Date: 20231005
Docket: CI 20-01-26949
(Winnipeg Centre)
Indexed as: Buffalo Point First Nation et al. v. Cottage Owners Association
Cited as: 2023 MBKB 141

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: Sections 44(2) and 44(4) of ***The Arbitration Act***, C.C.S.M. c. A120 and amendments thereto

BETWEEN:	)	
	)	
BUFFALO POINT FIRST NATION and	)	Bradley D. Regehr and
BUFFALO POINT DEVELOPMENT CORP LTD.	)	Ryan M. Lake
	)	for the applicants
applicant(s),	)	
	)	
- and -	)	
	)	
	)	
BUFFALO POINT COTTAGE OWNERS	)	Paul D. Edwards and
ASSOCIATION, INC.	)	Evan L.M. Edwards
respondent(s).	)	for the respondents
	)	
	)	
	)	Judgment Delivered:
	)	October 5, 2023

MARTIN J.

INTRODUCTION

[1] This is another instalment in the long-running legal saga between the Buffalo Point First Nation and its development corporation, the Buffalo Point Development Corp. Ltd., (referred to collectively as Buffalo Point) and the Buffalo Point Cottage Owners Association Inc. (the Association).

[2] In January 2020, pursuant to s. 44(2) of ***The Arbitration Act***, C.C.S.M. c. A120, (the ***Arbitration Act***), I granted leave to appeal on two questions of law arising from several arbitration decisions emanating from the same dispute; see ***Buffalo Point First Nation et al. v. Cottage Owners Association***, 2020 MBQB 20 (the ***January 2020 Decision***). Between the time of that decision, and the hearing of this appeal years later, the parties attempted to resolve the outstanding issues but to no avail. As such, this decision deals with the two questions of law, which I will detail later in this judgment.

BACKGROUND

[3] Paragraphs 2 to 4 of the ***January 2020 Decision*** will suffice as a short historical summary:

> [2] Briefly, Buffalo Point First Nation ("Buffalo Point"), through their Development Corp., leased land to individuals for cottage development; the Cottage Owners Association ("Association") represents the cottagers. The cottagers invested significant sums to build their cottages, relying on the contractual terms of their long-term leases. Before 2008, the goodwill and trust between the parties became strained, but it was reset in a 2008 Agreement. Then in 2011, the trust was uprooted when Buffalo Point unilaterally changed an agreed service fee structure and arbitration to a tax mechanism, after federal legislation aimed at providing greater autonomy of First Nations was enacted. The new tax was, initially at least, more costly to the cottagers.
>
> [3] Since then, Buffalo Point and the Association have endured many iterations of law suits, mediation and arbitration. All the while, what little trust remained further spoiled. Then in 2015, it seemed as though a resolution of all matters had been reached. Regrettably it had not. After an early good faith effort, disputes arose about how to give effect to the fundamental agreement upon which the resolution is designed. More arbitration and court actions followed.
>
> [4] Now, Buffalo Point seeks to appeal numerous issues determined in favour of the Association in two 2018 arbitration awards. …

I will not set out any further background other than to reference salient facts as necessary to flesh out this decision. Other background information can be retrieved at paragraphs 5 to 24 of the ***January 2020 Decision***.

[4] For purposes of the decision, the 2015 Settlement reached between the parties, with the Arbitrator's assistance, is seminal. It was all encompassing of the main arbitration dispute and all related disputes and litigation. By consensus, it terminated the 2008 Agreement between the parties that provided for "binding mediation" of disputes over annual fees charged by Buffalo Point to cottage owners; a concept that was, and remains, the key concern of both parties.

[5] The Minutes of Settlement (the Settlement) was ratified by the parties, and expressly adopted and incorporated in the Arbitrator's Consent Award on June 19, 2015 (the 2015 Consent Award). The Settlement noted:

> 13. These Minutes of Settlement, including Schedule A hereto, constitute a reconciling of the interests of taxpayers with the responsibilities of Council to govern the affairs of the Buffalo Point First Nation as mandated in paragraph 29(b) of the *FMA.*

Critical as well was that, as part of the Settlement and the 2015 Consent Award, Buffalo Point was to enact a Taxpayer Representation to Council Law (Taxpayer Law) pursuant to the provisions of the ***First Nations Fiscal Management Act***, S.C. 2005, c.9 (the ***FMA***) in the form and content set out as Schedule A to the Minutes of Settlement. Buffalo Point did that in September 2015.

[6] Vital features of the 2015 Consent Award include that it was to be a final and binding settlement of the arbitration and various related outstanding matters. The parties agreed the Arbitrator should retain jurisdiction as set out in paragraph 11 of the Settlement:

> 11. Arbitrator Peltz will retain jurisdiction to implement this settlement and the Consent Award in the event of any remaining remedial issues between the parties or any necessity for clarification of the Consent Award.

I pause to point out that this jurisdiction clause is now the central focus of the dispute over the Arbitrator's exercise of power pursuant, and subsequent, to the 2015 Consent Award.

[7] The Taxpayer Law incorporated the provisions of paragraph 3 of the Settlement, including that the Taxpayer Law would be in effect indefinitely and could be amended at the discretion of Buffalo Point from time to time; *except* two matters could not be changed without the Association's consent. The text of the two matters states:

> a) Recognition of the Association as the Taxpayer Association under the [Taxpayer Law].
>
> b) Binding expedited mediation to resolve disputes over budget expenditures the Association believes are clearly excessive or clearly unnecessary, and in particular, section 13 in the [Taxpayer Law], based on the fact that the following is a fundamental element of the settlement between the parties:
>
> *"Where the taxpayer association has a concern respecting proposed expenditures in the annual budget and has been unable to resolve the concern utilizing the procedures in this Law, the Association may refer the matter to binding expedited mediation on the grounds that the proposed expenditures are clearly excessive or clearly unnecessary for the provision of local services as those services for public purposes are defined in the Standards for First Nation Expenditure Laws*."
>
> (italics added)

Of note, the italicized text under ss. b) became s. 13.(1) of the Taxpayer Law.

[8] The Taxpayer Law was duly submitted to the First Nation's Tax Commission (the Tax Commission) for approval, as required by the ***FMA***. Further, s. 19 of the Taxpayer Law specifies it comes into force and effect on the day after it is approved by the Tax Commission.

[9] In December 2015, the Tax Commission responded. While pointing out some technical issues, materially, they advised:

> … Section 13 of the Law creates a binding mediation process available to the taxpayer association (as defined in section 2(1) of the Law) to unilaterally

> require binding mediation. Under this process the mediator has the authority to order the Buffalo Point First Nation Council to include specific expenditure amounts in its expenditure law. This process creates the potential for a fettering of Council's lawmaking powers by enabling a mediator to direct the content of the law. This process is inconsistent with section 5(1) of the FMA, which requires the First Nation Council itself to exercise the expenditure law-making power.

In other words, the Tax Commission would not approve the Taxpayer Law with the binding mediation mechanism as negotiated between the parties. Regrettably, this set the stage for more conflict, arbitration and litigation.

[10] Despite this, as agreed between the parties, on April 27, 2016, the Consent Award (and Minutes of Settlement) became a judgment of this Court, to enforce the Consent Award pursuant to s. 49 of the ***Arbitration Act*** in the event such an application is made.

[11] The parties have tried to reconcile the fundamental issue of binding mediation (essentially for a specific disputed expense imposed upon cottagers by Buffalo Point) but have been stymied by the Tax Commission's December 2015 position and its interpretation of the ***FMA***. As such, the parties have not mutually found a solution. However, individually they each had their own solutions.

[12] Buffalo Point suggested changing s. 13.(1) of the Taxpayer Law to non-binding or advisory mediation, but neither the Association nor the Arbitrator accepted this as a valid substitute for the "fundamental element" of binding mediation (as set out in paragraph 3 of the Settlement). On the other side, twice the Association asked the Arbitrator to use his residual or remedial powers under paragraph 11 of the Settlement to impose a remedy they believed was consistent with binding mediation, or at least with the practical consequences of binding mediation in the event Buffalo Point were to ever refuse a

mediator's position. In both instances, the Arbitrator essentially accepted the Association's position, issuing two Awards following from the Consent Award.

[13] First, on January 11, 2018, the Arbitrator issued a Supplementary Award granting the Association's application, requesting, in part, that he order Buffalo Point:

> … use their best efforts to secure the [Tax Commission's] approval as soon as reasonably possible of the [Taxpayer Law], <u>including making amendments of a non-substantive nature to the [Taxpayer Law] and passage by [Buffalo Point] of a Delegation Law if necessary.</u> The wording of these is to be the subject of consultation between [Buffalo Point] and [the Association], and is to be limited to that necessary to secure the [Tax Commission's] approval of the [Taxpayer Law].
>
> (underlining added)
> (page 10 of the Supplementary Award)

[14] The concept of a Delegation Law arises from s. 5(1)(f) of the ***FMA***. It provides that the council of a First Nation, that is approved to make taxation laws, may make laws "delegating to any person or body any of the council's powers" to make the itemized taxation laws allowed for in s. 5(a) – (e) of the ***FMA***.

[15] Buffalo Point objected to both the Arbitrator's jurisdiction to entertain and make such an Award, and to the substance of the Award. Within a month, Buffalo Point filed an appeal.

[16] Subsequently, the parties continued to work with each other to find a suitable solution. As noted, Buffalo Point's proposal was rejected.

[17] Second, the Association sought another hearing for the Arbitrator to consider an alternate position. After that hearing in November 2018, the Arbitrator issued the Second Supplementary Award in which he found the Association was entitled to "further supplementary remedial relief", but in a form somewhat different than the Association's specific request. Two of the Arbitrator's conclusions are in play on this appeal.

[18] One, the Arbitrator found dealings between the parties and the Tax Commission had overtaken the efficacy of the Supplementary Award, so he relieved Buffalo Point of any obligations under that Award until further arbitral order. However, he expressly noted that Buffalo Point was entitled to pursue its rights under the ***Arbitration Act*** consistent with their earlier appeal of the Supplementary Award.

[19] Two, pursuant to his reservation of jurisdiction under paragraph 11 of the Settlement, the Arbitrator ordered Buffalo Point's proposed revised Taxpayer Law (replacing binding mediation with advisory mediation) be submitted to the Tax Commission for approval, and, significantly, he ordered:

> Paragraph 3 of the Minutes of Settlement is amended by adding a third paragraph, as follows:
>
> > Where a proposed expenditure has been determined to be clearly excessive or clearly unnecessary by the mediator in accordance with the approved [Taxation Law], and the Nation has already included or subsequently includes the expenditure, in whole or in part, in any annual budget(s), the total amount so included shall be a debt due and owing by the Nation to the Association, payable on demand, but not earlier than the final day for payment of taxes in that year. The Nation shall not make any such payment using local revenues as defined by the *Standards for First Nations Expenditure Laws, 2017*. Any such debt is deemed for all purposes to be part of the settlement of the 2008 Agreement dispute, and not part of or subject to the Nation's Taxation Laws under the *FMA* or otherwise. Further, any such debt is subject to the remaining provisions of the Minutes of Settlement, including but not limited to …
>
> (para. 68(c) of the Second Supplementary Award)

In other words, he amended the Settlement to remove binding mediation from the Taxpayer Law and replaced it with expedited advisory mediation, with enforcement through a debt mechanism in the Minutes of Settlement, in favour of the Association rather than a taxpayer, for instances where an advisory mediator's findings were rejected by Buffalo Point. As well, in order not to run afoul of the ***FMA***, he ordered such a debt

not to be paid from "local revenues" (from property tax assessments) but from other unidentified sources.

[20] I pause to note that counsel confirmed the text of paragraph 3(b) of the Minutes of Settlement (as set out at paragraph 8 herein) remains part of the Settlement and Consent Award. That paragraph mandates binding mediation. On its face, un-amended, this sets up an apparent inconsistency with the new advisory mediation in the Taxpayer Law along with the debt mechanism provision (inserted as paragraph 3(c) in the Minutes of Settlement). I assume this may need clarification that the parties have agreed to amend the paragraph 3 of the Minutes of Settlement consistent with the revised Taxpayer Law and debt enforcement. I will proceed on that basis.

[21] Again Buffalo Point objected to both the hearing and to the result, asserting both were beyond the scope of the Arbitrator's retained jurisdiction in paragraph 11 of the Settlement.

[22] In sum, years of friction, disputes and litigation were resolved in 2015 by the Settlement. Critically, the parties agreed to (i) the fundamental element of binding mediation for potential expenses passed on by Buffalo Point to cottagers through its taxation powers and (ii) reservation of jurisdiction to the Arbitrator as set in paragraph 11 of the Settlement. Unfortunately, binding mediation as a component of the Taxpayer Law was rejected by the Tax Commission. The parties could not resolve the impasse, so the Arbitrator first issued a Supplementary Award ordering Buffalo Point to enact a Delegation Law. Later in the Second Supplementary Award he effectively suspended the Supplementary Award and imposed advisory mediation with enforcement through a debt

mechanism, but left the original binding mediation provision in the Settlement. Both these Awards aimed to mimic the binding mediation concept agreed to by the parties but rejected by the Tax Commission.

[23] At this point, the aforementioned is sufficient for background purposes.

ISSUES

[24] The points of law to be determined on appeal are whether the Arbitrator erred in amending the Settlement (including the Taxpayer Law), by ordering, in place of binding mediation in the Taxpayer Law:

i. Buffalo Point to pass a Delegation Law, if necessary; or

ii. advisory mediation with enforcement through a debt mechanism.

Any consideration of the points of law must be done considering the backdrop of the factual matrix found by the Arbitrator.

[25] I pause to note that the Settlement and the Consent Award expressly incorporated the reservation of jurisdiction to the Arbitrator as set out therein. As such, there is no issue as to the validity of such a reservation of jurisdiction in this situation. What is at issue, is the meaning and scope of the clause *vis a vis* the Association's subsequent applications to the Arbitrator which resulted in the Supplementary and Second Supplementary Awards.

ANALYSIS

I. Standard of Review

[26] As always in these cases, it is important for the reviewing or appeal court to identify and apply the proper standard of review for the question at issue. Historically, for private

arbitration appeals or judicial reviews, this has not been a significant concern, as a standard of review of reasonableness was most often the proper go-to standard, even in situations such as this where the Applications are pursuant to s. 44 of the ***Arbitration Act***. This approach was consistent with the Supreme Court of Canada's rulings in ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53 (CanLII), ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32 (CanLII) and ***Dunsmuir v. New Brunswick***, 2008 SCC 9 (CanLII).

[27] The Manitoba ***Arbitration Act*** states:

> 44(2) If the arbitration agreement (other than a family arbitration agreement) does not provide that the parties may appeal an award to the court on a question 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.

[28] Shortly after hearing these applications for leave to appeal in 2019, the Supreme Court of Canada issued its decision of ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65. While the impact of ***Vavilov*** was not argued before me, I nonetheless determined it meant the proper standard of review in this case should follow its reasoning under its subheadings of "*(1) Legislated Standards of Review*" and "*(2) Statutory Appeal Mechanisms*" (paras. 34 – 52). In other words, because these applications for leave to appeal required and restricted the applicant to demonstrate an error based on a question of law only, and as the legislation set the process as an appeal, the standard of review must then be that for a question of law on an appeal: correctness.

This principled approach appeared analogous whether a case on appeal arose from an administrative tribunal decision or a private arbitration decision. Upon releasing the ***January 2020 Decision***, neither party accepted my invitation to address my reasoning in applying ***Vavilov*** (para. 48, the ***January 2020 Decision***). This is perhaps because consideration of applying the proper standard of review on the leave application plays only a minor and nuanced role.

[29] However, on this hearing of the two questions of law, the proper standard of review, correctness or reasonableness, was an issue. Indeed, since the ***January 2020 Decision***, this question has vexed numerous courts who have answered with mixed conclusions. For example, in Manitoba alone, the ***January 2020 Decision*** was considered and followed in ***Broadband Communications North Inc. v. 6901001 Manitoba Ltd.***, 2021 MBQB 25, paras. 22 – 28, but not followed in ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited***, 2022 MBKB 239, paras. 80 – 102. Also, the Supreme Court of Canada itself commented on the issue, without resolving it, in ***Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 (CanLII).

[30] As explained in ***Halsbury's Laws of Canada***, Alternative Dispute Resolution (Markham, Ont: LexisNexis Canada, 2022 Reissue) at HDR-71 "Standard of Review":

> **Effect of *Vavilov***. There is some uncertainty in the law resulting from the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*. … In a later Supreme Court decision, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, the Court had the opportunity to resolve this conflicting case law. The majority refused to do so on the basis that the result in that case would have been the same on the application of either test. However, the concurring minority held that the question should be answered to clarify the applicable standard of review, that while there were important differences between commercial arbitration and administrative

> decision-making, those differences did not affect the standard of review where the legislature provided for a statutory right of appeal, and that there was no convincing reason to presume that legislatures meant something entirely different when they used the word "appeal" in an administrative law statute than they did in a commercial law context. Therefore, according to the minority, where an arbitration statute provides for an appeal from an arbitral award, the appellate standards of review identified in *Housen v. Nikolaisen* apply. In the minority's view, then, where the arbitration legislation provides that a party may appeal to the court on any question of law arising out of the award, the standard of review should be correctness, such that *Vavilov* displaced earlier Supreme Court jurisprudence. Lower courts have since held that the majority decision of the Supreme Court in *Wastech* precludes the conclusion that *Vavilov* impliedly overruled the Court's earlier jurisprudence.

[31] Subsequent to ***Wastech,*** and a week before ***Christie*** was released, the court in ***Esfahani v. Samimi***, 2022 ABKB 795 (CanLII) at paras. 61 – 77, laid out a comprehensive summary of the issue, conflicts in the jurisprudence, academic commentary, and referenced the only Court of Appeal decision to-date, ***Northland Utilities (NWT) Limited v. Hay River (Town of)***, 2021 NWTCA 1 (CanLII). The Court noted that ***Northland Utilities*** was "[T]he only appellate decision directly addressing the standard of review in an appeal from a non-statutorily mandated arbitration, since ***Vavilov****, …*" (para. 74) and explained that the Court of Appeal:

> [75] … examined the reasons given in ***Vavilov*** to determine whether the same reasoning would apply to a statutory appeal from an arbitrator's decision such that ***Vavilov*** is to be applied to commercial arbitration appeals. The Court relied on ***Vavilov*** for the point that the existence of the statutory appeal mechanism was an indication of legislative intent to employ the appellate standard of review, and as well the logic that an appeal should mean the same in the commercial context as in the administrative law context: ***Northland Utilities*** at paras 38-40. It concluded that the revised standard of review framework described and ***Vavilov*** applied as a result of the right of appeal given by the statute: ***Northland Utilities*** at para 44.

[32] The Court in ***Esfahani*** also considered Alberta jurisprudence, including cases relied on and followed in ***Christie***. Ultimately, the Court held the reasoning in ***Vavilov***

applied to commercial arbitrations:

> [77] In all of the circumstances, there is no binding appellate decision respecting the application of ***Vavilov*** to arbitration appeals, or with respect to its impact, if any, on ***Sattva*** and ***Teal Cedar***. However, I find ***Northland Utilities*** persuasive. Further, while the statements in ***Vavilov*** do not directly deal with arbitration appeals, and the Court did not mention ***Sattva*** or ***Teal Cedar*** in the decision, it seems to me that the Court's reasoning would apply to any statutory appeal right, including arbitration appeals, as contemplated in the concurring *obiter* comments in ***Wastech***. I cannot ignore the strong statements in ***Vavilov*** about the legislative intent associated with the Legislature's choice in the ***Act*** to create a statutory appeal and the presumption of consistent expression: ***Vavilov*** at para 44. In my view, the presumption is not rebutted in respect of the section 44 of the ***Act*** – – rather, the context and legislative history is consistent with the presumption.

[33] The Court of Appeal in ***Northland Utilities*** also set out comprehensive analytical rational, including addressing commercial arbitration policy considerations arising from ***Sattva*** and ***Teal Cedar***. The Court also noted neither ***Sattva*** nor ***Teal Cedar*** were mentioned in ***Vavilov,*** a rational underpinning numerous decisions that concluded ***Vavilov*** thus has no effect on the standard or review for commercial arbitrations. Ultimately, the Court concluded "the revised standard of review framework described in ***Vavilov*** applies to commercial arbitration decisions reviewed as a result of a right of appeal given by statute" (para. 44). ***Northland Utilities*** was not considered in ***Christie***. It was cited in the minority decision in ***Wastech*** (para. 117). No other Court of Appeal has definitively weighed in that I am aware of.

[34] It is against this mixed bag of jurisprudence that I must determine the proper standard of review here.

[35] Given the principled approach and analysis in ***Vavilov*** respecting legislative intent, notably that it is the "polar star" of judicial review (para. 33), the North West Territories Court of Appeal analysis in ***Northland Utilities***, other superior court decisions adopting

it including ***Esfahani***, the unequivocal minority position in ***Wastech*** (paras. 117 – 122) in light of the majority declining to express a view one way or the other respecting the impact of ***Vavilov*** on the standard or review principles set out in ***Sattva*** or ***Teal Cedar*** (para. 46), and critically the Manitoba legislation at play here, I remain of the view that the standard of review for the questions of law in this case is correctness. In so finding, I decline to address Buffalo Point's submission that the core issues deal with its constitutionally protected rights such that the standard of review cannot be reasonableness, but rather must be correctness, even without consideration of ***Vavilov***.

[36] I am not convinced this conclusion will result in a great upheaval in the world of private arbitration where deference to the arbitrator is key. Various forms of private arbitration are governed by other statutes, which may impact the appropriate standard of review. Critically, the parties themselves are free to design an arbitration appeal scheme suitable to their commercial circumstances, which will be adhered to by a court unless legislation specifically overrides the wishes of the parties. In Manitoba for instance, s. 44(1) of the ***Arbitration Act*** allows for appeals on questions of law, mixed law and fact, or fact where the arbitration agreement so provides. If the agreement is silent (other than a family arbitration agreement), as here, then the appeal is restricted to a question of law. Further, none of the core advantages of arbitration - - expediency, efficiency, simplicity, privacy, and finality - - are seriously compromised or inconsistent with a legislated default standard of review of correctness where the parties have not otherwise addressed appeals or judicial review in their arbitration agreement. Properly and carefully identifying issues for appeal from a private arbitration award, as explained

in ***Sattva*** (see i.e. paras. 43 and 44) and ***Teal Cedar*** (see i.e. para. 47), should effectively winnow out the chaff from the grain, so-to-speak, and stymie opening floodgates of appellate litigation for commercial arbitration awards.

II. Recap: Context

[37] For convenience, the following is a brief recap of the circumstances:

- except for approval of the Taxation Law, all aspects of the Settlement have now been implemented and are, for all practical purposes, irrevocable. While I have not detailed them, these components were each material and significant in their own right - - significant money has changed hands, litigation has been discontinued and individual cottagers have executed releases relinquishing their claims;
- the Tax Commission had the right to reject the Taxation Law. Their rational, their interpretation of the ***FMA***, has not been challenged through any judicial or quasi-judicial process. In other words, their reasoning stands;
- the parties agree they have a good faith responsibility to negotiate a resolution to give effect to the Settlement. They have done so on many points, sometimes with the Arbitrator's assistance. The only remaining issue is the binding mediation mechanism or concept;
- no one disputes that the binding mediation mechanism is the foundational or the number one premise of the Settlement; the document explicitly says so. Without that concept, there would not have been a Settlement;

- as expressly agreed between the parties, the Arbitrator was given jurisdiction:

> … to implement this settlement and the Consent Award in the event of any remaining remedial issues between the parties or any necessity for clarification of the Consent Award.
>
> (paragraph 11 of the Settlement)

and

- when the parties failed to reach a mutual resolution, the Arbitrator imposed two alternate solutions.

[38] For brevity and expediency to set the stage for the analysis that follows, I note two initial findings. First, while Buffalo Point was rather sharp in their criticism of the Arbitrator's actions imposing the two alternate Awards that did not reach the level of an allegation of bad faith or bias on his part. As such, it is not an issue I will address. Second, Buffalo Point raised issues with the Arbitrator even entertaining the Association's requests for intervention of the nature proposed, leading to the Supplementary Award and particularly the Second Supplementary Award. I find the Arbitrator was right to do so given the express reservation of jurisdiction in paragraph 11 of the Settlement and Consent Award, which the parties endowed upon him, and the processes the parties continued to engage in to try to reach a consensus of the ongoing problem. In effect, I will deal with the substantive issues rather than any procedural jurisdictional issues.

III. Supplementary Award: Delegation Law

[39] The critical substance of the Association's request leading to the Supplementary Award was it seeking an order from the Arbitrator requiring Buffalo Point "to use best efforts" to secure the Tax Commission's approval as soon as reasonably possible of the

Taxpayer Law, "including making amendments of a non-substantive nature" to the Taxpayer Law and passage by Buffalo Point "of a Delegation Law if necessary".

[40] Given this request, the background and the positions of the party at the arbitration hearing, much of the hearing appeared to focus on whether Buffalo Point was required by the terms of the Settlement to re-submit an amended Taxpayer Law or, alternately, was required to pass a Delegation Law (consistent with the ***FMA***). Very little of the Arbitrator's decision was devoted to analysis of the meaning and impact of a Delegation Law *per se*. At the appeal, the emphasis flipped to a critique of whether the Delegation Law was non-substantive in nature and whether it wrongly amended the Settlement.

a) Buffalo Point's Position

[41] Buffalo Point takes no real issue with that part of the Arbitrator's Supplementary Award that compels it to use best efforts to get a form of Taxpayer Law approved by the Tax Commission. I see this as an appropriate and significant move away from a position they took before the Arbitrator during the hearing leading to the Supplementary Award, which I will touch on shortly. However, they advanced several arguments that the Delegation Law was beyond the jurisdiction of the Arbitrator to impose.

[42] Materially, they assert that, under the ***FMA***, a Delegation Law is a wholly different device and means than the binding mediation agreed to in the Taxpayer Law and Settlement. This is so in part because a Delegation Law would usurp the tax law-making power of Buffalo Point's Council. It is far broader than binding mediation of a specific expenditure, as it in effect devolves the decision-making authority of the annual tax rate law to a third-party. If correct in this proposition, they say this aspect of the

Supplementary Award substantively alters the Settlement, changes its terms and prejudices Buffalo Point by requiring Buffalo Point to pass a different law than they agreed or contemplated. Further, they assert the Arbitrator is simply wrong in characterizing a Delegation Law as a "non-substantive" amendment to the Settlement. They point to the binding mediation provisions of the Taxpayer Law, as negotiated between the parties in good faith, as a "fundamental" component of the Settlement and Taxpayer Law, in contrast to a Delegation Law which would delegate Buffalo Point's inherent taxation powers against their will; something they would never have voluntarily agreed to. Finally, they say it attempts to do something through a route the Tax Commission refused to allow by a different route.

b) The Association's Position

[43] The Association says a Delegation Law was to be negotiated between the parties, with recourse to the Arbitrator if needed. They describe it as procedural only, with no negative effects on Buffalo Point. However, in their written brief they concede the concept is redundant because the Tax Commission would not approve it anyway.

c) Discussion

[44] Of note, in their responding brief, Buffalo Point expanded on discussions with the Tax Commission respecting a Delegation Law. Thus, both parties advanced and relied in part on discussions with the Tax Commission that took place between the Supplementary Award and the Second Supplementary Award. While the record on appeal in this respect is incomplete and imperfect, it appears clear the parties agree the Tax Commission would not endorse a Delegation Law as a substitute for the binding mediation mechanism it

earlier concluded was inconsistent with the ***FMA***. In some ways this makes the issue on appeal moot. However, because (i) it has not been crystallized by formal referral to the Tax Commission, (ii) the issue has been appealed to this Court, and (iii) both parties have addressed it as a live issue, I will deal with it, albeit succinctly.

[45] I start with the Arbitrator's analysis of his reservation of jurisdiction pursuant to paragraph 11 of the Settlement. Starting at page 26, the Arbitrator correctly noted:

- an arbitrator has no inherent jurisdiction;
- an arbitrator has no jurisdiction to make an order simply because they may consider it fair and reasonable under the circumstances; and
- an arbitrator cannot alter the Settlement without mutual consent of the parties.

These points arise in the context of the principle that an arbitrator's jurisdiction flows solely from the grant of jurisdiction provided by the parties or otherwise by law. Addressing paragraph 11, the reservation of jurisdiction provision in this case, the Arbitrator concluded that "the grant of implementation jurisdiction is broad but does not extend to amending the contractual bargain made by the parties when they entered into the Settlement" (at page 28).

[46] For the most part, neither party has any material objection to the Arbitrator's statement of the law as it applies in this situation. The issue boils down to whether imposing a Delegation Law falls within the scope of paragraph 11 of the Settlement.

[47] In assessing and construing the Settlement as a whole, with a view to understanding the scope of the reservation of jurisdiction provision, the Arbitrator focused his analysis on the obligation of Buffalo Point to re-submit a new version of the

Taxpayer Law that might be consistent with the ***FMA*** requirements, such that the Tax Commission would approve it. At page 35 he concluded:

> … I find the [Buffalo Point] is obligated to act in good faith and to take all reasonable steps to complete the Settlement, notwithstanding the absence of specific language in the Settlement prescribing a re-submission to [the Tax Commission]. Whether the obligation is characterized as a good faith contractual duty or an implied term of the Settlement, the [Buffalo Point] obligation is clear."

I pause to note that, as set out in the ***January 2020 Decision*** and again here, Buffalo Point does not argue against this proposition, rather they concede they are so bound.

[48] Critically, as I read the Award, there was little, if any, analysis of a Delegation Law concept in place of the failed binding mediation concept that had been negotiated. In the third last paragraph of the decision (at page 36), the Arbitrator simply agrees "with the Association that the requested order does not demand substantive changes to the [Taxpayer Law], such that the bargain made by the parties would be amended. The objective is to fully implement the arrangements agreed upon in the Settlement."

[49] With utmost regard to the well-respected Arbitrator, I find that a Delegation Law is in sum and substance materially different than the agreed binding mediation attempted to be enacted through the Taxpayer Law. The Supplementary Award imposing this solution goes beyond the Arbitrator's grant of jurisdiction to "implement" the Settlement or Consent Award "in the event of remaining remedial issues" or "necessary clarification" of the Consent Award.

[50] The Tax Commission found that the binding mediation provision could not be validly enacted by a Taxpayer Law as it was not consistent with the applicable legislation, the ***FMA***. Considering its analysis in its December 2015 letter, for two interrelated, significant reasons, I fail to see how a more sweeping Delegation Law could be ordered

in place of binding mediation. First, on its face, a Delegation Law is not an advisory, conciliation or mediation process. It grants certain of council's statutory powers to another person or body. Second, depending on its specific contours, under the ***FMA*** a Delegation Law is far broader than the binding mediation mechanism agreed to by the parties. Inherently, it is not limited to a proposed specific expense item which is under dispute, within the parameters set by paragraph 3 of the Settlement. All in, a Delegation Law is not akin to the binding mediation concept, and is a substantive amendment or alteration of the Settlement and Consent Award. Alternately, at best, it may be argued that a possible Delegation Law could be so narrowed so as to only delegate the power to decide whether to impose a disputed expense. Yet, this is effectively what the binding mediation attempted, which was rejected by the Tax Commission.

IV. Second Supplementary Award: Advisory Mediation & Debt Mechanism

[51] The Arbitrator's order requiring change to the Taxpayer Law and Minutes of Settlement, by the addition of a concept and process requiring advisory mediation with enforcement through a debt mechanism, is the real and narrow crux of the ongoing dispute at this point: was this beyond of the scope of the Arbitrator's paragraph 11 of the Settlement jurisdiction such that he erred in law in imposing such an Award?

a) Buffalo Point's Position

[52] Stripped to its core, Buffalo Point asserts the Arbitrator re-wrote the key provision of the Settlement and Consent Award, with the result being wholly inconsistent with the agreed Settlement and intentions of the parties. Further, the concept created a new and different legal relationship between Buffalo Point and the Association in that it potentially

required a debt to be paid from one to the other, something that was never contemplated. In fact, the agreed binding mediation process effectively precluded any need to re-pay taxes to anyone because the specific expense item generally would not have been a component of the expenditures underlying property taxes. However, to the extent it was ever necessary, the Taxpayer Law required refunds for overpayment to be made to the taxpayer who overpaid. Further, the concept is incompatible with other carefully considered provisions of the Taxpayer Law respecting the annual tax law development process. All in, the new imposed concept is a novel agreement "creating an improper workaround" to the Tax Commission's conclusions about binding mediation and a Delegation Law. As summarized at paragraph 180 of their brief:

> … it is further respectfully submitted that in both instances, the Arbitrator erred in law when he overstepped his remedial jurisdiction, altered the Minutes of Settlement (twice) and in express contention with the order of the [Tax] Commission and in a manner which sought to undermine it, and in a manner that perverted the bargain between the parties and derogated from the inherent and constitutionally protected rights of the Applicant's.

b) The Association's Position

[53] The Association starts with the position that paragraph 11 of the Settlement enabled the Arbitrator with broad authority to craft remedies to implement the Settlement and, related, to clarify the Consent Award as necessary. That said, the common law also provided the Arbitrator with jurisdiction to imply and implement terms as he did, either through normal contractual interpretation of the broad purpose of the Settlement, or through duties of good faith and honest performance. At paragraph 21 of their brief, they summarize their legal position as:

> … The Reservation of Jurisdiction Clause [paragraph 11] contemplates positive steps being made by the Arbitrator, and mandates him to implement the

> Settlement in the interests of reconciling the parties' interests on an indefinite basis. It is worded in a broad and purposive way, and actively engages the Arbitrator in the complex implementation process.

[54] As to the concept imposing advisory mediation with enforcement through a debt mechanism, the Association says the Arbitrator stayed faithful to the "bargain" and that it is not a material alteration to the bargain. In fact, they say it has no material effect on the bargain, rather Buffalo Point is inviting "the Court to favour form over function, and accept an absurd, patently unfair and most importantly destructive, result". Further, they say it was necessary to "remove enforcement of the results of the binding mediation provision in favour of the [Association] from anything that the [Tax Commission] had to approve". Finally, they say the Settlement itself recognizes the Association for purposes of the Taxpayer Law; it is an active party to the agreements.

c) Discussion

[55] The Second Supplementary Award starts with an outline of the history between the parties, prior awards and orders, and the parties' proposed resolutions and positions. At paragraph 22, the Arbitrator notes:

> … As I construe my reserved jurisdiction under Paragraph 11 of the Settlement, if any remedial issues remain for purposes of implementing the Settlement, such issues should be addressed by finding the most expeditious, least burdensome and most equitable solution, within the four corners of the fundamental bargain made by the parties themselves.

Further, he notes at paragraph 33: "the central issue to be decided is whether Paragraph 3 of the Settlement can and should be amended as sought by the Association."

[56] There is little doubt the Arbitrator had a firm grasp on the positions and arguments of the parties as extensively reiterated in the Award. He restated his approach for his authority from the Supplementary Award, that the reservation of jurisdiction in

paragraph 11 should be broadly construed, "in order to achieve the stated objective of resolving remedial issues, but constrained by the basic principle that a bargain cannot be amended" (at para. 57). He found he had jurisdiction "to vary the wording of Paragraph 3" to preserve and implement the bargain (at para. 59).

[57] Critically, the Arbitrator agreed the Association's request would be a change to the Settlement wording, but found the change was not material, considering all of the circumstances. He recognized that a debt mechanism as proposed by the Association was foreign to the Settlement, but also that the financial impact of a debt mechanism had the same net effect on Buffalo Point as if a mediator had determined Buffalo Point could not include a certain expense in the property tax that Association members paid.

[58] Finally, at paragraph 65, the Arbitrator found that Buffalo Point was seeking "to derive an unwarranted advantage" from the present situation, in a manner that deviates from the conduct of "an honest, prudent contracting party". He said:

> … This is a case where good faith performance of the Settlement is at stake. As stated in the January Award (at p. 9, p. 35), "the Settlement is the kind of contractual arrangement where it is necessary for the parties to cooperate in order to achieve the objects of the contract. … I find the [Buffalo Point] is obligated to act in good faith and to take all reasonable steps to complete the Settlement … ."

In making these comments, I understand him to be employing the constrained limitations on a court (arbitrator) to "slightly" amend a contract, consistent with the dicta in ***Churchill Falls (Labrador) Corp. v. Hydro-Quebec***, 2018 SCC 46 (CanLII) at paras. 118 and 121. Further, earlier in his Award, the Arbitrator noted:

> [59] I conclude that Paragraph 11 of the Settlement affords adequate scope to vary the wording of Paragraph 3 for the purpose of preserving and implementing the bargain between the parties. Basic contract law principles presented in argument appear to support this finding, not refute it.

> [60] The *Civil Code of Québec* applied in *Churchill Falls* and requires a party to act in good faith in exercising rights and performing contractual obligations (at para. 44), similar to the emerging case law under *Bhasin, supra*, in the common law world. Neither party distinguished *Churchill Falls* because of its Québec origin. In fact, as reviewed above, both parties relied on the courts reasoning. However, *Churchill Falls*, a very recent judgment, turns out to be a powerful precedent in favour of the Association's position when applied in the present factual context.

[59] I need not address the authorities the Association relied on explaining or defining critical words in the reservation of jurisdiction clause such as "implement", "remedial" or clarification". Their ordinary meanings, within the context of this dispute and jurisdiction clause, readily set the scope and parameters of the Arbitrator's jurisdiction. These are relatively broad terms, supple enough to both accommodate and be constrained by the case scenario at issue. No one really disputes the Arbitrator understood and in fact had a relatively broad scope of authority under paragraph 11, but not unlimited authority. As he noted, he had to be true to the bargain; he could not rewrite it.

[60] So what did he do? All in, he ordered amendments to the Taxpayer Law and the Settlement to:

- change the Taxpayer Law, consistent with Buffalo Point's proposed revised Taxpayer Law, to make binding mediation advisory only;
- change paragraph 3 of the Settlement by adding a debt mechanism, as proposed by the Association, essentially as a financial consequence or disincentive to Buffalo Point for ignoring a mediator's finding; while
- tightening the Association's debt mechanism proposal to specify Buffalo Point could not pay any such debt "using local revenues, as defined by the *Standards for First Nations Expenditure Laws, 2017".*

[61] Given the history and tortured circumstances, it is not without some hesitation that I find the Arbitrator erred in amending the Consent Award as he did. In effect, he re-wrote the key provision of binding mediation, altering its form and substance. That he included Buffalo Point's suggested revised Taxpayer Law as part of the new provision, does not bolster the correctness of the overall amendments - - Buffalo Point offered a revised Taxpayer Law to advisory mediation only as a full answer to the conundrum the parties faced. Alternately, the Association was satisfied to accept the revised Taxpayer Law "on condition that Paragraph 3 of the Settlement is amended to provide a monetary remedy in any case where [Buffalo Point] has refused to adopt a mediator's decision" (at para. 20, Second Supplementary Award). Thus, the revised Taxpayer Law component of the amendments he imposed, also need be taken into account as part of the correctness analysis.

[62] On the one hand, I understand his attempt to mimic the agreed form and method of binding mediation; notably that while the debt mechanism process he devised may have been different, the resulting net potential financial consequence to Buffalo Point would not have changed.

[63] However, on the other hand, the debt mechanism process substituted binding mediation for advisory mediation, with essentially liquidated damages in the form of a debt, in the event Buffalo Point ignored the mediator's opinion.

The Arbitrator described these changes as "not material" under all the circumstances. I disagree:

- the obligation to pay the Association would be imposed only because Buffalo Point choose not to follow the advisory mediator's finding, regardless of their reasons. It is akin to penalizing them;
- the section of the Taxpayer Law the Tax Commission would not approve, Section 13, was silent (as was the entirety of the Settlement) about remedies, or enforcement in the event Buffalo Point ignored a mediator's finding. So, this is a new concept;
- the debt would be an after-the-fact payment, rather than a bar to a specific tax expense being imposed. I recognize the intent of the debt is to dissuade Buffalo Point from including the contested expense in the budget underpinning the annual property tax;
- the debt is payable to the Association, not the taxpayer who paid their part of the disputed expense through their property tax levy. The Association is not a taxpayer. I recognize the Association is a party to the Settlement and represents the taxpayers;
- in the event there is a dispute about the debt or its collection, more litigation would follow to enforce it. This is the antithesis of the point of the Settlement. I recognize that Buffalo Point could also ignore binding mediation, and hence litigation remains a possibility under that process, but that is more remote than under this debt mechanism approach;

- in order to avoid running afoul of the ***FMA***, and to avoid potential Tax Commission concerns, the Arbitrator specified the source of the debt funds as being other than "local revenues", or property tax revenue. So, despite the issue arising from an expense underpinning property taxes, the debt is to be artificially disconnected from the collected taxes. Presumably such sources of monies exist, but this exceptional feature alone underlines how far afield the Arbitrator reached; and
- imposing the revised Taxpayer Law is itself a noteworthy rewrite of the text initially agreed to under the Settlement.

[64] With respect, collectively, these changes to the Minutes of Settlement and Taxpayer Law amount to a significant rewrite of the bargain, the aggregate agreement, by introducing new concepts alien to the negotiated bargain. This exceeded the reservation of jurisdiction authority the parties granted to the Arbitrator in paragraph 11 of the Settlement. It is far more than implementing or clarifying the Settlement or Taxpayer Law concept of binding mediation, as a remaining remedial issue.

[65] I have no doubt the Arbitrator was well-intentioned in coming to his conclusions in the Supplementary and Second Supplementary Awards. I have little doubt he did so in part because of positions Buffalo Point took soon after the Tax Commission rejected the binding mediation concept as part of a Taxpayer Law. Buffalo Point's initial position that their obligations under the Settlement were fulfilled - - were at an end with no further obligation to attempt to resolve this matter - - were destructive and highly counterproductive. Effectively, the Association's raison d'etre of the Settlement was

gutted and Buffalo Point's position toward the Association was "too bad for you". This is part of the factual matrix the Arbitrator was faced with.

[66] Fortunately, over time, Buffalo Point came to realize the folly of this stance. Implicitly, they came to recognize the long-term relational nature of the 2015 Settlement and Consent Award and their good faith obligations. Regrettably though, they did not offer to the Arbitrator any appropriately meaningful resolution to this quandary. The Arbitrator acknowledged Buffalo Point was "open to finding a resolution", but not one that placed new obligations on them (para. 47, Second Supplementary Award).

[67] With respect, I disagree that the effect of ***Churchill Falls*** is to open the door for an arbitrator to rewrite the key provisions of the Settlement based on his finding Buffalo Point was not acting in good faith. The Arbitrator's reservation of jurisdiction remains the key starting and controlling source of his power. Further, it must be kept in mind that Buffalo Point did not breach the contract; unexpectedly the Tax Commission refused to sanction binding mediation as part of a formal Taxpayer Law. Buffalo Point's troubling conduct was its initial position that it need not renegotiate, nor re-submit, another form of Taxpayer Law that could satisfy the Tax Commission. It is easy to see, in the context of this often highly contentious litigation, how Buffalo Point appeared to be taking advantage of unforeseen circumstances. Fortunately, this position changed over time, including at the hearing leading up to the Second Supplementary Award, although Buffalo Point remained somewhat intransigent about what changes to the Settlement it would agree to.

[68] Leaving aside the Second Supplementary Award, what remains is the parties entered a binding contract in 2015 resolving all of their disputes, the Settlement, that has been formalized into an Order of this Court since 2016. They have acted upon it, fully disposing of many and all other necessarily incidental and important matters. Neither party asserts the Settlement is frustrated. Both recognize, as expressly stated in the Settlement, "the fundamental element" of binding mediation to their agreement. Despite the Tax Commission not ratifying the Taxpayer Law with the binding mediation provision, binding mediation remains a contractual obligation negotiated by experienced counsel and sophisticated clients with a seasoned arbitrator's help.

d) Postscript

[69] As a suggestion only, it seems to me the simplest, direct and effective route to deal with this dilemma would be to revise the Taxpayer Law to address the Tax Commission's concerns by deleting the word "binding" from s. 13 of the text of the Taxpayer Law. Some other revisions may be necessary for cohesion. This would leave the bulk of the formal Taxpayer Law intact, and the binding mediation concept in paragraph 3 of the Settlement exactly as initially contemplated. The net effect would leave the 2015 negotiated Settlement, the contract (with binding mediation), in place, with unspecified remedies for a breach of contract, but fall short of enshrining binding mediation of tax expenditure matters in a formal Taxpayer Law.

[70] Considering the capacity of these entities to enter into agreements, the history of this overall dispute, the bona fide agreement for value the parties arranged and executed under the Settlement, and the spirit and letter of the ***FMA***, I cannot imagine this would

offend any sensible or principled assessment. It honors the bargain and maintains the fundamental concept of binding mediation as a workable, lawful solution to a critical, historical contractual safeguard. Important as well is that there have been no serious disputes about Buffalo Point annual taxes beyond the first taxes it imposed, and even that was rectified. Over all the years of litigation, the parties have never had to turn to any form of mediation to resolve an annual tax issue. It is time to be pragmatic and settle this once and for all.

CONCLUSION

[71] I answer the two questions of law in the affirmative. To that extent only, the orders flowing from the Supplementary Award and Second Supplementary Award are set aside.

[72] Given the unique nature and process of this litigation and that it emanates from arbitration hearings where the parties were responsible for their own costs, I decline to make an award of costs to either party.

[73] I would appreciate if counsel would arrange an appearance before me to hear submissions on an appropriate next step, now that the ruling is issued. Specifically, should the matter be remitted back to an/the Arbitrator or should some other process be engaged?

_____ J.