

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
)
 ROGERS COMMUNICATIONS INC.) *Matthew P. Gottlieb and M. Paul Michell,*
) *for the Applicant*
 Applicant)
)
 – and –)
)
 GLENTEL INC. and BCE INC.) *Kiran Patel, Christopher DiMatteo and*
 Respondents) *Andrew Irwin, for the Respondent BCE Inc.*
)
)
) **HEARD:** April 9, 2026

2026 ONSC 2446 (CanLII)

LEIPER, J.:

REASONS FOR DECISION

(Appeal pursuant to s. 45 of the *Arbitration Act, 1991*)

Overview

[1] Rogers Communications Inc. (“Rogers”) brings this application to appeal a partial award made by the Honourable Kathryn Feldman, Arbitrator, in its dispute with BCE Inc. (“Bell”) over the interpretation of a commercial contract.

[2] The issue at the arbitration was whether Rogers could require its retailer Glentel Inc. (“Glentel”) to offer a Rogers Bank credit card along with Rogers’ telecommunications bundles sold pursuant to a distribution agreement, and whether Rogers was permitted to pay commissions to Glentel sales representatives for each Rogers Bank credit card activated.

[3] Rogers submits that the arbitrator erred in law in four ways:

- 1) failing to answer the question that the parties asked her to answer;
- 2) failing to address Rogers’ alternative argument in support of its position;

- 3) incorrectly interpreting the provisions of the distribution agreement and
- 4) incorrectly deciding that Rogers could not pay commissions to Glentel.

[4] Rogers submits that the applicable standard of review is the appellate standard; Bell submits it is reasonableness. I have applied an appellate standard of review to the issues on appeal, based on the line of caselaw that flows from the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR.

[5] For the reasons set out below, I uphold the arbitrator's findings. Her analysis of the issues is unassailable and rests on correct legal principles of contractual interpretation.

[6] I reject Rogers' submission that the arbitrator acted outside her jurisdiction by failing to answer the question that was put before her. I find that the arbitrator addressed the key issues before her as they were defined in the terms of settlement ("TOS"), the terms of appointment ("TOA"), and as briefed and argued by the parties.

[7] I also reject Rogers' submission that the arbitrator erred in law by failing to address Rogers' alternative "System Promotion" argument. This argument was not briefed in advance. Bell responded to it. Rogers provided scant analysis of its alternative position during oral argument. Rogers conceded that its primary submission was the detailed, briefed argument that the Rogers credit card was an "ancillary service". Thus, I find the arbitrator addressed the "necessary and critical issue" before her.

[8] I dismiss the appeal.

Background

[9] Bell and Rogers are national telecommunications carriers. They provide mobile wireless and wired services to Canadian users.

[10] Bell and Rogers co-own Glentel, a retailer of wireless and wired services that operates 200 plus stores under various brand names. Glentel distributes Bell and Rogers products under separate, but largely identical, distribution agreements.

[11] The agreements include a parity principle which requires Glentel to treat Bell and Rogers equally. Under this principle, Bell and Rogers are required to pay the same commissions to Glentel employees for their sales of comparable Bell and Rogers products and services.

[12] The distribution agreements describe, among other things, the products, services and accessories that Glentel may sell to customers of Bell and Rogers. At the heart of this dispute is whether Rogers can require Glentel to offer a Rogers Bank credit card to customers as part of a bundle of telecommunications services under the terms of its distribution agreement.

[13] Because Bell does not offer a credit card, Rogers relied on an exception to the parity principle in the distribution agreement. Under that provision, either carrier may pay commission to Glentel for an “exclusive service”. Rogers submitted that it was able to pay an incremental commission to Glentel staff for processing the Rogers Bank credit card along with telecommunications bundled services. Bell disputed that Rogers could do so. Bell argued that the Rogers Bank credit card is not a “Service” as defined in the agreement, therefore, it cannot be an “exclusive service” justifying Rogers’ payment of additional commission payments to Glentel.

The Dispute

[14] In September 2024, Rogers began to offer its subsidiary, Rogers Bank credit cards at Glentel retail locations as part of Rogers’ bundles of wireless and wireline plans. Rogers paid Glentel sales representatives an incremental commission of \$15 for each Rogers Bank credit card activated with a Rogers bundle.

[15] Bell learned of the Rogers credit card and the commission payments that Rogers was paying to Glentel sales representatives. Bell objected that the distribution agreement did not permit Rogers to sell the credit card nor to pay additional commissions to Glentel. Rogers responded that the offering and the commissions were permissible because the credit card was an “ancillary service” (and therefore a “Service” as defined in the agreement) bundled with other wireless and wired services. Rogers defended its practice based on the provision in its distribution agreement permitting payment of commissions for an “exclusive service.”

[16] The dispute progressed from an exchange of lawyers’ letters and opinions to interlocutory injunction proceedings in the Superior Court of Justice.

[17] In October of 2024, the parties agreed to TOS of the injunction proceedings. They signed TOA with the Honourable Kathryn Feldman as arbitrator on November 15, 2024.

The Terms of Settlement

[18] The first recital in the TOS defines the “Dispute” and contains a list of action words as to what Glentel was permitted to do (“sell, distribute, market and promote”) which are relevant to two of the issues on this appeal. The recital reads:

Whereas Bell, Rogers and Glentel have a dispute about whether Glentel may **sell, distribute, market and promote** at Glentel retail locations the Rogers-branded Mastercard (the “Rogers Mastercard”) in a bundle with Rogers wireless and wireline services pursuant to Glentel’s respective Distribution Agreements with Bell and Rogers (the “Distribution Agreements”), and whether Rogers and/or Glentel are entitled to offer or pay Glentel sales representatives incremental commissions in respect of the Rogers Mastercard (**the “Dispute”**).

[Emphasis added.]

[19] Paragraph 4 (e) of the TOS then described how the arbitration was to be conducted, that is by way of a two-stage hearing before the same arbitrator:

The hearing of **the Dispute** shall be bifurcated into two stages as follows:

- a. **Stage 1**: The Arbitrator shall determine whether pursuant to the Distribution Agreements, the Rogers Mastercard can be **sold** at Glentel retail locations and whether Glentel sales representatives can be paid incremental commissions in connection with the Rogers Master card.
- b. **Stage 2**: If necessary, any claims for damages or other relief by any party arising from the Arbitrator's decision in Stage 1, including any claims to enforce Rogers' undertaking in damages to Bell and Glentel pursuant to the Interim order or the order described in paragraph 3 of these Terms of Settlement.

[Emphasis added]

[20] The TOA attached the TOS. At paragraph 2i, the TOA describes the Dispute consistently with the recital in the TOS:

Bell, Rogers and Glentel have a dispute about whether Glentel may **sell, distribute, market and promote** at Glentel retail locations the Rogers-branded Mastercard (the "Rogers Mastercard") in a bundle with Rogers wireless and wireline services pursuant to Glentel's respective Distribution Agreements with Bell and Rogers (the "Distribution Agreements"), and whether Rogers and/or Glentel are entitled to offer or pay Glentel sales representatives incremental commissions in respect of the Rogers Mastercard (**the "Dispute"**).

[Emphasis added.]

[21] The TOA confirmed that the TOS outlines "both the agreement to arbitrate and the defined scope of arbitration."

[22] The TOA included s.20 which required the parties to assist the arbitrator:

20. Duty to Assist

- i. The Parties accept that they have a duty to assist the Arbitrator and they agree that the Arbitrator may direct any Party to do all such things during the arbitral proceedings as may reasonably be needed to enable an Award to be made properly, fairly and efficiently.

[23] The TOS also set out the rights of appeal of the parties in, s. 4(i), which reads:

A party may appeal an award of the Arbitrator to the Ontario Superior Court of Justice on a question of law or a question of mixed fact and law.

The Facts Filed on the Arbitration

[24] Rogers argued in its factum that the Rogers Bank credit card amounted to a “Service” as defined in the distribution agreement, which is “only sold as part of a bundled offering with Rogers’ telecommunications services.” Rogers compared the credit card to other financial and loyalty programs offered by Bell. Rogers submitted that because Bell does not offer a credit card which competes with Rogers, then Rogers was also permitted to pay a commission for this “exclusive Service.”

[25] Rogers made no reference in its factum to the alternative submission made at the hearing, that if the credit card was not found to be a “Service” that Rogers could require Glentel to include the credit card offer with its telecommunications as part of a “System Promotion” under s. 9.3 of the distribution agreement. During oral argument, Rogers characterized this as the “good for the goose, good for the gander” argument, based on freebies and perks offered by Bell to its customers, such as coupons and discounts on other products and services.

[26] Finally, in defining the issues on the appeal, Rogers submitted that the dispute required the arbitrator to decide:

- a. Whether the Rogers Mastercard is a “Service”, as defined in the Distribution Agreement, when sold in a bundle with Rogers wireless and wireline services, and therefore can be promoted, marketed and sold at Glentel stores; and
- b. Whether Glentel’s sales representatives can be paid a commission in connection with sales of the Rogers Mastercard, because it is an “exclusive Service” in accordance with section 7.5(4) of the Distribution Agreement.

[Emphasis added.]

[27] Bell’s responding factum addressed Rogers’ submissions as to whether the Rogers Bank credit card was a “Product” or a “Service” under the defined terms in the Rogers distribution agreement.

[28] Neither party made an issue of whether Glentel was “offering” or “selling” or “marketing” or “promoting” the Rogers Bank credit card during customer interactions involving the purchase of Rogers wireless or wireline telecommunications services. The parties did not focus on the best description of the as briefed prior to the arbitration.

The Hearing of the Arbitration: The Clarification of what the Parties Meant by “Sold”

[29] During Rogers’ submissions, the arbitrator asked counsel whether there was any evidence that there was a fee for the Rogers’ Bank credit card and if not, the significance of the word “sold”

that counsel had used to describe what Glentel sales representatives did with the credit card. That exchange was as follows:

Arbitrator: Okay. And another question I have – and it’s really quite fundamental because the question I’m being asked to answer has this word in it, but everybody is talking about the fact that card is “sold” to customers.

And I’m wondering why the word “sold” has any significance? How is it sold to customers?

Rogers’ counsel: I don’t think the word sold has significance. it’s part of the offering. It’s bundled.

The Arbitrator: You’re not taking the position it’s sold?

Rogers’ counsel: I don’t see why the word “sold” would have any significance on the issue. We take the position that when someone goes into the Glentel stores and says I’d like to buy a product and then sign up for a Rogers service plan, they then have bundled with that the Rogers Mastercard that they apply for. So it’s bundled with it.

Arbitrator: So they don’t pay for it? It’s not sold.

Rogers’ counsel: Correct. They apply for it when they sign up for the Rogers service. [...]

Arbitrator: [...] So I just wanted to really get clear that if everybody is on side, that I don’t have to answer the question ‘sold’. It’s whether it can be offered in a bundle?

Rogers’ counsel: Or marketed or promoted. You’ll see in the agreement the language that comes into play with respect to it.

[30] This exchange is important. Counsel confirmed that the arbitrator did not need to determine whether the card was “sold” because the key question was whether it was a Service, whether or not it was “offered in a bundle” or “marketed” or “promoted.” Rogers counsel accurately mentioned the action words from the definition of the Dispute in the TOS. As excerpted above, the Dispute asked “whether Glentel may sell, distribute, market and promote at Glentel retail locations the Rogers-branded Mastercard (the “Rogers Mastercard”) in a bundle with Rogers wireless and wireline services...” [Emphasis added.]

[31] It appears that counsel merely used “sold” as a shorthand way of describing what Glentel was doing with the Rogers Bank credit card. As counsel confirmed to the arbitrator, nothing turned on whether Glentel was making a “sale” of the card, or whether it was being “offered in a bundle” or “marketed” or “promoted” as counsel confirmed, given that the card did not have any fee.

[32] This background is important for the discussion below as to whether the arbitrator answered the question that was asked of her at arbitration.

Rogers Makes a New Alternative Argument During the Hearing

[33] Rogers counsel went on to make his primary submission about whether the Rogers credit card is a “Service” under the terms of the distribution agreement because it was an “ancillary service”.

[34] Later in submissions, counsel suggested that s. 9.3 of the distribution agreement obliged Glentel to make its “commercially reasonable efforts to participate in System Promotion and to do it”. Counsel submitted that one could:

Forget whether it’s a “Service” under capital “S” and the answer is yes, you can get there that way too. We say you get there both ways. We do say it’s an ancillary service that’s bundled or included with the telecommunication services offering.

But yes, you can also get there under 9.3 because it is part of the System Promotion of Rogers, that Rogers is using to sell its services and plans and its telecommunication services. So you get there both ways.

...

The Arbitrator: ...But you’re saying look at 9.3?

Rogers Counsel: yes.

Transcript, pages 103-104.

[35] Several pages later into the transcript, Rogers counsel returned to this theme, submitting that “Bell wants to stop Rogers from using the Rogers’ Mastercard to promote and work with its telecommunications services. So it wants to stop it.”

[36] Counsel continued:

But that goes against the entire purpose and framework of the agreement which is Rogers is entitled and Glentel is obliged to promote Rogers’ system of marketing and promotion. And that’s exactly what it is. So, like I said, we can come at it in two different ways under the agreement; whether it’s a capital “S” Service or not, the Rogers Mastercard.

[37] Bell’s counsel submitted to the arbitrator that “Frankly, Rogers is not primarily relying on this (s. 9.3) definition. They’re relying on the definition “Ancillary Service.” The arbitrator

responded, “Correct. But you know [Rogers’ counsel] ended up saying that either way, they’re in. They may not get the commission, but either way, they’re in.”

[38] Bell distinguished coupons, gifts and other promotional add-ons under s. 9.3 of the agreement, from the steps required for a sales representative to process a customer’s credit card application. Bell counsel pointed out that its incentives are “extra things” that “automatically come with the service”, while a credit card is a separate product with its own sales stream, and application process.

[39] Later in its submissions, Counsel for Bell repeated that Rogers was making a new argument. At page 202-203 of the transcript, counsel stated that “other than perhaps [Rogers’ counsel] this morning, [their lawyers] have never suggested that the Rogers Mastercard can be offered by virtue of it being anything other than ancillary service. All of the material that we received [from] Rogers has been consistent in asserting that the Rogers Mastercard is permitted because it is an ancillary service.”

[40] At the close of the hearing, the arbitrator returned to her opening question, asking “what about the issue of “sold”? The parties agreed to send the “right question” to the arbitrator on the following day, November 29, 2024.

The Purported Clarification of the Scope of the Stage 1 Question

[41] The parties conferred immediately after the hearing, but could not agree on what to write to the arbitrator for several days. On December 3, 2024, at 2:05 p.m., the parties sent the following email to the arbitrator:

Arbitrator Feldman:

At last Thursday’s hearing, you noted that the questions for determination in Stage 1 included “whether pursuant to the Distribution Agreements, the Rogers Mastercard can be sold at Glentel retail locations” and your requested clarification regarding the term “sold”.

Bell, Rogers and Glentel have agreed to clarify the scope of the Stage 1 questions by adding the underlined language below:

Stage 1: The Arbitrator shall determine whether, pursuant to the Distribution Agreements, the Rogers Mastercard can be sold, distributed, marketed and/or promoted at Glentel retail locations and whether Glentel sales representatives can be paid incremental commissions in connection with the Rogers Mastercard.

[Underlining in original]

[42] I discuss the problem that this email created below in the analysis of the issues. At this point, I note that counsel's "clarification" was no different from the "Dispute" as described in the TOA and TOS. Yet the parties did not point this out in their email which they delivered late and close to the arbitrator's deadline under the TOA. Objectively, the email clarified nothing because those words were always part of the Dispute. And counsel created the apparent issue by using only the term "sold" in their factums and in s. 4 of the TOS, leading to the arbitrator's question about what they meant by "sold".

[43] The arbitrator responded to the parties later that same day:

Dear Counsel:

Thank you for your email. My concern with the word "sold" was that because there is no fee charged for the Mastercard, it is not itself being "sold". It is provided with no charge to qualifying customers.

My understanding is that "sold" was intended to refer to the provision of the Mastercard bundled with the sale of a Rogers telecom service in Glentel stores as an ancillary service. That was the basis of the evidentiary record and the written and oral argument.

My understanding is that whether the Mastercard can be distributed, marketed or promoted in Glentel stores in any other way was not the question on this arbitration.

As you can appreciate, my reasons, based on the questions referred to arbitration, are in the final stages of preparation in order to be delivered by December 6, 2024 in accordance with the arbitration agreement.

I would therefore propose that the wording of the question not be revised at this time.

[44] The parties could not agree on whether a further joint email should be sent in response to the arbitrator.

[45] On December 4, 2024, Rogers responded that it sought to have the arbitrator decide the question as clarified by the parties. Counsel's email, stated "The agreed-to formulation encompasses within it the question as you have framed it in your email but is not limited to that framing." Rogers confirmed that Bell did not agree to its position, nor with its further correspondence to the arbitrator.

[46] Bell wrote separately to the arbitrator on December 4, 2024, that "Bell objects to the emails that [Rogers' counsel] sent to you earlier today and takes the position that they should be disregarded."

[47] The arbitrator did not respond further to these follow-up emails.

The Partial Award of the Arbitrator

[48] The arbitrator released her reasons for the partial award on December 6, 2024. The parties take no issue with the accuracy of how the arbitrator framed the dispute, her understanding of the events that preceded the arbitration or the facts of the distribution agreements. Likewise, the parties do not identify any error in the principles of contractual interpretation which the arbitrator applied to the contractual interpretation.

[49] In paragraph 5 of her reasons, the arbitrator described the issues using the language from 2.4(e) in the TOS and consistently with how Rogers had defined the issues in its factum:

1. Whether pursuant to the Distribution Agreements, the Rogers Mastercard can be **sold** at Glentel retail locations and
2. Whether Glentel sales representatives can be paid incremental commissions in connection with the Rogers Master card.

[Emphasis added.]

[50] The reasons set out the context for the dispute and the key provisions of the Rogers distribution agreement. The arbitrator described the record of promotional offerings, including gift cards and benefits offered by Bell, and by Rogers, under s. 9.3 of the System Promotion provisions.¹

[51] The arbitrator then described Rogers' position at paragraph 31 as follows:

Rogers' position is that the Rogers Mastercard is a Service, as defined in the Distribution Agreement (the "agreement"). Under the agreement, Glentel has the right to sell and distribute Rogers Products, Accessories and Services, all as defined. It also has the obligation to diligently market and promote the Rogers Brands, Services, Products and Accessories.

[52] The arbitrator described the "ancillary service" argument in paragraph 32. In paragraph 33 of her reasons, she noted that Rogers had compared its credit card to the "perks and benefits that Bell offers when marketing its telecom products, such as pre-paid Visa Gift Cards, monthly plan and hardware discounts, bill credits etc." The arbitrator noted that because its credit card is more

¹ Both companies offered discounts and promotions for food and merchandise as part of their sales efforts at various times.

tied to its telecommunication services, Rogers submitted that it should be permitted to do so, just as Bell had been doing with its bonuses and perks.

[53] In paragraphs 36-39 of the reasons, the arbitrator set out Bell's responding submissions on the ancillary service and the exclusive service issues.

[54] The arbitrator wrote at para. 40 that there were "two issues to be decided in accordance with the Terms of Settlement incorporated into the Arbitration Agreement":

- 1) Whether pursuant to the Distribution Agreements, the Rogers Mastercard can be sold at Glentel retail locations; and
- 2) Whether Glentel sales representatives can be paid incremental commissions in connection with the Rogers Mastercard.

[55] The arbitrator did not advert to the exchange of emails or the differently worded description of the "Dispute" in the reasons.

[56] The arbitrator went on to consider the two issues, beginning with the principles of the interpretation of contracts in paragraphs 41-43. The arbitrator conducted a detailed analysis and interpretation of "Services", "ancillary service" and other key terms in the distribution agreement. She concluded that the Rogers Bank credit card was a financial service, but not an "ancillary service to a Rogers telecom service within the meaning and intent of the agreement."

[57] Secondly, the arbitrator considered Rogers' comparison of its credit card with the benefits and incentives offered by Bell that were part of its merchandising of telecom "Products Services and Accessories", finding that the parties agreed it was not part of the mandate to consider on what basis Bell's incentives could be offered along with its telecom services.

[58] The parties agree that the arbitrator did not expressly consider whether the s. 9.3 "System Promotion" could be said to permit Glentel to offer the Rogers Bank credit card.

[59] Finally, the arbitrator discussed the second issue. The arbitrator concluded that given her finding on the first question, the credit card could not be found to be an "exclusive service" under Article 7.5(4) of the distribution agreement.

[60] The arbitrator concluded her reasons with the following award:

- a. The Rogers Mastercard is not a Service within the definition contained in the Distribution Agreement.
- b. The Distribution Agreement does not permit Rogers to sell the Rogers Mastercard at Glentel locations.

- c. The Rogers Mastercard is not an exclusive Service under Article 7.5(4) of the Distribution Agreement.
- d. Glentel sales representatives cannot be paid incremental commissions in connection with the Rogers Mastercard.

The Issues on the Appeal

[61] The issues on this appeal are:

- a. What is the standard of review of an appeal from an arbitral decision pursuant to the *Arbitration Act, 1991*?
- b. Did the arbitrator exceed her jurisdiction by answering a question that she had not been asked to answer?
- c. Did the arbitrator fail to consider one of Rogers' arguments in deciding the first question?
- d. Did the arbitrator err in her analysis of the first question as to whether the Rogers credit card was an ancillary service?
- e. Did the arbitrator err in her analysis of the second question as to whether Rogers could pay incremental commissions to Glentel?

Analysis of the Issues

a) What is the standard of review of an appeal from an arbitral decision pursuant to the Arbitration Act, 1991?

[62] The parties do not agree on the standard of review that applies to this application for an appeal. Bell submits that the standard of review in arbitral appeals is one of reasonableness. Bell submits that *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 is binding authority on the standard of review.

[63] Rogers submits that after the Supreme Court decided *Vavilov* in 2019, the standard of review for statutory appeals, including appeals by way of s. 45 of the *Arbitration Act*, attract the appellate standard of review. Thus, on questions of law, or extricable questions of law from a mixed question of fact and law, the correctness standard applies: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[64] Appeals from an arbitration award are governed by s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 which provides:

45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

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

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

Idem

(2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

Appeal on question of fact or mixed fact and law

(3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

[65] Because the parties agreed to an appeal to this court on questions of law, or questions of mixed fact and law, this appeal is justiciable without leave by virtue of these provisions of the *Act*.

[66] In *Sattva*, the Supreme Court of Canada decided that arbitral appeals were subject to the deferential standard of reasonableness, except in rare circumstances such as where a matter involves “constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator’s expertise”: *Sattva*, at para. 106.

[67] In 2017, the Supreme Court revisited the standard of review in arbitral appeals from B.C. arbitration legislation, which permitted appeals only on questions of law. In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, the Supreme Court held that the *Sattva* deferential standard of review should apply because “[t]ogether, limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality.” *Teal Cedar*, at para. 1.

[68] In 2019, the Supreme Court decided in *Vavilov* that statutory rights of appeal from an administrative decision-maker to a court, require that appellate standards of review apply by way of *Housen*, at para. 8. The Supreme Court recognized that where a legislature intends that a different standard of review should apply in a statutory appeal, it is free to make that intention known by prescribing the applicable standard through statute: *Vavilov*, at para. 37.

[69] *Vavilov* did not discuss the decisions in *Sattva* or *Teal Cedar*, nor did it create an explicit exception for commercial arbitration appeals from appeals of administrative decision-makers (including arbitrations pursuant to other statutes) for the review of government action.

[70] In *Travelers Insurance Co. of Canada v. CAA Insurance. Co.*, 2020 ONCA 382, 151 O.R. (3d) 78, the Court of Appeal applied the *Vavilov* principles to an appeal from an arbitral award under the *Insurance Act*. The Court of Appeal found that this statutory appeal raised questions of law, including questions of statutory interpretation, thus a standard of correctness applied: *Travelers Insurance*, at para. 14.

[71] The issue of whether commercial arbitral appeals should continue to attract a more deferential standard by virtue of *Sattva* emerged in the 2021 decision of the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32. Three concurring justices called for the court to explicitly settle the question of whether *Vavilov* had replaced the *Sattva/Teal Cedar* standard of review in commercial arbitration appeals. This arose in the context of lower court decisions declining to apply *Vavilov* in commercial appeals: *Wastech*, at para. 118.

[72] The majority in *Wastech* declined to do so, reasoning that the question was not part of the reasons below, it had not been the subject of submissions and on either standard of review, the result would be the same: *Wastech*, at paras. 45-46.

[73] The concurring members of the court would have applied the appellate standard of review to statutory appeals from arbitral awards, to maintain the coherence of the principles in *Vavilov* and to provide clarity to lower courts: *Wastech*, at para. 46, 117-119.

[74] The question of standard of review in arbitral appeals has not been decided by the Court of Appeal for Ontario. However, post-*Wastech*, in an appeal from an arbitration conducted under the *Insurance Act*, the Court of Appeal determined that *Vavilov* had changed the standard of review, because the legislature had provided for an appeal to the court: *Continental Casualty v. Chubb Insurance Company of Canada*, 2022 ONCA 188, 87 M.V.R. (7th) 185, at para. 47.

[75] In Ontario, judges of the Superior Court of Justice have diverged on the applicable standard of review in appeals from arbitrations of commercial disputes.

[76] In *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516, at para 72, aff'd 2021 ONCA 592, the application judge found that the *Sattva* standard of review should continue to apply to commercial arbitrations. Justice Hainey distinguished the private arbitration/appeal context from arbitrations and appeals mandated by statute such as arbitrations conducted under the *Insurance Act*: *Ontario First Nations*, at para. 67. He concluded that because the appeal was not mandated by statute, it was distinguishable from those appeals from administrative decisions that are subject to a statutory right of appeal: *Ontario First Nations*, at paras. 64-66.

[77] On appeal, including on the standard of review issue, the Court of Appeal declined to decide the issue because it would have upheld the award of the arbitrator on any standard: *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, at paras. 37-40.

[78] Several other judges have similarly since found that *Sattva* continues to be binding authority until the Supreme Court of Canada explicitly overrules *Sattva* and *Teal Cedar*: See *Serbcan Inc. v. National Trust Co.*, 2022 ONSC 2644, at paras. 10-17; *Bergmanis v. Diamond*, 2021 ONSC 2375, at paras. 32-34; *Jewish Foundation of Greater Toronto et al. v. The Joseph Lebovic Charitable Foundation et al.*, 2025 ONSC 5068, at paras. 121-122.

[79] In another line of decisions, including *D Lands Inc. v. KS Victoria and King Inc.*, 2022 ONSC 1029, at paras. 60-64, other judges have favoured the reasoning in the *Wastech* concurring opinion. In *D Lands Inc.*, Dietrich, J. concluded that the correctness standard of review should apply to an extricable question of law on appeal under s. 45 of the *Arbitration Act, 1991*.

[80] In an appeal from a family law arbitration, Fowler-Byrne, J. adopted the reasoning in the *Wastech* concurring opinion in the context of that appeal which was provided for pursuant to the *Arbitration Act, 1991* and s. 59.1 of the *Family Law Act*, R.S.O. 1990, c. F.3: *Le v. Nguyen*, 2022 ONSC 6265, 80 R.F.L. (8th) 94, at para. 14.

[81] In *Bot Construction et al. v. Minister of Transportation*, 2025 ONSC 6184, Callaghan, J. relied on *Vavilov* and the decision of the Court of Appeal in *Continental Casualty*, concluding that because the parties' appeal was governed by the *Arbitration Act, 1991*, this was a statutory right of appeal to which the appellate standard applied.

[82] Similarly, in *Ontario Minister of Transportation v. Link 427 General Partnership*, 2025 ONSC 2375, at para. 39, Kimmel, J. discussed the roots of the debate, ultimately concluding that appellate standards now apply:

The reasonableness standard that has for many years been applied to appeals from commercial arbitration awards was rooted in the *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, framework for determining the standard of review by focusing on the underlying nature of the question at issue: see *Sattva*, at paras. 105-106; *Teal Cedar*, at paras. 74-76. The similarities between appeals from commercial arbitrations and statutory tribunals led the Court to use aspects of the *Dunsmuir* approach to conclude that reasonableness was the standard of review for appeals from commercial arbitrators: see *Sattva*, at paras. 105-106. Such similarities included that both involve reviewing the decisions of non-judicial decision-makers, and the unique expertise that statutory tribunals and commercial arbitrators bring to their work: see *Sattva*, at para. 105.

[83] In *Place Laurier Ltd. v. The Manufacturers life Insurance Company*, 2025 ONSC 4172, Jensen, J. held that appellate standards of review govern arbitral awards, including in the commercial contractual context and applying other decisions based on horizontal *stare decisis*. See also *Burwell et al v. Wozniak*, 2024 ONSC 5851, 174 O.R. (3d) 544, at para. 39; *1750738 Ontario Inc. c. 6888631 Canada Inc. et al*, 2025 ONCS 3145, at para. 25.

[84] The British Columbia Court of Appeal (“BCCA”) recently considered much of the conflicting jurisprudence across Canada, including several of the Ontario decisions. The BCCA concluded that *Vavilov* established a new paradigm replacing *Sattva* to the extent that its standard of review principles rested on *Dunsmuir*. The reasons of the majority found that “the presumption of consistent expression favoured interpreting all statutory provisions establishing a right to appeal from administrative decisions consistently, and as importing the appellate standards described in *Housen v. Nikolaisen*, 2002 SCC 33. The majority [in *Vavilov*] found no reason was presented to support interpreting ‘appeal’ as having a different meaning in the context of commercial, criminal, or administrative law.”: *Vancouver School District No. 39 v. Kingsgate Property Ltd.*, 2026 BCCA 98, at para. 112.

[85] The majority applied the logic from the concurring opinion in *Wastech*; the majority rejected any distinctions between arbitral and administrative decision-makers as a matter of statutory interpretation: *Vancouver School Board*, at para. 170.

[86] Finally, the majority found favour with the reasoning applied by Bielby, J. in *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1, 456 D.L.R. (4th) 278, who adopted appellate standards to arbitral appeals, as a matter of consistency, jurisprudence, logic and commercial realities: *Vancouver School District*, at paras. 126-129.

[87] The majority also considered the perspective of the Manitoba Court of Appeal in *Buffalo Point First Nation v. Buffalo Point Cottage Owners Association Inc.*, 2025 MBCA 72, leave to appeal to S.C.C. requested, 42053. In *Buffalo Point*, Monnin, J. discussed the historical development of commercial arbitrations for resolving disputes, including its roots in contract. Justice Monnin contrasted this development from administrative decision makers who review government action. Justice Monnin concluded that until the Supreme Court of Canada decisively overturned *Sattva* and *Teal Cedar*, those decisions remain good law: *Buffalo Point*, at para. 44.

[88] I respectfully agree with the decisions in *Burwell*, *Link 407*, *Place Laurier* and *Bot Construction* from the Ontario Superior Court of Justice which adopt an appellate standard as a result of the *Vavilov* framework. I am guided by the logic applied by the Court of Appeal in *Continental Casualty* and *Travelers* and the absence of any binding appellate direction to the contrary in Ontario. Finally, I consider and prefer the reasoning of the majority in *Vancouver School District* and the Northwest Territories Court of Appeal in *Northland*.

[89] Although there has not been consensus in the Superior Court of Justice on the question, there is a substantial body of case law on both sides of the issue. Thus, I conclude that questions of judicial comity do not require that I favour one perspective over the other.

[90] The logic of the concurring opinion in *Wastech* is compelling. Arbitral awards are administrative decision-making processes as applied to commercial disputes. Parties are free to contract out of appeals to the court, or to provide rights of private appeal, and to stipulate the standard of review on such appeals. However, once the statutory regime is triggered, in my view,

having consistent standards of review for all statutory appeals is rational, for the reasons expressed by Bielby, J. in *Northland*.

[91] While there are differences between commercial arbitrations and the decision of administrative boards and tribunals, like the concurring justices in *Wastech*, I agree that as a matter of statutory interpretation, these differences do not affect the standard of review. The concurring justices found, and I agree, that the “legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts” (para. 39)...”: *Wastech* at para. 119.

[92] I will apply appellate standards to this appeal: correctness for questions of law, and palpable and overriding error for questions of mixed fact and law.

b) Did the arbitrator exceed her jurisdiction by answering a question that she had not been asked to answer?

[93] Arbitrators take their jurisdiction from the contractual instrument under which they are appointed: *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819, 11 C.P.C. (7th) 363, at para. 54; *Mattamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013, 41 B.L.R. (6th) 235, at para. 40; *Faubert & Watts v. Temagami Mining Co.* (1959), 17 D.L.R. (2d) 246, at p. 256 (Ont. C.A.), aff’d [1960] S.C.R. 235.

[94] Rogers claims that the arbitrator erred because she did not answer the question that the parties agreed should be answered, that is whether the credit card “can be sold, distributed, marketed and/or promoted”. Rogers submits that the arbitrator answered a “different” and “narrower” question than that posed by the parties: whether the credit card could be “sold.”

[95] I disagree, for three reasons.

[96] First, whether described as permission to “sell” or to “sell, distribute, market or promote” the Rogers credit card, this distinction did not matter to the issue the arbitrator was asked to determine. The parties briefed the issues by focusing on whether Glentel was required to offer the Rogers Bank credit card to customers because it was an “ancillary service”. Counsel agreed with that proposition on appeal. This can be seen at the beginning of the hearing when counsel for Rogers answered the arbitrator’s question about the significance of the word “sold”.

[97] In his response, counsel for Rogers informed the arbitrator that he did not think “the word sold has significance. It’s part of the offering. It’s bundled.” Counsel’s written and oral argument focused on whether the credit card was an “ancillary service.” This argument did not depend on there being a fee for the card, or a determination of whether it was being “offered, promoted, marketed or sold.”

[98] Second, the TOS did not use consistent nomenclature. Although the recital in the TOS described the “Dispute” and used the phrase “sell, distribute, market or promote”, paragraph 4 of the TOS used only the verb, “sell.” The parties adopted the latter portion of the TOS in their factums, as did the arbitrator in her reasons when defining the issue.

[99] Returning to counsel’s response at the hearing to the question of the importance of the word sold, the final part of that opening exchange was:

Arbitrator: [...] So I just wanted to really get clear that if everybody is on side, that I don’t have to answer the question ‘sold’. It’s whether it can be offered in a bundle?

Rogers’ counsel: Or marketed or promoted. You’ll see in the agreement the language that comes into play with respect to it.

[100] The parties agreed at the hearing that it did not matter for the purposes of the ancillary services argument, whether the card was “sold.” For the purposes of Rogers’ argument on “ancillary services” it did not matter whether Glentel was selling the card, promoting the card, or offering the card to customers.

[101] This understanding of the word “sold” at the hearing is important context to determine whether the arbitrator answered the question she was asked, as the parties intended and as provided by the TOS. I find that she did.

[102] Third, when the parties purported to “clarify” the scope of the first question in the late delivery of their email to the arbitrator, they did not identify that this was unnecessary by virtue of the TOS, nor did they explain or suggest that the term “sold” now mattered, in contradiction to counsel’s response at the opening of the hearing, that whether the card was “sold” or “offered in a bundle” did not matter to the resolution of the issue. To that extent, counsel “muddied the waters.” They did so close to the deadline for the decision, and days after they told the arbitrator that they would clarify in writing what “sold” meant in the context of the submissions and evidence. They had a duty to assist the arbitrator, which arguably, they failed to carry out.

[103] The arbitrator was correct to observe that her understanding was that:

... “sold” was intended to refer to the provision of the Mastercard bundled with the sale of a Rogers telecom service in Glentel stores as an ancillary service. That was the basis of the evidentiary record and the written and oral argument.

[104] In her reasons for decision, the arbitrator noted how the parties used the word “sell” in her analysis of the first question:

The factual context for the first question is Rogers’ wish to sell the Rogers Mastercard bundled with Rogers telecom services at Glentel stores, as it began to do in September, 2024, and to pay the salespeople an added commission of \$15 per credit card activation in addition to the commission for the Service Subscription. The parties refer to this as “selling” the credit card, although there is no fee for the card. [Emphasis added.]

[105] The terminology used by the parties themselves, found in the TOS, read together with how the dispute was framed from the start, leads me to conclude that the arbitrator properly considered the question before her. Therefore, she did not exceed her jurisdiction in her approach to the first question. She used one of two equally acceptable ways of describing what Glentel was “doing” with the Rogers credit card. She considered the questions she was asked to determine, consistent with the TOS and the TOA, read together.

[106] I would not give effect to the first ground of appeal.

[107] The arbitrator did not repeat the word “promote” in her definition of the issue. This relates to the second ground of appeal: whether the arbitrator considered Rogers’ alternative argument, that the credit card could also be found to be a “System Promotion.” I will deal with that question next.

c) Did the arbitrator fail to consider one of Rogers’ arguments in deciding the first question?

[108] An arbitrator must provide reasons for an arbitral award to demonstrate to the parties that the arbitrator has considered their arguments and treated them fairly. Where counsel submits that an award is flawed because of an absence of reasons the reviewing court will consider:

...whether in the context of the record, the issues and the submissions of the parties, the judgment is sufficiently intelligible to show that the adjudicator understood the substance of the matter and addressed the necessary and critical issues.

Alberta Cricket Association v. Alberta Cricket Council 2021 ONSC 8451, at para. 55.

[109] The parties agree that the issue of whether the arbitrator failed to consider a necessary issue raises a question of law.

[110] Rogers submits that the reasons for decision do not analyze or consider its alternative argument; in offering the credit card, Glentel was participating in a “System Promotion” under s. 9.3 of the distribution agreement.

[111] I agree that this alternative framing of the Rogers argument is not explicitly addressed in the reasons; however, I find that the arbitrator was alive to the issue.

[112] First, the arbitrator included s. 9.3 in her reasons in the section describing the distribution agreement. This was the section which Rogers’ counsel read to the arbitrator at several points during the hearing. In including s. 9.3 in her reasons, the arbitrator signaled to the parties that she had read this portion of the agreement.

[113] Second, the arbitrator stated her understanding that Rogers was comparing its credit card to Bell’s “perks” used to market its telecom products. In the analysis of the first issue, the arbitrator

found that the question of whether Bell's incentives were permissible was not part of her arbitration mandate.

[114] Finally, in her responding email to counsel after they purported to clarify the scope of the first question, the arbitrator wrote:

My understanding is that whether the Mastercard can be distributed, marketed or promoted in Glentel stores in any other way was not the question on this arbitration.

As you can appreciate, my reasons, based on the questions referred to arbitration, are in the final stages of preparation in order to be delivered by December 6, 2024 in accordance with the arbitration agreement.

[Emphasis added.]

[115] This leaves the question of whether the arbitrator erred in law, on a standard of correctness, by declining to consider whether Rogers could "sell, distribute, market or promote the card [...] in any other way".

[116] In oral submissions on the appeal, Rogers' counsel confirmed that the clarification email related only to its alternative argument, that the credit card was a "System Promotion."

[117] I find that the "system promotion" issue was not a "necessary and critical" issue as Perell, J. put it in *Alberta Cricket Association*.

[118] Counsel had been working on the dispute for several months. They litigated the injunctions based on Rogers' theory that its credit card was an "ancillary service". Rogers developed this argument in its written submissions to the arbitrator. The alternative argument could fairly be described as an afterthought, arrived at "on the fly."

[119] I have considered whether the circumstances amount to an error in law. I find that it does not. I conclude that the arbitrator was aware of Rogers' alternative argument, cited the provisions in s. 9.3, and told counsel that at the finalization stage for the award, she would not be dealing with this alternative argument.

[120] I find that on a standard of correctness, the arbitrator's decision not to consider Rogers' alternative argument did not rise to an error in law. I say this because of the lack of prominence that Rogers gave to this submission, the way in which the argument arose, Bell's response to the argument, and the nature of Rogers' primary argument. The arbitrator was at the stage where she was able to find that the alternative argument did not have merit.

[121] The arbitration process is intended to be practical and efficient. The parties were before an experienced arbitrator and former judge of the Court of Appeal. It is clear from the entire record, including the transcript, that the arbitrator understood the alternative argument and determined

that it did not require further explication in her reasons. The arbitrator stayed with the analysis of the primary, “critical and necessary” question that had been posed, consistent with the TOS and the TOA, and the arguments as fully developed by the parties.

[122] Counsel for Rogers requested that if this ground of appeal amounted to an error of law, that I decide the question of Rogers’ alternative argument in lieu of returning the matter to another arbitrator. If I was to decide this question, I would decide the question in favour of Bell. A contract to accept a credit card is not equivalent to discounts or free items used to incentivize the purchase of telecommunication services. Rogers’ alternative argument did not have merit.

[123] I dismiss this ground of appeal.

d) Did the arbitrator err in her analysis of the first question?

[124] Rogers identifies what it submits are three extricable errors of fact and law in the arbitrator’s approach to interpreting the meaning of “ancillary services” in this distribution agreement.

[125] Rogers disagrees with the arbitrator’s interpretation of the word “ancillary services.” This does not amount to an extricable error of law. As the Supreme Court of Canada has pointed out, extricable legal errors in questions of contractual interpretation are “rare and uncommon errors”: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 175 O.R. (3d) 240, at para 28; *Corney Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para 44. The standard of review for contractual interpretation will generally always be on the basis of palpable and overriding error.

[126] First, Rogers submits that the arbitrator erred in not giving the ordinary grammatical meaning to the word “ancillary.” Rogers submits on appeal that “ancillary” used in the context of the agreement means something “extra” or “added.” In its submissions to the arbitrator, Rogers provided the Black’s Law Dictionary definition which equates “ancillary” to “supplementary”, “subordinate”, “subsidiary” or “auxiliary.” These definitions were not a great distance from those proposed by Bell, which included the Oxford English Dictionary: “subordinate” or “subsidiary” or the Merriam Webster dictionary which refers to “having a subordinate subsidiary or secondary nature, serving as a supplement or addition, directly related”.

[127] The arbitrator appropriately considered the ordinary and grammatical meaning of “ancillary”, and the dictionary definitions submitted by both parties. Her reasons demonstrate that she was alive to the “contextual factors including the purpose of the agreement and the nature of the relationship created by the agreement.

[128] The arbitrator directed herself to read the whole distribution agreement. She described the purpose of the agreements that applied to each carrier, to “allow Bell and Rogers telecom services, products and accessories to be sold in the Glentel stores.” She accurately appreciated the

surrounding circumstances of the agreement: the carriers' joint purchase of Glentel to market their competing telecommunication products.

[129] Second, Rogers submits that the arbitrator erred by finding that to be an "ancillary service" the service had to be a "necessary adjunct" to the operation of telecommunication services. This overstates the arbitrator's findings.

[130] The arbitrator recognized that an ancillary service includes a telecommunication-related service that "supplement[s] the use or operation or accessibility" of the primary service. In oral argument, the parties used a mobile protection plan as an example of an ancillary service. The arbitrator discussed that example in considering the meaning of the word "ancillary", observing that while a mobile protection plan is not necessary to the mobile service, it "only exists to warrant the operation of the phone while it operates using the wireless service." Thus, it is an "ancillary" service to the telecommunication services in the sense of being "supplementary, subordinate or auxiliary."

[131] Third, Rogers submits that the arbitrator erred in failing to consider Bell's incentives and promotions, such as a member benefits program. Rogers submitted that because Bell was entitled to offer promotions, it would be "commercially absurd" to deny Rogers a similar entitlement as an "ancillary service."

[132] The arbitrator rejected this submission, correctly noting that Bell's offers and promotions were not the question on the arbitration. The arbitrator acknowledged Bell would not have characterized its promotional perks and benefits as "ancillary services" as Rogers was trying to do. I find no error in the arbitrator rejecting Rogers' false equivalency argument. To the contrary, had the arbitrator found that Bell's promotional perks were "ancillary services", this would have been inconsistent with how she defined that term in the agreement.

[133] The arbitrator correctly directed herself to the legal principles that apply to contractual interpretation. The arbitrator cited the leading case on the test, *Sattva Capital Corp v. Creston Moly Corp*. She referred to the principles for considering commercial contracts as discussed by the Ontario Court of Appeal in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24.

[134] The arbitrator did not fall into any extricable legal error in her approach to the contractual interpretation of the phrase "ancillary service", nor was there any palpable or overriding error on this question of mixed fact and law.

[135] I dismiss this ground of appeal.

e) Did the arbitrator err in her analysis of the second question?

[136] The arbitrator's findings on the second question flow from her determination that the Rogers Bank credit card is not an "ancillary service" and thus, is not a "Service" within the meaning of the distribution agreement.

[137] Rogers submits that the arbitrator carried her errors of law on the first question into the second question. Rogers' submission rely on the success of its arguments above, which I have rejected.

[138] The arbitrator concluded that Rogers could not pay an incremental commission to Glentel if the credit card was not a "Service" as defined in the distribution agreement. Given my findings that the arbitrator made no extricable error in arriving at that conclusion, that decision and the logical extension to that interpretation is owed deference, absent any palpable and overriding error.

[139] The arbitrator concluded alternatively that Rogers could not pay a commission for the sale of credit cards because the Rogers Mastercard was not listed in Schedule F of the Distribution Agreement.

[140] The arbitrator read the distribution agreement including section 7.5(4) and determined that the credit card would have had to be listed in the agreement to qualify for commission payments. She applied the proviso in the first sentence to the case of exclusive services described in the third sentence of the section.

[141] Section 7.5(4) provides, as follows:

(4) The commissions payable to Retailer's sales representatives for Activations, hardware upgrades and the sale of Products and Services, including associated warranties, shall be those set forth in Schedule F. Such commissions shall be paid by Retailer to its sales representatives from the compensation paid to Retailer by Carrier under Section 3.1. For any Service that is offered exclusively to Retailer by Carrier in a certain Retailer Location, Carrier shall have the right to solely determine the commissions payable to Retailer's sales representatives in such Retailer Location, provided that the commission paid for the sale of such exclusive Service shall not be higher than the highest commission paid to Retailer's sales representatives for the sale of wireless telecommunications services (irrespective of the carrier) in such Retailer Location. [...]

[142] This interpretation was open to the arbitrator on her reading of s. 7.5(4). I defer to her interpretation, absent a palpable and overriding error, which Rogers has not made out.

Conclusion

[143] I dismiss the appeal. If the parties are not able to agree on costs, they may propose a timetable for the exchange of brief written submissions (maximum 4 pages) on costs.

Leiper J.

Released: April 27, 2026

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COURT FILE NO.: CV-25-00734196-0000
DATE: 20260427

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ROGERS COMMUNICATIONS INC.

Applicant

– and –

GLENTEL INC. and BCE INC.

Respondents

REASONS FOR DECISION

Leiper J.

Released: April 27, 2026