COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Northern Health Authority v. du Plessis,* 2026 BCCA 143

Date: 20260409
Docket: CA49413

Between:

Northern Health Authority

Appellant/
Respondent on Cross Appeal
(Respondent)

And

Dr. Jannie du Plessis

Respondent/
Appellant on Cross Appeal
(Petitioner)

Before: The Honourable Mr. Justice Butler
The Honourable Justice Riley
The Honourable Justice Mayer

On appeal from: Awards of an arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2, dated September 14, 2023, and February 16, 2024.

Counsel for the Appellant/Respondent on Cross Appeal:	A.M. Gunn, K.C. J.G. Cummings
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Place and Date of Hearing:	Vancouver, British Columbia October 8 and 9, 2025
Written Submissions Received:	October 15, 27 and November 4, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 9, 2026

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Justice Riley
The Honourable Justice Mayer

Summary:

The respondent was a pediatrician under service contract with the appellant health authority during the COVID-19 pandemic. The appellant terminated the 2021 service contract because the respondent did not receive a vaccination against COVID-19, contending the contract had been frustrated as the respondent was required to obtain a vaccination pursuant to an order by the Provincial Health Officer to continue to provide services. The respondent disputed the termination and commenced arbitration. In an initial award, the arbitrator found the NHA had breached the service contract by terminating the respondent. In a subsequent remedy award, the arbitrator found the respondent was entitled to damages for breach of contract and costs. The appellant filed an appeal from both awards, and the respondent filed an appeal from the remedy award. The appeals were agreed to be heard together, and both parties waived the other party's requirement to seek leave to appeal under s. 59(2)(b) of the Arbitration Act.

Held: Appeal dismissed; cross-appeal dismissed.

On the appeal, the arbitrator's assessment of the frustration defence, and the two elements at issue in the analysis were matters of mixed fact and law. Foreseeability as part of the frustration analysis was fact dependent, requiring the arbitrator to determine whether the parties might have reasonably contemplated the possibility of a vaccine mandate. Whether the health order was a supervening event making performance of the contract impossible also required consideration of the respondent's contractual obligations and his unique factual circumstances. In addition, the interpretation of the health order cannot be separated from the frustration analysis as a question of law and was an integral part of the analysis. Even if viewed as an independent analysis, its interpretation is so inextricably linked to the evidentiary record that most questions raised by the NHA are questions of mixed fact and law reviewable on a deferential standard. To the extent that the NHA has identified a question of law, it is unable to demonstrate that the arbitrator erred in law in the interpretation of the health order.

On cross-appeal, the alleged questions of law arising from the remedy award are either questions of mixed fact and law or legal questions which do not arise out of the remedy award. The characterization of the dismissal is a finding of mixed fact and law and does not raise a legal question on the application of the common law presumption of reasonable notice. The question of repudiation was never raised to the arbitrator; it does not arise out of the remedy award. The respondent's alleged question of legal construction of the contract and termination provision are

attempts to reframe a central exercise of contractual interpretation of the termination provision, which was undertaken by the arbitrator, to seek a different outcome.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] At the height of the COVID-19 pandemic in 2021, Dr. Jannie du Plessis was working as a pediatrician under a service contract with the Northern Health Authority (the "NHA"). The NHA terminated the contract because Dr. du Plessis had not received a vaccination against COVID-19. The NHA contended that the

service contract had been frustrated because Dr. du Plessis was required to obtain a vaccination—in accordance with the provisions of an order issued by the Provincial Health Officer (the "PHO") on October 14, 2021—in order to continue providing services.

[2] Dr. du Plessis disputed the termination and commenced an arbitration seeking redress. The arbitrator issued an award on September 14, 2023 (the "Liability Award") finding that the NHA had breached the service contract in terminating Dr. du Plessis. In a remedy award issued on February 16, 2024 (the "Remedy Award"), the arbitrator found that Dr. du Plessis was entitled to damages for breach of contract and costs totalling $388,582.13.

[3] The NHA filed notices of appeal from both awards. Dr. du Plessis filed a notice of appeal from the Remedy Award. The parties agreed to consolidate the two appeals and waived the opposite party's requirement to seek leave to appeal under s. 59(2)(b) of the *Arbitration Act*, S.B.C. 2020, c. 2, without broadening the scope of appellate review of the arbitral awards and without exempting either party from the need to identify a question of law arising out of the arbitral awards.

[4] The critical question for both appeals is whether the parties, in their respective appeals, have identified a pure question of law arising from the awards thus bringing the appeals within this Court's appellate jurisdiction under s. 59(1) of the *Arbitration Act*.

[5] For the following reasons, I would dismiss both appeals.

Background

[6] Dr. du Plessis worked for the NHA under a series of one-year term service contracts from 1999 until his termination in 2021, at which time he was 73 years old. Each of the service contracts provided that Dr. du Plessis was an independent contractor and contained an arbitration clause. Although earlier versions of the contract had provided that the NHA could terminate the contract "without cause or reason…by providing not less than 30 days notice...", Article 3.1 of the 2021 service contract provided that "…either party may terminate the Contract without cause upon six (6) months' written notice to the other party."

[7] In July 2019, Dr. du Plessis suffered a heart attack which required coronary bypass surgery. At that time, he decided he no longer wanted to provide on-call services. When he returned to work, with the agreement of the NHA, he did not provide on-call or hospital services and there was no expectation he would do so. The NHA was satisfied with Dr. du Plessis's level and mode of service delivery.

[8] When the Province of British Columbia declared a state of emergency on March 16, 2020, Dr. du Plessis closed his clinic for health and safety reasons and provided all services to patients virtually via telephone consultations from his private residence. The NHA did not take any issue with that arrangement.

[9] In April 2021, the parties renewed the service contract for the term April 1, 2021 to March 31, 2022 (the "2021 Contract"). The 2021 Contract did not state that Dr. du Plessis would continue providing services exclusively virtually from his private residence, nor did it contain any provision requiring or exempting him from obtaining a COVID-19 vaccine. Those vaccines became available in British Columbia in December 2020, and by April 2021, approximately one million doses of the vaccine had been administered in this province. In February 2021, Dr. du Plessis declined the NHA's offer to reserve a dose of the vaccine for him.

[10] During the course of the pandemic, the PHO issued numerous orders under the *Public Health Act*, S.B.C. 2008, c. 28. In September 2021, the PHO announced it would issue an order requiring all health care workers to receive a COVID-19 vaccine. On October 14, 2021, the PHO issued the order—the vaccine mandate—entitled, "Hospital and Community (Health Care and Other Services) Covid-19 Vaccination Status and Information and Preventative Measures".

[11] The order is lengthy and complex, containing 29 recitals and five pages of definitions. It was amended on several occasions including on October 21, November 9, and November 18, 2021. The arbitrator found that the November 9, 2021 order was the relevant iteration of the order, and I will refer to that order in these reasons as the "PHO Order". In its arguments on appeal, the NHA also refers to the October 21 order and submits that it "must be considered" because that was the version in place when Dr. du Plessis was given notice of his termination. I accept that the PHO Order is the relevant order, but where necessary, will refer to that order and any other versions of the order by date.

[12] The NHA medical staff were notified on October 15, 2021 that all staff and physicians employed by British Columbia health authorities were required to have a first dose of the COVID-19 vaccine by October 25, 2021. The PHO Order contained a provision that allowed medical staff and physicians to apply for a medical exemption from the vaccine requirement. Dr. du Plessis chose not to receive a COVID-19 vaccine because of health concerns related to medication he received for thrombosis and did not apply for an exemption because he understood he would not qualify.

[13] The PHO Order contains definitions under various headings, some of which apply to all provisions in the order, some of which are relevant to specific sections. The following provisions are relevant to the issues on appeal. There are five definitions of "staff member" but the one that applies to Dr. du Plessis reads:

> "staff member" means…
>
> > (b) an individual who provides care, services or health related research in a care location under contract with a regional health authority, ...

[14] As a staff member who was hired before October 26, 2021, the following provisions apply to Dr. du Plessis:

> "care location" means …
>
> > h. a private residence in which a patient or client resides, …
> >
> > m. another other [sic] place where care is provided.
>
> "in a care location" includes any place where a patient, resident or client of a care location is being provided with care or services by a staff member or student;
>
> "not permit … to work" means
>
> (a) if the employer operates the care location, not to permit a staff member to work in the care location;
>
> (b) if the employer does not operate the care location, not to deploy a staff member to work in the care location or a residential care facility...
>
> "work" means…
>
> With respect to a Part A staff member, one of the following:
>
> > (i) to work for a regional health authority…
> >
> > (ii) to provide care, services or health related research in a care location…
> >
> > (iv) to be in a care location for training, research or associated administrative purposes...

> 1. Subject to section 2 and 3, as of October 26, 2021, a staff member who was hired before October 26, 2021 must be vaccinated or have an exemption to work. …
>
> 4. An employer must not permit an unvaccinated staff member... to work after October 25, 2021.

[15] The NHA understood that the PHO Order applied to all medical staff irrespective of the manner in which they delivered services. Dr. Ronald Chapman, Vice President Medicine for the NHA, advised Dr. du Plessis that his service contract would be terminated on November 14, 2021, if, by that date, he had not obtained a first dose of the COVID-19 vaccine or a medical exemption. On November 17, 2021, Dr. Chapman wrote to Dr. du Plessis advising that as he had not applied for an exemption nor received the vaccine, the 2021 Contract had been frustrated and was terminated effective immediately.

[16] Dr. du Plessis commenced proceedings under the *Arbitration Act* seeking a declaration he had been wrongfully dismissed and damages. The NHA defended the claim maintaining that the 2021 Contract had been terminated by the common law doctrine of frustration and alternatively that Dr. du Plessis had committed a fundamental breach of the 2021 Contract by failing to comply with the PHO Order. The arbitrator bifurcated the damage issue and proceeded to hear the liability issue by a three-day Zoom hearing. The evidence consisted of affidavits from Drs. du Plessis and Chapman and the cross-examinations of both witnesses. The arbitration hearing itself was not recorded or transcribed. The parties provided written submissions, and the arbitrator issued the Liability Award on September 14, 2023. The parties then provided written submissions on remedy, and the arbitrator issued the Remedy Award on February 16, 2024.

<u>Liability Award</u>

[17] The arbitrator considered the service contract was not frustrated by the PHO Order, nor was there cause for the NHA to terminate the contract. He found:

> [21] … On its face, the Order as worded at the relevant time did not capture the Petitioner's unique situation wherein it was recognized and accepted that he would continue to provide services virtually from his private residence. In other words, the Order in place at the time did not prevent the Petitioner from lawfully fulfilling the terms of his contract. Further, as at the time the parties entered into their most recent contract in April 2021, it was not out of the realm of reasonable possibility that a mandatory vaccine policy and/or law to curb the covid pandemic would be implemented and the fact they did not mention this topic indicates they felt

> they did not need to, which is not surprising given the disconnect between virus transmission and the provision of virtual services the Petitioner had exclusively been performing for some time.

[18] The arbitrator disregarded references in the service contract to matters that no longer "applied to the real life situation that existed", such as to "hospital privileges". In the arbitrator's findings of fact about the parties' contractual obligations, he found, based on the uncontested evidence, that the parties agreed that Dr. du Plessis would not exercise hospital privileges. After the state of emergency was declared, the parties had agreed that all Dr. du Plessis's work was to be provided virtually from his residence and there was no intention he would be performing other work.

[19] Turning to the defence of frustration, the arbitrator referred to *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, and *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, 1960 CanLII 37, for the principle that frustration "occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'radically different from that which was undertaken by the contract'": Liability Award at para. 24. The arbitrator also considered supervening illegality and noted that a change in law that renders the performance of a contract illegal can be the basis for frustration but observed that "the change in law must be one which was not foreseen by the parties and for which no express or implied provision is made in the contract": Liability Award at para. 25.

[20] The arbitrator concluded:

> [26] In the present case there was no supervening event that made the performance of the contract impossible to be fulfilled or "radically different" from what was contractually undertaken. Primarily this is because the Order in effect at the time [Dr. du Plessis's] contract was terminated did not appear to apply to [Dr. du Plessis], with his unique factual circumstances and accepted arrangement.

[21] The arbitrator reviewed the PHO Order terms in determining how they did not apply to Dr. du Plessis's unique factual circumstances. He assessed key terms including "staff member", "care location", provision of services "in a care location", and "work", to establish this iteration of the Order did not capture Dr. du Plessis.

[22] The arbitrator grounded his analysis in the evidence and his observations about uncertainty or ambiguity in the language of the PHO Order. He examined how the definition of “staff member” hinged on the provision of care or services “in a care location”. In his general analysis of care location, the arbitrator observed that a sub-category of “care location” itself was defined as a private residence where a patient or client resides. The arbitrator inferred from this that a care location is where the patient is *receiving* the care, rather than where it is being *provided from*, in this case, Dr. du Plessis’s private residence used for virtual services:

> [27] Specifically, given the nature of the Petitioner’s services at the time the Respondent ended the contract it is not clear he was a “staff member”, as defined, or that he was “(providing) care... in a care location”, as defined, and/or that the services being provided met the definition of “work”, as defined. Of significance, the Order makes no reference to virtual care in any of the twenty-four enumerated categories of a “care location”. Further, the relevant iteration of the Order fails to define a physician’s private residence as a “care location.”
>
> [28] Consistent with the purpose of the Order, its reference to a “private residence” as a “care location” appears to refer to the private residence of a patient or client where care is actually being provided, and not a physician’s private residence being used by the physician to provide virtual services. Had the Order been intended to these latter situations it would likely have clearly stated as much as it could easily have made express reference to the private residence of a staff member providing virtual services. Given the use of virtual technology from private residences since the spring of 2020, the concept was an obvious one to expressly include if it were so intended by the PHO at the time in question.

[23] The arbitrator further reasoned that the PHO would have expressly stated that “care location” encompassed Dr. du Plessis’s situation—the private residence of a staff member providing virtual services—had they intended it to apply. This finding was based on considerations including that: (1) virtual technology had been used since spring 2020; (2) no reference to virtual care was made in “any of the twenty-four enumerated categories” of care location; and (3) a subsequent iteration of the order in April 2023, which removed the notion of “care location”, would have squarely captured Dr. du Plessis.

[24] In establishing there was no supervening event as the PHO Order did not apply, the arbitrator emphasized that Dr. du Plessis was not seeking to change his mode of service delivery to virtual care but was continuing to provide services as he had done “long before covid was identified as a pandemic, and well prior to the

introduction of the provincial health Order": Liability Award at para. 31. He also found that "the implementation of a mandatory vaccination policy or law for health care workers was not so out of the realm of possibility so as to characterize such as reasonably unforeseeable": Liability Award at para. 32.

[25] The arbitrator also noted that Dr. du Plessis had refused to obtain a flu vaccine contrary to a PHO order in 2012 and had been permitted to continue to provide services under contract for almost a decade while that order was in place. The PHO also knew he had declined the COVID-19 vaccine in February 2021. In light of these circumstances, the arbitrator concluded:

> [37] Notwithstanding, [the PHO] deliberately chose not to make vaccination a term of any service contract or the parties' relationship including, notably, the parties April 1, 2021 to March 31, 2022 contract. On balance, it is not out of the realm of reasonable possibility that the parties – at the time they entered into their 2021 contract – deliberately chose not to provide for mandatory vaccination or covid contingencies because, from a health and safety standpoint, [Dr. du Plessis's] virtual practice met the gold standard from the standpoint of eliminating the transmission of covid.

[26] Finally, the arbitrator concluded that for the same reason the 2021 Contract was not frustrated, the NHA had no cause to terminate the contract: Liability Award at para. 38.

<u>Liability Appeal</u>

Positions of the parties

The NHA

[27] The NHA argues the arbitrator erred in his interpretation of the PHO Order by concluding there was a "carve out" from the vaccine mandate requirement for physicians who provided care remotely from a private residence. As the PHO Order is an "enactment" within the meaning of the *Interpretation Act*, R.S.B.C. 1996, c. 238, the NHA submits that the arbitrator's interpretation is to be reviewed on the correctness standard, although it also argues the same conclusion would be reached if reviewed on a standard of reasonableness. In support of its interpretation of the PHO Order, the NHA submits the arbitrator's interpretation of the PHO Order and its application to remote workers is contrary to numerous decisions of British Columbia courts and arbitrators.

[28] The NHA argues the PHO chose to implement a vaccine mandate that was intended to apply as broadly as possible. While that meant the vaccine mandate might apply in some contexts that could be considered non-essential from a health risk perspective, it avoided the need to anticipate every conceivable practice scenario. It submits that the PHO's policy choice was intended to keep the number of unvaccinated workers, even amongst those who had little or no direct contact with others, as low as possible: *Hoogerbrug v. British Columbia*, 2024 BCSC 794 at para. 213.

[29] Referring to the definitions in the PHO Order, the NHA submits that Dr. du Plessis was a "staff member" with "hospital or facility privileges" and that it was irrelevant whether his residence was a "care location". Under the October 21 Order, he was a "staff member" because he was providing health care under contract for a regional health authority in a "care location". While the definitions of "staff member" and "care location" were changed in the subsequent PHO Order, it submits that Dr. du Plessis remained a staff member because the order applied to "any place" where care was provided to a patient. Further, the definition of "care location" had been expanded to include "<u>another other</u> [sic] place where care is provided".

[30] The NHA argues that the absence of reference to virtual care or a physician's residence in the enumerated categories of "care location" in the PHO Order was immaterial as the drafter "plainly intended to give these terms the broadest possible meaning". It also submits the arbitrator erred by giving weight to an irrelevant consideration: that the policy considerations of the PHO Order—elimination of all threat or risk to patients and co-workers—could still be achieved if virtual services were performed exclusively from a physician's private residence.

[31] Unlike the earlier versions of the vaccine mandate order, the PHO Order created categories of employer described as Part A and Part B. The NHA fell within Part A, and the PHO Order included a broad prohibition against performance of work by unvaccinated staff "for" a health authority or provision of health care "in a care location". The NHA submits that the breadth of the definitions precludes "any loophole for unvaccinated individuals to provide care to patients from outside of a 'care location'".

[32] The NHA further submits that the arbitrator's errors in interpreting the PHO Order are "upstream" or independent from the alleged errors concerning frustration. Accordingly, it argues that on correctness review, the award must be set aside even if the frustration decision raises a question of mixed fact and law.

[33] In addition, the NHA submits that the arbitrator's frustration analysis was faulty because it is anchored in his erroneous interpretation of the PHO Order and based on consideration of irrelevant factors. As a result, it asserts the arbitrator's conclusions are subject to review on a standard of correctness. The factors it says are irrelevant to the frustration analysis are the arbitrator's findings that:

- The 2021 Contract did not accurately depict the terms of employment specifically regarding provision of hospital privileges;
- The NHA knew that Dr. du Plessis performed all work remotely;
- A mandatory vaccination policy for health care workers was reasonably foreseeable; and
- The NHA deliberately chose not to make mandatory vaccination a term of the parties' relationship in 2021.

[34] The NHA argues these findings are not relevant to its frustration defence because the PHO Order was unforeseeable in April 2021. Even though vaccine mandates were not wholly foreign, the possibility that such a mandate might bar physicians who provided service virtually was truly unprecedented; the COVID-19 pandemic completely upended the existing social order. The NHA argues it had no alternative but to implement the PHO Order because permitting a physician who was unvaccinated to provide health services would constitute an offence. The arbitrator's contrary conclusion that the contract was not frustrated is incorrect or alternatively unreasonable.

Dr. du Plessis

[35] Dr. du Plessis submits that the liability appeal should fail because the NHA has not raised a pure question of law which means this Court does not have jurisdiction to hear the appeal. Even if it has, he argues the Liability Award is

subject to the deferential standard of review of reasonableness and that this Court should conclude that the arbitrator's decision was reasonable.

[36] Regarding the scope of the appeal, the NHA's arguments raise two alleged errors in the arbitrator's frustration analysis: an error concerning the foreseeability of the vaccine mandate; and an error in interpreting the PHO Order. Dr. du Plessis submits that both alleged errors involve determination of questions of mixed fact and law. Further, the arbitrator's findings on foreseeability are fatal to the frustration defence and unassailable on appeal as they are incontrovertibly based in fact. He also asserts that even if this Court finds an error in law with respect to interpretation of the PHO Order, the frustration defence still fails because of the arbitrator's findings of fact on the element of foreseeability. The arbitrator's decision accordingly involved a mixed question of fact and law.

[37] Dr. du Plessis also argues that the interpretation of the PHO Order does not raise a pure question of law. While statutory interpretation normally gives rise to legal questions, if the application of the statute is inextricably linked to the evidentiary record at an arbitration hearing, the issue arising is of mixed fact and law: *Mazzei v. Insurance Corporation of British Columbia*, 2023 BCCA 367 (Chambers) [*Mazzei*]. As the NHA's complaint relates to the outcome of the arbitrator's application of the legal test in the PHO Order to the evidence, the appeal raises a question of mixed fact and law, and this Court has no jurisdiction to entertain the appeal.

Scope of appellate review

[38] The parties each consented to the other's appeal of the arbitral awards and agreed that the scope of appellate review remained as set out in s. 59 of the *Arbitration Act*:

> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal <u>on any question of law arising out of an arbitral award</u> if
>
> > (a) all the parties to the arbitration consent, or
> >
> > (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> […]

> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
> >
> > (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
> >
> > (c) the point of law is of general or public importance.
>
> [Emphasis added.]

[39] Neither party made submissions on whether the other party had satisfied the leave requirements in s. 59(4). In other words, neither took the position that if the other party succeeded in identifying a question of law arising out of one of the awards, the leave requirements in s. 59(4) also had to be satisfied.

[40] Accordingly, I proceed on the basis that the only constraint on the scope of this Court's jurisdiction is whether the appeal is on a question of law arising out of the awards. Nevertheless, that constraint is significant as the legislative choice limiting review of commercial arbitration awards has left "only a very small window for appellate review of arbitral decisions": *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2019 BCCA 66 at para. 4; *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 60 [*MSI Methylation*].

[41] The distinction between questions of fact, law and mixed questions is not contentious. Legal questions are "about what the correct legal test is", while "questions of fact are about what actually took place between the parties". Meanwhile, questions of mixed fact and law are about "whether the facts satisfy the legal test" or, put differently, the application of a legal standard to a set of facts: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43 [*Teal Cedar*]; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 49 [*Sattva*]; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35, 1997 CanLII 385 [*Southam*]; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26–27.

[42] Applying a legal standard to a set of facts is normally a question of mixed fact and law: *Southam* at paras. 35–37; *Sattva* at para. 49. However, statutory interpretation is normally a legal question: *Teal Cedar* at paras. 47, 50. The

qualification to statutory interpretation being a legal question is when the application of a statutory provision to the facts is “inextricably linked to the evidentiary record at the arbitration hearing”: *Teal Cedar* at para. 51. In such circumstances, the issue becomes one of statutory application, which is a question of fact, or of mixed fact and law, and no longer an extricable legal question: *Mazzei* at para. 26.

[43] The NHA’s arguments in relation to the Liability Award, and in turn the Remedy Award, require us to consider whether it has identified an extricable question of law or whether it raises issues of mixed fact and law. Much has been written in decisions from this province about the difficulty in distinguishing questions of law from questions of mixed fact and law, particularly with reference to this Court’s appellate review jurisdiction in relation to arbitral awards. In *MSI Methylation*, Justice Hunter helpfully summarized the relevant principles:

> [72] From these authorities, and having in mind the legislative evolution of s. 31 of the *Arbitration Act*, I draw the following principles in relation to appeals from arbitration awards:
>
> > (a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.
> >
> > (b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).
> >
> > (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the “question” is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the

> more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.
>
> (d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

Application to the Liability Award

[44] In my view, the application of these principles to the questions identified by the NHA leads to the conclusion that its appeal of the Liability Award raises mainly questions of mixed fact and law which this Court is without jurisdiction to entertain on appeal. Even if the NHA's appeal raises a question of law with regard to the interpretation of the PHO Order, I would conclude that the arbitrator's decision was correct.

[45] The NHA relied on the doctrine of frustration in terminating Dr. du Plessis's 2021 Contract. As the arbitrator stated, the "main issue" on liability was whether the NHA breached the 2021 Contract or whether the doctrine of frustration applied, such that the contract ended by operation of law: Liability Award at para. 20. On appeal, the NHA describes the arbitrator's alleged errors in relation to his rejection of the frustration defence as: 1) an erroneous interpretation of the PHO Order; and 2) taking irrelevant considerations into account to conclude that the 2021 Contract had not been frustrated.

[46] The alternative argument, that it had just cause to terminate Dr. du Plessis's contract because of his failure to be vaccinated or obtain an exemption, was raised by the NHA before the arbitration hearing. That argument is also based on the contention that the judge erred in interpreting the PHO Order. The NHA submits the judge's interpretation error is "upstream" or independent of the frustration analysis such that this error on its own allows this Court to intervene on appeal.

[47] As I will explain, I am of the view that while the NHA's appeal of the arbitrator's frustration findings raises principally issues of mixed fact and law, and that the interpretation of the PHO Order cannot be regarded as being upstream or independent of the frustration analysis. However, even if the interpretation issue is truly an "upstream" question of law, I conclude for the reasons stated below that the NHA has failed to demonstrate any legal error in the arbitrator's interpretation of the PHO Order.

[48] The arbitrator summarized the law of frustration in two paragraphs of the Liability Award:

> [24] … In circumstances of frustration the adjudicator is asked to intervene to relieve the parties of their bargain because a supervening event has occurred without the fault of either party. When a contract has been frustrated, the contract is brought to an end forthwith, without more and automatically, in the sense that it releases both parties from any further performance of the contract. Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58; *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361. In essence, <u>the doctrine of frustration involves the concept of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without fault of either party</u>. …
>
> [Emphasis added.]

[49] Turning to frustration by supervening illegality, the arbitrator referred to *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357 (Div. Ct.), and stated:

> [25] … The court noted that to qualify as a frustrating event, <u>the change in the law must be one which was not foreseen by the parties and for which no express or implied provision is made in the contract.…If these conditions are met, the contract is automatically discharged by frustration the moment performance in accordance with its terms becomes illegal</u>.
>
> [Emphasis added.]

[50] The NHA does not contest the arbitrator's statement of the applicable legal principles which is consistent with this Court's more detailed review of those principles in *Aldergrove Duty Free Shop Ltd. v. MacCallum*, 2024 BCCA 28 at paras. 24–35 [*Aldergrove*].

[51] In *Aldergrove*, the Court referred to different articulations of the frustration defence, including a description of the question a court should ask in the employment context:

> [29] Specific to the employment context, it was held in *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424, that the frustration defence requires a court to ask "… <u>whether the contract is broad enough to apply to the changed circumstances or whether the change is such that performance of the contractual obligations in the new circumstances would be something radically different from what the parties had agreed upon</u>": at para. 26.

> [Emphasis added.]

[52] Having referred to the different articulations of the defence, the Court in *Aldergrove* noted a "consistent theme: it is the impact of the change on the nature of the contractual obligations themselves that matters": at para. 31. The Court concluded its review of the authorities with a summary of the elements a party relying on frustration must establish:

> [36] In light of the above-cited authorities, this Court has held that to prove frustration, a party must establish each of the following elements:
>
>> a) a qualifying supervening event that was not contemplated by the parties when they entered into the contract;
>>
>> b) the supervening event is not the fault of either party; and,
>>
>> c) the supervening event rendered performance of the contract something radically different from that which was undertaken.
>
> See, for example, *Blackmore Management Inc.* at para. 59; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at paras. 65–66; *Rickards (Estate of) v. Diebold Election Systems Inc.*, 2007 BCCA 246 at paras. 37–38; and *Wightman Estate* at paras. 21–26.

[53] In *Aldergrove*, the Court stressed that "[d]etermining whether the defence has been made out is fact dependent and requires an individualized assessment": at para. 37. The Court also found that the judge's conclusion on the frustration defence was "properly characterized as a matter of mixed fact and law"; as such, the appellant "bore the onus of establishing palpable and overriding error to justify intervention with that conclusion": *Aldergrove* at para. 79.

[54] I accept that determining whether the defence of frustration has been made out will almost always be fact dependent and require an assessment of the particular circumstances. That is certainly the situation here. The arbitrator's conclusion on the frustration defence is properly characterized as a matter of mixed fact and law.

[55] The essential elements in issue required the arbitrator to consider: foreseeability (whether the enactment of the PHO Order was or was not contemplated by the parties when they entered the 2021 Contract); and whether the 2021 Contract was broad enough to apply to the changed circumstances (whether the PHO Order rendered the performance of that contract radically different from that agreed upon).

[56] The first question was clearly fact dependent. The arbitrator was required to find facts to decide if the parties might reasonably have contemplated the possibility of a vaccine mandate for the purpose of considering foreseeability as part of the frustration analysis. The alleged error arising from the judge's conclusion on foreseeability is accordingly a question of mixed fact and law.

[57] The second question required the arbitrator to determine whether the PHO Order amounted to a supervening event within the frustration analysis that made performance of the 2021 Contract impossible. The arbitrator found that the PHO Order did not apply to him given his "unique factual circumstances and accepted arrangement": Liability Award at para. 26. In doing so, the arbitrator had to consider, as described in *Aldergrove*, whether the PHO Order rendered performance of the contract something radically different from that which was undertaken.

[58] The NHA's challenge to the arbitrator's finding on the second element in issue also raises a question of mixed fact and law. The arbitrator had to find facts about foreseeability of the PHO Order and whether it rendered performance of the 2021 Contract radically different from what had been agreed. That question involved consideration of Dr. du Plessis's contractual obligations. In this context, the interpretation of the PHO Order could not be considered independent or "upstream" of the frustration analysis.

[59] However, even if the NHA is right that the interpretation of the PHO Order raises an "upstream" question of law, I am not convinced that the arbitrator's interpretation was legally erroneous, for the reasons explained below.

Did the arbitrator consider irrelevant factors in his frustration analysis?

[60] The NHA also argues that the arbitrator's error in considering irrelevant factors amounts to an error in law because it "altered the relevant legal test in the course of its application". I cannot agree. Examination of each of the so-called erroneous factors indicates that the NHA's criticism of the arbitrator's findings is an attempt to mischaracterize the findings of fact made as part of his frustration analysis as being matters irrelevant to that analysis. I examine each of these findings, noted at para. 75 of the appellant's factum, in turn.

"The 2021 Service Contract did not accurately depict the terms of employment specifically regarding provision of hospital privileges"

[61] This challenge is directed at the arbitrator's finding regarding the parties' agreement that Dr. du Plessis would not access hospital privileges:

> 22. … For example, the contract continued to include reference to "hospital privileges", when it was clear that, since the Petitioner's heart attack in 2019, he would not be returning to perform any services at the hospital. Suffice it to observe the parties' shared intention, as discussed between the [parties'] representatives, was that he would not access hospital privileges nor perform on-call work. There was no dispute in the evidence on this matter."

[62] As the arbitrator notes, there was no dispute on the evidence. The arbitrator had to make findings about the parties' contractual obligations. His finding that Dr. du Plessis would not and did not need to exercise hospital privileges to fulfill his contractual obligations was open to him on the evidence and relevant to the question of whether the change arising from the PHO Order was "such that performance of the contractual obligations in the new circumstances would be something radically different from what the parties had agreed upon": *Aldergrove* at para. 29. The suggestion that this is irrelevant to the frustration analysis is plainly wrong.

"NHA knew that Dr. du Plessis performed all work remotely"

[63] Again, this is an attempt by the NHA to mischaracterize as irrelevant one of the arbitrator's findings about the parties' agreed contractual obligations. As the arbitrator noted, the NHA and Dr. du Plessis agreed in 2020, before the 2021 Contract was entered into, that the doctor would perform all work virtually from his private residence. To take the phrase from *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424, the arbitrator had to decide "whether the contract is broad enough to apply to the changed circumstances": at para. 26. His determination that the parties had agreed about the way in which Dr. du Plessis would perform his contractual obligations was a finding of fact necessary for the frustration analysis. I would not accede to the NHA's argument, which in my respectful view, seeks to characterize this finding as an "irrelevant factor" in an attempt to extract a question of law from what was clearly a fact-intensive analysis.

"A mandatory vaccination policy for health care workers was reasonably foreseeable"

[64] The arbitrator's finding that "when the parties entered into the [2021 Contract], the implementation of a mandatory vaccine policy or law for health care workers was not so out of the realm of possibility so as to characterize such as reasonably foreseeable" was a central prong of his frustration analysis: Liability Award at para. 32. The NHA's suggestion that it was irrelevant is without merit. Because the NHA was relying on the PHO Order as the supervening event, the arbitrator was required to determine whether a vaccine mandate was foreseeable.

[65] Examination of the NHA's argument demonstrates that its position is based on its contention that the finding should be regarded as palpably wrong. The NHA states in its factum that "an enactment prohibiting the engagement of persons based on their vaccination status was not reasonably foreseeable in April 2021", and that the "pandemic was a truly unprecedented circumstance" that "completely upended the existing social order."

[66] The reason the NHA has not directly argued that the arbitrator's finding was palpably wrong is because the inference drawn by the arbitrator on foreseeability was clearly available to him on the evidence. The evidence was not controversial. When the 2021 Contract was entered into, COVID-19 vaccines had been available in British Columbia for four months and over a million doses had been administered. The parties were also acutely aware of Dr. du Plessis's unwillingness to take a vaccine because of his particular health risks and indeed, when the 2021 Contract was entered into, he had already rejected receipt of a vaccine. The NHA is now asking this Court to draw a different inference about the foreseeability of the vaccine mandate from the evidence, but that is not our role on appeal.

"NHA deliberately chose not to make mandatory vaccination a term of the parties' relationship in 2021"

[67] This is a further attempt by the NHA to suggest that the arbitrator's finding about the foreseeability of a mandatory vaccine policy is irrelevant, in an effort to transform a factual dispute into a question of law. As I have indicated, the findings of the arbitrator on foreseeability were available on the evidence and were clearly relevant to the frustration analysis.

Precedential value of the Liability Award

[68] As stated in *MSI Methylation*, the expected precedential value of the question raised on appeal is an indication of whether the issue raised is a question of law. As the Court affirmed: “if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law”: *MSI Methylation* at para. 72.

[69] The NHA attempts to paint a high level of generality by claiming that the proper interpretation of the PHO Order raises a question of law with precedential value to the health sector in British Columbia. It argues that the “carve out” of an exception for a physician providing services from a private residence raises a policy issue with broad relevance for healthcare workers and justifies appellate intervention. The NHA refers to other decisions interpreting the PHO Order “not for their factual similarity but because they were wrongly decided if the arbitrator’s interpretation of the PHO Order was sound”. It also argues that the “result of this appeal will have an impact beyond the parties.” The decisions relied on include: *Hoogerbrug*; *Vancouver Island Health Authority (Cowichan Home Support) (Re)*, 2024 BCLRB 81; *Fraser Health Authority v. Hospital Employees’ Union*, 2022 CanLII 91089 (B.C.L.A.) [*Hospital Employees’ Union*]; *Fraser Health Authority v. British Columbia General Employees’ Union*, 2022 CanLII 25560 (B.C.L.A.) [*British Columbia General Employees’ Union*].

[70] I would reject the submission that the question raised is of precedential value or would be useful to other litigants. The award lacks precedential value for two reasons. First, the arbitrator’s decision turned on his finding that Dr. du Plessis was in a “unique situation wherein it was recognized and accepted that he would continue to provide services virtually from his private residence” and would not provide on-call or hospital services: Liability Award at para. 21. Further, the availability and efficacy of COVID-19 vaccines was known to the parties when the 2021 Contract was entered into. Dr. du Plessis’s situation was factually unique and both questions to be determined by the arbitrator relied on his findings of fact.

[71] Second, the arbitrator’s award depended on his determination of the scope of inclusion of the PHO Order. However, the scope of inclusion of the various iterations of the vaccine mandate changed through its multiple amendments. It is

difficult to see how the questions raised could have precedential value given that the PHO Order was in effect for a short time and has now been repealed. The initial order was revised three times by November 18, 2021. The order was amended again in April 2023. The arbitrator expressed concerns about the lack of clarity in the PHO Order with reference to the final amendment of the order in April 2023:

> [30] It bears noting that the April 2023 iteration of the Order has been amended such that the term "care location" no longer exists, so that, unlike the relevant November 9, 2021 iteration, it is now clear the Order applies to someone simply by virtue of being under contract with a health authority such as the Respondent, regardless of whether they have any physical interaction with clients or patients.

[72] The two circumstances highlighted—Dr. du Plessis's unique situation, and the amendment and repealing of the vaccine mandate order—contribute to the lack of possible precedential value.

[73] I would also reject the NHA's submission that the award is inconsistent with other decisions related to the healthcare sector, which further diminishes its argument of precedential value. The tribunal authorities referred to by the NHA are distinguishable as they dealt with employees, rather than contracted service providers. These decisions also dealt with different iterations of the vaccine mandate or focused on issues other than scope of inclusion of the PHO Order. The two Fraser Health Authority grievances can be distinguished on all three of those grounds: *Hospital Employees' Union* at paras. 19–22; *British Columbia General Employees' Union* at paras. 2, 23.

[74] I would also note that the NHA's reliance on *Hoogerbrug* is misplaced as the issues raised in that petition were quite different. The petitioners challenged the reasonableness of the PHO vaccine mandate orders, in particular the iterations from October 2023, as well as the constitutionality of those orders. Furthermore, this Court dismissed the appeal from that decision as moot when the PHO vaccine mandate was repealed: *Tatlock v. British Columbia (Attorney General)*, 2025 BCCA 181. The finding of mootness supports the view that the question raised on this appeal could not have precedential value.

[75] In summary, applying the reasoning in *MSI Methylation*, the question raised is a question of mixed law and fact "so tied to the particular circumstances of the

parties that its resolution is unlikely to be useful for other litigants”: at para. 72.

Alleged error in interpretation of the PHO Order

[76] The NHA argues that the standard of review applicable to the judge’s interpretation of the PHO Order is correctness and that his allegedly erroneous interpretation is an error of law that permits this Court to intervene. In effect, it says the interpretation of the PHO Order is a question that is “upstream” or independent of the frustration analysis.

[77] I would reject this argument for two reasons. First and foremost, the arbitrator was required to interpret the PHO Order to determine whether it amounted to a supervening event within the frustration analysis. The analysis the arbitrator had to undertake was heavily fact dependent. The arbitrator found that the PHO Order did not apply to Dr. du Plessis given “his unique factual circumstances and accepted arrangement”. The interpretation of the PHO Order was an integral part of the arbitrator’s analysis and accordingly could not be characterized as being “upstream”. The frustration decision resulted from an analysis that was clearly one of mixed fact and law.

[78] Second, to the extent that the interpretation of the PHO Order can be regarded as raising a question of law, the NHA is unable to demonstrate any error in the arbitrator’s decision, even on a correctness standard of review. As noted in *Teal Cedar*, it is important to properly characterize the nature of the specific question before the court, which requires delicate consideration of the narrow issue actually in dispute: at para. 47. I would restate the narrow question posed by the NHA’s arguments as follows:

> Under the terms of the PHO Order, where a service provider, like Dr. du Plessis, is providing services exclusively from their private residence, does that residence fall within the definition of “care location”?

[79] The NHA argues that Dr. du Plessis was a staff member providing services in a “care location”, and that the arbitrator’s conclusion to the contrary is clearly incorrect. It relies on the definition of “in a care location” that was not included in the earlier iteration of the order. As noted above, that term is defined in the PHO Order to include “any place where a patient, resident or client of a care location is being provided with care or services by a staff member…”. The alleged errors focus on some of the arbitrator’s findings of fact around the parties’ agreed

contractual obligations, which in turn impacted whether the PHO Order applied. For example, the NHA argues that the PHO Order applied to Dr. du Plessis because he was a “health professional with facility privileges”. However, the arbitrator found, based on the uncontested evidence before him, that Dr. du Plessis did not exercise hospital privileges or provide on-call services under the 2021 Contract. Similarly, the arbitrator concluded that the “NHA knew Dr. du Plessis performed all his work remotely” after the state of emergency was declared. While that finding was relevant to foreseeability, it was also relevant to the nature of the obligations undertaken pursuant to the 2021 Contract. As I have noted above, the NHA’s real complaint is that the arbitrator should have arrived at a different conclusion when finding facts about the contractual obligations to decide whether Dr. du Plessis fell within the scope of the PHO Order. Those alleged errors raise questions of mixed fact and law.

[80] I would also reject the NHA’s argument based on reference to *Hoogerbrug* at para. 213, that it was clear that the PHO intended to implement a vaccine mandate that would apply as broadly as possible. To state the obvious, interpretation of a PHO order does not depend on the subjective intent of the PHO, it must be based on the language of the statutory instrument. While recitals can assist in contractual or statutory interpretation, the recital referred to in *Hoogerbrug* (Recital SS of a subsequent iteration of the order) was not included in the PHO Order and is not relevant to the question before this Court.

[81] For completeness, I would note that Dr. du Plessis’s argument on the standard of review is not available to him. He argues that even if it were found that the interpretation of the PHO Order was an error of law, the arbitrator’s conclusion on the interpretation of the PHO Order should be reviewed on a standard of reasonableness. His submission on the appropriate standard of review was based on the decisions in *Sattva* and *Teal Cedar*, and that the Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, did not appear to exempt appeals from commercial arbitration awards from the principle that the presumptive standard of review is reasonableness. However, this Court has recently determined that the standard of review for questions of law from arbitration awards is correctness: *Vancouver School District No. 39 v. Kingsgate Properties Ltd.*, 2026 BCCA 98 at para. 157.

Just cause

[82] The appellant's alternative argument, that the arbitrator erred in finding the NHA did not have cause to terminate the 2021 Contract, also cannot succeed. To establish just cause, the employer has the burden of proving breach of contract: *Staley v. Squirrel Systems of Canada, Ltd.*, 2013 BCCA 201 at para. 22. However, to prove a breach of contract in these circumstances, the NHA would have to succeed with its argument that the arbitrator erred in finding the PHO Order did not apply to Dr. du Plessis. As I have already found, the NHA has failed to demonstrate that the arbitrator erred in law in arriving at that conclusion.

[83] In summary, I would dismiss the NHA's appeal of the Liability Award.

Remedy Appeal

Remedy Award

[84] The arbitrator began by setting out the relevant provisions of the 2021 Contract, including:

> 2.2 This Contract may be renewed for such period of time and on the terms as the parties may mutually agree to in writing …
>
> 3.1 <u>Subject to clause 3.2, either party may terminate the Contract without cause upon six (6) months' written notice to the other party</u>.
>
> 3.2 Either party may terminate this Contract immediately upon written notice if the other party breaches a fundamental term of this Contract. …
>
> 4.1 The Physician is an independent contractor and not the servant, employee, or agent of the Agency. …
>
> [Emphasis added.]

[85] The arbitrator concluded that Dr. du Plessis was a dependent contractor and accepted the legal presumption that dependent contractors are entitled to reasonable notice on termination. However, as Article 3.1 of the 2021 Contract (the "WCT provision") clearly and unequivocally provided a six-month notice period for termination without cause, he found that the presumption of reasonable notice was rebutted. Applying the WCT provision, he found that Dr. du Plessis was entitled to six months' notice for without cause termination and awarded one half of his annual compensation as damages plus costs.

[86] The arbitrator rejected the NHA's submission that Dr. du Plessis failed to mitigate his loss by obtaining a COVID-19 vaccine. Given his conclusions on

liability, the arbitrator observed that "[i]t would be an odd result indeed to allow the Respondent to benefit from the very same position resulting in its contractual breach – that is insistence on vaccination – to evade damages resulting from the breach": Remedy Award at para. 25.

[87] Dr. du Plessis argued the NHA acted in bad faith by changing its position: initially terminating the 2021 Contract based on the doctrine of frustration but then relying on the without cause termination notice provision. The arbitrator disagreed. He concluded the evidence did not support an award for aggravated, moral and/or punitive damages, but rather "a conclusion that the Respondent terminated the Petitioner's contract based on how it honestly and in good faith interpreted the Order": Remedy Award at para. 28.

Positions of the parties

[88] Dr. du Plessis alleges the arbitrator erred:

a) In his legal characterization of the severance as a "without cause termination".

b) In failing to characterize the severance as a repudiation of contract, such as to render the WCT provision unenforceable.

c) In his legal construction of the WCT provision as a liability-limiting provision when it was a liability-limiting provision contingent on payment of severance upon reasonable notice.

d) In allowing the NHA to retroactively rely on the WCT provision.

e) In failing to give effect to the common law presumption of reasonable notice on termination.

[89] He submits that these five errors, all related to the misapplication of the WCT provision, do not arise from the application of facts to the terms of the contract but are questions of law concerning: construction of the contract; application of the common law presumption of reasonable notice; application of the legal doctrine of repudiation; and misconstruction of the WCT provision which was contingent on payment of severance. In his view, the alleged misapplication of the WCT provision, and the four questions of law which emerge have "precedential

value with respect to the application of ‘without cause’ termination provisions in circumstances of invalid frustration claims”. I address these four proposed questions of law and the related alleged errors which fall under them in turn.

[90] Dr. du Plessis’s arguments on appeal focus on his assertion that the position taken by the NHA was a repudiation of the 2021 Contract such that it was precluded from relying on the WCT provision to limit damages or oust common law notice obligations. He argues that the position taken by the NHA deprived him of the whole benefit of the contract including his right to reasonable notice or payment in lieu thereof. He submits that the failure of the arbitrator to address the NHA’s repudiation of the 2021 Contract in the Remedy Award adds support for his contention that the appeal concerns an extricable question of law arising from the award.

[91] In response, the NHA argues that Dr. du Plessis has failed to identify a question of law arising out of the Remedy Award within the meaning of s. 59(2) of the *Arbitration Act*. It submits that Dr. du Plessis’s arguments raise, at most, questions of mixed fact and law. Further, given the unique factual matrix, the answers to the questions raised by Dr. du Plessis do not carry any general importance. The NHA also argues the questions do not arise out of the Remedy Award. It submits that the arbitrator did not, as suggested by the appellant, construe the WCT provision as a liability-limiting provision, but rather as a clear and unequivocal term outlining notice obligations for without cause termination rebutting the presumption of reasonable notice. Further, the alleged failure of the arbitrator to find that the NHA repudiated the 2021 Contract does not arise from the award as that argument was not raised in the arbitration. Alternatively, the NHA argues that the arbitrator’s decision was reasonable, or if needed, correct, based on the appropriate standard of review to apply to the decision of an arbitrator.

Analysis

[92] In my analysis of the appeal, at paras. 38–42 above, I set out the general principles applicable to the jurisdiction of this Court to hear appeals of arbitral awards. Applying those principles, I conclude that Dr. du Plessis, appellant on the cross-appeal, has failed to identify a question of law arising from the Remedy Award and accordingly, this Court has no jurisdiction to entertain the appeal.

[93] The first step in the analysis is to characterize the questions said to arise on appeal: *Teal Cedar* at paras. 43–45. The Court's admonition against identifying extricable questions of law too readily is particularly fitting here:

> [45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question—for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments—are transparent.

[94] I would not accede to counsel's creative attempts to identify questions of law arising from the Remedy Award. Dr. du Plessis posits extricable legal errors by recasting the arguments he advanced at the arbitration. As I noted above, there is a "small window" for review of arbitral awards for two reasons: questions of contractual interpretation are generally mixed questions; and the jurisdiction of this Court is restricted to questions of law "arising out of an arbitral award": s. 59(2). The principle that this Court will not entertain new arguments on appeal is necessarily more exacting on appeals from arbitral awards given this narrow legal issue requirement which serves as a "gate-keeping function" in arbitration: *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 560 at para. 36; *Teal Cedar* at para. 45. Similarly, a general allegation of legal error does not suffice: *Domtar Inc. v. Belkin Inc.* (1989), 62 D.L.R. (4th) 530 at 4, 1989 CanLII 238 (B.C.C.A.).

[95] In my view, Dr. du Plessis has failed to raise an extricable question of law. To the extent that he has identified legal questions in this cross-appeal, they do not properly arise out of the Remedy Award.

[96] As Dr. du Plessis has failed to identify a question of law arising from the Remedy Award, his arguments fail at the first step in the analysis—characterization of the questions on appeal. Accordingly, I do not find it necessary to consider his substantive arguments directed at the proposed legal questions which I have found do not properly arise on this cross-appeal.

Application of the common law presumption of reasonable notice

[97] This proposed legal question encompasses Dr. du Plessis's allegation that the arbitrator erred in his legal characterization of the dismissal as a without cause termination. Dr. du Plessis advances this argument to counter the NHA's

submission that the arbitrator's finding of dismissal without cause was an application of the facts to the terms of the 2021 Contract. The suggestion that the characterization of the dismissal was other than a finding of mixed fact and law is without merit.

[98] There is no question that the characterization of the dismissal was at the core of the arbitrator's task given the NHA's position that the contract was frustrated. The arbitrator was required to consider the extensive evidence surrounding Dr. du Plessis's dismissal to determine if the contract was frustrated or breached by one of the parties. In the liability portion of the arbitration, Dr. du Plessis took the position he was dismissed without cause and that is what the arbitrator found. His argument that the arbitrator erred in "characterization of the severance" is not only inconsistent with the position he took on liability at the arbitration, but also a transparent attempt to recast the argument that he was entitled to reasonable notice following his dismissal without cause. It does not raise an extricable question of law.

Application of the legal doctrine of repudiation

[99] Dr. du Plessis's argument that the arbitrator erred in failing to characterize the dismissal as a repudiation of the 2021 Contract is a primary focus of Dr. du Plessis's oral and written submissions on appeal. This is surprising because repudiation, as a relevant legal principle, was not raised at the arbitration.

[100] At the arbitration hearing, Dr. du Plessis framed the issue as whether the 2021 Contract, and specifically the WCT provision, was sufficiently clear to rebut the presumption that a dependent contractor is entitled to reasonable notice on termination without cause. He argued that the NHA could not rely on the 12-month "fixed-term provision" of the 2021 Contract to limit the damages awarded for breach of contract because, as an independent contractor, he should benefit from the presumption that the contract contained an implied term entitling him to reasonable notice and commensurate damages in lieu thereof. Of note, Dr. du Plessis submitted that the "implied term can only be rebutted by legally enforceable contractual terms that clearly and [un]ambiguously limit that right." He further argued the NHA could not rely on the purported limitation of damages in the WCT provision because of a lack of consideration. He submitted that it was an "open question" whether the termination provision was intended to rebut the

common law presumption to reasonable notice and argued that the provision was ambiguous and should be construed contrary to the NHA because of the power imbalance that existed between the parties.

[101] Dr. du Plessis's arguments were rejected by the arbitrator who concluded that the 2021 Contract contained a "clear and unequivocal term outlining notice obligations for without cause terminations" such that the presumption that without cause terminations require "reasonable notice" was rebutted. This was a core finding of contractual interpretation.

[102] Rather than challenging that conclusion explicitly, Dr. du Plessis reworks his arguments on appeal to encompass repudiation in order to call into question the enforceability of the termination provision. He does so because challenging the arbitrator's interpretation directly clearly raises a question of mixed fact and law.

[103] Dr. du Plessis's written submissions on remedy at the arbitration concluded with the following position statement:

> 31. Finally, it is not open to NHA to retroactively rely on the without cause termination provision after: breaching Dr. du Plessis's contract; repeatedly taking the position that "*the legal basis for the termination of Dr. Du Plessis' contract is frustration of contract*"; and alleging cause for termination for the first time one year after the termination. Reliance on the termination provision is inappropriate in light of NHA's bad faith conduct as further delineated below.

[104] Dr. du Plessis now argues by referring to this statement on appeal that he squarely raised the legal question of whether the NHA repudiated the 2021 Contract at the arbitration, and submits the arbitrator erred by rejecting or failing to consider that argument. I disagree. The term "repudiation" does not appear once in Dr. du Plessis's written brief to the arbitrator. His contention that it was not open to the NHA to change its position on frustration was made in support of his claim for "aggravated/moral/punitive damages". That claim was set out in detail in his "Petitioner's Claim", the initiating document that identified the claims raised in the arbitration. The claim for aggravated or moral damages was then expanded on in his written submissions following the hearing, and the arbitrator properly responded to these arguments advanced by Dr. du Plessis in his analysis within the Remedy Award. The arbitrator further concluded that the NHA terminated the 2021 Contract "based on how it honestly and in good faith interpreted the [PHO Order]", and that its actions did not amount to bad faith.

[105] Dr. du Plessis cannot now modify his arguments to advance a new legal theory on appeal. It cannot be said on a fair reading of the pleadings, submissions and Remedy Award that he has identified a question of law concerning the principle of repudiation arising out of the award within the meaning of s. 59(2) of the *Arbitration Act*. This Court does not generally allow parties to raise new issues for the first time on appeal unless they relate to "a pure legal argument on uncontroverted factual findings or it is clear that, had the question been raised at the proper time, no further light could have been shed upon it": *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 at para. 36; *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at para. 63, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 32. Given that this issue was not considered or raised at the arbitration, it does not arise out of the Remedy Award, and I would not entertain this new argument on appeal.

Legal construction of the contract and of the WCT provision

[106] These two proposed legal questions are different articulations of the same broader contention that the arbitrator erred in his construction of the 2021 Contract. They capture Dr. du Plessis's stated position that the arbitrator erred in: legal construction of the WCT provision; in allowing the NHA to retroactively rely on the WCT provision; and in failing to give effect to the presumption of reasonable notice upon termination. It is not contentious that contractual interpretation is an exercise in applying the words of a contract to the fact finder's consideration of the factual matrix, and accordingly, involves questions of mixed fact and law: *Sattva* at para. 50. Contractual interpretation is precisely what the arbitrator was tasked with here.

[107] Interpretation of the WCT provision was a central issue at the remedy stage of the arbitration. As I have noted, the arbitrator rejected Dr. du Plessis's construction of the WCT provision and found that the contract was clear and unambiguous such that the presumption of reasonable notice was rebutted. As the NHA submits, the arbitrator's decision involved "the interaction of a bespoke contractual provision and the common law in a unique factual matrix" and, accordingly, engaged questions of mixed fact and law. Dr. du Plessis's arguments on "legal construction" merely ask this Court to arrive at a different decision than the arbitrator, which is not this Court's role on an appeal from an arbitral award.

These differing expressions of the alleged errors do not assist Dr. du Plessis's attempt to articulate an extricable question of law.

[108] One of Dr. du Plessis's arguments is that an appropriate construction of the WCT provision does not rebut the presumption of reasonable notice. He submits a "high degree of clarity", and attention to ambiguity in drafting of termination clauses is required, citing *Nemeth v. Hatch Ltd.*, 2018 ONCA 7 at para. 12, which refers in turn to *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614, 2001 CanLII 8589 (O.N.C.A.) [*Ceccol*]. However, the arbitrator addressed these considerations by distinguishing the case at hand from the situation in *Ceccol*—where reasonable notice was not rebutted. The arbitrator noted differences from *Ceccol* including that: (1) the plaintiff in *Ceccol* was found to be an employee, not a dependent contractor like Dr. du Plessis; (2) it was not clear in *Ceccol* that the contract arrangement was a fixed-term; (3) and the ambiguity in the termination provision in *Ceccol* allowed for plausible interpretation of the contract which did not contemplate termination without cause, whereas for the arbitrator termination without cause was apparent on its face in the WCT provision: *Ceccol* at paras. 43, 49. The arbitrator's analysis shows such considerations were appropriately contemplated in his interpretation of the contract and WCT provision.

[109] Dr. du Plessis also argues that the judge erred in construing the WCT provision as a liability-limiting provision without also concluding it was contingent on payment of severance upon reasonable notice. However, that alleged error raises the same question of contractual interpretation. Engaging briefly with his argument, Dr. du Plessis asserts that the arbitrator should have instead interpreted the WCT provision as conditional, uninvoked, and therefore unenforceable. He depends for his claim on *Yee v. WestJet*, 2025 ABCJ 87 [*Yee*], a decision that relies on the specific wording of another without cause termination provision in a different contract. In *Yee*, the provision contained conditional language that substantially diverges from what is found in the WCT provision. As with his repudiation grounds of appeal, this is another path to undermine the finding that the WCT provision was enforceable, this time because it was "never invoked". In essence, he again seeks a different outcome from that reached by the arbitrator, who viewed the WCT provision as an unambiguous term in a fixed-term contract which specified some other period of notice and rebutted the presumption—a question of mixed fact and law.

[110] If this were an appeal from a trial court finding in an action based on breach of contract, Dr. du Plessis could advance the argument that the arbitrator made an error in failing to find that the WCT provision could only limit the NHA's liability if it had paid severance upon reasonable notice. However, that alleged error would not be reviewable on a standard of correctness, but on a deferential standard of review. This reinforces the conclusion that the alleged errors do not raise questions of law. The interpretation of a termination clause is normally an exercise that is "necessarily context specific and fact-dependent", as noted in *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222 at para. 50 [*Egan*]. Dr. du Plessis's alleged errors fail to engage this Court's jurisdiction because they are all properly characterized as raising questions that are "context specific and fact-dependent".

[111] Moreover, the premise underlying Dr. du Plessis's argument regarding the termination clause and its enforceability is not correct. As noted in *Egan*:

> [78] … An employer's failure to comply with a contractual notice requirement does not render a termination clause unenforceable, it constitutes a breach of contract. What flows from that is not a finding that the contract is void but rather a measure of damages for the breach.

[112] From a contract law point of view, it was also open for the arbitrator to take the termination clause into account as evidence for the appropriate contractual notice period towards assessment of damages. As the NHA submits, to the extent that Dr. du Plessis's arguments could be characterized as a challenge to the arbitrator's assessment of damages for the NHA's breach of the 2021 Contract, the WCT provision was relevant to that assessment. Where there is more than one way in which a contract might be performed, damages for the wrongful termination of that contract should generally be assessed by adopting the mode of assessment that is the least profitable to the plaintiff, and the least burdensome to the defendant: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at paras. 11–17, 20; *Truong v. Jeweler's Mutual Insurance Company*, 2024 ONCA 734 at para. 49. As noted, the arbitrator found this was not a situation where termination was exercised in bad faith, which is one means of justifying departure from this principle: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at paras. 111–116.

Principles of appeals from arbitration awards

[113] The *Arbitration Act* allows for appeals only on pure questions of law. The question is not whether the arbitrator was correct, but whether the applicant has

raised an extricable question of law arising out of the arbitrator’s analysis.

[114] Returning to the four principles outlined in *MSI Methylation*, it is my view that to the extent that Dr. du Plessis’s grounds of appeal raise legal questions, those are general questions of law that do not arise from the Remedy Award or questions the arbitrator was not asked to consider. Dr. du Plessis’s arguments ask this Court to arrive at a different outcome on the issues placed before the arbitrator, strongly indicating that these are questions of mixed fact and law. Further, I do not accept that Dr. du Plessis has identified a question that could be expected to have precedential value. While the WCT provision is a somewhat generic contractual term, its interpretation by the arbitrator was tied to the history of the relationship between the parties to the arbitration including the changes over time to the contractual terms across versions of service contracts. The answers to the questions posed on appeal are thus “integrally tied to the facts of the case” and would not produce answers that would have general application.

[115] In summary, this Court does not have jurisdiction to consider the cross-appeal.

<u>Disposition</u>

[116] I would dismiss the appeal and the cross-appeal for want of jurisdiction.

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Riley”

I AGREE:

“The Honourable Justice Mayer”