arbitrator’s decision. The Court went on to observe as well, however, that no deference would have been due to the arbitrator’s decision in any event, as the standard of correctness always applied to the constitutional, jurisdictional and exceptional issues raised in that matter.
16. Here, NU argues that notwithstanding that ***Vavilov*** did not expressly address whether commercial arbitration would henceforth be subject to an appellate standard of review, it should be interpreted as applying to such appeals. Hay River argues to the contrary. It points out that three parties interested in commercial arbitration were given permission to intervene in ***Vavilov***, and that comprehensive argument was heard from them to the effect that the reasonableness standard of review should exceptionally be retained in relation to arbitration decision-making. As the Supreme Court nonetheless chose not to expressly address this issue, Hay River argues it cannot be considered to have simply missed the issue.
17. 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.
18. Rather, assuming, without deciding, that the Partial Final Award was a commercial arbitration decision, the reasons given in ***Vavilov*** for developing a new framework for review of administrative decisions must be examined to determine whether the same reasoning would apply to a statutory appeal from an arbitrator’s decision, including commercial arbitrators, such that ***Vavilov*** is to be applied in commercial arbitration appeals.
19. Of particular importance is the provision of a statutory appeal mechanism. Namely, the appeal provision in s 27 of the *Arbitration Act* was utilized by NU to launch its appeal before the chambers judge, the result of which is now before this Court. In ***Vavilov*** at para 37, the existence of such a statutory appeal mechanism was found to be an indication of legislative intent that such matters are to be reviewed “with reference to the nature of the question and this Court’s jurisprudence on appellate standards of review”. Respect for legislature intent is the “polar star” of judicial review: ***Vavilov*** at para 33, citing ***CUPE v Ontario (Minister of Labour)***, 2003 SCC 29 at para 149, [2003] 1 SCR 539.
20. Applying the “presumption of consistent expression”, which is one of the principles of statutory interpretation, the word “appeal” is to be given a consistent meaning; see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at paras 13.25-13.26 [*Sullivan*]. That is, “appeal” should be taken to mean the same thing in an administrative law statute as it does in “a criminal or commercial law context”: ***Vavilov*** at para 44. Should the converse then not also be true, that an appeal in a commercial law context means the same thing as an appeal in an administrative law context?
21. In ***Vavilov*** at para 46, Chief Justice Wagner for the majority expressly observed that “the presumption of reasonableness review is no longer premised upon notions of relative expertise”, an approach done away with by the “legislature’s institutional design choice” in the context of a statutory appeal. This logic supports the argument, for example, that a commercial arbitrator’s presumed expertise does not justify exemption from an appellate standard of review any more than does the expertise of other administrative boards typically staffed by experienced adjudicators. Further, there is no reason to have an otherwise anomalous standard of review that applies only to arbitration decisions when all other decisions are reviewable on the appellate standard.
22. Further, the suggestion that the extension of ***Vavilov*** principles should be avoided because it would significantly disrupt the legal landscape pertaining to commercial arbitrations, is met by observing that the degree of disruption created through a change affecting every administrative tribunal in Canada would equal or exceed that affecting commercial arbitrations, yet was no reason for the Supreme Court to decline to implement the new framework in ***Vavilov***. The submission that maintenance of a reasonableness standard of review for commercial arbitration decisions is necessary to prevent the courts from being overwhelmed by appeals is answered, in part, by the observation that adoption of the appellate standard of review to commercial arbitration decisions would hardly open the litigation floodgates. Most issues reviewed on that standard would still be reviewed with deference to the findings of the arbitrator, as most issues on appeal are issues of fact or mixed fact and law.
23. It is difficult to follow the argument that the reliability of Canada as a forum for resolution of local and global business disputes, would be rendered less grounded in the rule of law in a rules-based system of law by employing an appellate review standard. The ***Dunsmuir*** standard requiring deference to arbitrator’s decisions, no matter the basis upon which they were determined, resulted in greater uncertainty than an appellate standard of review. In other words, commercial attractiveness may be enhanced, rather than reduced, by allowing appeals based on an arbitrator’s errors on questions of law. The development of a body of arbitral jurisprudence based on appellate rulings will assist in fostering acceptance of the predictability and reliability of Canadian decision-making.
24. The ability of parties to consensually participate in arbitration would also not be affected by the adoption of an appellate standard of review in relation to appeals arising under legislation akin to the *Arbitration Act*, which allows appeals only where contracting parties have agreed to include a right of appeal as a term of their contract; see *CTV Act*, s 91(5); *Arbitration Act*, ss 26, 27. The parties are free to sign an agreement which does not contain a right of appeal should they so choose.
25. We therefore conclude that the revised standard of review framework described in ***Vavilov*** applies to commercial arbitration decisions reviewed as a result of a right of appeal given by statute. As noted, this does not mean that all issues under appeal pursuant to the *Arbitration Act* are to be automatically reviewed on a standard of correctness. As this legislation does not limit the right of appeal to questions of law, an appellate standard of review is to be applied to all issues raised, including not only questions of law reviewed for correctness, but questions of fact or of mixed fact and law which will continue to be reviewed on a standard of palpable and overriding error.

## Does the test for selecting the valuation method for determining the purchase price for a utility system raise a question of law? If so, is the Partial Final Award correct in its selection of the “fairness to both sides” test?

1. The Arbitrator described the legal test for selecting the valuation method for franchise assets, by quoting from ***Airdrie #2*** at 13 which provided that there is “an overriding principle that, in the absence of statutory prescription, the Board must treat both sides of the transaction fairly in setting the price…”: Partial Final Award at para 133. The chambers judge found at para 12 of the Decision, this was “not only reasonable and absent legal error, it was entirely correct.” The chambers judge, like the Arbitrator, further adopted the reasons in ***Airdrie #2***, to the following effect:

(a) There is no compelling authority, including from the Supreme Court of Canada, that RCN-D must be applied as the valuation methodology when determining the value of franchise assets upon the termination of the franchise;

(b) There is no one acceptable approach to determining such a price. There is instead a broad obligation to treat the Parties fairly and equitably according to the particular circumstances of each case.

See also ***Town of High Prairie and Northland Utilities Limited***, PUB Decision No 30331, October 4, 1971 at 6-7 [***High Prairie***].

1. The issue is then whether the test for selection of a valuation method in a given case is a question of law, in which case it should have been reviewed by the chambers judge on the correctness standard. While conceding that neither the legislation nor the Franchise Agreement requires the RCN-D method be used for valuation, NU argues that its use is nonetheless required by law on the basis of prior jurisprudence, and that the Arbitrator’s failure to apply it thus amounts to an error of law reviewable on the standard of correctness. Hay River responds that while decision-makers employed the RCN-D method in a number of earlier decisions, the choice of that method was not in issue, nor the subject of a decision, in any of those authorities; it was simply part of the context in which other issues arose.
2. No court has expressly decided that the RCN-D method must or should always be used in determining the value of a utility system. Rather, Hay River submits that there is existing jurisprudence that directly speaks to the issue of valuation, imposing a test that valuation be undertaken based on a method that produces a fair result to both parties in all of the circumstances.
3. Whether the test for selecting a method of valuation is a question of law or of mixed fact and law requires an assessment of the circumstances in this case. As noted earlier, the Supreme Court stated in ***Sattva*** at para 50, that contractual interpretation involves issues of mixed fact and law. However, neither party argued that the Arbitrator was interpreting the Franchise Agreement when he decided that valuation must be undertaken based on a method that produces a fair result to both parties in all of the circumstances. There is nothing in the Franchise Agreement that he relied on implicitly or indirectly, in determining the test for selecting a method of valuation. It is entirely silent on the issue of valuation.
4. We agree that determining what test to apply in selecting a method of valuation of a utility system in the absence of that method being set by contract or statute, raises a question of law, although for different reasons than those argued by NU. In our view, the Arbitrator was required to determine the correct legal test for selecting a valuation method; whether or not he did so, is a question of law. Further, it is an extricable question of law, distinct from the issue of determining whether the valuation method ultimately selected, did, in fact, achieve a fair result, whether by using the RCN-D method, the modified book value or some other method. It is distinct from the application of that test to the facts in determining what valuation method should be employed in a given case, which is a question of mixed fact and law.
5. This is because the requirement for a test for selection of a valuation method arose as the result of the interplay of two statutes; s. 91(5) of the *CTV Act* which expressly permitted Hay River to purchase the electrical utility assets from NU at a value set by agreement or, failing that, by arbitration and ss 26 and 27 of the *Arbitration Act,* which directs that any resulting arbitration award is final subject to a right of appeal to a judge where permitted by the underlying agreement, as here. The arbitrator’s mandate to set a value is thus rooted in statute, which suggests that the test used to establish that value is a question of law.
6. Further, the choice of method of valuing a utility system concerns a general principle, independent of a particular set of facts arising only in a given situation. It addresses a point in controversy that might well arise in future situations where municipalities wish to purchase utility systems under contracts similar or identical to the Franchise Agreement, and thus has some precedential value. More specifically, it requires the application of the principle of universality which demands appellate courts ensure that the same legal principles apply in similar situations.
7. This conclusion is in keeping with the Supreme Court’s discussion of the differences between a question of law and one of mixed fact and law in ***Canada (Director of Investigation and Research) v Southam Inc****,* [1997] 1 SCR 748 at para 35, 144 DLR (4th) 1 [***Southam***]:

Section 12(1) of the *Competition Tribunal Act* contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests… .

1. A few years later, in ***Housen***, the Supreme Court further expanded on this difference, stating that where “. . . the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law”. At para 33, the Court further stated: “Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a ‘correctness’ standard of review. . .”.
2. Importantly, ***Southam***at paras 36-37, further provided that a question of law will arise where a dispute concerns a general proposition that qualifies as a principle of law, rather than a particular set of circumstances that would not be of much interest to the legal profession in the future; see also ***Housen*** at para 28. If the point in controversy between the parties is one that will potentially arise in future cases, ie is not unique but rather raises an issue of general proposition and therefore is of wider precedential value, a question of law arises: ***Southam*** at paras 36-37; see also ***Alberta (Workers’ Compensation Board) v Appeals Commission***, 2005 ABCA 276 at paras 21-22, 258 DLR (4th) 29. This is based on the principle of universality which requires appellate courts to ensure that the same legal rules apply in similar situations: ***Housen***at para 9.
3. The British Columbia Court of Appeal in ***Gemex Developments Corp v British Columbia (Assessor of Area #12 – Coquitlam)*** (1998), 62 BCLR (3d) 354 at para 9, 112 BCAC 176, found that a question of law may arise in a variety of situations concerning an appeal of a tribunal’s determination. It stated that in such a context, a question of law arises where there is a misapplication by the decision-maker of an applicable principle of general law or where the decision-maker is wrong in principle.
4. We emphasize that the issue at this point is not whether the Arbitrator should have applied the RCN-D method or the modified book value method or any other particular method, but rather it is the overarching principle of how the valuation method to be used should be selected.
5. In any event, none of the authorities offered in support of NU’s argument that the Arbitrator erred in law by not selecting the RCN-D valuation method, go so far as to mandate its use in every case. Rather, those cases provide examples of situations in which the RCN-D approach was imposed; for example, where by operation of the agreement, the value of the franchise (past and future) is to be excluded from consideration of the sale price, which is instead based on the value of the use and operation of the purchased asset: ***Northland Utilities Ltd v City of Grande Prairie****,* [1966] AJ No 77 (QL) at paras 29-34, 57 DLR (2d) 481 (ASC, AD) [***Grande Prairie***].
6. By way of another example, in ***Calgary Power Ltd v City of Camrose***, [1975] 2 SCR 465, 48 DLR (3d) 699 [***Camrose***], while the Supreme Court addressed the consequences of applying the original valuation method to the inclusion and valuation of specific assets, the choice of valuation method was earlier set by the Public Utilities Board and was not an issue on appeal. The Court’s decision does not expressly refer to the RCN-D method at all.
7. Therefore, this line of regulatory and court decisions relied on by NU do not support the proposition that the required or default method of valuation is the RCN-D method, or that the Arbitrator was obliged to apply the RCN-D method as a question of law.
8. To the extent that any support for the proposition that the RCN-D method must be used when valuing assets for sale is found in the 1965 Public Utilities Board decision in ***City of Grande Prairie v Northland Utilities Limited****,* 1965 PUBA, Decision 27014, the successor Alberta Energy and Utilities Board decisions in ***Airdrie #1*** and ***Airdrie #2*** supplanted that view with its conclusion that valuation should be based on whatever methodology leads to a fair result for both parties in all of the circumstances.
9. While the Public Utilities Board did apply an RCN-D method in the 1971 ***High Prairie*** decision, that decision must also be viewed through the lens of the subsequent ***Airdrie*** decisions. And even so, in ***High Prairie*** the Board stated at 6-7: “…it is clear from the authorities that reproduction cost less depreciation is not the only proper method and the board must have regard to all relevant factors when considering value”.
10. Having found the standard of review for the test for selecting the valuation method of a utility system raises a question of law, we next conclude that the Arbitrator was correct in selecting the “fairness to both sides” approach; i.e. selecting the valuation method based on treating the parties fairly and equitably in the circumstances of the case. This approach best achieves the intention of the legislature that utility systems be constructed for municipalities that lack the resources to immediately fund their purchase, but that those municipalities, in due course, have the opportunity to acquire ownership of those systems that serve their residents.
11. It is worthwhile to observe that if we are incorrect in concluding that the test for selection of a valuation method is a question of law, and it is rather a question of mixed fact and law, the same result would ensue. The chambers judge’s conclusion that the Arbitrator’s decision was reasonable in this respect, would have been correct. Therefore, whether ***Vavilov*** applies to this case or not, the result is the same – no reviewable error was made in relation to the test to be applied in the selection of a method of valuation.

## Did the chambers judge err in concluding that the Partial Final Award was reasonable in applying the modified book value method of valuation as being the most fair to both parties?

1. We must then move on to the issue of whether the Arbitrator erred in applying the test to the facts before him in arriving at the conclusion that a modified book value method was most likely to achieve a fair and equitable result between the parties. In other words, was the chambers judge correct in finding that the Arbitrator reasonably applied the facts to the law in determining that the modified book value method should be employed?
2. As set out above, this issue raises a question of mixed fact and law, not pure law, given that it deals with the application of a legal standard (the proper approach to utility asset valuation) to a set of facts (the particular assets at issue). The standard of review for an error of mixed fact and law as affirmed in ***Vavilov*** at para 37 and citing ***Housen*** at paras 26-37, is palpable and overriding error. The standard of palpable and overriding error, or reasonableness, is a highly deferential standard that requires an “obvious” error which goes to the “very core of the outcome of the case”: ***Benhaim v St-Germain***, 2016 SCC 48 at paras 38-39, [2016] 2 SCR 352. In other words, the accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong: ***Stein et al v ‘Kathy K’ et al (The Ship)***, [1976] 2 SCR 802 at 806, 62 DLR (3d) 1.
3. Hay River argues that the selection by the Arbitrator of a modified book value approach was reasonable, based on his express reasons, as described in paragraph 14, above. NU argues to the contrary, and states that the Arbitrator unreasonably concluded that it would be fair and just to the parties to apply an adjusted book value methodology because in so doing, he first failed to find whether this was an asset sale or a business sale. It submits that finding is a mandatory relevant factor to be considered when setting value, but did not provide any supporting analysis for this proposition. While it attempted to rely on ***Camrose*** in support, nothing in that case indicates that a choice of valuation methodology is driven by the type of sale, whether asset or business.
4. NU alternatively argues that the Arbitrator erred in law in basing his choice of valuation method on an implied finding that Hay River had obtained a proprietary interest in the electrical distribution system as a result of its ratepayers paying their utility bills over the years, contrary to the Supreme Court of Canada’s decision in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4 at para 64, [2006] 1 SCR 140, sometimes referred to as the Stores Block case. This argument arises from the Arbitrator’s statement that his primary reason for rejecting the RCN-D methodology as unfair “. . . is that Hay River (and its residents) have already paid to [NU] rates covering a return on capital employed and depreciation of assets used for the purpose of the franchise”: Partial Final Award at para 198. In any event, Stores Block was decided in the context of allocating sale proceeds on the disposition of a gas utility assets in a regulatory context between the gas utility and rate-payers, which is quite different than an arbitrator determining the price to be paid for assets purchased by the municipality under a franchise agreement.
5. Further, that statement of the Arbitrator is not a conclusion that ratepayers had obtained a property interest in the utility as a result of having paid their bills over time, as demonstrated by his comments in the following paragraph 199 to the effect that “. . . the essence of the grant of a franchise agreement [is] namely, that the utility be entitled to recover all its capital costs and enjoy a return on capital employed during the term of the franchise”.
6. Moreover, we were directed to no evidence relied upon by Mr. White, Hay River’s expert appraiser who calculated the modified book value, that depended on the assumption that utility customers in Hay River obtained a property interest in the utility because they had paid their electric bills, or based on their consumption of electricity over the years the Franchise Agreement operated.
7. The Arbitrator’s observations about a return on capital, can therefore only be viewed as a description of one of the reasons that the modified book value would be most fair to both parties.
8. NU similarly challenges the Arbitrator’s consideration of the effect of utilizing the RCN-D approach, being that Hay River would not be able to exercise its right to purchase due to the size of the resulting valuation. In doing so, it misconstrues earlier jurisprudence as dictating that the size of a resulting purchase price is an irrelevant consideration in setting a price that is fair and equitable to both parties. Comments by the Court in ***Grande Prairie*** at 6 to the effect that the City could decline to purchase the franchise assets if it finds the price too high, does not equate to the conclusion that the effect of a very high price is irrelevant in the “fairness to both sides” test to be undertaken by the decision-maker**.**
9. We defer to the selection by the Arbitrator of the modified book value as the appropriate method of valuation. Given his express reasons for that selection, described in paragraph 14 of this decision, that choice was not “clearly wrong” or based on an obvious error, and otherwise fell within a range of reasonable, acceptable outcomes and was transparent, intelligible and defensible. In short, it was reasonable.

## Did the chambers judge err in concluding that the Partial Final Award was correct and reasonable in including the diesel generators in the assets to be sold?

1. The Partial Final Award determined that certain contested assets were included under the Franchise Agreement and therefore subject to purchase by Hay River. NU is dissatisfied with the inclusion of certain generators physically located within the Town among those assets.
2. This issue also triggers the application of deference to the Arbitrator’s decision to include these generators. NU acknowledges in para 61 of its factum, that this alleged error amounts to a plausible alternative interpretation of the Franchise Agreement that would survive a reasonableness review.
3. The Arbitrator found the generators essential to the continuity of electricity distribution within the Town. As such, he determined that they are “property used in connection with the franchise” within the meaning of s 91(5) of the *CTV Act* and “apparatus and property used for the purposes thereof” within the meaning of s 15 of the Franchise Agreement, and therefore fell within the definition of the assets subject to sale: Partial Final Award at para 102.
4. He adopted the reasoning of the Alberta Supreme Court Appellate Division in ***Grande Prairie*** at 481 to the effect that, the fact that certain assets are used both for the municipality that seeks to purchase them as well as other purchasers, does not mean that they are excluded from the sale if their principal use was for the municipality: Partial Final Award at paras 104-107.
5. NU argues that this finding was unreasonable because the Arbitrator was required to read “the contract as a whole, giving the words their ordinary and grammatical meaning” (***Young v Williamson***, 2019 ABCA 110 at para 11), and failed to do so. This failure is said to arise from his treatment of the word “supply” in s 1 of the Franchise Agreement as if it meant “generate”, whereas “generate” is implicitly given a different meaning in s 14 of the Agreement. A well-established principle of contractual interpretation, as well as statutory interpretation, is that of consistent expression; meaning that within a contract, the same words have the same meaning and different words have different meanings: *Sullivan* at para 8.32.
6. The gist of this argument is that because Hay River granted NU the exclusive right to “distribute, supply and sell electric energy” within Hay River in s 1 of the Franchise Agreement, that did not include the right to generate electricity. NU argues that the use of the word “generate” in s 14, means it should be found to have been implicitly excluded from the types of activities granted to it by s 1. If so, it states, the fact that NU generated electricity by way of the diesel generators and sold it to Hay River, means that those generators are not properly the subject of the Franchise Agreement and are therefore not caught by the right of purchase therein.
7. However, s 14 of the Franchise Agreement, entitled “Exclusive Right”, is a provision that disallowed Hay River to grant to “any other person, firm or corporation, the right to generate, distribute or sell electric energy in the Town”. It does not speak against NU’s ability to generate electricity; quite the opposite, it speaks to NU’s exclusive right to do so.
8. Further, even if the failure to use a term in one section of a contract could found an argument of inconsistency where it is used in another section, a contract should be interpreted based on the presumption of coherence to avoid contradictions or inconsistencies: *Sullivan* at para 11.3. This is most readily achieved by interpreting s 14 to mean that the parties intended electricity generation to be one of the activities permitted to NU, such that the equipment it used to do so is included in the franchise assets that are subject to the right of purchase.
9. Moreover, the diesel generators in question served a back-up role in ensuring continuity of electric service on those rare occasions where the default sources of electricity were out of service to Hay River. Although about 10% of their capacity was also used to supply electricity to small communities outside of the Town, permitting Hay River to purchase these generators will not impact the small communities that rely upon them. As observed by the Arbitrator, the rights of the other purchasers of electricity produced by these generators are protected by the fact that they will continue to be subject to regulation by the Northwest Territories Public Utilities Board; a change in ownership alone will not put these other communities at risk.
10. The chambers judge was therefore correct in concluding that the Arbitrator reasonably included these diesel generators within the assets covered by the purchase under the Franchise Agreement. That reasonable standard does not disclose any palpable and overriding error by the Arbitrator.

# Conclusion

1. The appeal is dismissed.

Appeal heard on October 27, 2020

Reasons filed at Yellowknife, NWT

this 20th day of January, 2021

“Bielby J.A.”

Bielby J.A.

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**Reasons for Judgment Reserved of**

**The Honourable Madam Justice Veldhuis and**

**The Honourable Madam Justice Strekaf Concurring in the Result** **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

1. We have reviewed the judgment of our colleague and concur in the result.
2. We agree that the standard of review to be applied on the appeal of the Partial Final Award, post *Vavilov*, is the appellate standard of review outlined in *Housen* and we endorse the reasons set out at paragraphs 20 to 44 of our colleague's judgment. We agree with the analysis at paragraphs 73 to 82 that the Arbitrator's inclusion of the diesel generators in the assets to be sold discloses no reviewable error.
3. In our view, the Arbitrator's selection of the valuation method to set the price to be paid pursuant to s 15 of the Franchise Agreement does not raise an extricable question of law subject to appellate review on a correctness standard. That matter involves questions of mixed fact and law and the exercise of discretion, which are reviewable on the standard of palpable and overriding error and reasonableness, respectively. The Arbitrator's application of the modified book value approach, which he concluded would be fair to both sides, was reasonable and discloses no palpable and overriding error.
4. We would also dismiss the appeal.

Appeal heard on October 27, 2020

Reasons filed at Yellowknife, NWT

this 20th day of January, 2021

“Veldhuis J.A.”

Veldhuis J.A.

“Strekaf J.A.”

Authorized to sign for: Strekaf J.A.

**Appearances:**

L.G. Keough

 For the Appellant

T.D. Marriott

 For the Respondent

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**Corrigendum #2 of the Memorandum of Judgment**

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1. In paragraph 85 of the Concurring Reasons, the first sentence was amended to read, “...**we endorse the reasons set out at paragraphs 20 to 44.”**

2. In paragraph 85 of the Concurring Reasons, the second sentence was amended to read, **“We agree with the analysis at paragraphs 73 to 82.”**

The Citation has been amended to read:

***Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1.cor 2**

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**Corrigendum of the Memorandum of Judgment**

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In the last sentence of paragraph [81], the reference to the Alberta Utilities Commission was amended to read the **Northwest Territories Public Utilities Board.**

The Citation has been amended to read:

***Northland Utilities (NWT) Limited v Hay River (Town of)*, 2021 NWTCA 1.cor 1**

A-1-AP-2019-000010

IN THE COURT OF APPEAL

OF THE NORTHWEST TERRITORIES

**Between:**

 NORTHLAND UTILITIES (NWT) LIMITED

 - and -

 THE TOWN OF HAY RIVER

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| **Corrected judgment:** A corrigendum was issued on February 17, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment. |

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| **Corrected judgment:** A corrigendum was issued on February 1, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment. |

REASONS FOR JUDGMENT RESERVED OF

THE HONOURABLE MADAM JUSTICE BIELBY