

Canadian Arbitration and Mediation journal

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Institut d'arbitrage et de
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This broad membership base allows for diverse skills and experience and contributes to the development of the field of dispute resolution in Canada.

Numerous organizations refer to ADRI for guidance in administering disputes

between the organization and its clients or customers, between employees, or between employees and management using ADRI's National Mediation Rules and its Arbitration Rules. Members adhere to ADRI's Code of Ethics and are subject to disciplinary policies. Those who have achieved the required education and practical experience may apply for recognition as designated Qualified Arbitrators, Chartered Arbitrators, Qualified Mediators, or Chartered Mediators.

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October 18-20, 2017

ADRIC 2017: ADR & Access to Justice

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MESSAGE FROM THE PRESIDENT

ADRIC's 2016 Conference was a great success: Held at the Toronto Ritz-Carlton, the food, service and facilities were outstanding, but the sessions received the greatest praise.

This year's topics were planned by leaders in their subject area along with the National Conference Committee, and their expertise truly showed. Some of the sessions were recorded and will be online soon, some free via our YouTube channel, and some will be available for a modest fee.

ADRIC also hosted the only Global Pound Conference for Canada. Its goal and format is to facilitate a conversation about access to justice and what can be done to improve the quality of justice in commercial conflicts around the world. It engages all stakeholders in the field of dispute prevention and resolution: Parties (or Users); Service Providers; Advisors and Influencers. Truly a thought leadership series: events have also taken place in Singapore, Lagos, Mexico City, New York, Geneva and Madrid, and will be taking place in 26 other cities around the globe. A report of results is available [here](#).

**OCTOBER 18-20, 2017 -
SAVE THE DATE! PLAN SOME
EXTRA VACATION TIME!**

ADRIC's 2017 conference will be most

interesting: the theme is Access to Justice and the location will be St. John's NL.

We are developing some exciting partnerships, topics and speakers. In addition to an exceptional program, we will have tours and social events for spouses and families to make the most of an incredible part of the world. Sponsorship and speaking spots are already being reserved, so we encourage you to express your interest soon.

FURTHER ACTIVITIES AT ADRIC: ADRIC will be launching a new Corporate Membership package with enhanced benefits such as discounts on arbitration administration services, more interaction with our regional affiliates, and is developing a Corporate Advisory Board.

The number of arbitration cases under ADRIC's administration service is growing exponentially. The ADRIC Arbitration Rules received a complete revision, were launched De-



**PRESIDENT,
ADR INSTITUTE OF CANADA, INC.**

Scott is a Government of Canada accredited mediator with the Department of Justice's *Informal Conflict Management System* network. An experienced Labour Relations mediator and facilitator, Scott's background also includes international relief and development work and corporate finance. Scott is also President of the ADR Institute of Saskatchewan.

cember 2014, and are proving ever more popular for their clarity and simplicity. [Have a look.](#)

We will be revising the National Mediation Rules in 2017 and hope to distribute soon. Let us know if you would like to receive a copy or participate in their revision.

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— Janet McKay
Executive Director ADRI

We have developed a Med-Arb Task Force to work on creating National Guidelines for members to maintain standards and credibility.

We will be launching an ADR ROI research project.

We are working with Canada's foremost International Arbitrators to enter a bid for ICCA 2022, the International Council of Commercial Arbitration conference, to be held in Canada.

We continue to form strategic alliances with like-minded organisations for the benefit of the profession and our members.

Our Professional Development committee has been very active, and is now offering National Course Accreditation to qualifying course providers.

We plan to issue more regular press releases to help increase awareness of ADR. See what we have issued to date [here](#).

To learn more about any of these activities, events and services, contact our Executive Director, Janet McKay.

As we near the end of 2016, we remain encouraged by the fantastic engagement and impact our Affiliates and Membership are having across this country. Undoubtedly, 2017 will bring challenges and opportunities, and we feel incredibly well positioned to take advantage of all that lies before us. All the best in the holidays and new year. 🏠



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MESSAGE FROM THE EDITOR

WE ARE LIVING IN A TIME OF GREAT UPHEAVAL.

Established values and ideas are being challenged, as are the institutions that promote and protect those values and the social, economic and professional groups that are said to disproportionately benefit from them.

Attending a session of the *Global Pound Conference* which was hosted by ADRI in Toronto on October 15, 2016, I was struck by the theme of empowering those with disputes to find their own solutions outside the framework of the legal system. "What about the rule of law?" came the protest from one of the lawyers present. The response was a deafening silence – which, based on the rest of the discussion, I interpreted to mean "What good is the rule of law if it makes our disputes more difficult and expensive to resolve?"

There are two challenges here: first, the challenge of making the legal system work for people and businesses with disputes; second, the challenge of providing people with real alternatives. The two challenges are related. As alternatives to court litigation become more effective it becomes harder for court processes to match their efficiencies and economies, especially with the limited resources available to the courts. At the same time, alternative processes require some support from the court system in order to be fully effective. This latter observation applies, for example, to the *early* use of mediation in court litigation, but it is particularly applicable to the enforcement of arbitration agreements and awards.

There is an ongoing tension between the role of the courts in defining the acceptable bounds of arbitration and, at the same time, defining their own role in the emerging dispute resolution landscape. That tension is nowhere more evident than in the conflicting decisions of the British Columbia Court of Appeal (the "BCCA") in

the cases of *BCNET Networking Society v. Urban Communications Inc.* ("BCNET") and *British Columbia v. Teal Cedar Products Ltd.* ("Teal").

The former follows the lead of the Supreme Court of Canada (the "SCC") in *Sattva Capital Corporation v. Creston Moly Corporation* in prescribing deference to arbitral awards, with the result that court interference with an award would be rare. The latter seeks to dissect *Sattva* so as to produce a result where the court is almost always in a position to substitute its own conclusion for that of the arbitrator, i.e. whenever the issue can be characterized as one of applying the law to the facts. On November 1, 2016, the Supreme Court of Canada will hear appeals from both the *BCNET* and *Teal* decisions and will either affirm the viability of arbitration as an independent method of dispute resolution or will take arbitration in the opposite direction.

By way of comparison, the Ontario Court of Appeal (the "OCA") recently demonstrated the effectiveness of the *Sattva* approach in *The City of Ottawa v. The Coliseum Inc.* ("Coliseum") which is discussed by Joel Richler in his article in this edition of the *Journal*. Whereas the BCCA in *Teal* sought to minimize the ultimate test of reasonableness in *Sattva* by deconstructing all of the constituent elements of the SCC's reasoning, the OCA did the opposite, finding that the direct application of the reasonableness test obviated the need for further analysis. Mr. Richler describes and evaluates this approach in his thoughtful article.

However, the conflicting approaches will not be resolved until the SCC decides the pending appeals in *BCNET* and *Teal* – and perhaps not even then. The true resolution will come when the courts, and those who practice before the courts, redefine their role in a way that



EDITOR-IN-CHIEF

Bill practices as an arbitrator and mediator of Canadian and international business disputes. Prior to establishing his current practice, Bill served as lead counsel in major commercial disputes in arbitrations, mediations and before all levels of courts, up to and including the Supreme Court of Canada.
<http://wghlaw.com/>

takes account of the new dispute resolution environment.

I would respectfully suggest that the courts would be well served to focus on disputes which the parties are not capable of resolving by using their own resources rather than seeking to retain pervasive control over the results in private arbitrations. The result of this approach would be that the limited resources that are made available to the court system are used to maximum advantage in areas of dispute resolution which are critical to society and for which no other effective means of dispute resolution exists. Constitutional law and civil rights, criminal law, class actions, family disputes, bankruptcy and insolvency, torts of all descriptions are all areas of dispute in which greater court resources are needed and in which the public interest is directly engaged. The courts must also provide adjudication for all those who are unable or unwilling to have recourse to private means

of resolving their dispute. This is a particular challenge as the rate of unrepresented litigants skyrockets in synchronicity with astronomical costs of representation.

There will also, somewhat ironically, always be a demand on the courts to ensure that private dispute processes are proceeding within the boundaries of consent and that the resulting legal obligations are enforced.

However, there is no compelling reason why the courts should seek to expand demands upon the resources available to them by hobbling access to effective, alternate forms of adjudication for private commercial disputes, as some courts do when they resist greater deference to the results of arbitrations.

Legislative reform may be needed to satisfy some judges that fulfilling their judicial duties does not require them to substitute their own views for that of the arbitral tribunal. The Uniform Law

Conference of Canada recently passed a new Uniform Arbitration Act that seeks to promote that objective.

However, such legislative guidance already exists in the most recent revision to the Quebec Civil Code which states that parties to disputes are encouraged to seek resolution outside the court system, including by arbitration or mediation before turning to the court system. Appeals on the merits from arbitration awards are not, and have not for some time been, allowed in Quebec.

In the meantime, it is incumbent on those who seek to provide dispute resolution services to actively develop and implement new methods that do not simply mimic court procedures or morph into extended litigation before the courts after the arbitration is over.

In this edition of the *Journal*, in addition to the article by Joel Richler mentioned above, we have examples of new avenues to be explored as well as a few


updates on familiar themes.

Joanne Todesco writes about the possible use of arbitration to resolve medical malpractice disputes. Dr. Todesco's views and suggestions are of particular interest as they come from a member of the medical, rather than the legal, community.

In her article on collaborative law outside the family context, Jenna Himelfarb discusses whether the experience of collaborative law which has been developed in the family law context can be applied with respect to other kinds of disputes. Ms. Himelfarb's ideas may be of particular interest to in house counsel who have the responsibility to design dispute resolution processes on a portfolio basis rather than for one-off disputes.

Although it is not a new development, the article by Bevan Brooksbank on the National Automobile Dealers Arbitration Program is a reminder of the work that continues to be done in various business and industry sectors to produce dispute systems that suit particular needs. As the most recent in our series on sectoral dispute resolution, Mr. Brooksbank's article is an excellent review of what it takes to create a system that is voluntarily adhered to, well used and responsive to user needs. The addition of an internal arbitration appeal process is of particular interest for those who wish to preserve all of the benefits of arbitration that are otherwise lost in an appeal to the courts.

Rounding out our current issue is an article by Mary Comeau on the issue of *res judicata* and issue estoppel in arbitration. Since Ms Comeau wrote her article on the recent Alberta Court of Appeal decision in *Enmax Energy Corporation v. TransAlta Generation Partnership*, the principle of *res judicata* as it applies in arbitration was also affirmed by the Ontario Court of Appeal in *Victoria University v GE Real Estate Equity*.

Once again, I hope you enjoy this edition of the *Canadian Arbitration and Mediation Journal*. We welcome your comments, concerns and contributions. 

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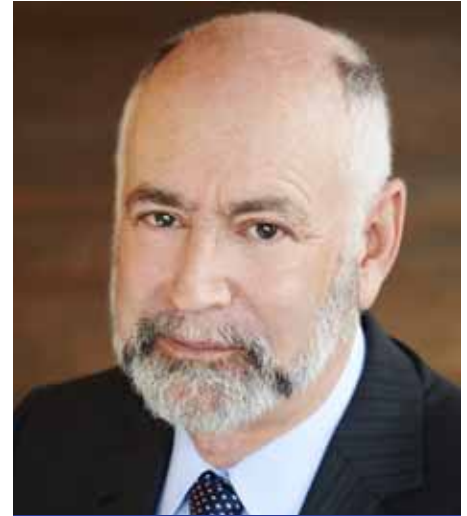
THE CITY OF OTTAWA V. THE COLISEUM INC., A CASE COMMENT

The domestic arbitration process in Canada has been vexed for many years by the question of appeals from arbitral awards.

As recently noted in *Highbury Estates Inc. v. Bre-Ex Limited*,¹ there is no inherent right to appeal an arbitrator's award; any appeal right comes either from statute, or by express agreement of the parties. As to the former, Canadian domestic arbitration acts treat appeals in different ways. A common characteristic, however, is that appeals on questions of law will be permitted with leave of the court that is to hear the appeal (whether by separate application or on the appeal itself).² In Ontario, for example, parties have that right unless they exclude such appeals by contract. In Alberta, to posit another example, parties cannot by contract opt out of the leave/appeal process. Where leave applications and appeals on legal questions are available, parties who have won their arbitrations have faced months and years of litigation fighting about whether putative appeals raise pure questions of law and, if so, the standard of review that judges sitting on appeal should use in determining those appeals. For those winning parties, whether ultimately successful or not, the primary objectives of arbitration (efficiencies and costs) will have been defeated.

*Sattva Capital Corporation v. Creston Moly Corporation*³ is an archetypal example of an arbitration followed by years of very expensive appellate litigation. *Sattva* is an extremely important arbitration-related case for two critically important reasons. First, the Court ruled that, as a general matter, contractual interpretation raises questions of

mixed fact and law, such that appeal provisions in domestic arbitration statutes that give rights of appeal on questions of law, with leave of the court, will generally not apply. There will only be appeal rights where the parties have expressly agreed to provide for same. For many years, the courts, counsel and litigants have struggled on leave applications with distinctions made in decided cases between those issues that raised questions law, and those issues that raised questions of mixed fact and law. It is an understatement to say that the courts have not been consistent in their approach, and that the distinction between the two classes of cases has not always been easy to draw. This has resulted in inconsistencies and much delay in the final resolution of cases. In its ultimate decision on this issue, the *Sattva* Court ruled that inasmuch as contract interpretation is an exercise in which the principles of contractual interpretation are applied to words in a written agreement, considered in light of the factual matrix of a contract, and inasmuch as the goal of contractual interpretation is to ascertain the objective intentions of the parties, the exercise is inherently fact specific and thus does involve issues of mixed fact and law. It further ruled that in rare instances, it will be possible to extricate a question of law from within a question of mixed fact and law. Examples given by the Court of possible extricable questions of law were: the application of an incorrect principle; the failure to consider a required element of a legal test; or the failure to consider a relevant factor.



Joel, a retired partner in Blake, Cassels & Graydon LLP, is an experienced arbitrator and mediator at Bay Street Chambers. He has chaired several domestic and international arbitration tribunals, both institutional and ad hoc.

Second, the *Sattva* Court dealt with the appropriate standard of review for arbitral decisions. Without getting into the detail of the Court's reasoning on this issue,⁴ the Court was driven by the facts that parties voluntarily submit their commercial disputes to arbitration and select their own arbitrators. The Court thus held that:

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.⁵

The foregoing was very-much echoed in the 2016 arbitration-friendly decision of the Ontario Court of Appeal in *Popack*

v. Lipszyc,⁶ where Justice Doherty wrote:

... [T]he nature of the specific order under appeal can also enhance the deference rationale. The application judge exercised her discretion in the context of a review of an award rendered in a private arbitration before a panel chosen by the parties to determine the dispute between them. The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum. The application judge's decision not to set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.⁷

*The City of Ottawa v. The Coliseum Inc.*⁸ ("Coliseum") was an early opportunity for the Ontario Courts to apply what was apparently decided in *Sattva*. It was heard in first instance before the *Sattva* decision was issued, but decided approximately eight months thereafter. J. MacKinnon J. granted leave to appeal on the questionable basis that the proposed appeal did raise extricable questions of law. She then reversed the arbitral award on the basis that it was unreasonable. The Court of Appeal did not deal with the question as to whether the arbitrator had erred on an extricable error of law. It did, however, reinstate the award, based on its finding that arbitrator's interpretation of the contract in issue was reasonable. In doing so, it reinforced the import of *Sattva* in Ontario making it clear that, henceforward, where there are appeals, the courts will give great deference to decisions of adjudicators chosen by the parties.

COLISEUM AROSE OUT OF THE FOLLOWING FACTS.

- Under a long term lease with the City of Ottawa (the "Ottawa"), Coliseum leased Frank Clair Stadium at Lansdowne Park, for use as a domed recreational facility.
- A dispute between the parties was resolved by a Settlement Agreement, pursuant to which Ottawa could ter-

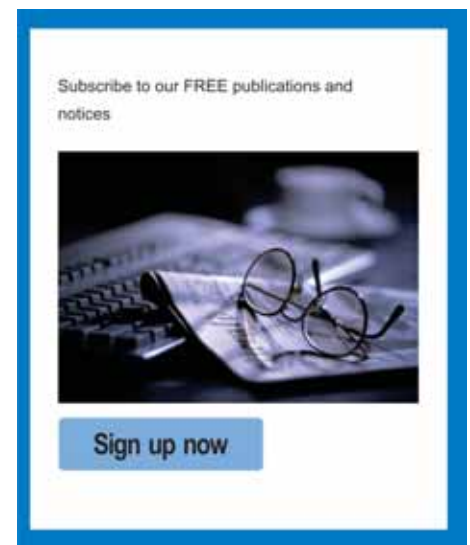
minate the lease in the event that it had plans to redevelop the stadium.

- Paragraph 5 of the Settlement Agreement provided that if Ottawa had redevelopment plans, the parties would enter into good faith negotiations to find Coliseum an alternative site appropriate for its operations. It also provided that Ottawa was to give Coliseum 12 months' notice of termination.
- Paragraph 6 of the Settlement Agreement provided that in the event of a termination under section 5, Ottawa would grant Coliseum an option to lease a portion of Ben Franklin Park. In the event that that park was unavailable, Ottawa agreed to grant an option to lease a similar property within 10 kilometers of Frank Clair Stadium. This option to lease was to be provided on or before delivery of the notice to terminate described in paragraph 5 of the Settlement Agreement. The parties were to then, in good faith, negotiate a new lease, failing which they would proceed to arbitration to fix the terms of that new lease.
- Ottawa did deliver notice of intention to terminate the lease and, at the same time, delivered an option to lease nearby Ledbury Park, as Ben Franklin Park was unavailable.
- After Coliseum objected to use of Ledbury Park, the parties unsuccessfully explored other sites.
- Coliseum commenced an arbitration, alleging that Ottawa had breached the Settlement Agreement.
- Following an 11-day hearing, with 11 witnesses and 750 documents, the arbitrator issued a 392-paragraph \$2,240,000 award, ruling that Ottawa breached the Settlement Agreement by failing to take appropriate steps to determine that Ledbury Park was appropriate to Coliseum's operations as required by paragraph 5 of the Settlement Agreement.

Ottawa sought leave to appeal the Award under section 45(1) of the *Arbitration Act, 1991*.⁹ The parties agreed that the importance to the parties of the matters at stake in the arbitration justified an appeal, and the Application Judge accepted that the determination of the

questions of law would significantly affect the rights of the parties, so those two requirements of the statutory leave to appeal test were met.¹⁰ Ottawa further submitted that the arbitrator had made three extricable errors in law: (i) he ignored the principle that an agreement to agree is not enforceable by failing to consider the import of the words "the parties will enter into good faith negotiations"; (ii) he failed to apply the rule of contractual interpretation that requires that general contractual language must yield to specific language; and, (iii) he speculated on Coliseum's contractual intentions rather than determining those intentions based upon the express words of the contract. With scant, if any, explanation or analysis, the Application Judge accepted each of these three as extricable errors of law, and so the appeal proceeded.¹¹

The issue framed by the Application Judge turned on the arbitrator's interpretation of paragraphs 5 and 6 of the Settlement Agreement and how those two sections interacted. As summarized by MacPherson J.A. for the unanimous Court of Appeal, the arbitrator interpreted those two sections so as to require Ottawa to provide a site similar to Ben Franklin Park as it was in 2004, provided that the alternative site was appropriate for Coliseum's operations. Once that was done, the parties were then to negotiate the lease terms. In sum and substance, paragraph 6 of the Settlement Agreement explained and modified the good faith negotiation ob-



ligation provided for by paragraph 5. In reaching this interpretation, the arbitrator noted that it accorded with what one Ottawa representative believed and told Coliseum and with what Coliseum relied upon.¹²

The Application Judge took a different view. She ruled that paragraphs 5 and 6 had to be applied sequentially. First, under paragraph 5, the parties had to negotiate in good faith to find Coliseum a new site. Then, if those negotiations failed, paragraph 6 required Ottawa to identify an alternative site. This was to be followed by negotiations of a new lease or, failing an agreement, an arbitration. As a foundation for her analysis, the Application Judge did take notice of the *Sattva* requirement that an extricable question of law had to be identified on a leave application. In her view, the arbitrator erred in law in his interpretation of the Settlement Agreement. Specifically, he erred in overlooking the paragraph 6 requirement that Coliseum exercise its option prior to the start of site negotiations and by finding that the general language of paragraph 5 overrode the specific language of paragraph 6. Further, the arbitrator erred in law by speculating as to Coliseum's intention in making the Settlement Agreement, and she ruled that his ultimate conclusions were unreasonable "having regard to the inconsistent conclusions the errors led him to".¹³

The Court of Appeal first considered whether it could review the Application Judge's decision granting leave to appeal. Relying upon section 49 of the Act, as well as its two earlier decisions in *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce*¹⁴ and *Denison Mines Ltd. v. Ontario Hydro*,¹⁵ it ruled, correctly, that it had no such jurisdiction.¹⁶

The Court then considered whether the Application Judge erred in finding that the arbitrator's interpretation of the Settlement Agreement was unreasonable. It deciding that she had erred in this respect, the Court relied upon the following language of Bastarache and LeBel JJ. in *Dunsmuir v. New Brunswick*:¹⁷

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [underlining added by this writer].

Applying the underlined language above, the Court then wrote that while the Application Judge's own interpretation of the Settlement Agreement was both "possible" and "reasonable", so too was the arbitrator's. While it was true that the arbitrator's interpretation did not "flow entirely from an analysis of only the words inside the four corners of the Minutes of Settlement", it was also true that he had relied upon evidence that he had heard that provided "background and context" to his legal analysis. In that regard, he had been "entirely faithful" to Justice Rothstein's statement in *Sattva* that, when construing contracts, adjudicators may consider surrounding circumstances on the basis that "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning".¹⁸

It should be noted that the Application Judge and Court of Appeal also dealt with an issue unrelated to construction of the Settlement Agreement. On the initial appeal, the Application Judge reduced the arbitrator's damage award by 40 percent on the basis that he had relied upon a "paucity of evidence as to the relationship between the corporate entities and the extent of Coliseum's ability to control the flow of revenue to one or other entity".¹⁹ The Court of Appeal reversed on this issue as well, accepting that there was a "significant amount of evidence" on damages, including experts, and noting that Ottawa's own expert did not make the adjustments that the Application Judge did. In the result, the Court of Appeal ruled that the arbitrator's damages award could not be said to have been unreasonable.²⁰

As noted at the outset, the Court of


Appeal's decision in *Coliseum* is significant as it makes it clear that the courts are required to give deference to arbitration decisions, even on issues that relate to extricable issues of law. While the *Sattva* Court did draw an exception to this broad statement for a few types of issues that would attract a correctness standard (being, "constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise"), it is hard to imagine that that exception could be raised in more than a miniscule number of commercial arbitrations. The decision is also useful because it raises a very high bar on any court that would upset an award based upon the deferential standard, properly defined and applied. This is exemplified, in particular, by the Court's reinstatement of the arbitrator's damages award. In order to upset an award, it will have to be found that an award under appeal was unreasonable in the sense that, paraphrasing from Justice Rothstein in *Sattva*, it did not fall within a range of possible, acceptable outcomes, defensible in fact and law.

The foregoing being said, it is unfortunate that the Court did not take the opportunity provided by this appeal to deal with whether the Application Judge properly applied *Sattva* in concluding that the appeal before her raised extricable questions of law. Implicitly, as evidenced by paragraphs 42 through 44 of its decision, the Court thought that she did err. It is implicit in the appeal decision that, in effect, the Application Judge erred by finding that the arbitrator misapplied legal principles to the facts before him. But, this is far from clear. Perhaps the Court did not delve into this issue as it ruled that there was no appeal from the Application Judge's decision to grant leave to appeal. It is this writer's view that notwithstanding that decision on jurisdiction, it did remain open on appeal to consider whether extricable errors of law on contractual interpretation had been raised.

It is also this writer's view that the issues before the Application Judge, insofar as they related to contractual interpretation, were not extricable ques-

tions of law. In *Sattva*, the Supreme Court made it clear that, in essence, contractual interpretation is comprised of the identification of the proper legal test and then the application of that test to a set of facts. It is an exercise of applying the proper test to the words of a written agreement, considered in the light of the relevant factual matrix. In this context, there is a great difference between the "application of an incorrect principle" on one hand (this being the type of extricable error of law identified by the Court), and the misapplication

of a correct legal principle (this being an error of mixed fact and law).²¹ In first instance, the Application Judge appears to have readily accepted Ottawa's characterizations of the arbitrator's errors as purely legal. There is little consideration given to this precise question in her decision, and scant attention is paid to how the *Sattva* Court distinguished between errors of law based upon the application of an incorrect principle and errors that happen when correct legal principles are misapplied to the facts.

It is fairly clear that the Application Judge overturned the award based upon her view that correct legal tests had not been properly applied to the facts in the case. As specifically noted in *Sattva*, it is because there is a close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the agreement in issue, that the ability to extricate a pure question of law material and determinative to an appeal will be very rare. The errors in *Coliseum* did not fall within the exception. 

1 2015 ONSC 4966, para. 41

2 Quebec, Newfoundland, Prince Edward Island, the Yukon, Northwest Territories, Nunavut and the federal Commercial Arbitration Code excepted [2014] 2 S.C.R.

4 A subject covered in these pages in Robson, Jim, "The Impact of *Sattva* on the Judicial Review of Commercial Arbitral Decisions", Canadian Arbitration and Mediation Journal, Vol. 25, No 1

5 *Sattva*, para. 106

6 2016 ONCA 135

7 As cited in paragraph 33 of *Coliseum*, with citations omitted.

8 2016 ONCA 363, rev'g. 2014 ONSC 3838 (CanLii)

9 S.O. 1991, c. 17

10 *Arbitration Act, 1991*, S.O. 1991, c. 17, section 45(1)(a) and (b)

11 Para. 38 of application decision

12 Paras. 38 and 39

13 Paras. 47-51 and 53 of application decision, set out in para. 18 of appeal

decision

14 (1996), 29 O.R. (3d) 612 (C.A.)

15 (2001), 56 O.R. (3d) 181 (C.A.)

16 It should be noted that this is not the situation in all provinces. In British Columbia, for example, leave application decisions can be appealed, as was the situation that prevailed in *Sattva*.

17 [2008] 1 S.C.R. 190

18 *Sattva*, at para. 47

19 Application decision, para. 72

20 Paras. 46 to 49

21 Although even this may be a distinction without much real significance in commercial arbitration, as even regarding errors on extricable questions of law, the courts will defer to arbitrators on a reasonableness standard unless the errors relate to constitutional questions or questions of law that are of central importance to the legal system and outside the arbitrator's expertise.

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ARBITRATION OF CANADIAN MEDICAL MALPRACTICE DISPUTES

A CASE STUDY

Jane Doe, a 50 year-old artist went to a busy walk-in family medicine clinic complaining of recent onset indigestion and fatigue. While getting dressed that day she noticed a hard area by her left collarbone that she did not associate with her symptoms. At the clinic a medical student did a history, physical, and blood count while Ms. Doe waited for the attending physician, Dr. Walken. The blood count showed that Ms. Doe had iron deficiency anemia. After hearing about the patient from the student, Dr. Walken reassured Ms. Doe that anemia from heavy menses was common at her age and was easily treated with iron supplements. Dr. Walken was obviously rushed and she did not examine Ms. Doe herself. A nurse then instructed Ms. Doe to take iron pills, have her blood count repeated in three months, and to use antacids for her indigestion. Ms. Doe did not have an opportunity to say that she was postmenopausal or that she had already tried antacids (and no one had asked). There was no record of a lymph node examination being done.

One month later, Ms. Doe was rushed to hospital after vomiting a large quantity of blood. She was found to have advanced inoperable stomach cancer. An involved lymph node indicating spread of the cancer could be felt near her left collarbone. Chemotherapy was started, but Ms. Doe's prognosis was poor.

She filed a malpractice suit, claiming that several defendants had been negligent in not performing a full history or physical exam and not following up in a timely manner, thereby being responsible for the late diagnosis of her cancer.

Ms. Doe died from stomach cancer two

years after filing suit and prior to any settlement or judgment being made. During that time a lengthy discovery occurred during which all defendants were dropped except for Dr. Walken.

The expert witness for the plaintiff was an oncologist, Dr. Metts who presented complex epidemiological information about stomach cancer at trial. He stated a 30% five-year survival rate if the diagnosis had been made after spread to the lymph node, but before spread elsewhere; compared with a 4% five-year survival rate that now applied to Ms. Doe. Dr. Metts was uneasy on the stand and felt he was being forced into an unduly harsh criticism of the defendant's expert witness who had made some reasonable points in her written opinion. Dr. Metts also thought Dr. Walken seemed to be a competent family physician who had perhaps been disadvantaged by the requirement for teaching students while providing rapid patient turnover in the clinic. Dr. Metts was later criticized by some of his colleagues for testifying against another doctor.

The expert witness for the defendant was a seasoned family physician, Dr. Sage who testified that since a 50 year-old female is not the typical profile for stomach cancer, other more common diagnoses were reasonable at the initial visit. Dr. Sage criticized Ms. Doe for not pointing out what was obviously a tell-tale lymph node near her collarbone. Privately, Dr. Sage felt badly about this and didn't really believe Ms. Doe was responsible for her own late diagnosis. The judge had difficulty reconciling the testimony of the two experts. Both experts suspected Ms. Doe had a hereditary form of cancer and asked their lawyers to insure Ms. Doe's children were being tested. They were



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both told this was not something that could be done during litigation.

As Ms. Doe's health deteriorated, she repeatedly told her family and lawyer that all she really wanted was for Dr. Walken to say she was sorry about what happened, that she had learned from the experience, and had changed her way of doing things. Ms. Doe's estate eventually received a settlement sufficient to cover her legal and uninsured medical expenses. Dr. Walken left clinical practice due to the stress of the drawn-out malpractice suit, doubts about her own competency, and depression. The medical student decided against a career in family medicine largely because of this incident. Neither of the expert witnesses agreed to participate in any future malpractice proceedings.

This is a fictional story adapted and patched together from actual events, that illustrates a number of disadvantages of medical malpractice litigation. The option of arbitration, another method for dispute resolution, will be explored here.

BACKGROUND

Arbitration normally occurs as a result of a pre-dispute contract between two parties in which they agree to waive their right to trial in the case of any future dispute. Instead the parties agree to a set of rules that govern the process and outcome of arbitration, including a final binding decision delivered by an unbiased person or panel. Using a fair process that is outlined in the rules, the parties themselves choose the arbitrator(s). A panel of three arbitrators is common. The sequence of events in an arbitration is a modified version of what would happen in litigation; notably proceeding more quickly, with less formality, more flexibility for outcomes and processes (such as application of the law, rules of evidence, and conventions for the examination of expert witnesses), more content expertise on the part of the adjudicators, and outside the public domain. The final decision is not on the public record but is enforceable by a court of law and is not subject to appeal apart from limited circumstances.

Despite widespread initial skepticism, arbitration is now used extensively for commercial, consumer, and employment disputes around the world, significantly reducing the burden of litigation on the courts, in addition to its many other advantages. Its success has depended upon the deference given to arbitrators by the courts; the wisdom, integrity, and commitment of individual

arbitrators to fairness; and the availability of high quality templates for arbitration contracts, procedures, and rules.

Statutes allowing the use of arbitration to resolve medical malpractice claims were introduced in a number of American states after the medical malpractice crisis of the 1970s, when a drastic increase in claims and steep awards led to an outcry from the medical profession over escalating malpractice insurance premiums. However, despite its subsequent success in the US, arbitration has never been implemented as an option for resolving medical malpractice disputes in Canada.

There are two fundamental hurdles in the way of arbitration of medical malpractice claims in Canada that are related to the prevailing model for the management of medical malpractice claims and an interesting feature of our universal healthcare system.

The first has to do with the fact that the Canadian Medical Protective Association (CMPA) provides medical liability protection to nearly all practicing physicians in Canada and therefore assists with virtually all Canadian medical malpractice cases. The only model of formal malpractice dispute settlement used by the CMPA is litigation^{1,2}. The scope of the CMPA's activities was most recently captured in the 2015 annual report², which cited 862 newly opened legal actions in that year with no instances of mediation or arbitration.

The other main hurdle to arbitration has to do with the absence of patient-physician contracts in Canada. Although many Canadians have some form of private insurance that covers "extras" and uninsured health benefits, the gov-

ernment covers basic healthcare expenses for all Canadians. In the Canadian model of universal healthcare, citizens do not have any form of written contractual agreement with their physicians or healthcare facilities, and as a result there is no obvious place to house a pre-dispute arbitration clause. This is a significant obstacle and would require new national or provincial standards, not only for an arbitration clause, but for a contract in which an arbitration clause could be embedded. To my knowledge this has never before been contemplated and could have the unintended side effect of promoting a consumer-style relationship between physicians and their patients that does not currently prevail in Canada. Post-dispute arbitration contracts might be put forward as an alternative, but would be fraught by inconsistencies and difficulty with enforcement.

Another important point about arbitration contracts is that they cannot act like or be perceived to be adhesion contracts. That is, they cannot represent a "take it or leave it" arrangement, as Canadian patients do not (with a few exceptions) have other choices for accessing healthcare. As such, treatment of a patient cannot be conditional upon the signing of an arbitration contract. Otherwise, under Canadian arbitration law, as under the Federal Arbitration Act in the US, the contract would be viewed as unconscionable and therefore unenforceable. Since signing such a contract would therefore have to be optional, arbitration would have to be introduced as an alternative to litigation rather than as an across-the-board replacement.

The idea of arbitration for medical malpractice claims and the related topic of patient-physician contracts has the

makings of a lively national debate and there are numerous details that would need to be sorted out. Bringing these issues forward for open discussion by all stakeholders would have the advantage of broadly informing the public about arbitration itself, along with details about the contract that would be required; two issues that arguably have not been well addressed in the US ³. This could be a time of opportunity to develop "from scratch" a modern and relevant contract that enhances Canadian healthcare in general, in addition to providing an alternative method for managing medical malpractice disputes.

ADVANTAGES OF ARBITRATION

The general advantages of arbitration over litigation have already been noted to include speed, less expense, finality, privacy, the role of parties in determining the membership and content expertise of their own tribunal, and the allowance for flexibility and creativity in the process itself and the determination of any awards. For medical malpractice disputes specifically, the advantage of confidentiality for all physicians involved would lead to less undue damage to relationships among them and to their reputations. Arbitration would also be less stressful and less likely to negatively impact all parties in the long term. In short, Ms. Doe could have gotten exactly what she wanted and lived her final months in relative peace.

It has been argued that litigation plays an essential role in medical malpractice because providing one's day in court is the only way to satisfy a patient's need to be heard ⁴ or to punish a wrongdoing physician, but these assumptions are not necessarily accurate. First, arbitration can satisfy both needs, albeit in a less public venue. Second, public denigration of the physician is not necessarily what most patients want. There has been an increasing awareness of patients' need for apology, validation, explanation, acknowledgement of their pain, and the assurance that faulty systems, unsafe processes, poor communication skills, broken equipment, *etc.* will be fixed so that what happened to them will not happen to

someone else ^{5,6}. It is therefore short-sighted to view the success or failure of litigation in terms of the size of the monetary award alone. Indeed, outcomes that are important to patients may be better achieved with arbitration because of the more private, less formal environment, along with the involvement of arbitrators who have the content expertise to craft creative solutions; and the ability of parties to step out and mediate their own settlement in the middle of an arbitration. While she was alive, Ms. Doe's needs were not met at all by litigation. In addition, serious damage occurred to the physicians involved, and no improvement of any faulty systems was evident. There were no winners in the case of Ms. Doe.

Arbitration's advantage of speed also holds special importance in the context of medical malpractice and this is again highlighted by Ms. Doe's case. The plaintiff may be sick, disabled, or dying, and lack the energy, will, life expectancy, or resources to spend their days engaged in an adversarial process.

A speedier process also means less expense for the patient, moderating the financial advantage currently held by the defendant due to the fact that physicians' legal fees are entirely paid for by the CMPA. The CMPA is a not for profit mutual defense organization whose revenue derives from members' annual fees, which in turn are calculated based on an actuarial method that predicts the year's liability costs. As such, the CMPA's costs are recovered through annual fees, which are the same for all practitioners within a given category based on their type of work and region of practice within Canada. Thus, a physician who has been sued does not pay any additional fees to the CMPA regardless of the length of the dispute or its outcome. In addition, most physicians have a significant portion of their annual CMPA dues reimbursed by their provincial medical association. So an individual physician who has been sued does not experience any financial burden directly related to legal fees incurred during their case. (This observation is not intended to devalue the income and nonmonetary losses suffered by a phy-

sician who has been sued.)

Even so, a process that is less expensive than litigation overall should still be attractive to Canadian physicians as a group because it would eventually result in decreased annual dues for all members.

In the 2013 CMPA Annual Report the President and CEO stated, "The Association exists to protect the professional integrity of physicians and to promote safer medical care" ¹. In the fictional case of Ms. Doe, arbitration could arguably have facilitated not only the protection of Dr. Walken's professional integrity but also her mental health and career longevity. Malpractice litigation is stressful for all parties and can have a lasting effect on a physician's practice, even with the high level of support currently provided to physicians by the CMPA. Even just the fear of litigation can result in physicians limiting their practice to less risky areas - witness the current shortage of obstetricians ⁷. It can also lead to overly risk averse behaviors such as practicing defensive medicine ⁸ and mental health problems for the physician ⁹.

To the point of promoting safer medical care, arbitration introduces no disadvantages. The CMPA's efforts at promoting safer medical care are carried out primarily through educational activities such as risk management advice and the publication of instructive case reports and aggregate data - valuable activities that could continue unhindered, or even enriched by the inclusion of arbitrated cases. For example, a compilation of risk factors including those that were involved in Ms. Doe's case could be highly instructive to other physicians. The confidentiality of the arbitration process does not necessarily rule out the sharing of de-identified data for this purpose.

It is essential to include unbiased medical expertise in medical malpractice disputes. However, many doctors who have served as expert witnesses in litigation have found the experience dissatisfying and limited in its potential to systematically examine an incident.

Doctors know that most medical errors are multifactorial and complex. They are also inclined to care about the plight of a patient, collaborate with each other professionally, and work toward continuous improvements of the healthcare system. As such, the experiences of testifying against a suffering patient or against another physician can cause frustration, doubt, and regret. Furthermore, even experienced judges may find it difficult to reconcile complex and contradictory expert testimony.

Arbitration addresses all of these issues. A three-member arbitration panel can ensure the inclusion of medical as well as the necessary legal and procedural expertise. The flexible process can allow a meaningful change in the way that medical evidence is presented, for example through the use of "hot tubbing" of the expert witnesses. This term refers to concurrent evidence given by two or more expert witnesses with the chair of the arbitration panel leading the questioning and discussion¹⁰. This is a more natural way for medical experts to get at (and even agree on) the truth. Other advantages of hot tubbing are that the medical information can be presented all at once, rather than on different days of a trial, and the arbitrators can question both experts at the same time. Hot tubbing allows a conversation among experts to occur, with the possibility that areas of agreement will be found and areas of uncertainty acknowledged. Areas of disagreement can be explored face-to-face and clarifications can be provided instantly. Similar to how they problem-solve normally, the experts can review the literature thoroughly (*i.e.* not just those papers that support their initial position), weigh the

available information, and may even reach a consensus. These features would be highly attractive to doctors and would likely increase their trust in the system since they would feel less like they were being forced into an aggressive, adversarial relationship with each other, the defendant, and the patient.


Medical practice is full of unknowns, best estimates, art in place of science, and unique contexts that have an influence on decision-making and performance. These factors are not easy to discuss in an open adversarial system, but lend themselves well to a confidential hot tubbing discussion where there is medical expertise among the arbitrators. In this context one can envision the two expert witnesses being candid in their testimony, feeling satisfied with the process and result, more likely to provide expert testimony in the future, and less likely to feel they have acted contrary to their code of ethics, face, and values.

Finally, the advantage that would likely be embraced by doctors and patients alike is the ability of the parties to take a time-out during an arbitration to mediate their own settlement. In the case of Ms. Doe, this might have happened very early on and she might have gotten exactly what she needed from Dr. Walken (and *vice versa*); even settled without a financial award. Stepping out for mediation would provide a venue for the kinds of conversations that are known to be important to patients, such as how and why the problem happened, what has occurred to make sure it doesn't happen again, the provision of emotional support, and an apology¹¹.

A time-out from arbitration to mediate would also provide the defendant physician with an opportunity to communicate concern, preserve face, and deal with his or her own feelings about what happened. In court, the doctor is forced to stop being an advocate for his or her patient, and the two parties in essence become enemies. This represents an obligatory about-face that challenges the physician's values, code of ethics, face management, and role as patient advocate. During mediation it is no longer necessary.

It is important to add here that given the type of communication that occurs in mediation, its sensitivity and its need for protection, no member of the arbitration panel should act as mediator in this instance. Rather, a separate unbiased mediator should be engaged to be on call for this purpose. Given the major impact this step could have, the option of stepping out for mediation should be well publicized, explicitly entrenched in the arbitration clause, and encouraged by arbitrators.

CONCLUSION

The obstacles to the introduction of arbitration as an option for medical malpractice disputes in Canada are primarily technical in nature and can be resolved. Numerous benefits to patients and physicians have been discussed, most importantly the preservation of the physician's role of patient advocate and a more compassionate environment for the patient. As such, arbitration has the potential to enhance the relationship between Canadian physicians and their patients, improve the quality and safety of patient care, and even reduce overall costs to the medical system. 

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THE APPLICABILITY OF COLLABORATIVE LAW OUTSIDE THE FAMILY LAW CONTEXT

INTRODUCTION

Clients traditionally think of their lawyers as 'litigation counsel', retained to represent them in a dispute. However, due to the overwhelmingly high proportion of disputes that are resolved without a trial, lawyers in practice have become 'settlement counsel'. While negotiation, mediation, and arbitration are the three most commonly cited forms of alternative dispute resolution, they are not the only options. Collaborative law has been increasing in popularity since its inception in the 1990s. A form of negotiation, collaborative law does not contemplate eventual litigation and is therefore not structured so as to prepare the parties and their counsel for a possible trial. Collaborative law was developed specifically for family law and has grown in popularity almost exclusively within that context, but collaborative theories and techniques have potential for broader applicability. This essay will explore the emergence of collaborative law and its potential applicability to dispute resolution outside of the family law context. In particular, this essay will argue that collaborative law is germane and suitable in the context of disputes between parties who share an interest in maintaining an ongoing relationship.

ORIGINS AND EMERGENCE OF COLLABORATIVE LAW

Collaborative law can be traced to Stuart Webb, a family lawyer in Minneapolis. In the 1980s, Webb considered ending his legal career. He began to feel discouraged and pessimistic by what he saw as the harmful and damaging reality of family law practice. Before taking this drastic step, Webb endeavored in 1990 to try a new form of practice

wherein he worked exclusively with clients that were active participants in settlement negotiations. In cases where negotiations were unsuccessful, Webb would withdraw from the case and the clients would retain new counsel for the litigation process.¹

Webb handled ninety-nine cases in the first two years of his collaborative practice, all but four of which were successfully settled.² Shortly thereafter, Webb established the Collaborative Law Institute of Minnesota, which was and is aimed at reaching "a settlement [...] process [that] is client-driven" wherein "each person's goals are identified and disagreements are resolved using an interest-based, problem solving approach".³

Collaborative law began to rise in popularity almost immediately. By 2009, the Uniform Law Commission⁴ promulgated the *Uniform Collaborative Law Rules/Act*.⁵ This legislation has been adopted in eleven states and introduced in twenty-one others, indicating widespread acceptance of this relatively new mode of practice.⁶ Collaborative law has spread beyond the United States. The International Academy of Collaborative Professionals is a group of specialists that works to promote the growth of collaborative conflict resolution globally.⁷ In Canada, the practice of collaborative law has spread to every province.⁸

Across various jurisdictions, collaborative law is consistently characterized by a unique agreement entered into by clients and counsel. A typical retainer agreement will be based on central principles such as a commitment to "good-



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faith negotiations focused on settlement, without court intervention or even the threat of litigation, in which the parties assume the highest fiduciary duties to one another" and "full, honest and open disclosure of all potentially relevant information, whether the other side requests it or not".⁹ The most indispensable aspect of the arrangement is the agreement that if the dispute moves to litigation, all lawyers will be immediately terminated and the parties will be required to retain new litigation counsel. This establishes a commitment to settlement at the outset that enables parties to focus on resolution without the underlying threat of litigation. William H. Schwab argues that this provision diminishes the value of each party's BATNA¹⁰ and discourages "arguing in the shadow of the law".¹¹ Instead of aiming for the 'justice' that might have been served at trial, parties have

settlement as their primary goal.

COLLABORATIVE LAW AND NEGOTIATION

The reason that parties agree to negotiate a dispute is to achieve a better resolution than could otherwise be achieved. In traditional negotiation, the parties have litigation in mind as an alternative to a negotiated settlement, which plays a role in the determination of their respective BATNAs. In collaborative law, the parties have made litigation an inefficient and undesirable option by agreeing that in order to litigate, they would have to retain new counsel. In the context of collaborative negotiation where the underlying threat of litigation is effectively eliminated, the values of alternative outcomes are minimized and the joint interest in reaching a settlement is maximized.

This makes collaborative law distinct from classical negotiation, which involves an understanding of "negotiations as contests over a limited or fixed amount of some mutually desired benefit such that one person's gain is another person's loss".¹² In such contexts, counsel is more likely to adopt competitive tactics. This is called "value-claiming". Integrative approaches, in contrast, frame negotiations as "interactions with *win-win* potential" wherein parties adopt strategies for expanding mutual gain.¹³ This is called "value-creating".

In classical negotiation, counsel is not privy to how cooperative or trustworthy the other party may be, which encourages the use of competitive strategies. When someone perceives negative behavior from another person, they tend to over-attribute that behavior to something internal about the actor, instead of considering possible external causes, fostering inaccurate assessments about that person's trustworthiness.¹⁴ Allred argues that as a result, negotiators tend to assert competitive strategies more often than is necessary, which can transform what would otherwise be a cooperative relationship, characterized by integrative practices, into a competitive relationship.¹⁵

In addition to reaching a settlement, "effective negotiators seek to maintain, and even enhance, the relationship with the other party".¹⁶ Allred submits that value-claiming approaches are inconsistent with maintaining relationships, while "little tension exists between creating value" and the maintenance of ongoing relationships.¹⁷ This essay will therefore continue on the assumption that a value-creating approach is preferable to a value-claiming approach.

Collaborative dispute resolution is distinct from a traditional negotiation because prior to negotiations, parties have created a circumstance demonstrating that, at least to some extent, they are interested in maintaining an ongoing relationship. This signals willingness to cooperate, allowing negotiations to begin with a value-creating approach. In this context, collaborative law is based heavily on interest-based negotiation. Counsel does not argue extreme or contrary positions. Rather, the role of the lawyer is to guide clients through the negotiation by actively listening to their suggested outcomes and discerning the most important interests at stake.¹⁸ Both parties are active participants in the negotiation process and in creating options for settlement.

Before initial negotiations, the involved lawyers have a consultation without their clients present. At this meeting, counsel discusses agenda items with their respective clients' interests in mind. The lawyers discuss the interests that they have discerned by actively listening to their clients and agree upon a structure for the impending negotiations. The purpose of setting this schedule is to ensure that the parties do not retreat to positional bargaining, but rather maintain a focused and solution-driven process.¹⁹

All subsequent negotiations include each party and its lawyer. These "four-way meetings" appear to eliminate consistent characteristics of traditional bargaining such as "arm's length communication" and the "exclusion of clients from direct participation".²⁰ Additionally, collaborative negotiations are distinct from traditional negotiation,


where counsel has to wait for a legal triggering event such as a pre-trial conference in order for negotiations to commence, because they can begin immediately after the initial client-counsel meetings.²¹

In traditional, positional bargaining, power can be used as a competitive tactic.²² In contrast, "one of the major advantages of [collaborative family law] is the power created by two lawyers who understand and engage in the collaborative negotiation process" where both lawyers share an expectation that all relevant information will be disclosed.²³ In such a setting, parties are committed to and focused on problem solving, which removes what Allred would call the tension between effective collaboration and value-claiming advocacy. The relationship between lawyers in a collaborative negotiation is unique because of a mutual understanding of preference for a value-creating approach from the start. In collaborative law theory, power is not used as a competitive tactic. Instead, mutual power is created by the shared intentions of the parties to cooperate.

An empirical study found "widespread agreement that [the use of collaborative family law] reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals".²⁴ This is because of the information gathering that takes place before negotiations begin. As a result of the initial meetings between counsel, there is a clearer sense than in traditional negotiations of the interests of each party. There is also awareness amongst the lawyers that "they are responsible for modelling cooperative behaviour to their clients".²⁵

CASE STUDY: HOW COLLABORATIVE LAW TECHNIQUES MIGHT BE APPLIED IN THE CONTEXT OF A LABOUR LAW DISPUTE

In 2005 there was a labour dispute between the Canadian Broadcasting Company (CBC) and the Canadian Media Guild (CMG), a union representing CBC employees. The parties were in negotiations over contract em-

A portrait of Judith Da Silva, a woman with long, dark, curly hair, smiling. She is wearing a dark top. The background is a light, out-of-focus interior.

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ployment and work adjustment, which can each be characterized as a resource-based issue.²⁶

In the context of these negotiations, CBC decided to lock out its employees. CMG responded with an open letter indicting the lockout, calling it an "aggressive" and "un-Canadian" decision.²⁷ CMG perceived itself as being unfairly treated, which transformed a resource-based dispute into a personal, values-based dispute. Reconciliation of values-based issues is more cumbersome because parties become more adversarial and resistant to settlement.²⁸ According to Richler, the lockout created mistrust and a relationship where the "adversarial, zero-sum strategy of value claiming was destined to prevail" over a value-creating approach.²⁹

Six weeks after the lockout began, CMG made an aggressive offer allowing no concession on either of the two central resource-based issues in dispute. CBC responded with an antagonistic counter-offer that increased the number of contract employees by 225 per cent.³⁰ Both parties had adopted what Alfredson and Cungu would call value-claiming strategies characterized by competitive tactics.

External factors ultimately forced CBC to agree to a settlement that was favourable to CMG. There was mounting political pressure on CBC to "keep the country connected" and it would face massive potential revenue losses if the dispute was not resolved before the start of the National Hockey League season.^{31, 32} Though CBC ultimately made major concessions on the central resource-based issues, CMG employees were unable to work during the lockout (which lasted nearly two months), making the dispute costly and inefficient for both parties.³³ CBC adopted a value-claiming strategy in deciding to lockout its employees that ultimately undermined its own interests and diminished value for both parties.

In imposing the lockout, CBC was using the power it held as a strong, managerial body with resources. The structural approach to negotiation em-

phasizes such "'hard' aspects of power".³⁴ In responding with its open letter of indictment, CMG strategically used the media as an alternative source of power. Creative use of such alternatives explains why "victory in negotiations does not always go to the party who is ostensibly more powerful".³⁵ As discussed above, use of power as a competitive tactic is characteristic of adversarial, value-claiming negotiations. The decision by CBC to lock out its employees created mistrust, in light of which "it is not surprising that potential value would get left behind or possibly destroyed".³⁶ Richler argues that had CBC not locked out its employees, CMG would not have felt as affronted and would have therefore been more responsive to CBC's interests.

Would the outcome have been different if CBC and CMG had retained collaborative lawyers to guide them through their dispute? If the parties had contractually agreed to settle the dispute, effectively eliminating the underlying threat of litigation, the negotiations might have been more consistent with a value-creating approach.

In any dispute, a party is likely to perceive the other as an adversary and may be suspicious of the other before negotiations commence due to the nature of the conflict that is forcing the parties together. Distrust can lead parties to be defensive at the outset, which in turn can be perceived as dishonesty or an unwillingness to cooperate, leading to self-fulfilling prophecies where potential value is not realized. By signing a collaborative agreement, each party signals to the other that it has a strong incentive to settle. In such a setting, where pre-existing skepticisms have been somewhat neutralized, negotiations are more likely to commence in a proactive, communicative, value-creating environment.

In collaborative negotiations, the focus is on the issues instead of the people. CMG's President used an open letter to personally indict the CBC President for the decision to lock out employees.³⁷ If the parties had agreed to collaborate, counsel would have had a consultation

where the respective interests of each party would have been discussed. The negotiations would have been conducted according to a problem-solving agenda created based on these interests, minimizing opportunities for hostility and the creation of mistrust. The collaborative lawyers would have focused on the mutual interests of the parties, ensuring that CBC and CMG would have been acutely aware during negotiations of their shared interest in the longevity of CBC.

Richler argues that had the parties focused on their mutual interest in the long-term welfare of CBC, CBC could have created value by raising salaries, which would have induced a cooperative environment wherein CMG would have reciprocated and made concessions in management's favour.³⁸ Just as in the family law setting where disputants are often mutually interested in preserving ongoing personal relationships, parties in the labour context are often interested in maintaining fruitful professional relationships. A collaborative negotiation might have encouraged CBC and CMG to adopt integrative approaches focused on an efficient resolution of the resource-based issues.

The focus on the open letter published by the CMG President highlights the importance of psychological and emotional interests in a negotiation.³⁹ Richler argues that CMG's perception of the lockout and their emotionally charged response exacerbated the conflict and led the parties to a temporary impasse.⁴⁰ Had collaborative lawyering facilitated honest communication between the parties about the possibility of a lockout in advance of its imposition, CBC may have been made more aware of the emotive weight that would be given to a lockout by CMG, and may have therefore been better able to evaluate whether the lockout was in its own best long-term interests.

Had the parties agreed to collaborative negotiations, their respective counsel would have been able to guide them with knowledge of their particular emotional concerns. CBC may have been able to intuit that a lockout would be taken as

an affront to CMG, but CBC still may have benefitted from having collaborative counsel remind it that injuring the psychological interests of CMG would ultimately undermine its own interests by forcing the parties to revert to positional bargaining. Collaborative law may therefore be better able to address the emotional and psychological interests of parties.

Richler acknowledges that an integrative approach in the dispute between CBC and CMG would not have necessarily lead to an outcome more favourable to CBC, but he argues that averting the lockout would have allowed CMG to perceive fairer treatment. On that basis, he suggests that the conflict would not have necessarily morphed from being about resource-based issues into an "intractable matter of principle".⁴¹ Retaining collaborative lawyers would not have guaranteed a more expeditious resolution of the dispute. However, it would necessarily be the case that the parties would have commenced negotiations in agreement about their joint desire to settle the dispute, and it would necessarily be the case that the parties would have been made aware of each other's most important interests. If the parties had begun with a value-claiming approach and been able to avoid the lockout, the dispute may have been settled with an outcome more favourable to all.

PRACTICAL BARRIERS TO THE APPLICATION OF COLLABORATIVE LAW OUTSIDE OF THE FAMILY LAW CONTEXT

The thesis of Richler's article is that an integrative and interest-based approach to negotiation is superior to a competitive approach. It follows that collaborative law, which is more compatible with such an integrative approach, is preferable to traditional negotiation. Despite its theoretical advantages, collaborative law in practice is rarely applied outside of the family law context.

McMurchie argues that in "commercial settings, preserving future working relationships" may be an important interest of parties, and that collaborative law is better able to address such interests

because it creates an environment of cooperation between parties to achieve a settlement, instead of constructing an adversarial relationship where one side is seen as the 'winner'.⁴² Collaborative law allows clients to participate throughout the process while recognizing that settlement is unlikely unless the important interests and concerns of each party are addressed.⁴³

There are three predominant factors that explain why collaborative negotiations have been particularly prevalent and effective in the family law arena. The first is the common resources between divorcing parties, who share an interest in "reducing transaction costs, because there is a finite 'marital pot' of assets" from which each will pay its respective counsel. Eliminating trial means eliminating the most costly aspect of a traditional dispute.⁴⁴ While it is impossible to make generalizations about costs because of the uniqueness of every case, it follows that the elimination of "procedural steps, court disbursements and the ritual of anachronistic negotiation" reduces costs for clients.⁴⁵ Distinct from some areas of business law, family disputants do not have a budget for legal disputes nor can their expenditures be deducted from their income.⁴⁶

The second factor is that family law disputes often have somewhat predictable results. In many jurisdictions, there are well-established guidelines with respect to property division and support payments that create ranges of likely outcomes, thereby limiting the scope of negotiations. This is distinct from cases where large damages awards may be possible or the possible recovery of legal fees can incentivize litigation.⁴⁷ Divorcing disputants are also unlikely to want a trial for the purpose of setting an important precedent or challenging an area of law. Similarly, divorcing parties are unlikely to have any desire to establish a reputation as being litigious or aggressive, which is a possible tactic in commercial venues.

The third factor is the unique culture of the family law bar. Hoffman explains that the family law bar is particularly "tightly knit" and practitioners tend to

work together repeatedly.⁴⁸ Collaboration is fostered in the collegial environment. Family law is highly emotional and lawyers do not enjoy the "roller coaster of emotions that is exacerbated by an adversarial system".⁴⁹ Furthermore, it is typical for clients in a family law dispute to change counsel in the midst of a case. Commercial clients tend to have long-term relationships with their lawyers, so having to retain a new lawyer to litigate an unsettled matter could be more undesirable and/or prohibitively expensive. In contrast to business lawyers who have incentive to retain loyalty and billings from clients, family lawyers do not depend on repeat clients.⁵⁰

Hoffman acknowledges that many of these factors apply outside of family law. Disputants in general are interested in economic efficiency, prefer to avoid trial, and there are many tightly knit bars, especially in specialty areas.⁵¹ However, the use of collaborative law has not spread in non-family law areas. Hoffman argues that "the answer to this mystery can be found [...] in the culture and sociology of litigation practice".⁵² There is reverence to the trial as the highest form of 'real' legal work. Additionally, within law firms, status flows from revenue production and "litigation is often a primary engine for producing revenue".⁵³ Law firms, as rational actors, would be unwilling to refer clients to other firms for the most lucrative part of resolving a dispute. In addition to immediate lost revenues, such a referral would raise questions about where that client's future loyalties might lie. Further, commercial lawyers are not typically faced with the undesirable emotional aspects of a divorce case.

Writing a decade later, Heavin and Keet highlight the same cultural differences between family lawyers and business litigators. They stress that while lawyers drove the spread of collaborative family law, lawyers will not do the same in other contexts because the "economic incentives of law firms do not encourage adoption of [collaborative law] techniques in business disputes".⁵⁴ It follows that any increased adoption of collaborative law in non-family con-

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texts would have to be driven by clients themselves.

While business lawyers resist collaborative law for fear of losing clients at the most lucrative moments of their disputes, there are reasons why clients themselves may also be uncomfortable with collaborative law. When clients retain collaborative lawyers, they bind themselves to potentially incurring the additional costs associated with retaining new counsel if the negotiations fail, creating a risk factor. The benefit of this 'disqualification clause' is that it removes the threat of litigation, thereby encouraging parties to disclose information and facilitating good faith negotiations. Collaborative law is only worthwhile for clients when they predict that their dispute can be settled without litigation or the threat of litigation, such that the benefit outweighs the risk of additional cost.⁵⁵ Therefore, if parties believe that their dispute cannot be settled as such, there is an economic disincentive to electing collaborative negotiation.

POTENTIAL FOR COLLABORATIVE LAW IN DISPUTES CHARACTERIZED BY A JOINT INTEREST IN THE MAINTENANCE OF AN ONGOING RELATIONSHIP

Family law litigants typically have a personal relationship. Even if there is no longer strong trust between the parties, they are each more likely to be able to rely on the other party's predictability in assessing whether the chance of settlement is high enough to outweigh the diminished risk of having to retain new counsel.⁵⁶ Additionally, family litigants typically have a high incentive to maintain cordiality for the sake of a shared family.

The opposite is true outside of family law. In many cases, such as tort cases, parties are strangers and do not have a joint interest in an ongoing relationship, nor do they have any level of trust for one another. By contrast, the relationship between such parties is predicated only on an adversarial misfortune. Without any trust whatsoever, it is nearly impossible to predict a fair settlement as the outcome of negotiations, such

that the risk associated with the disqualification clause makes collaborative law an unattractive option. This may explain why collaborative law has not flourished in commercial litigation.

However, this cannot explain why collaborative law has not flourished in commercial cases where the litigants do have a joint interest in maintaining collegiality. In labour disputes, such as that between CBC and CMG discussed above, the disputants do have an ongoing relationship. Even if there is negligible trust between the disputants, each party will have some ability to predict the other's behaviour. The employer or manager and the employees or union will both have a shared interest in the longevity of the business of the employer and in maintaining cordiality. Hoffman would argue that this would make collaborative law a more appealing option for such parties. As argued above, agreeing to collaborate would also signal to the other party a willingness to negotiate in good faith and would allow negotiations to begin with decreased suspicion and guardedness.

Franchisees and franchisors in commercial disputes, which would comparably have a joint interest in the continued success of the brand and maintenance of a viable business relationship, might similarly benefit from the use of collaborative law. Both parties might prefer to avoid litigation in order to avoid negative publicity and the production of materials.⁵⁷ Ben Hanuka, writing specifically about the potential benefits of arbitration as a means of resolving specialized franchise disputes, argues that such disputants should not default to a trial, but should rather consider forming a unique adjudicative process tailored to the particular case and the parties involved.⁵⁸ The use of collaborative law may be a worthwhile option for such litigants. This would ensure that each party's interest in maintaining confidentiality could be achieved and could minimize costs. Even where collaborative negotiations do not lead to a global settlement, they can lead to settlement of particular issues, thereby narrowing the issues that do become publicly adjudicated.

Collaborative law may also be attractive to parties in the context of a time-limited dispute. In the CBC and CMG example, external factors, such as the start of the National Hockey League season, forced CBC to make concessions in order to settle quickly, indicating that resolution was a more efficient option than continuing the lockout and eventually litigating the dispute. Where parties know that they will not be able to negotiate indefinitely and therefore know that they will *never* be able to litigate, the risks associated with terminating settlement counsel in the event of litigation will be virtually eliminated, thus minimizing the potential costs associated with collaborative law. Collaborative law might therefore be an attractive option in labour disputes that are inherently time sensitive.

Even in cases where litigants do not have an ongoing relationship meaningful enough to incentivize entering into a collaborative agreement with a disqualification clause, parties may consider retaining collaborative counsel to work contemporaneously with their litigation counsel. Collaborative counsel would be hired for the express purpose of negotiating a settlement without reference to and unaffiliated from any ongoing adversarial litigation. Collaborative counsel may be able to aide parties in settling particular issues, thereby narrowing the outstanding issues to be resolved in the traditional trial process. Even in the shadow of a trial, collaborative law has the potential to benefit litigants by eliminating or minimizing the need to resort to the long and arduous litigation process.

So why has collaborative law failed to gain a foothold in the context of legal disputes between parties with ongoing business relationships, such as in labour and franchise disputes? Collaborative law may be attractive to potential clients with a joint interest in an ongoing professional relationship, but this does not eliminate the disincentives for lawyers to encourage the use of collaborative law. A lawyer who represents a major employer, union, or franchise has an enduring interest in maintaining her/his relationship with that client, and will

not jeopardize any existing loyalties. The economic disincentives of collaborative law therefore inhibit lawyers from furthering its proliferation.

It follows that, for as long as existing hourly-fee structures continue to dominate in law firms, clients will have to advance the spread of collaborative negotiation by proactively requesting and demanding its use. Collaborative law has the potential to benefit all disputants who have a shared interest in a continuing relationship. In addition to employers/employees and franchisors/franchisees, this can include commercial and residential neighbors

involved in nuisance disputes, landlords and tenants who share an interest in continued tenancy and any other commercial parties in the context of a joint venture dispute.

CONCLUSION

As stated at the outset of this essay, almost every litigator has effectively become 'settlement counsel' because of exceptionally high settlement rates. The vast majority of commenced actions will not result in a trial, making the competitive strategies associated with traditional negotiation, which are based on posturing for an eventual trial, outdated and no longer in the best in-

terests of clients. Collaborative law has been widely adopted as a method for resolving family law disputes across the world. It encourages a value-creating approach that is more conducive to maintaining cordial relationships, minimizing costs, and addressing the emotional interests of parties. While not practicable in every instance, there is potential for the benefits of collaborative law to be extended to disputants in contexts outside of family law.

Collaborative law is "not intended to replace traditional approaches, but rather to add a creative choice to the menu of options available to clients".⁵⁹ Consum-

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ers of legal services ought to be made aware of alternative options for resolving their disputes so that they can obtain the legal advice and guid-

ance best suited to their needs. However, as long as the practice of traditional negotiation is in the best interests of lawyers, there will be resistance

to change. In order to obtain the benefits of collaborative law, clients will have to create a demand that legal professionals cannot ignore. ☺

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- 38 Richler, *supra* note 26 at 13.
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- 55 *Ibid* at 3-4.
- 56 Hoffman, *supra* note 44 at 5.
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NADAP: AN ADR SYSTEM IN THE CANADIAN AUTOMOBILE INDUSTRY

The significant costs imposed by litigation in Canadian jurisdictions, both in terms of time and resources, is a constant theme and lament heard from the bench, lawyers, and their clients. Parties will therefore aim to structure their relationship so that future disputes are resolved within the forum that provides the greatest level of deterrence against undesirable conduct, and at the lowest cost. Quite apart from broader concerns of delay and legal costs, litigation in the franchise and distributor contexts possesses its own unique risks and disincentives.

A dispute between a franchisor and one of its franchisees may implicate heightened concerns over trade secrets, proprietary business information and in general the effect that litigation may have on the franchisor's system and brand as a whole. In the early 1990s the Canadian automobile industry recognized these salient facts, and embarked upon the negotiation of a binding arbitration program to govern disputes between auto manufacturers and their respective dealers. The result was the National Automobile Dealer Arbitration Program ("NADAP"). While not without its weaknesses, NADAP provides an example of the success of alternative dispute resolution in a discrete industry context. When situated within recent theoretical work on the economics of arbitration, the relative benefits and motivations of the actors involved are placed in sharper focus. Moreover, it is contended that NADAP embodies a model that may constructively be applied to other franchise/distribution systems. The following paper will provide a brief outline of the origins of NADAP, its structure, and several issues of interest that have arisen in arbitrations.

Lastly, the question of how NADAP works in practice, as revealed through available statistics, will be examined.

A VOLUNTARY FRAMEWORK

In short, NADAP provides a national arbitration forum, governed by the NADAP Rules (as described below), for the resolution of disputes between vehicle manufacturers and their respective dealers. In October, 1996, the Canadian Automobile Dealers Association ("CADA"), the Canadian Vehicle Manufacturers Association ("CVMA") and Global Automakers of Canada ("GAC") agreed to be bound by the Rules of NADAP. The Rules were the result of an extensive four year negotiation between representatives of CADA and the manufacturer bodies.

When discussing the instigation of NADAP, the motivation behind pursuing this ADR model may be scrutinized. Contracting parties can choose, before any disputes arise, whether to resolve all or a subset of their disputes in court or through arbitration. In general, arbitration is seen to possess several advantages, namely the i) speedier pace



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and reduced expense of the proceeding, ii) lessened risk of aberrant damages awards, iii) decreased exposure to class actions, iv) heightened accuracy of outcomes through specialized tribunals, v) stronger protections of confidential information, vi) use of trade practices/rules, and vii) preservation of business relationships.²

Proceeding from the premise that such pre-dispute agreements are designed to minimize the costs to the relationship, Hylton and Drahozal have posited that the most advantageous dispute resolution forum will be that which maximizes the difference between deterrence/governance benefits and dispute resolution costs. Deterrence/governance benefits represent avoided harms (ie. losses from breach of contract) net of avoidance costs (where effective enforcement and relief is not optimal).³

It is largely accepted that arbitration is viewed by contracting parties to possess the advantage of lower dispute resolution costs. Hylton and Drahozal however note that in the franchise context the other side of the ledger, namely deterrence benefits, are of equal if not greater importance to parties when choosing an arbitration forum.⁴ The framework of deterrence/governance benefits and dispute resolution costs is particularly useful in evaluating NADAP. Whether the authors' conclusions in the franchise context hold true in the analogous, yet distinct, auto dealer network scenario, will be touched upon below.⁵

THE APPLICATION OF NADAP

The NADAP Rules themselves, created to govern dispute resolution, were negotiated at arms-length. The manufacturer organizations agreed to request that each of their member companies adopt NADAP, and in fact to date all vehicle manufacturers operating in Canada, except one, have done so. Similarly, CADA undertook to encourage its membership to adopt NADAP and roughly 95% of dealers adopted the program. NADAP will apply only where the individual dealer voluntarily elects to be bound through execution of an Implementation Agreement.

The Rules apply to a "dispute", defined as any disagreement between a manufacturer and a dealer arising under the terms of a Dealer Agreement. This includes termination of a Dealer Agreement, refusal to approve a dealer request to sell, the proposed creation of a new abutting dealer point, and the performance of a Dealer Agreement in good faith (Rule 5).

Conversely, the Rules also delineate those matters which cannot be arbitrated under NADAP, including termination due to the bankruptcy/insolvency of a dealer, disputes between dealers, and "class, multi-party or representative claims." Thus, one of the central supposed motivations to arbitrate identified in the literature, namely to limit class action exposure, is of no explanatory value in the NADAP context. It has been held that the intent of NADAP was to address individualized disputes,

rather than those affecting all dealers within a network.⁶

Similarly, Rule 20(d) specifically carves out claims related to the discontinuance of any or all of a manufacturer's product lines which a dealer was authorized to sell or service.⁷

I) MANAGING THE DEALER

NETWORK AND ENCROACHMENT

On the question of the management of a dealer network, and creation of new dealer locations, the drafters of the Rules displayed a clear intention to set out a code to foster certainty. At common law, the treatment of whether the creation of another dealer location in proximity to an existing dealer will constitute encroachment and a breach of the duty of good faith has been uncertain and fact specific. This is particularly the case where no exclusive territory is granted under an agreement.⁸

Rule 6 sets out particular grounds on which a dealer may challenge the creation of new dealer locations. The Rule acknowledges the exclusive right of the manufacturer to create and relocate dealers, subject to the right of dealers within a certain geographical radius of a proposed dealership to receive notice of the proposal and to lodge an objection.⁹ The challenge is predicated on the type of market in question ("metropolitan" or "non-metropolitan"), and the distance between the existing and proposed dealer locations (the "8km rule"). Where the proposed dealer location is more than 8 km from the dealer, Rule 6 does not apply and the dealer is not entitled to formal notice or a right of challenge.¹⁰ The Rule is also not without its own ambiguity, being susceptible to a

reading that a dealer's right of challenge in a non-metropolitan market is not subject to the 8 km limitation. However, authority on the point has held that it was the intention of the drafters of the Rules to make all dealer challenges subject to the "8 km rule."¹¹

Assuming that the proposed new dealer location is within 8 km of the existing dealer, the latter must then satisfy the arbitrator that it will suffer a "significant loss of sales and profits" if the open point is permitted.¹² The arbitrator will then balance this prejudice against the collective interests of the manufacturer and dealer network.¹³

II) CONTRACTUAL PERFORMANCE AND THE DUTY OF GOOD FAITH

The substantive law that would otherwise pertain to a franchise dispute is similarly mirrored in NADAP. Rule 7 imposes a duty of good faith and fair dealing on both parties in the performance, enforcement etc. of a Dealer Agreement. The NADAP Rules contain a prescient definition of "good faith" which in fact predates, and largely traces, the doctrine's more recent elaboration at common law and under the *Arthur Wishart Act*. As most recently confirmed by the Supreme Court in *Bhasin v. Hrynew*, the duty applies to the performance of contractual rights, and is not independent of the terms of the Dealer Agreement. It may not derogate from, or add to, express contractual rights nor create new, unbargained-for rights and obligations.¹⁴

In addition, the standard codified in the Rules reflects the principal that the duty is a "two way street", and that in evaluating both parties' conduct the arbitra-

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tor should bear in mind the interests of the network as a whole. It is suggested that this is consistent with the decision of Strathy J. (as he then was) in *Fairview Donut Inc.* in upholding the actions of a franchisor in implementing a system-wide policy intended to accrue to the benefit of its franchisees as a collective.¹⁵

III) BREACH AND TERMINATION

A key difference between litigation and arbitration may be their respective implications, absent termination of a dealer agreement, for the continuity of the relationship. A presumption of an ongoing business relationship is generally reduced when litigation is employed.¹⁶ In addition, Hylton and Drahozal note that arbitration is beneficial where a contractual requirement is difficult to specify *ex ante*, and to evaluate *post ante*. What are called "implicit" requirements, such as compliance with expectations that a franchisee devote optimal efforts to local brand promotion or customer service, may be easier to evaluate accurately or to enforce in an arbitration regime than in litigation.¹⁷ Parties are more likely to leave contract provisions vague, opting for relational governance, when they have chosen a dispute resolution forum that is trusted to reach value-maximizing results.¹⁸ This observation carries some weight in the NADAP context. For example, dealer agreements may be necessarily "incomplete" to allow for discretionary decisions taken to develop the network, and brand, over time. Standards with which a dealer must comply may not be articulated until well after a contract has been executed.¹⁹ The question of dealer compliance with dynamic performance and sales standards clauses which may be drafted purposefully broad, or with facility image and branding requirements, may arguably be best adjudicated by a specialized tribunal.

Where a manufacturer relies upon the termination provisions of a dealer agreement, the tribunal will necessarily interpret the termination, and related cure rights, conferred. In the context of NADAP, arbitrators have applied the duty of good faith most strictly to scrutinize a manufacturer's decision to ter-

minate a dealer. In *Barrie Nissan*, an appeal panel upheld an arbitrator's decision to set aside a notice of termination of a dealer.²⁰ The award was heavily fact specific, and held the decision to terminate the applicant had been made hastily and without full knowledge or regard to all the circumstances, including the dealer's efforts to remedy default. Consequently Nissan's decision, although not made in bad faith, was not commercially reasonable or fair to the dealer. The decision illustrates the extent to which a manufacturer's internal *process* will be scrutinized, importing into the duty a notion of "procedural fairness" in corporate decision making.

In the commercial environment, a non-renewal is not an exercise of contractual discretion, and was not modified in *Bhasin* by the duty of good faith. Yet the duty of honesty applies, and in *Bhasin* the defendant's dishonesty was directly connected to the exercise of the non-renewal.²¹ By way of contrast, in *Trillium* the decision to non-renew dealer agreements in the franchise context was evaluated on the basis of the good faith standard.²² Similarly, it has recently been held that the NADAP Rules do not substantively modify a dealer agreement so as to require "cause" on the part of a manufacturer to exercise a non-renewal right. The arbitrator proceeded, however, to address the decision in light of the good faith duty.²³

The problem raised for the NADAP context is that it is often difficult in practice to draw a line between an error/omission and an act of dishonesty. It is likely that *Bhasin* and its progeny will encourage greater scrutiny of dealer communications, and decision-making, leading up to a dealer termination. This will be accompanied by a commensurate increase in the scope, and cost, of discovery and hearings.

A NADAP ROADMAP

The bulk of the NADAP Rules pertain to the procedural structure of the dispute resolution process. As a preliminary step, the parties are required to utilize the manufacturer's dispute resolution process (the "DRP") first, and where available. Upon the emergence

of a dispute and/or failure of a DRP, a mediation must be initiated through a Request for Mediation within 21 days.²⁴ This request is the initiating mechanism for NADAP, and has recently been construed strictly to bar stale disputes.²⁵ The mediation is to be held within 15 days of the appointment of a mediator, and before pleadings. The third, and final, step to the process is the progression of the dispute to binding arbitration, initiated within 15 days of receipt of a notice of failed mediation.

NADAP arbitrations are bifurcated between two procedural routes. "Complex Track" arbitrations (Rule 23) include terminations, disputes involving claims of over \$50,000, claims for interim relief, relief under Rule 6, and in general matters involving substantial evidence or a hearing of more than two days. Practically speaking the vast majority of arbitrations fall within this track. Under this procedure, the arbitration is to be held within 90 days, with full evidentiary hearings and *viva voce* evidence where necessary.²⁶

Rule 46 mandates that hearings are held in private. This traces one of the central tenets of arbitration law.²⁷ Rule 29 stipulates that all documents disclosed in the course of an arbitration are to be kept confidential by the parties, unless disclosure is required by law or on consent. Moreover, this principle precludes granting intervenor status to other affected dealers.²⁸

While an arbitrator is not bound by prior arbitral decisions, a tribunal may adopt the reasoning of any prior NADAP decision or the courts in general.²⁹ In practice, this has resulted in the development of a discrete digest of arbitral authority which is applied in equal measure with common law authorities.

The NADAP Rules provide a private right of appeal to a NADAP appeal panel with respect to Complex Track arbitrations. The disposition of an appeal is binding and final on the parties. Under the Rules, the standard of review is correctness both for questions of fact or law (Rule 102), although there is authority for the proposition that factual findings

are entitled to deference.³⁰

The conduct of NADAP arbitrations is governed by the relevant provincial domestic arbitration statute and the Rules. In the event of an inconsistency, the Rules prevail. Arbitrators may rule on their own jurisdiction and the arbitrability of a matter.

NADAP: THE STATISTICS

One of the central objectives of NADAP was to create a relatively cost effective, and expeditious, framework for dispute resolution. It was recognized that prolonged litigation was not in the best interests of manufacturers nor their dealer networks. To evaluate whether this goal has been met it is necessary to assess how NADAP works in reality, quite apart from its stated aims and Rules-imposed timetables. While by no means exhaustive, the available data suggests that NADAP moves at a brisk pace procedurally, and this efficiency is an effective means to reduce dispute resolution costs.³¹

Of 167 disputes that have proceeded to a NADAP request to mediate or further, 14 have gone to a final arbitration award, with 2 appeals taken. The bulk of decisions have in fact focussed on requests for interim relief or preliminary questions of arbitrability, with approximately 20 awards on interim relief or procedural matters and 5 appeals taken. In fact, 65% of disputes settle at mediation or shortly thereafter.

The speed at which a NADAP dispute may proceed is necessarily party driven. That being said, the specialized arbitrator roster through ADR Chambers possesses the capacity to accommodate the NADAP Rules timelines. The relative speed of the process is a distinguishing feature of NADAP. By way of example, of 7 ongoing disputes at the beginning of 2013, all had been resolved by year end (1 settled by the parties, 3 mediated, 3 arbitrated). The average time that elapses from the filing of a Request to Mediate to the hearing of a mediation is 5 months. If the dispute proceeds to the next stage, the average time from mediation to the release of an arbitral



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award is a mere 4 months.³²

CONCLUSION


Having been in place for roughly 20 years, and accepted on a near-universal basis in the Canadian automotive industry, NADAP may be judged a qualified success. While issues linger with respect to the language of certain Rules, a body of arbitral authority fashioned by an increasingly specialized arbitrator pool has provided a degree of certainty to industry participants. Arbitrators, as selected by the parties, have an incentive to become specialized and to resolve disputes so as to enhance the governance benefits, net dispute resolution costs, to the contracting parties. Even where a forum does not provide an advantage in terms of accuracy, the parties still may prefer arbitration where the reduction in dispute-resolution costs is sufficiently large.³³ In order to maintain its effectiveness, NADAP must retain an experienced pool of arbitrators as well as reduce dispute resolution costs through expeditious procedure.

While the deterrence/governance ben-

efits and dispute resolution costs model is a helpful explanatory tool, certain aspects of NADAP fit uneasily within the framework. For example, where, as in NADAP, the arbitral system in question does not place limits on damages awards, or preclude certain forms of relief, it may be questioned how much weight may be placed on the deterrence benefit of arbitration as opposed to litigation. The NADAP Rules in fact diverge only to a small degree from the substantive law that would otherwise confront the parties in the courts. Second, the explicit/implicit contractual requirements notion of Drahozal et al. regarding the favourability of arbitration cannot explain certain aspects of NADAP. Rather than be confined to murky implicit terms, NADAP in fact codifies and makes explicit the rules surrounding encroachment where statute and common law have been silent, or uncertain.

Lastly, an aspect of the arbitration/litigation dichotomy that cannot be overlooked is the value placed on confidentiality and private hearings by the

parties. It is submitted that this factor, together with the significant reduction in dispute resolution costs as outlined above, most influences participation in NADAP.

In a highly competitive industry, NADAP had proven to be an arbitral program that can provide relatively quick and cost-effective dispute resolution. NADAP enhances the dispute resolution process beyond what may be otherwise obtainable through a standard arbitration clause, imposed by a franchisor. By providing a voluntary system that embraces the entire industry of manufacturers and their dealers, rather than being confined to one particular dealer network, NADAP has arguably assumed greater legitimacy and effectiveness. While obviously shaped by the particular concerns of the automobile industry, the NADAP Rules may provide a useful template for other franchise/distribution systems. In most cases, use of such a program is an effective alternative to recourse to the court system to resolve disputes. 

- 1 Bevan Brooksbank is a lawyer in the Commercial Litigation Group of Borden Ladner Gervais LLP (Toronto). The author wishes to thank Norman Letalik, General Counsel at Volkswagen Group Canada, for his valuable guidance and comments during the drafting of this paper. A version of this article was first published in *Commercial Litigation and Arbitration Review*, published by LexisNexis Canada Inc.
- 2 Christopher R. Drahozal, Stephen J. Ware, "Why Do Businesses Use (or Not Use) Arbitration Clauses?" (2010) 25 Ohio State Journal on Dispute Resolution, No. 2 433-476 at pg 451 ["Arbitration Clauses"]
- 3 Christopher R. Drahozal, Keith N. Hylton, "The Economics of Litigation and Arbitration: An Application to Franchise Contracts." (June, 2003), 32 Journal of Legal Studies, No. 2, 549-584 ["Economics of Litigation and Arbitration"]
- 4 *Ibid.*
- 5 Whether an authorized auto dealer network properly constitutes a franchise system as defined under statute is a question to be left for another article. That being said, such status was conceded in the *Trillium* class proceeding.
- 6 *Stoneline Motors Ltd. v. General Motors of Canada Ltd.*, [2010] O.J. No. 1621 (S.C.J.) per Pepall J. where a reduction of the GM dealer network and discontinuance of the Pontiac line was at issue. See also *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 (S.C.J.) for an extensive treatment of GM's reduction of its dealer network, in the context of a common issues trial. The trial decision is currently under appeal.
- 7 See *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada*, [2000] O.J. No. 1815 (Div. Ct.) reversing [2000] O.J. No. 533 (S.C.J.) with settlement approval reasons at [2004] O.J. No. 1270 (S.C.J.)
- 8 See for example *Shelanu Inc. v. Print Three Franchising*, [2003] O.J. No. 1919 (C.A.), *Country Style Food Services Inc. v. Hotoyan*, [2001] O.J. No. 2889 (S.C.J.), *Katotikidis v. Mr. Submarine Ltd.*, [2002] O.J. No. 1858 (S.C.J.). Franchise agreements typically do not contain exclusive territories due to *Competition Act* concerns.
- 9 Dealer Agreements typically do not grant an exclusive territory, but rather a defined area of responsibility often called a primary marketing area ("PMA").
- 10 *Cowell Imports Inc. v. Jaguar Canada*, (2009) NADAP Nos. 103, 104
- 11 *South London Infiniti Nissan Inc. v. Nissan Canada Inc.*, (2009) NADAP No. 117
- 12 *Leggat Saturn-Saab-Isuzu v. General Motors of Canada Limited*, (2002) NADAP No. 066
- 13 *Downsview Chrysler Plymouth (1964) Limited v. Chrysler Canada Ltd.* (1998) NADAP No. 09
- 14 *Woodbine Chrysler Appeal Reasons* *supra*, at pp 8, 9; *Agribrands Purina Canada*

- Inc. v. Kasamekas*, [2011] O.J. No. 2786 (C.A.) at para 51; *Bhasin v. Hrynew*, 2014 SCC 71
- 15 *Fairview Donut Inc. v. TDL Group Corp.*, [2012] O.J. No. 834 (S.C.J.) affirmed [2012] O.J. No. 5775 (C.A.)
- 16 *Economics of Litigation and Arbitration*, *supra*, at pg 8
- 17 Drahozal et al. posit that explicit contractual terms setting out rules directly regulating *ex ante* incentives will provide for greater ease of enforcement, and minimize the likelihood a court will err and impose higher avoidance costs (such as inadequate or disproportionate damages).
- 18 *Economics of Litigation and Arbitration*, *supra*, at pg 9
- 19 See Gillian Hadfield, "Problematic Relations: Franchising and the Law of Incomplete Contracts," (April 1990) 42 *Stanford Law Review* 927
- 20 *Barrie Nissan Inc. v. Nissan Canada Inc.*, (2013) NADAP No. 148
- 21 *Bhasin* *supra*, at paras 90-103
- 22 *Trillium* *supra*, at para 205
- 23 *Charles Brewis Limited O/A Olympic Honda v. Honda Canada Inc.*, (2014) NADAP No. 155
- 24 The Request is provided to ADR Chambers, which administers NADAP.
- 25 *Downtown Pontiac Buick (1983) Limited v. General Motors of Canada Limited*, (2015) NADAP No. 167.
- 26 Conversely, under the "Fast Track" an arbitral hearing is to be held within 45 days, no provision is made for interim relief, and the matter is usually determined on a documentary record alone.
- 27 See for example Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: Juris, 2011) at pg 216, and authorities cited therein.
- 28 *Big 4 Motors Ltd. v. Daimler Chrysler Canada Inc.*, (2006) NADAP No. 85
- 29 Rule 57 states that an Arbitrator "shall not be bound by these earlier decisions but may adopt or adapt the reasoning from any prior decision or the reasoning from any prior decision of tribunals or courts generally in disposing of the issues raised in an Arbitration[.]"
- 30 See discussion in Appeal Reasons in *Barrie Nissan* *supra*.
- 31 However as noted in *Arbitration Clauses* *supra*, at pg 447, a factor of some importance in addressing dispute resolution cost is the fact that litigation in a court system receives a *de facto* government subsidy, whereas arbitration is by its nature privately funded.
- 32 The author wishes to thank Mr. Alan Stitt at ADR Chambers for assistance in collecting this data.
- 33 *Economics of Litigation and Arbitration*, *supra*, at pg 10

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RES JUDICATA IN ARBITRATION: SETTING THE RECORD STRAIGHT

The Alberta Court of Appeal decision in *Enmax Energy Corporation v. TransAlta Generation Partnership*¹ sets the record straight by confirming that the legal principles of *res judicata* and issue estoppel do as a matter of law apply to commercial arbitrations in Canada.

The lower Court had found that they did not as a matter of course apply to arbitrations under the *Alberta Arbitration Act*, opening the door to parties with ongoing commercial relationships having to re-arbitrate issues that have previously been decided between them. Leave to appeal to the Supreme Court of Canada was denied.²

The appeal was from a decision of the Alberta Court of Queen's Bench issued in 2015 arising out of the Power Purchase Arrangements ("PPAs") in Alberta.³ The PPAs are statutory arrangements created under the *Electric Utilities Act* as the result of a process undertaken by an Independent Assessment Team in the late 1990s to deregulate the electricity industry in Alberta.⁴

The power generated by each unit was auctioned off in August 2000 (followed by a second auction for power that did not sell initially). PPA Buyers acquired the right to purchase electricity from a specified generating unit for a term ranging from three to twenty years, based upon the lesser of the deemed remaining useful life of the generating unit or twenty years. Each PPA is otherwise in substantially the same form and cannot be amended by the parties except in extremely limited circumstances.

The amounts to be paid by a PPA Buyer are made up of numerous payments intended to provide the Owner with, among other things, a reasonable opportunity to recover the fixed costs of generating electricity over the term of the PPA. To achieve this aim, the PPAs provide for a series of calculations to reflect inflation (or deflation as the case may be) in certain costs by reference to various indices published by Statistics Canada. The PPA also provides direction as to how changes in indices will be dealt with.

During the terms of the PPAs, Statistics Canada has variously ceased to publish, changed the name, and altered the manner in which indices were compiled. Disputes between Enmax as Buyer and TransAlta as Owner arose as to how these changes should properly be accounted for in undertaking the calculations required under the PPA.

Under the PPAs disputes are required to be resolved by reference to senior management, followed by submission to binding arbitration in accordance with the *Alberta Arbitration Act*.⁵ However, the PPA provides that either party can refer questions of law to the courts for determination notwithstanding that the question of law may be part of a dispute be-



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fore a board of arbitrators.

In 2014 Enmax and TransAlta were in the early stages of an arbitration filed by Enmax related to a number of changes to various Statistics Canada indices that apply under the PPA. In its pleadings in that arbitration, TransAlta took the position that one of the issues raised by Enmax had been determined in a prior arbitration between the parties several years before. The issue related to the proper interpretation of one of the provisions in the PPA dealing with how changes to indices would be applied. TransAlta pled that the parties were estopped from taking a position in the current arbitration contrary to the interpretation set out in a prior binding award from an arbitration between TransAlta and Enmax under the same PPA related to the interpretation of the exact same provision. Enmax took the position that

it was not bound by that prior award and put several questions of law to the Court related to it. The issues related to questions of *res judicata*, issue estoppel and confidentiality.

The analysis of the Court of Queen's Bench judge is a reflection of the lack of familiarity that some members of the judiciary still have with respect to arbitration. With respect to the issues of *res judicata* and issue estoppel, the Court determined that those did not apply in arbitration based on a 1981 labour relations decision.⁶ In the analysis, the Court expressed the view that arbitrators are not bound to apply the law, that *res judicata* did not apply in arbitration and that, while the parties could have agreed that the prior award was binding, he found no evidence that such was the case here.⁷ He found that the prior decision could be admitted as "evidence" by the panel in the present arbitration if the panel determined that the prior decision was relevant and admissible and that they could determine what weight if any to give to it.⁸ TransAlta appealed the decision of the chambers judge to the Alberta Court of Appeal as provided for under the Alberta Rules of Court.

It was with relief that the arbitration community received the January, 2016 decision of the Alberta Court of Appeal, which set the record straight. They observed that the lower Court appeared to have conflated the issues of *stare decisis* and *res judicata*.⁹ The Court of Appeal reviewed the doctrine of *res judicata* and found that the lower Court had erred in finding that *res judicata* did



not apply to arbitration. The Court found ample authority for the proposition and stated that *res judicata* and issue estoppel would apply where the same question had been decided in an earlier final decision between the same parties.¹⁰ They also set the record straight that in fact, arbitrators are bound to apply the law in arbitrations unless the parties have expressly agreed to the contrary.¹¹

They also noted that while the lower court had found no evidence that the parties had agreed that the prior award would be binding, the PPA did provide that decisions of an arbitration tribunal on disputes with respect to the arrangement were "final, binding and non-appealable". Notably, the Alberta *Arbitration Act* also provides that arbitration awards are binding upon the parties

unless set aside or varied.¹² The Court rightfully observed that with no indications to the contrary, the parties were bound by the final award arising in a prior arbitration.¹³

In the result, the decision affirms what I expect most clients would certainly have assumed to be the case. Unless the parties expressly agree otherwise, arbitrators are bound to apply the law and *res judicata* and issue estoppel apply in the appropriate circumstances. However, it is a cautionary tale that one should never assume that all members of the superior court have had the opportunity to become familiar with arbitration and may struggle to understand what those of us who live in that world take as fundamental tenets of the process in Canada. 🏠

- 1 Enmax Energy Corporation v. TransAlta Generation Partnership, 2015 ABCA 383 ("Enmax CA").
- 2 Enmax Energy Corporation v. TransAlta Generation Partnership, 2016 CarswellAlta 262.
- 3 Enmax Energy Corporation v. TransAlta Generation Partnership, 2015 ABQB185 ("Enmax QB").
- 4 Electric Utilities Act, RSA 2000, c. E-5, Part 4.1.
- 5 Arbitration Act, RSA 2000, c. A-43 ("Arbitration Act").

- 6 Enmax QB, paras. 101, 112.
- 7 Enmax QB, paras. 99-100, 115.
- 8 Enmax QB, para. 115.
- 9 Enmax CA, para. 39.
- 10 Enmax CA, paras. 40, 52-55.
- 11 Enmax CA, para. 48.
- 12 Arbitration Act, s. 37.

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