Has the Music Stopped?— Public Access to Construction Arbitration Decisions in Canada

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Editor's Note

Arbitration is often ranked as the most common or favoured construction dispute resolution process. Many current construction contracts mandate arbitration if disputes cannot be resolved amicably through party-to-party negotiations or mediation. However, the authors, Jason J. Annibale, Charlotte Conlin, and Donia Hashem, discuss the impact of arbitration, a private and confidential process, on the evolution of construction law. Without access to decisions on important issues, the development of case law is slowing. This timely and thoughtful paper reviews the reasons why arbitral decisions rarely form part of the public record, including the limited rights of appeal and judicial review designed to provide parties with finality. The authors make the case for publication of arbitration decisions in the area of construction law by drawing parallels with other specialized areas, such as marine law, and by development of an organizational infrastructure for the collection and publishing of construction arbitration decisions.

1. INTRODUCTION

In her 2016 article, *The Day Doctrine Died: Private Arbitration and the End of Law*, Myrian Gilles, Professor of Law at Cardozo Law School, observes that resolving disputes within the "hermetically sealed vault of private arbitration" creates a game of "high stakes musical chairs."[2] She argues that private arbitration's removal of entire categories of cases from the judicial system freezes the development of legal doctrine at an arbitrary point in time where "much depends upon where you are when the music stops."[3]

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[2] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, University of Illinois Law Review, Vol 2016, 371-424, pp 372, 377, and 422.

[3] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, University of Illinois Law Review, Vol 2016, 371-424, pp 377 and 422.

Noradèle Radjai, a partner with the international arbitration team at LALIVE, argues that this freezing of doctrinal development draws into question commercial arbitration's legitimacy.[4] Radjai reasons that commercial arbitration at once relies upon and undermines "a system of law which evolves and adapts with jurisprudence over time."[5] In laying the foundation for her argument, Radjai draws upon the dramatic imagery employed by other arbitration critics who accuse arbitration of "turning the common law into 'an ossuary'" and who lament that arbitration "is retreating into its lair, dragging with it into the darkness the very cases that should be used to develop the common law. . ."[6]

With equally artistic (but somewhat less charged) language, The Right Honourable Beverley McLachlin, PC, observes the impact of arbitration on the law's development specifically in the context of construction:

> . . . all areas of law — construction law included — are living, constantly evolving, trees. Some branches sprout and grow: others crack and need trimming. Thus the law develops and remains responsive to changes in society.
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> . . .
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> The construction law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are being neglected.[7]

Almost all sophisticated construction contracts provide for arbitration as the preferred method of dispute resolution where parties are unable to resolve their disputes in the absence of a final and binding order from a third-party decision-maker.[8] Arbitration affords several advantages to

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4 Noradèle Radjai, *Commercial Arbitration and the Development of Common Law*, Evolution and Adaptation: The Future of International Arbitration, International Council for Commercial Arbitration Congress Series No. 20, Sydney 2018 (Wolters Kluwer Law & Business, 2020) pp 342-343.

5 Noradèle Radjai, *Commercial Arbitration and the Development of Common Law*, Evolution and Adaptation: The Future of International Arbitration, International Council for Commercial Arbitration Congress Series No. 20, Sydney 2018 (Wolters Kluwer Law & Business, 2020) pp 342-343.

6 Noradèle Radjai, *Commercial Arbitration and the Development of Common Law*, Evolution and Adaptation: The Future of International Arbitration, International Council for Commercial Arbitration Congress Series No. 20, Sydney 2018 (Wolters Kluwer Law & Business, 2020) p 333; Notably, one of these critics was the Former Lord Chief Justice of England and Wales, Lord John Thomas.

7 The Right Honourable Beverley McLachlin, PC, *Judging the 'vanishing trial' in the construction industry*, Construction Law International, Vol 5, Issue 2 (June 2010) (9-14), pp 9-10.

8 The Right Honourable Beverley McLachlin, PC, *Judging the 'vanishing trial' in the construction industry*, Construction Law International, Vol 5, Issue 2 (June, 2010) (9-14), p 10; Noradèle Radjai, *Commercial Arbitration and the Development of Common Law*, Evolution and Adaptation: The Future of International Arbitration, International Council for Commercial Arbitration

construction industry participants that courts, as a whole, either struggle or outright fail to provide, including the following:

(a) The parties select their decision-maker. As such, they are able to retain trusted industry experts to evaluate and decide upon the complex facts, norms, and expert engineering, scheduling and quantification evidence that comprise construction disputes.

(b) Arbitration provides much greater flexibility in tailoring a dispute resolution process appropriate to the dispute. This enables a dispute resolution process that is faster, more efficient and business-like, and less formal. Moreover, parties are free to agree that their process results in a final and binding decision with very limited, if any, opportunity to appeal. As such, parties are almost always able to resolve their disputes with a single hearing and thereafter move on with their businesses.

(c) As a consensual process, arbitration is generally less acrimonious than litigation and therefore better suited to the protection of relationships than court process.

(d) Finally, arbitration allows parties to resolve their disputes in a private and confidential forum.

These benefits make it a near certainty that sophisticated construction industry participants will not be returning to the courts *en masse* any time soon for the resolution of their construction disputes. It is that fourth and final benefit, however, that creates the dilemma identified by the jurists cited above: a frozen common law where the music stops.

As we consider below, domestic arbitration decisions in Canada are not exactly locked-up in a "hermetically sealed vault."[9] Such decisions, or at least portions of them, may become part of a public court record upon appeals, judicial reviews, and enforcement proceedings.[10]

It will be seen, however, that the circumstances in which domestic arbitration decisions become public through the mechanisms available in arbitration legislation are relatively rare. Recognizing this, we then make the case for their publication in the area of construction law. Enabling

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Congress Series No. 20, Sydney 2018 (Wolters Kluwer Law & Business, 2020) pp 334 and 336; Andrew Stephenson, *Arbitration: Can it assist in the development of the common law — An Australian point of view*, Lexology (October 17, 2016) pp 7-8.

[9] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, University of Illinois Law Review, Vol 2016, 371-424, p 372.

[10] We would note that these circumstances are particularly rare in respect of construction law.

the publishing of such decisions, as we outline in this article, provides the construction bar and industry with continually developing legal reasoning "responsive to changes in society"[11] while still protecting construction industry participants' access to the advantages that arbitration provides. Though we limit ourselves here to the construction industry, we suspect that our considerations will find application elsewhere in other sectors and jurisdictions.

We begin with a consideration of the arbitration legislation potentially touching arbitral decisions. While all somewhat similar, each Canadian provincial, territorial, and federal jurisdiction has its own governing arbitration legislation.[12] For our present purposes, it will be sufficient to restrict ourselves to Ontario, Alberta, and British Columbia in particular. We also consider the applicable standards of review for appeals and judicial reviews and how parties may contractually adjust rights of appeal.

2. APPEALS AND JUDICIAL REVIEW OF ARBITRAL DECISIONS IN ONTARIO, ALBERTA, AND BRITISH COLUMBIA

Consistent with the intention of arbitration, there is relatively limited opportunity for a court to intervene in or become a part of a construction arbitration. The circumstances under which arbitral decisions enter the public record and become available to the public at large are correspondingly limited.

With reference to the Ontario *Arbitration Act, 1991*, the Supreme Court of Canada has described the statutory language as a signal for courts to "take a 'hands off' approach to matters governed by the [Act]."[13] Separately, Ontario's Court of Appeal has found that in exercising its discretion to intervene in arbitral decisions, courts "should take a pragmatic approach and intervene only when there are undoubted practical reasons for doing so."[14] Proceeding in such fashion honours the parties' agreement to settle disputes through arbitration. Echoing this sentiment, the Alberta Law Reform Institute has explained that the limited scope of judicial intervention in arbitral proceedings is a "necessary adjunct to the central principle of party control."[15]

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[11] The Right Honourable Beverley McLachlin, PC, *Judging the 'vanishing trial' in the construction industry*, Construction Law International, Vol 5, Issue 2 (June 2010) (9-14), p 10.

[12] In Quebec, the arbitration legislation is within the *Quebec Civil Code* (SQ 1991, c 64, Arts. 2638-2643, 3121, 3133, 3148, 3168).

[13] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 56.

[14] *Ontario v. Ontario First Nations Ltd. Partnership* (2004), (*sub nom.* Ontario First Nations Limited Partnership v. Ontario) 245 D.L.R. (4th) 689 (Ont. C.A.) at para. 26.

Opportunities for judicial intervention are outlined within each Canadian jurisdiction's arbitration statute, and are generally confined to appeals, judicial review, and the enforcement of awards. The grounds for appeal and judicial review are most restrictive. Moreover, the need to enforce arbitration awards seldom proves necessary — especially in respect of complex construction disputes. As such, construction arbitral decisions rarely become part of a court record and available to the general public.

In what follows, we consider the limited circumstances in which an arbitral decision may become available to the public through court intervention, namely appeals, judicial review, and enforcement proceedings, by reference to the legislation in Ontario, Alberta, and British Columbia.

2.1 Appeals

Canadian courts view appeal rights from arbitrations as "narrowly circumscribed,"[16] and "neither required nor routine."[17] Rights of appeal are statutory and accordingly dependent on the available grounds of appeal, if any,[18] as prescribed in the governing statute. Thus, if a statute only permits appeals on questions of law, "a finding that the questions on appeal . . . are not questions of law would wholly dispose of the issue of the court's jurisdiction to review those questions."[19]

Most arbitration statutes in Canada allow parties to vary or exclude appeal rights. This practice is common in the construction industry where parties often seek to exclude the availability of appeal altogether.

2.1.1 Appeals under the Ontario Act

In Ontario, section 45 of the Ontario *Arbitration Act, 1991,* (the "**Ontario Act**") limits appeal rights to questions of law, with leave, where the parties' arbitration agreement does not deal with such appeals. When determining whether to grant leave, the court will assess whether,

> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

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[15] Alberta Law Reform Institution, "Final Report Arbitration Act: Stay and Appeal Issues", September 2013, 2013 CanLiiDocs 389 at para 23.

[16] *Creston Moly Corp. v. Sattva Capital Corp.* (2014), 373 D.L.R. (4th) 393 (S.C.C.) at para. 38.

[17] *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 at para. 20, leave to appeal refused 2019 CarswellOnt 18325 (S.C.C.).

[18] For example, Section 36 of the *Newfoundland and Labrador Arbitration Act*, R.S.N. 1990, c. A-14 stipulates that all arbitration decisions are final and binding and does not permit appeal of such decisions.

[19] *Teal Cedar Products Ltd. v. British Columbia* (2017), 411 D.L.R. (4th) 385 (S.C.C.) at para. 42.

(b) determination of the question of law at issue will significantly affect the rights of parties.[20]

This conjunctive, high threshold test operates to "encourage finality in the dispute resolution process. It is meant to prevent parties from pursuing unnecessary litigation through re-litigation of their private disputes in a different forum."[21]

Although rarely done in the construction context, parties may contract out of this statutory limitation "by agreeing to a more wide-ranging [set of] appeal rights."[22] Where the parties agree, section 45(2) of the Ontario Act allows parties to submit questions of law to appellate review without leave and section 45(3) allows them to agree to submit an appeal on questions of fact or questions of mixed fact and law. In construction, the more common circumstance is one where parties seek to limit or prohibit appeal altogether.

2.1.2 Appeals under the Alberta Act

Similar to Ontario, section 44(2) of the Alberta *Arbitration Act* (the "**Alberta Act**") permits parties to appeal an award on questions of law, with leave of the court, where their arbitration agreement does not contemplate such appeals.[23]

The Alberta Act is similar to the Ontario Act in that it employs a conjunctive, high threshold test for leave to appeal. However, section 44(3) of the Alberta Act imposes the additional, restrictive requirement that leave may only be granted if the question of law at issue has not been expressly referred to the arbitral tribunal for consideration.[24] The Alberta Court of Queen's Bench explained this unique requirement by stating that "it now appears settled that section 44(3) prohibits an appeal of a discrete question of law that the parties expressly posed to the arbitrator. If the question of law arose incidentally in the course of making a broader or more topic-oriented decision, there is no barrier to appeal."[25]

It is difficult to imagine a circumstance within a construction (or other) arbitration where this additional requirement might be satisfied alongside the conjunctive test. Perhaps recognizing this, courts have

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[20] *Arbitration Act, 1991,* S.O. 1991, c. 17, s. 45(1).
[21] *Newport Investment Counsel Inc. v. 2033862 Ontario Inc.*, 2016 ONSC 6703 (S.C.J.) at para. 31.
[22] *Patton-Casse v. Casse* (2012), 298 O.A.C. 111 (C.A.) at paras. 1 and 9.
[23] *Arbitration Act,* R.S.A 2000, c. A-43, s. 44(2).
[24] *Arbitration Act,* R.S.A 2000, c. A-43, s. 44(2).
[25] *Driscoll v. Hautz*, **2017 ABQB 168** at para. 19. See also *KBR Industrial Canada Co v. Air Liquide Global E&C Solutions Canada LP* (2018), 80 C.L.R. (4th) 85 (Alta. Q.B.) at para. 62.

come to adopt a narrow approach when interpreting section 44(3) by giving significant effect to the word "expressly". In doing so, courts have come to require an explicit referral of an identified question of law to the arbitrator in order to bar an appeal. To follow an otherwise broad interpretation would potentially "render section 44(2) meaningless."[26]

As in Ontario, questions of fact or questions of mixed fact and law are not subject to appellate review, unless specifically agreed to by the parties.[27] Parties can also agree to submit questions of law to appeal without satisfying the statutory threshold.[28]

2.1.3 Appeals under the British Columbia Act

The notion of arbitral appeals is a fairly recent concept in British Columbia, where until 1982, "there was no right . . . to appeal an arbitration award on any basis."[29] Today, section 59 of the British Columbia *Arbitration Act* (the "**BC Act**") prescribes the availability (albeit limited) of appellate review.[30] This section permits appeals only on questions of law where the parties consent[31] or with leave of the court if the parties have not expressly prohibited such appeals in their arbitration agreement.[32]

For leave to be granted, a party must meet the following threshold test under section 59(4) of the BC Act by satisfying the Court of Appeal 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,
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> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
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> (c) the point of law is of general public importance.[33]

At least one of the three conditions set out in section 59(4) of the BC Act must exist for the court to grant leave to hear an appeal on a question of law. However, even then, meeting the threshold test does not automatically entitle a party to an appeal. The Court of Appeal

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[26] *Athan Homes Inc v. Phan*, 2021 ABQB 119 at para. 36; *Clark v. Unterschultz*, 2020 ABQB 338 at paras. 42-45.
[27] *Arbitration Act,* R.S.A 2000, c. A-43, s. 44(1).
[28] *Arbitration Act,* R.S.A 2000, c. A-43, s. 44(1).
[29] *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 59.
[30] *Arbitration Act,* S.B.C. 2020, c. 2, s. 59(1).
[31] *Arbitration Act,* S.B.C. 2020, c. 2, s. 59(2)(a).
[32] *Arbitration Act,* S.B.C. 2020, c. 2, s. 59(3).
[33] *Arbitration Act,* S.B.C. 2020, c. 2, s. 59(4).

continues to have an overriding discretion to refuse appellate review of an arbitral award, even if all the conditions of the threshold test are met.[34]

2.1.4 Standard of Review on Appeal

The Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.* ("***Sattva***") explained that "appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations."[35] Courts are therefore instructed to use the reasonableness standard when intervening in commercial arbitrations, granting deference to the tribunal's or the arbitrator's findings.[36] In *Teal Cedar Products Ltd. v. British Columbia*, the Supreme Court further elaborated that relying on the reasonableness standard "dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality."[37] In exceptional circumstances, for example when dealing with constitutional questions or questions of law of central importance to the legal system as a whole that are outside of the arbitrator's expertise, the courts will employ a correctness standard.[38] Such exceptional circumstances, however, would be particularly rare in construction arbitrations where constitutional questions seldom arise and arbitrators are selected on the basis of their expertise in construction.

Recent case law, however, has drawn into question whether the reasonableness standard of review might have shifted (or may do so in the future) to that of correctness in light of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[39] In *Vavilov,* the Supreme Court of Canada clarified that the standard of review applicable to administrative tribunals is presumptively reasonableness, unless certain limited exceptions apply. One of the limited exceptions identified by the Court is where the legislature provides for a statutory right of appeal. Where a statutory right of appeal exists, appellate review of questions of law should be approached on a non-deferential, correctness standard.

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[34] This overriding discretion exists as section 59(4) of the BC Act states that the Court of Appeal "may" grant leave if one or more of the conditions within this section are met. The Court of Appeal is not required to do so as it would be if the term "shall" was used in the place of "may".

[35] *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 104.

[36] *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 106.

[37] *Teal Cedar Products Ltd. v. British Columbia* (2017), 411 D.L.R. (4th) 385 (S.C.C.) at para. 74.

[38] *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 106.

[39] 2019 SCC 65.

The Supreme Court of Canada subsequently considered *Vavilov*, in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, where three Justices (Brown, Rowe, and Cote JJ.) concluded that *Vavilov* changes the law related to statutory appeals from arbitral awards.[40] The Justices explained that while there are "important differences between commercial arbitration and administrative decision-making",[41] such differences do not affect the standard of review where the legislature has provided for a statutory right of appeal. The majority of the Court, however, declined to comment on this issue.

Whether the *Vavilov* approach to statutory rights of appeal applies to arbitration remains to be seen. Some lower courts across Canadian jurisdictions have maintained that *Sattva* remains good law and the standard of review on appeal from an arbitral award on a question of law was reasonableness.[42] Others think the *Vavilov* reasoning ought to apply to the arbitration context as well.[43] In any event, the opportunity for construction arbitral decisions to become part of the public record would remain limited.

2.2 Judicial Review

Judicial review is a process by which Canadian courts ensure the procedural fairness of legal proceedings taking place outside of the courts. It is how courts oversee that the decisions of administrative bodies and arbitral tribunals are fair, reasonable, and lawful.

Interestingly, courts have no inherent jurisdiction to judicially review arbitration decisions in Canada: "arbitration is a private law dispute resolution mechanism in respect of which judicial review is not available."[44] The Ontario Superior Court of Justice held that judicial review is not an available remedy where an arbitrator is proceeding on

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[40] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 120.

[41] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 119, citing *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 104.

[42] See for example: *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516 (S.C.J. [Commercial List]), affirmed *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 CarswellOnt 12281 (C.A.), additional reasons *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 CarswellOnt 13232 (C.A.); *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106; *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830 (S.C.J.).

[43] See for example: *Buffalo Point First Nation et al. v. Cottage Owners Association*, 2020 MBQB 20; Northland Utilities (NWT) Limited v. Hay River (Town of), 2021 NWTCA 1; *Clark v. Unterschultz*, 2020 ABQB 338.

[44] *Olympic Seismic Ltd. v. Talbot* (2008), 442 A.R. 350 (Q.B.) at para. 21; *Piazza Family Trust v. Veillette* (2011), 279 O.A.C. 175 (Div. Ct.) at para. 76, additional reasons 2011 CarswellOnt 5012 (Div. Ct.).

the basis of a private agreement, reiterating that judicial review remains a public law remedy.[45] Similarly, the Alberta Court of Appeal noted that "judicial review of decisions of private tribunal constituted by contracts is ordinarily impossible. Normally judicial review does not lie against private arbitrators."[46]

Instead, courts derive their power to judicially review arbitration decisions through the applicable arbitration statute. Where available, there is considerable overlap on the grounds upon which arbitral awards may be set aside across Canada's domestic arbitration regime. The Ontario Act, the Alberta Act, and the BC Act all allow judicial review of arbitral awards on various grounds, all focused on procedural fairness as well as the reliability and legitimacy of the dispute resolution process. These grounds are found within sections 46 of the Ontario Act, 45 of the Alberta Act, and 58 of the BC Act, and include the following:

(a) legal incapacity of a party when it entered into the arbitration agreement;

(b) the arbitration agreement is invalid, inoperative, or ceases to exist;

(c) the arbitral award deal with issues that were beyond the scope of the agreement;

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement;

(e) the subject matter of the dispute is not capable of being the subject of arbitration;

(f) the parties were not given a reasonable opportunity to present or answer their case, or proper notice of the arbitration;

(g) the arbitral award was obtained by fraud;

(h) the applicant was not treated equally or fairly,[47] or the presence of justifiable doubts as to the arbitrator's independence or impartiality.[48]

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45 *Alaimo v. Di Maio*, 2008 CarswellOnt 3729 (S.C.J.) at para. 54, additional reasons 2009 CarswellOnt 669 (S.C.J.).

46 *Bansal v. Stringam* (2009), 448 A.R. 236 (C.A.) at para. 16.

47 Under s. 45(1)(f) of the Alberta Act, the requirement is for the applicant to have been treated **manifestly** unfairly or unequally.

48 *Arbitration Act, 1991,* S.O. 1991 c. 17, s. 46; *Arbitration Act,* R.S.A. 2000, c A-43, s. 45; *Arbitration Act,* S.B.C. 2020, c. 2, s. 58.

Leave is generally not required for an application to set aside an arbitral award.

It is important to emphasize that judicial review is not an opportunity to relitigate a dispute. The judicial review provisions in Canada's domestic arbitration statutes do not provide for a substantive review of arbitral decisions.[49] Rather, judicial review is a much more limited procedure through which courts can investigate the propriety of the process that brought about a certain result.

In that respect, the courts' power is generally restricted to setting aside the arbitral award, which effectively annuls the award as though it was never made. The British Columbia Court of Appeal found that "[m]ost authorities seem to agree that when an award is set aside the whole arbitration process is set aside with it and the parties return to the beginning of the exercise."[50] The Ontario Act and the Alberta Act, however, allow courts to remit the award to the arbitral tribunal with directions about the conduct of the arbitration.[51]

2.2.1 Standard of Review on Judicial Review

The Ontario Superior Court of Justice held that the "standard for determining whether a decision maker complied with the duty of procedural fairness is correctness."[52] Recently, the Alberta Court of Appeal confirmed this approach and noted that where the proposed appeal is about procedural fairness, it "attracts the less deferential standard of correctness."[53] In British Columbia, there is no case law to date deciding the applicable standard of review under the new arbitration regime.[54] Historically under the old arbitration act, there was a strong preference for utilizing the correctness standard when dealing "with errors that go to the heart of the arbitrator's jurisdiction."[55]

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[49] *Highbury Estates Inc. v. Bre-Ex Ltd.*, 2015 ONSC 4966 (S.C.J.) at para. 25; *Flock v. Flock* (2007), 77 Alta. L.R. (4th) 20 (Q.B.) at para. 27, leave to appeal refused 2007 CarswellAlta 1207 (C.A.).

[50] *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.* (1987**), 14 B.C.L.R. (2d) 273** (C.A.) at para. 18.

[51] *Arbitration Act, 1991,* S.O. 1991 c. 17, s. 46(8); *Arbitration Act,* R.S.A. 2000, c A-43, s. 45(8).

[52] *Tall Ships Landing Devt. Inc. v. City of Brockville*, 2019 ONSC 6597 (S.C.J.) at para. 40, additional reasons 2020 CarswellOnt 13182 (S.C.J.); *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301 (S.C.J.) at para. 31.

[53] *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2020 ABCA 68 at para. 30.

[54] For a consideration of the standard of review on an application to set aside an award made under the BC *International Commercial Arbitration Act*, see *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428.

[55] *Wireless 2000 RF & UWB Technologies Ltd. v. AMS Homecare Inc.* (2007), 41 B.L.R. (4th) 297 (B.C. S.C. [In Chambers]) at para. 21.

As one would expect, the grounds upon which judicial review is available are concerned with matters of jurisdiction and natural justice, as noted above. It will be a rare occasion where construction arbitral awards become impugned on such grounds and thus made publicly available.

2.3 Contractually Excluding Rights of Appeal and Judicial Review

Arbitration agreements in the construction context will often incorporate exclusion clauses designed to limit or remove parties' rights of appeal. In such circumstances, parties employ language to describe arbitral decisions, such as "final and binding" or "not subject to an appeal" in an effort to seek finality to the dispute.

Ontario courts have generally held that such language operates to exclude the application of section 45(1) of the Ontario Act. Where a contractual provision expressly states there shall be no appeal from the determination of the arbitrator to any court, "there is no appeal to the court, period."[56] Ontario Courts have also held that "an agreement that there shall be no appeal from a final and binding decision of an arbitrator includes agreement that there will be no application for leave to appeal."[57] Judicial review is different; the same exclusion clauses that remove parties' ability to seek appeals of arbitral awards do not disentitle a party from applying to set aside the award under section 46 of the Ontario Act.

In Alberta, parties are slightly more limited in their ability to exclude rights of appeal than in Ontario. Section 3 of the Alberta Act prohibits the parties from agreeing to vary or exclude sections 44(2) and 45, which deal with the ability to seek leave to appeal on a question of law and an application for judicial review, respectively.

In British Columbia, section 59(3) of the BC Act allows parties to opt out of their rights of appeal if they explicitly stipulate such an intention in their arbitration agreement. However, no similar provision exists to allow parties to exclude their rights to judicial review when procedural fairness is concerned.

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[56] *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254 at paras. 221-222, leave to appeal refused 2019 CarswellOnt 18325 (S.C.C.).

[57] *Orgaworld Canada Ltd. v. Ottawa (City)*, 2015 ONSC 318 (S.C.J.) at para. 70, leave to appeal allowed 2016 CarswellOnt 8895 (S.C.J.).

2.4 Other Considerations

2.4.1 Enforcement

As arbitration decisions can also become part of the public record through enforcement proceedings, we briefly address this subject here. Each of the Ontario Act, the Alberta Act, and the BC Act provide that an arbitral award binds the parties, unless it is set aside or varied.[58] Correspondingly, each of the Acts therefore provide an avenue for parties to apply to the court to enforce arbitral awards made anywhere in Canada.[59] These applications must be made on notice to the party against whom enforcement is sought.

2.4.2 Appeals and Review Restricted to Final Awards

Arbitration legislation across Canada further limits judicial intervention by limiting the types of decisions of arbitral tribunals that are subject to appellate review.

In Ontario, interlocutory appeals are not allowed. An appeal under section 45 of the Ontario Act can only arise out of the final award of the arbitrator, even where a preliminary ruling constitutes an error in law. The Ontario Court of Appeal has taken this approach and reiterated that it "will not encourage the bifurcation of proceedings by engaging in review of preliminary matters."[60]

The same is true in respect of judicial review where the Ontario Court of Appeal held that a court should not exercise its judicial review powers to reverse an arbitrator's procedural or interlocutory order.[61] The Court held that judicial review under section 46 of the Ontario Act is only available in respect of an arbitral award that "disposes of part or all of the dispute between the parties."[62]

Courts in Alberta have generally agreed with this approach and held that "the tribunal's determination of procedural issues that arise in the course of the proceedings" are not subject to review.[63]

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[58] *Arbitration Act, 1991,* S.O. 1991 c. 17, s. 37; *Arbitration Act,* R.S.A. 2000, c A-43, s. 37; *Arbitration Act,* S.B.C. 2020, c. 2, s. 54.

[59] *Arbitration Act, 1991,* S.O. 1991 c. 17, s. 50; *Arbitration Act,* R.S.A. 2000, c A-43, s. 49; *Arbitration Act,* S.B.C. 2020, c. 2, s. 61.

[60] *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* (1996), 135 D.L.R. (4th) 471 (Ont. C.A.) at para. 8.

[61] *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 at para. 18.

[62] *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 at para. 29.

[63] *Suncor Energy Inc. v. Alberta*, 2013 ABQB 728 at para. 23.

The jurisprudence in British Columbia also reiterates that courts should not become involved in the arbitration process at preliminary stages. The British Columbia Supreme Court held that the appeal sections under the BC Act were not "intended to give the court jurisdiction to review or hear appeals about evidentiary rulings . . . before the substantive dispute is decided."[64] In other words, a condition precedent to the application of the BC Act's appeal provisions is that the appellate review arises out of the final arbitral award that deals with the subject matter of the dispute between the parties.[65]

3. WHY AND HOW TO PUBLISH CONSTRUCTION ARBITRATION DECISIONS

We began this article with the observations and cautions raised by esteemed jurists that the "hermetically sealed vault of private arbitration" will stunt or ossify the development of the common law. Having reviewed the limited bases upon which arbitral decisions may become public through the courts, one can see how these cautions ring true, particularly in respect of construction law. Where construction industry participants so often choose arbitration over the courts, much of the legal reasoning grappling with the industry's most pressing disputes will remain hidden behind the parties' default to confidentiality. The resulting problem of a weakening construction common law tree, however, has adverse implications to the parties' long-term interests, particularly the quality of their future awards and the certainty of their commercial dealings generally.

Radjai makes this observation and alludes to the solution in the context of international commercial arbitration, noting that,

> the expected development of "a formation of a free-standing body of law responsive to the needs of international commerce" has been somewhat slower by virtue of the limited publication of awards. Nevertheless, arbitrators can and do perform a lawmaking function. It is accepted that between tribunals, awards, while not binding precedent, may constitute persuasive precedent: "past solutions have some impact on the thinking of arbitrators having to resolve future cases". The

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64 *Slocan Forest Products Ltd. v. Skeena Cellulose Inc.*, 2001 BCSC 1156 (In Chambers) at para. 11.

65 *InterLink Business Management Inc. v. Bennett Environmental Inc.*, 2007 BCSC 1538 (In Chambers) at para. 35; *Domtar Inc. v. Belkin Inc.* (1989), 62 D.L.R. (4th) 530 (B.C. C.A.) at para. 18; *Canada v. Lynwood Industrial Estates Ltd.*, [2000] B.C.J. No. 2501 (S.C.) at paras. 32-33; *Morton v. H&R Block Canada Inc.*, 2007 BCSC 1093 (In Chambers) at para. 10; *British Columbia (Ministry of Housing & Social Development) v. WCG International Consultants Inc.*, 2011 BCSC 1353 at para. 26.

> arbitrators develop normative rules that may not be binding but they influence future awards.[66]

The enlightened, long-term self-interest of the construction industry lies in finding some way to make private arbitration decisions publicly available.

Construction contracts are unlike most other commercial contracts in their complexity and execution. Certainly, there are aspects where case law continues to be relatively well developed, such as principles of general contract interpretation and the law respecting bidding and tendering. However, the same cannot be said for wide swaths covering much of modern construction law, particularly in the context of standardized contract terms and complex, multi-billion-dollar infrastructure projects and public private partnerships. With only few notable exceptions, there is a scarcity of case law guiding the resolution of numerous key construction issues, such as those relating to delay and impact claims, which have become particularly important through the COVID-19 pandemic.[67]

The dearth of available case law respecting construction is, in large measure, a result of parties resolving their differences through arbitration in favour of court process. The private and consensual arrangements of sophisticated contracting parties in how they choose to allocate significant risks between themselves, the choice of law that will govern their relationship, and the manner in which they will resolve disputes are not only legislatively supported and judicially respected, but are enforced.

Given the advantages of arbitration, construction industry participants will continue to choose private arbitration to resolve their disputes. They do not share the same concerns as jurists about whether the preference for arbitration will diminish the court's ability to develop the common law as a guide to industry norms and practices. Even if arbitration legislation were to change to make it easier for parties to appeal from arbitration decisions, there is no guarantee that parties

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[66] Noradèle Radjai, *Commercial Arbitration and the Development of Common Law*, Evolution and Adaptation: The Future of International Arbitration, International Council for Commercial Arbitration Congress Series No. 20, Sydney 2018 (Wolters Kluwer Law & Business, 2020) p 346.

[67] We would identify two such notable exceptions in Associate Justice Todd Robinson's decision in *Schindler Elevator Corporation v. Walsh Construction Company of Canada* (2021 ONSC 283 (S.C.J.)) and Justice Markus Koehnen's decision in *Crosslinx v. Ontario Infrastructure* (2021 ONSC 3567 (S.C.J. [Commercial List]), additional reasons 2021 CarswellOnt 9151 (S.C.J. [Commercial List]), leave to appeal refused *Crosslinx Transit Solutions General Partnership v. Ontario Infrastructure and Lands Corporation*, 2021 CarswellOnt 12711 (Div. Ct.), reversed *Crosslinx Transit Solutions General Partnership v. Ontario (Economic Development, Employment and Infrastructure)*, 2022 CarswellOnt 2701 (C.A.)).

would respond to the invitation. Courts will always play a role in construction law and have the undisputed responsibility for the common law's development, but the opportunity for the courts to develop the common law in the context of the construction industry will continue to be limited because of the prevalence of arbitration.

In this context, construction counsel and their clients will not have the benefit of a continually developing body of case law to inform their decision-making concerning risk allocation and dispute resolution. Instead, they will rely heavily on their own experience in arbitration, combined with what they may glean from industry association events and gossip. In the absence of relevant precedent, parties who choose arbitration (and the arbitrators they select) do not have a means to ensure that like cases are decided on a similar basis.

We do not want to be mistaken for suggesting that arbitration decisions should have jurisprudential weight. Courts, and not privately chosen arbitrators, are responsible for the development of the common law. There is no reason, however, why arbitration decisions could not have some persuasive value to those in the industry, including arbitrators, similar to the decisions of statutorily created tribunals or boards in public administrative law (which are typically subject to the same appellate restraint through limited statutory appeal rights and reasonableness standard on judicial review).

We see two primary obstacles to providing the Canadian construction industry with access to the wealth of reasoned arbitration decisions: 1) confidentiality; and 2) the absence of an organizational infrastructure for the collection and publishing of construction arbitration decisions.

Fortuitously, other highly specialized areas of commercial law have also grappled with this issue and have found ways to address these impediments. They offer a road map to the Canadian construction industry. We explore these below, as we address each of these two obstacles in turn.

3.1 Confidentiality

Confidentiality in arbitration, like the process itself, is based on party autonomy. Parties choose confidentiality — just as they can also choose to allow the arbitral reasons in their cases to be made public, including the timing of release and the redactions necessary to maintain privacy.[68]

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[68] For example, a 2019 international survey of participants in international infrastructure and energy construction projects identifies confidentiality as the third most frequently given reason why

Indeed, the desire to resolve disputes privately and confidentially remains one of the more significant reasons parties elect arbitration over court proceedings. Construction law is not the only area of law where private arbitration is the preferred method of dispute resolution, nor is it the first to grapple with the question of whether the benefits of confidentiality to the parties are eclipsed by the value of publishing arbitration awards to the larger industry. Maritime disputes have long been determined through private arbitration. Expert arbitrators have formed various societies and associations, such as the London Maritime Arbitrator's Association ("**LMAA**") or the New York based Society of Maritime Arbitrators ("**SMA**"), to offer dispute resolution services to the international shipping industry. The rules of each of the LMAA and SMA for the conduct of arbitrations specifically contemplate that their arbitrators may publish reasoned decisions unless the parties to the arbitration object.[69]

The reasons why these associations publish arbitration decisions align closely with our comments and observations earlier. The LMAA, for example, notes that since the introduction of the UK Arbitration Act 1979,[70] courts have reviewed fewer arbitral decisions. As the SMA notes, fully reasoned written opinions offer "instructive insight for future commercial dealings" and while not binding, "the body of written awards does provide a degree of predictability regarding the likely outcome of similar disputes."[71] The LMAA publishes anonymized summaries through Lloyd's Maritime Law Newsletter, while the SMA decisions are available on its own subscription service as well as through LexisNexis.

In a very different context, as of January 1, 2021, the International Chamber of Commerce ("**ICC**") seeks the consent of the parties to publish partially redacted arbitral awards to further its "commitments to facilitate access to justice, enhance the global rule-based order, and improve transparency in arbitration."[72] These ICC arbitral decisions are

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respondents chose arbitration (after the desire to avoid legal systems or national courts and the ability to select the arbitrators): School of International Arbitration, Queen Mary University of London, and Pinsent Masons LLP, *International Arbitration Survey — Driving Efficiency in International* Construction Disputes, Special Report (November 2019) at p. 22 International Arbitration in Construction (pinsentmasons.com).

69 Under the LMAA rules, the decision to publish may be made by the arbitrators if they consider the decision merits publication, at which point the parties are given the opportunity to object (The LMAA Terms, 2021, paragraph 29) whereas under the SMA Rules, parties must object to publication in advance (SMA Rules, 2018, Rule 1).

70 Repealed and replaced with the UK Arbitration Act, 1996.

71 Society of Maritime Arbitrators, "Why Arbitration In New York Under SMA Rules?", online: https://www.smany.org/arbitration-why-sma-new-york.html.

72 https://iccwbo.org/dispute-resolution-services/arbitration/publication-of-icc-arbitral-awards-with-jus-mundi/. See also section IV C of Note to Parties and Arbitral Tribunal on the Conduct of

publicly available through a legal database of international arbitration decisions collected and hosted by Jus Mundi[73] in cooperation with a number of international arbitration associations. Where an arbitration agreement contains a confidentiality clause, the ICC Secretariat will obtain the parties' specific consent and may also in its discretion, exempt ICC awards and related documents from publication.[74]

We accordingly regard obtaining the parties' and arbitrators' consent as a relatively surmountable obstacle. The main element is to provide parties with a rules-based framework to give or withdraw their consent to publication, together with terms of publication that may provide for anonymized decisions and a delay in the release of the decision for publication.

3.2 Organizational Infrastructure

As much as the construction industry and practitioners might benefit from the publication of arbitral decisions, three things must first happen:

1. Someone will need to determine which arbitral decisions merit publication.
2. Someone will need to set the rules and the process by which the parties and arbitrators' consent to publish the arbitration decision will be effected. These would include any required redactions (such as the redaction of commercially sensitive information or personal information).
3. Finally, someone needs to receive, house and provide access to, the collection of publishable arbitration decisions.

Ideally, all three of these functions would be performed by a single organization — one that does not yet exist.

Again, we are not proposing to take the Canadian construction industry into wholly uncharted waters. As noted earlier, maritime law has long benefited from consensual publication of significant arbitration decisions, and both the LMAA and the SMA rules include the process

Arbitration Under the ICC Rues of Arbitration (January 1, 2021) https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.

[73] Jus Mundi is an organization based in France and describes its mission as providing easy and public access through its search engine for international law and arbitration. See: https://jusmundi.com/en/about.

[74] Note to Parties and Arbitral Tribunal on the Conduct of Arbitration Under the ICC Rues of Arbitration (January 1, 2021) https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf, paras 60 and 62.

by which the associations themselves seek the parties' consent to publication and the transmission of decisions to third parties for that purpose.[75] The ICC Secretariat similarly takes the lead in procuring the consent of the parties and making any necessary redactions prior to their release through *Jus Mundi*.

In our view, this task may not be one that existing legal publishers or authors could easily undertake. While they could no doubt select and publish decisions that are of interest to the construction industry, they have no role to play until the parties and arbitrator consent to the potential publication of the decision in their arbitration. Without someone to ensure that the parties and arbitrators consent to publication, there is no way to bring significant arbitration decisions to the attention of traditional newsletter and law reporter editorial boards.

We think that it ultimately would be more fruitful for the arbitrators themselves to identify significant decisions that should be published, and then leave it to this newly created entity, whether an association, chamber of arbitrators, or a construction arbitration centre with sufficient administrative support to carry out the task, to obtain the consent of the parties and redact the arbitration decision as required. Once the parties have consented to publication of their arbitration decision, the decisions themselves could be published in any number of ways, including a subscription service operated by an association, on LexisNexis, or even through CanLII.

4. CONCLUSION

So . . . has the music stopped? We don't think so. But the playlist is definitely a lot shorter than it used to be.

In this article, we have centered our attention on arbitration as being a primary reason for the limited availability of recent case law and legal reasoning in the area of construction. There are other forces driving the paucity of case law, however, including,

(a) the adjudication regime presently in force under Ontario's *Construction Act* and soon to be implemented elsewhere;

(b) dispute resolution boards; and

(c) other alternative forms of dispute resolution, including mediation, referees, and expert determination.

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[75] In the case of the LMAA, through Lloyds and in the case of the SMA, LexisNexis. The SMA also has a paid subscription service that allows access to this collection.

To be sure, these are truly positive forces in the construction industry. In different ways, they all help parties complete projects, protect and encourage good relationships, and avoid costly business disruptions.

Our point here: A healthy, modern common law is also an important ingredient to ensure consistency and certainty in a vibrant construction industry. As Justice McLachlin put it in the closing of her article, *Judging the 'vanishing trial' in the construction industry*:

> Great projects are built not just of bricks and stones, but by human aspirations, creativity and cooperative effort. That effort, in all its diversity, must be protected and supported by law.[76]

In recognizing the prevalence of arbitration in construction and the very limited circumstances presently under which arbitral decisions may become part of the public record, as well as identifying the benefits to the construction industry by public access to arbitral awards and the dangers in failing to do so, we hope to encourage a greater clarity and security in Canada's construction industry.

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[76] The Right Honourable Beverley McLachlin, PC, *Judging the 'vanishing trial' in the construction industry*, Construction Law International, Vol 5, Issue 2 (June 2010) (9-14), p 14.