14th WCCAS Arbitration Conference

Case Law Update

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Doctrine of Separability

Petrowest Corporation v. Peace River Hydro Partners, 2020 BCCA 339

Issue: Was receiver appointed under BIA bound by arbitration clauses having sued on the contracts?

Held: No. (1) receiver has the power to disclaim contracts; and (2) doctrine of separability means arbitration agreement exists separate and independent from main contract.

Therefore, by suing, receiver disclaimed the arbitration agreement with result that it was not a party to arbitration agreement and the stay provision under the BC Arbitration Act was not engaged.

Note: although wording of stay provision under new BC Act has changed, similar wording to previous Act exists under other provinces' domestic acts including Alberta.

Record on an application for leave to appeal

Christie Building Holding Company, Ltd. v. Shelter Canadian Properties Ltd., 2021 MBQB 77

Issue: Could the Applicant adduce extensive affidavit material on a leave application in an attempt to reconstruct the arbitration's evidentiary record that had been limited by the parties' procedural decisions?

Held: No. The parties were bound by the procedural decisions they made even if the effect was to "disarm" appellate review based on the record.

Attornment and summons of non-party witnesses

Bergmanis v. Diamond, 2021 ONSC 2375

Issue: Did third parties attorn to an arbitrator's jurisdiction by bringing a motion before the arbitrator to challenge summons that he issued against them?

Answer: No. The arbitrator's jurisdiction to issue the summons arose from his authority under the Arbitration Act and not the Arbitration Agreement. As a result, the third parties did not bind themselves to the Arbitration Agreement because they appeared before the arbitrator to challenge the summons.

See also Octaform Inc. v. Leung, 2021 BCSC 73, an international commercial arbitration case, where the Court found the request for its assistance in issuing summons to third-party witnesses was premature despite the arbitrator concluding there was "*no doubt*" witnesses had relevant and material evidence

Remedies where award challenged for natural justice

Tall Ships Landing Devt. Inc. v. City of Brockville, 2020 ONSC 5527

Issue: Having determined that that three arbitral awards should be set aside for serious procedural fairness issues and errors of law, and given that there was no evidence of bias on the part of the arbitrator, should the dispute be sent back to the original arbitrator or a different one?

Answer: A new arbitrator. This was necessary where the original arbitrator heard evidence and made findings of fact and credibility because of "*the difficulty that any person may have in divorcing themselves from conclusions they have already reached and truly considering an issue afresh*".

Adequacy of reasons

Clark v. Unterschultz, 2020 ABQB 338

Held: Based on case law that preceded the Supreme Court of Canada's statement in Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (that adequacy of reasons is not a standalone basis for review), Chambers Judge concluded that inadequate reasons, as in this case, can constitute an error of law.

Chambers Judge held the applicable standard of review for errors of law such as this was correctness based on Vavilov. She concluded that Vavilov qualified the relevance of Newfoundland Nurses statement on reasons because it concerned the reasonableness standard and not correctness.

Result: As the arbitrator provided no reasons for making an exceptional lump sum spousal support award, leave was granted, appeal allowed and matter remitted to arbitrator.

Costs

Allard v. The University of British Columbia, 2021 BCSC 60

Confirmed: The "*normal rule*" in domestic arbitrations is that the successful party is entitled to its reasonable legal costs.

New York Convention

Parrish & Heimbecker Ltd. v. TSM Winny AG Ltd., 2020 SKQB 348

Mr. Justice Elson held that New York Convention's mention of an "*agreement in writing*" in the definition of agreement to arbitration was "*inclusive*" and imposed no formal requirement that an "*agreement in writing*" needed to be signed.

"*Given the absence of text and email messages in 1958, when the New York Convention was created, I think it only logical for the Court to modernize these words and find that the reference to "telegrams" should include other similar forms of electronic communication, such as facsimile, text and email messages*".

Final offer arbitration

Canadian National Railway Company v. Gibraltar Mines Ltd., 2020 FC 1034

Mr. Justice Manson held that, in final offer arbitration, the absence of reasons in a decision qualified the decision as reasonable and correct. Though one party objected to the other's final offer including an agreement to arbitrate, Manson J. held that the arbitrator had to accept either offer "*in its entirety*" based on which offer the arbitrator considered more reasonable. Final offer arbitration's "*all-or-nothing*" approach prevents an arbitrator from extracting reasonable terms from one offer for inclusion in the other and the Canada Transportation Act, SC 1996, c 10 prohibited the arbitrator from explaining the choice made.

UNCITRAL

United Mexican States v. Burr, 2021 ONCA 64

Ontario Court of Appeal quashed appeal of decision in first instance dismissing challenge to a tribunal's preliminary decision on jurisdiction. Despite counsel's agreement that a party could "*ride both horses*" and rely on both articles 16 and 34 of the UNCITRAL Model Law when challenging an arbitral tribunal's decision on jurisdiction, the Court limited its decision to prohibiting those appeals wherein a party's jurisdictional decision was determined as a preliminary question under article 16(3) and not in the award on the merits.

Limitation periods

Agrium, Inc v. Colt Engineering Corporation, 2020 ABQB 807

Madam Justice Dilts held that held that she retained jurisdiction under section 7(1) of Alberta's Arbitration Act to consider waiver and attornment notwithstanding expiry of a limitation period in which to commence arbitration. To be consistent with Hnatiuk v. Assured Developments Ltd., 2012 ABCA 97 and Lafarge Canada Inc. v. Edmonton (City), 2013 ABCA 376, Dilts J. held that "*regardless of whether the limitation period to arbitrate has expired, the court may consider whether the mandatory arbitration provision has been waived or repudiated, and the defendant has attorned to the court*".

Limitation periods

Maisonneuve v. Clark, 2021 ONSC 1960

Madam Justice Gomery held she had jurisdiction to determine if an application for referral to arbitration is time-barred. First, the record provided her sufficient insight with respect to limitation issues despite having to draw some inferences. Second, the "*just, most expeditious and least expensive determination*" of the limitation issue justified her deciding the issue and relieving parties of having to re-argue it before arbitrator if/when she referred them to arbitration.

Right of appeal of stay denial

Paulpillai Estate v. Yusuf, 2020 ONCA 655

Ontario Court of Appeal held that it lacked jurisdiction to hear an appeal of a motion judge's order regarding a stay in favour of arbitration. No formal motion had been made to refer the dispute to arbitration, the motion judge's dispositive order was silent on the issue of arbitration and any comments on waiver of arbitration were merely *obiter*. Even assuming that an order might have been made, the Court held it lacked jurisdiction because section 7(6) of Ontario's Arbitration Act stipulated no appeal lay from a decision under section 7.

Right of appeal of stay denial

Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636, 2020 ONCA 612

Ontario Court of Appeal observed how a wrong interpretation is never right, set out its approach to overruling its own precedents, acknowledged new guidance given in TELUS Communications Inc. v. Wellman, 2019 SCC 19 (CanLII), [2019] 2 SCR 144 on section 7(5) of Ontario's Arbitration Act but distinguished its impact from the Court of Appeal's well-accepted reasoning in Huras v. Primerica Financial Services Ltd., 2000 CanLII 16892 (ON CA) on section 7(6)'s application. Reasserting its interpretation on section 7(6), the Court held that it did have jurisdiction to hear an appeal of a motion judge's decision purporting to exercise discretion under section 7(5) to deny a stay.

Right of appeal of stay denial

Abbey Resources Corp. v. Andjelic Land Inc., 2020 SKCA 125

Saskatchewan Court of Appeal endorsed the Ontario Court of Appeal's reasoning in Huras v. Primerica Financial Services Ltd., 2000 CanLII 16892 (ON CA) to determine that, under section 8(6) of Saskatchewan's Arbitration Act, the Court of Appel did have jurisdiction to hear an appeal of a decision in first instance which refused a stay if the decision held that that arbitration agreement did not apply.

Right of appeal of Master's denial of stay - yes

Agrium, Inc v. Colt Engineering Corporation, 2020 ABQB 807

Madam Justice Dilts held that unsuccessful applicants could appeal to a justice of the court a Master's decision refusing a stay under section 7(1) of Alberta's Arbitration Act. The legislated right of appeal from a Master's decision under the Alberta Rules of Court does not contradict the policy decisions underlying the Arbitration Act. Alberta's Court of Queen's Bench Act "*creates layers of decision making authority*" and section 7(6) did not intend to render Master's decisions on stay applications "*unappealable*". Section 7(6) should "*not be read in a manner that would be inconsistent with that legislated right*". Having jurisdiction to hear the appeal, Dilts J. held that she retained jurisdiction under section 7(1) to consider waiver and attornment notwithstanding expiry of a limitation period in which to commence arbitration.

Right of appeal of Master's denial of stay - no

Wang v. Mattamy Corporation, 2020 ONSC 7012

Mr. Justice Penny dismissed Plaintiffs' application to extend the delay in which to appeal a Master's decision staying their action in favour of arbitration. As part of his decision making, he had to determine the merits of their proposed appeal. Based on section 7(6) of Ontario's Arbitration Act which prohibits appeals of decisions under section 7, he held that the Master's decision "*falls squarely*" within section 7 and "*it is not appropriate for the court to engage in an analysis of the Master's decision because any review of it is precluded*" by section 7(6).

Adequacy of reasons

lululemon athletica canada inc. v Industrial Color Productions Inc., 2021 BCSC 15; leave to appeal granted lululemon athletica canada inc. v. Industrial Color Productions Inc., 2021 BCCA 108

Arbitrator did not address a scope of authority argument but Mr. Justice Funt held arbitrator could not have made the award without having considered having authority to do so. *"While under s. 31(1) of the ICA Act the "arbitral award must state the reasons on which it is based", I do not see such as requiring the arbitrator to, so to speak, paint by numbers, especially having regard to the Kompetenz-Kompetenz principle*".

Set aside on matter not pleaded

Parrish & Heimbecker Ltd. v. TSM Winny AG Ltd., 2020 SKQB 348

When recognizing and enforcing the appellate arbitral tribunal's award issuing from an administered arbitration, Mr. Justice Elson acknowledged there was "*little doubt*" that the appeal panel "*premised its analysis on a basis that was not part of either the notice of appeal or the respective arguments it received*" but concluded that doing so did not justify a dismissal of the application. "*I accept that it was unfortunate for the Appeals Committee to have addressed the question in the manner it did, without giving the parties an opportunity to address the point*" but that the appeal panel "*clearly believed it was entitled to act as it did*".

Vavilov …

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

Opportunity to clarify a contracting party's duty to exercise in good faith a discretion granted to it by contract and recognized in Bhasin v. Hrynew, 2014 SCC 71. In dismissing appeal, Supreme Court upheld decision in first instance to set aside a private, commercial arbitration award. The appeal presented an opportunity for the Supreme Court to consider the effect, if any, of Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 on the standard of review principles applicable to appeals of commercial arbitration awards set out in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 and Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32.

Vavilov – six justices decline invitation

Six justices preferred to "*leave [it] to another day*" while the other three chose to embrace it, considering that to "*leave this undecided is to invite conflict and confusion*".

Kasirer J. reasoned that they did not have the benefit of submissions on that question or the assistance of reasons on point from the courts below and that, in any event, the appeal's outcome did not depend on identifying whether the proper standard of review was correctness or reasonableness.

Vavilov – three justices accept invitation

Three justices acknowledged "*important differences between commercial arbitration and administrative decision-making*" but declared that such differences do not affect the standard of review where legislation provides for a right of appeal.

Brown and Rowe JJ. Drew on Vavilov which explained that "*a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts*" and held that Vavilov had "*displaced*" the reasoning in Sattva and Teal Cedar. "*Concluding otherwise would undermine the coherence of Vavilov and the principles expressed therein*".

Brown and Rowe JJ. limited the scope of their determination. "*Our conclusion on this point is limited to the specific statutory provision at issue. In every case, the question is one of legislative intention, as reflected in the language of the statute*".

Vavilov - followed

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

N.W.T. Court of Appeal held that Vavilov's revised framework applies to commercial arbitration awards reviewed as a result of a statutory right of appeal. "*It is difficult to follow the argument that the reliability of Canada as a forum for resolution of local and global business disputes, would be rendered less grounded in the rule of law in a rules-based system of law by employing an appellate review standard*". The Court distinguished appeal wording in the N.W.T.'s domestic arbitration legislation from the former B.C. domestic arbitration legislation considered in Sattva and Teal Cedar. Vavilov's omission of any mention of commercial arbitration did not argue for or against its extension. "*Silence cuts both ways*". The Court did not comment on whether Vavilov applied to awards arising from contracts which contained no right of appeal and where no statute provided such right.

Vavilov – noted and applied

Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382

Ontario Court of Appeal set aside an award which issued following a statutory arbitration because the Ontario statute did not apply to the defendant. Because the appeal was a statutory appeal under the Insurance Act, the Court applied the standard of review recently restated in Vavilov.

Vavilov – noted, decline to engage

Nolin v. Ramirez, 2020 BCCA 274

B.C. Court of Appeal set aside part of an arbitration award which rested on the arbitrator's dismissal of a party's evidence as suspicious in one context and reliance on it in another. The Court paused, at paras 30-39 to determine whether Vavilov applied to the standard of review of family law arbitration awards under section 31 of the now-repealed Arbitration Act, RSBC 1996, c 55 .

"*In my opinion, it makes no difference in this case whether the standard of review is reasonableness or palpable and overriding error, as the result would be the same. Since it is unnecessary to decide the obviously complex question, I will leave it to another day*".

Vavilov – noted, invite to engage

lululemon athletica canada inc. v. Industrial Color Productions Inc., 2021 BCCA 108

Madam Justice Griffin focused on proposed grounds relating to the decision made to apply a standard of reasonableness rather than a standard of correctness for errors of law, as established in Mexico v. Cargill, Incorporated, 2011 ONCA 622. Griffin J.A. noted the release of Wastech after the decision in first instance, the B.C. Court of Appeal's own choice in Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd., 2019 BCCA 66 to apply standard of correctness and the lack of a B.C. Court of Appeal decision which re-considered the standard set following the various, recent Supreme Court decisions.

Vavilov - followed

Canadian National Railway Company v. Gibraltar Mines Ltd., 2020 FC 1034

Mr. Justice Manson held that, in final offer arbitration, the absence of reasons in a decision qualified the decision as reasonable and correct. Applicant and Respondent disagreed on the applicable standard of review, arguing respectively for a standard of correctness or reasonableness. In light of the statutory nature of the dispute resolution process, Manson J. applied the standards in Vavilov.

Vavilov – noted and applied

Grey v. Whitefish Lake First Nation, 2020 FC 949

Madam Justice Strickland dismissed challenges to an arbitrator's decision, applying correctness as the standard of review for questions of procedural fairness, including those which encompass issues of bias. Strickland J. held that the standard of review is the presumptive standard of reasonableness, citing Canadian Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69 (CanLII), [2019] 1 FCR 121 and Vavilov.

Citing Vavilov, Strickland J. observed that reasonableness required the court to ask whether the decision "*bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision*".

Vavilov – noted and applied

719491 Alberta Inc. v. The Canada Life Assurance Company, 2021 ABQB 226

Having already determined the application, Mr. Justice Sullivan in *obiter* endorsed the concurring three (3)'s approach in Wastech to apply Vavilov to appeals of commercial arbitration awards.

Broadband Communications North Inc. v. 6901001 Manitoba Ltd., 2021 MBQB 25

Mr. Justice Edmond held that imposing conditions on an award of damages does not comply with principles of awarding damages in breach of contract cases. Edmond J. expressly followed and applied the principles set in Vavilov in choosing correctness as the standard of review in an appeal provided by statute.

Vavilov – noted, decline to engage

New Dawn Enterprises Limited v. Northbridge General Insurance Corporation, 2020 NSSC 150

Mr. Justice Arnold agreed that an umpire's failure (i) to share information obtained and relied on or (ii) to give a party the opportunity to respond breached the principle of *audi alteram partem*. Because Vavilov had issued after the hearing before him, he invited submissions. Having received and reviewed the parties' supplementary submissions, Arnold J. declined to speculate further on whether the outcome was reasonable.

Vavilov – noted, invite to engage

lululemon athletica canada inc. v. Industrial Color Productions Inc., 2021 BCSC 15

Mr. Justice Funt determined that a standard of reasonableness applied to the court's review of jurisdictional challenges in consensual arbitration. Funt J. referred to both Vavilov and to Sattva Capital. He referred to the former as the standard for judicial review of a statutory tribunal and the latter for its general framework for domestic commercial arbitration. Having done so, and without affirming that either decision applied to consensual international commercial arbitration, he observed only that the standard of reasonableness in the case before him "*aligns with the general framework*" set out in each Supreme Court decision for its respective area of dispute resolution.

Vavilov – doubtful, not needed

Christie Building Holding Company, Ltd v. Sheritan Canadian Properties Ltd, 2021 MBQB 77

Mr. Chief Justice Joyal observed that *"it is anything but obvious that the Supreme Court of Canada intended Vavilov to apply to a statutory appeal of a commercial arbitration award and thereby overrule its own significant judgments in Sattva and Teal Cedar Products Ltd. along with the long-standing legal principles which acknowledge the reasons for limited judicial intervention in commercial arbitration*".

Nothing in Vavilov would or could change the inappropriateness of using a problematic and disputed evidentiary record.

Vavilov – noted, not applied

Bergmanis v. Diamond, 2021 ONSC 2375

Relying Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation, 2020 ONSC 1516, Mr. Justice Chalmers held that Vavilov did not modify the standard of review.

Parc-IX Limited v. The Manufacturer's Life Insurance Company, 2021 ONSC 1252

Mr. Justice Koehnen noted differing treatments of Vavilov, supported applying the correctness standard to a review of an arbitrator's award, but endorsed the reasons set out at para. 72 of Ontario First Nations which stated that "*as a matter of legal principle it is appropriate that Vavilov does not apply to commercial arbitrations*".

Vavilov – noted, decline to engage

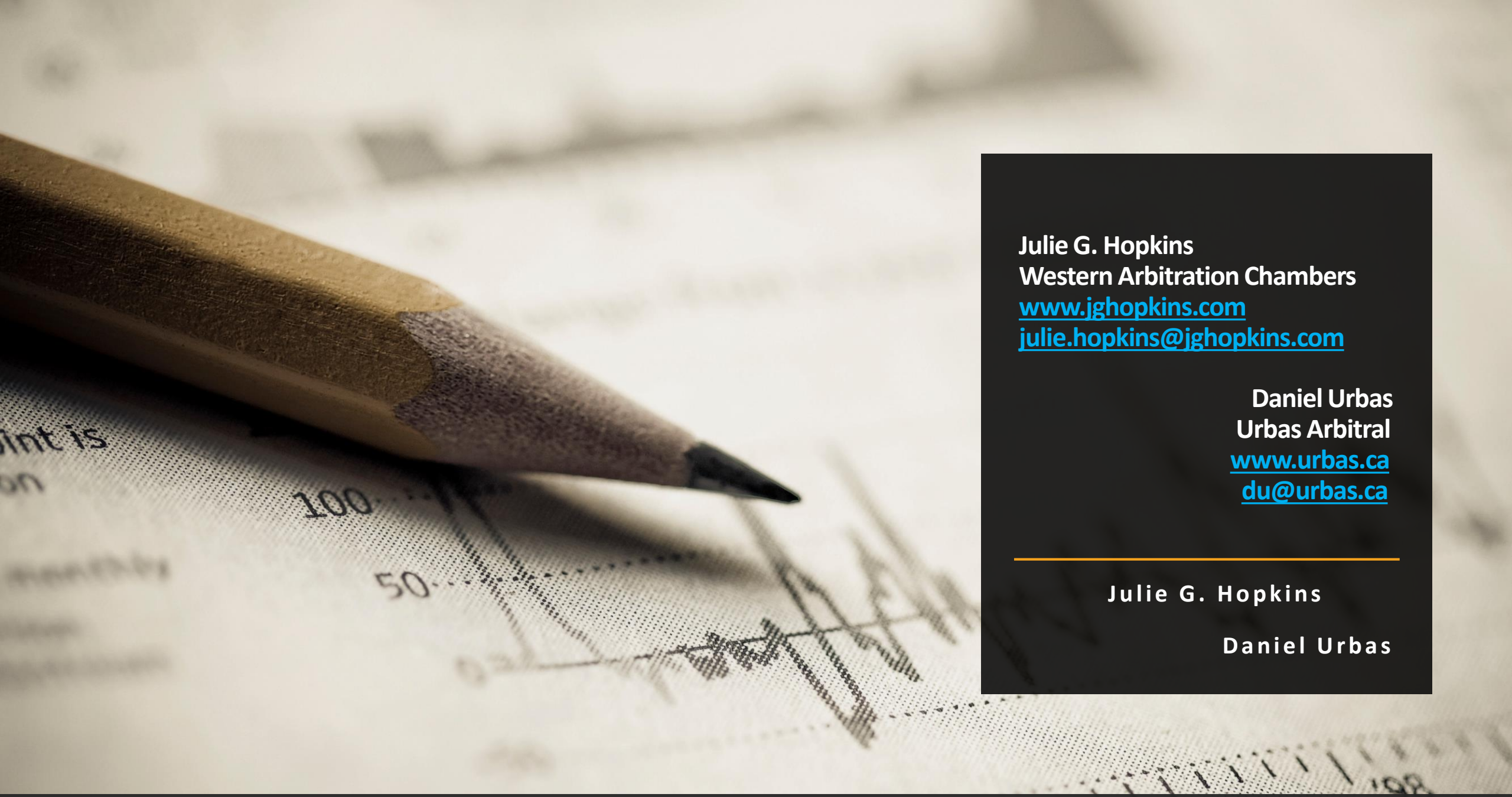
Johnston v. Octaform Inc., 2021 BCSC 536

Mr. Justice Kent observed that the word "*appeal"* did not appear in section 16 of 34 of the ICAA or in section 30 of the Arbitration Act and that term used was "*setting aside*". Referring to the three (3) concurring judges as the "*minority*" Kent J. held that "*I am not bound by the minority decision in Wastech when considering the standard of review applicable to sections 16 and 34 of the ICAA*".

Vavilov – noted, not needed

Allard v. The University of British Columbia, 2021 BCSC 60

Madam Justice Douglas in noted that Petitioners submitted that a standard of correctness applied because their appeal arose from statute and Vavilov had changed the standard of review for commercial arbitration awards from reasonableness to correctness. Douglas J. determined that she did not have to decide the standard because Petitioners met neither standard.



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