

Canadian Arbitration and Mediation Journal

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INSIDE THIS ISSUE

President's Message	4
Andrew D. Butt, M.S.T., B.ED., B.SC., C.MED, C.ARB	
Message from the Editor	7
William G. Horton, C.Arb, FCI Arb	
The Principle of Impartiality: Is it Relevant to Dispute Resolution Practitioners?	9
Rick Russell, BA, LL.B, C.MED, C.ARB	
Non-Signatories in Franchise Arbitrations	13
Ben Hanuka, J.D., LL.M., C.S., FCI Arb	
William (Bill) J. Hartnett Retires from ADRIIC Board	17
The Mediator's Toolkit: Formulating and Asking Questions for Successful Outcomes	21
Gerry O'Sullivan	
SMART or Not, It's What the Parties Bargained For:	25
Tina Cicchetti	
Domestic Commercial Arbitration Awards: to Appeal or Not Appeal?	29
Alexa Biscaro, J.D./LL.L.	
Congratulations to our New Designation Recipients!	34
Adequate Remedial Recourses From an Arbitral Tribunal Must Be Exhausted Before a Party can Seek Recourse Before the Courts	38
Alexander Gay and Alexandre Kaufman	
The Ontario College Strike from the Perspective of an Alternative Dispute Resolution (ADR) Professor	40
Helen Lightstone, LL.M. (DR), C.MED, Licensed Paralegal	
Congratulations to the 2018 Winners of the Lionel J. McGowan Award of Excellence!	41



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LEADING DISPUTE RESOLUTION IN CANADA



ALEXA BISCARO, J.D./LL.L.

AUTHOR: "Domestic Commercial Arbitration Awards:
to Appeal or Not Appeal?"

[SEE PAGE 29](#)

NEWS AND EVENTS

PAGE 3 - ADRIIC 2019 CONFERENCE - NOVEMBER 20-22, 2019
PAGE 41 - MCGOWAN AWARD WINNERS ANNOUNCED
PAGE 34 - NEW DESIGNATION RECIPIENTS

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ADRIC brings together seven affiliates as well as major corporations and law firms to promote the creative resolution of disputes across the country and internationally.

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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PRESIDENT'S MESSAGE

Our 2018 Annual General Meeting and Conference was held in Montreal. I hope you were there and agree it was a resounding success!

We have already begun building on it for our 45th event in Victoria, BC, November 21-22, 2019. As usual, we will be sourcing a compelling pre-conference workshop or two for the Wednesday before (November 20th), so mark your calendars and send us any ideas you may have about what you most want to attend. We will be at the lovely Fairmont Empress on Vancouver Island so you must plan to be there!

The ADRIE Board held its meetings after the conference and elected its 2019 directors and officers. ADRIE is comprised of seven Affiliate Representatives elected by their membership to represent ADR Practitioners and Supporters from their geographic area. We also have seven representatives elected by ADRIE's Corporate Member organizations, representing ADR Users and Supporters. These fourteen directors then exercise the option of appointing up to four directors-at-large to complement their skills and achieve diversity.

ADRIE's new Executive Committee:

- The undersigned, as President
- Scott Siemens, Past President
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- Jim McCartney, Vice-President
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Other members of the Board include:

- Naïm Antaki
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- Michelle Maniago
- David McCutcheon
- Jim Musgrave
- Jennifer Schulz

You can learn more about us from our bios on the website: <http://adric.ca/about-adr/board/>. ADRIE directors are truly dedicated. Of course, they have had the support of many dedicated volunteers. Following are some great achievements:

- The **Med-Arb Task Force** has been working effectively to create National Guidelines for members to maintain standards and credibility, to review the viability and develop criteria for a national Med-Arb designation for which a number of members have expressed interest. Stay tuned for the results of their hard work.
- The **Mediation Rules Working Group** has reviewed and updated ADRIE's rules and will be recommending a revision to the ADRIE Board. We hope to publish new rules early next year!
- The **ODR Task Force** is reviewing ODR in Canada and considering



ANDREW D. BUTT, M.S.T., B.ED., B.SC., C.MED., C.ARB

Andy has 20 years of experience in executive management positions with large corporations, 15 years of extensive experience in mediating workplace disputes, completing workplace assessments, conflict coaching and training with managers and leaders in conflict management situations.

which platforms if any might be appropriate for ADRIE to purchase, or negotiate a discount with, for members' use.

- The **Arbitrations Designations Standards committee** is setting up a Continuing Education and Engagement program for our members with arbitration designations. We hope to roll out a program next year to begin in 2020.
- The **Ethics and Professional Practice committee** has begun and will continue to develop some important policies for ADRIE members.
- ADRIE's **Government Relations and Designations Promotions** committees work hard to implement

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ways to make ADR and designations even more relevant to the public and other organizations. As you may know, the federal government considers ADRI's Chartered designations a standard of excellence and often requires the C.Med or C.Arb when hiring and engaging ADR professionals.

There are a number of committees seeking members: see the committee chart on the website and let our Executive Director know what interests you. I encourage each and every member to become involved in ADRI's and our Affiliates' committees. Our volunteers are the driving force to our shared success.

We have appointed numerous mediators and arbitrators to cases this year and continue to administer increasing numbers of arbitrations under the ADRI Rules. The Roster Development committee continues to identify and reach out to industries to create more of these kinds of work opportunities for member practitioners. We have also just set up a roster of interim measures arbitrators and renewed our roster for Amex cardholder arbitrations. We will be calling for a mediation roster early 2019. We also have a national Job Postings board in the Member Resources section of the Member Portal as a benefit for our full members.

ADRI continues to seek out benefits for members across the country. ADRI is now working to arrange a members' health, vision and dental plan, which will be especially helpful to independent practitioners. We invite you to suggest any other benefits you feel members would find valuable.

We also encourage you to join us on social media – we are very active and continue to increase in numbers of followers. Help us spread the word about ADR!

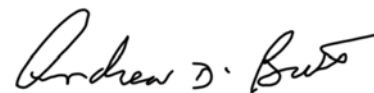
ADRI is continuing to mature as an organization. Through an unprecedented project with all Affiliates, we have just finalized a new Memorandum of Understanding (MoU) for our collec-

tive relationships and activities. Conceived by the Presidents' Roundtable, the MoU Taskforce has been working since 2015 to review, renew, and recreate the covenant relationships between ADRI and its Affiliates, and between the Affiliates themselves. This immense project was led by the most capable Wendy Hassen (ADRIA Past President and ADRIA representative on ADRI Board) and Kathryn Munn (ADRIO Past President) until 2018 and was recently finalized under the capable facilitation of Stan Galbraith (ADRIA Past President). The affiliates are now taking the MoU to their Boards for approval and signature. Members may look forward to greater alignment, standards and collaboration between

ADRI and affiliates; now more appropriately referred to as *the Federation*.

ADRI is in excellent shape and has much on its agenda going forward: a new Strategic Plan, the new National Mediation Rules, the final MoU, a report and recommendation on ODR for ADRI and affiliates, etc, etc.

We look forward to an exciting and progressive year! 🏠



Andrew D. Butt, C.Med, C.Arb
President



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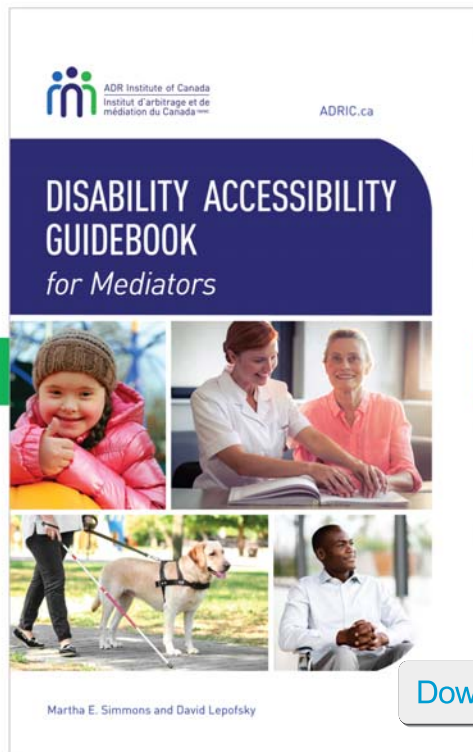
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Launched at the ADRIC 2017 Conference, the **Disability Accessibility Guidebook for Mediators** has proven a very popular resource providing concrete information on the importance of, and how to, increase accessibility in the mediation process.

Authors:
Martha E. Simmons and
David Lepofsky

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MESSAGE FROM THE EDITOR

Dear Readers of the *Canadian Arbitration and Mediation Journal*, with this edition, I bid you farewell in my role as Editor in Chief.

The time has come for *CAMJ* to renew itself with new leadership and a new look, and for me to make room for other projects which have grown to consume more of my time in the last two or three years.

Genevieve Chornenki will be the new Editor and Chief.

I knew from the first moments that I met Genevieve that she would be the perfect person for the role of Editor in Chief. She has a varied ADR practice, wide ranging interests in all facets of dispute resolution, and experience in editing. She is thoughtful, collaborative, diplomatic and decisive: all traits that will serve her well in the role of editor in chief.

Appropriate to the transition, *CAMJ* will take a slightly longer break between this edition and the next edition in order to redesign the format and relaunch the publication. Readers can anticipate the next issue in September 2019. I am

excited to see the changes.

I will not be a stranger to *CAMJ* as I now rejoin the ranks of its regular contributors. Indeed, you may be at even greater risk of seeing my opinions displayed on these pages! There is so much for us all to reflect on and share opinions about as forms of dispute resolution continue to develop exponentially and multidimensionally across every field, and on multiple platforms.

For example, if anyone was under the impression that the Supreme Court of Canada decision in *Sattva* has created for arbitration a sanctuary from merits review by the courts, by applying a reasonableness standard, they should consider the cautionary result of the same Court in *Groia v The Law Society of Upper Canada* 2018 SCC 27. In that case the decision of a presumptively expert administrative tribunal was found by 5 judges in the Supreme Court to be unreasonable even though three other judges of the same Court and 13 other judges and tribunal members in previous proceedings found the result to be either correct or reasonable. What refuge does the reasonableness standard provide if the opinions of 16 other judges and tribunal members can be found not to be reasonable, i.e. not to be within a spectrum of possibly correct results? The interesting thing about the *Groia* decision is not just that it involved a lack of deference to the views of the tribunal that made the original decision, but also a lack of deference to the views of other judges who considered the same matter. When it comes to applying the reasonableness standard, why would it not be enough that *some* judges (who presumably meet all the tests for rational, qualified and objective observers) found the de-



WILLIAM G. HORTON, C.ARB, FCIARB

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>

cision to be reasonable—or even correct?

Consider also the issue currently being deliberated by the Supreme Court of Canada in the *Wellman v Telus* case. The question is whether the *Arbitration Act* of Ontario requires the Court to exclude from a class of plaintiffs customers of Telus who have the identical claims under identical contracts with identical arbitration clauses because, unlike other members of the class who are protected by the *Consumer Protection Act*, they are bound by their agreements to arbitrate. The Court is faced with choosing between two very unsatisfactory alternatives: *either* do some violence to the exact words of the *Arbitration Act* and allow the claims to be included in the class, *or* apply the Act literally and exclude the claims knowing that the excluded class members will be left with no *effective* recourse to the courts or any other dispute process.

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Claims of this size simply will not be pursued on an individual basis.

The problem stems from the fact that, in mass market contracts of adhesion, arbitration clauses are inserted not to provide an effective or efficient remedy, but rather to defeat access to the only legal process that may produce a remedy. Such a use of arbitration clauses is an abuse of the idea of arbitration and a blatant circumvention of the public policy objectives of the *Class Proceedings Act*, such as providing access to justice and modifying corporate behaviour. As Justice Abella pointed out in argument of the case, the notion that arbitration agreements in such cases should be upheld because they are based on consent and party autonomy is a fiction. Whatever technical legal arguments may be made in favour of enforcing such agreements, they do not deserve the halo effects of true arbitration clauses, and those who support enforcing them to the exclusion of recourse to the court are not, in my opinion, being “pro-arbitration”. The question in my mind is not so much which alternative will the SCC choose (they both lead to bad outcomes) but rather what will it take to move legislatures in Canada to provide the needed reform.

We have a number of excellent articles for you in this edition.

I highly recommend the thought-provoking article by **Rick Russell** on the Principle of Impartiality in ADR, particularly in the context of mediation. The time has come to go beyond received wisdom on this subject, and Russell’s article takes us to the next level of a conversation we must have.

The article by **Ben Hanuka** on Non-Signatories in Franchise Agreements will be of interest to those arbitrating franchise disputes and those dealing with non-signatory issues more generally.

We are pleased to provide an extract from “The Mediator’s Toolkit”, a book by **Gerry O’Sullivan** in which she discusses the intriguing concept of the “ladder of inference” as a way of giving disputants a better insight into their dispute.

Tina Cicchetti has written a case comment on the *Smart Technologies v Electroboard* 2017 ABQB 559 decision of the Alberta Queens Bench, which opens the door to thinking about the

phenomenon of appeals within the arbitration process and how that affects judicial review.

Alexa Biscaro addresses the practical choice facing many who draft arbitration agreements in the aftermath of *Sattva*: To Appeal or Not to Appeal.

Alex Gay and **Alex Kaufman** address the important, but rarely discussed, subject of the need to exhaust remedies available from the arbitral tribunal before seeking relief from the courts.

Finally, the article by **Helen Lightstone** on the Ontario College Strike puts dispute resolution and negotiation theory to the test in a real and practical context. It is always good to test our ideas about dispute resolution in the laboratory of actual experience.

As always: Enjoy! Contribute!

I wish Genevieve Chornenki and ADRIc every success in keeping *CAMJ* a vital communication tool for the dispute resolution community in Canada. 🏠

— Bill Horton
November 30, 2018

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These two useful guides from the ADR Institute of Canada are excellent reference manuals for ADR practitioners. Supplement your training with these invaluable educational resources. A superb primer and a great resource to familiarize anyone wishing to understand the arbitration and/or mediation process in a commercial or business context.



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THE PRINCIPLE OF IMPARTIALITY: IS IT RELEVANT TO DISPUTE RESOLUTION PRACTITIONERS?

In December 2000, Fiona Terry published an important discussion paper for *Médecins Sans Frontières* (Doctors Without Borders), called “The principle of neutrality: is it relevant to MSF?”¹. In it, she asks some difficult questions about how relevant neutrality is to the work of MSF in these times. Interestingly, Terry does not define “neutrality” in her article, though she does note that the word ‘neutral’ comes from Latin and means neither one thing nor the other. The decision to remain neutral might not be rooted in the desire to remain above the political fray, but might also stem from cowardice and indifference; neutrality is not a virtue in itself.

Terry argues that in many instances “keeping out of it” is not being morally responsible; in particular she notes the International Red Cross’s silence in the face of the Nazi genocide and the French Operation Turquoise in Rwanda where French troops did not intervene to stop ethnic cleansing as examples of where “keeping out of it” to protect MSF’s neutrality was indefensible in light of what was happening.

Terry goes on to say that neutrality does not prevent MSF from acting as witnesses to testify about what is going on (“témoignage”), even in circumstances where it is not free to provide humanitarian aid. She makes the point that keeping silent is a choice as much as speaking out is.

Ultimately, Terry concludes that if neutrality is relevant and going to remain in the MSF Charter, then MSF “should logically renounce speaking publicly about any issue that could be perceived as engaging in controversies of a political, ideological, racial or religious nature.” She argues that MSF has not been neutral throughout its history, so it is time to remove the term from its charter.

This is only a brief synopsis which does not capture the many nuances of Fiona Terry’s paper which should be read in its entirety.

This article explores the application of neutrality to the practice of dispute resolution. When should practitioners “keep out of it?” When should they “engage?” Does neutrality have the same meaning and significance for us as it does for Doctors Without Borders?

THE EVOLUTION OF NEUTRALITY IN MEDIATION, ARBITRATION, AND FACILITATION

Neutrality is not a static concept in dispute resolution, and its practical application varies according to the process in question.

The practice of mediation, particularly commercial mediation, has moved a long way from the interest-based ideal that many mediators were taught. Now, civil and commercial mediators are often chosen for their substantive expertise and are expected to use their knowledge to convince parties and counsel to move away from unrealistic positions so cases will settle. Mediators who will not provide input on substantive issues are in less and less



RICK RUSSELL, BA, LL.B,
C.MED, C.ARB

Rick Russell, is a principal of Agree Incorporated. Agree is a full service conflict management firm which offers mediation, arbitration, training, workplace assessment, construction partnering, facilitation and workplace related investigation services. Rick is currently the Ombudsperson for the Region of Waterloo, and the Integrity Commissioner and Ombudsperson for the City of Cambridge.

demand. It seems that the marketplace has given licence to those who conduct mediations to offer substantive feedback without it affecting their impartiality. The key is that the honest broker provides feedback to *both* parties based on genuine opinions.

By contrast to mediators, arbitrators must be careful about expressing opinions on substantive matters lest they be seen as pre-judging a case, unless they are engaged to conduct mediation-arbitration, a process that is becoming increasingly popular.

In the field of workplace assessment, clients are looking for substantive expertise about what constitutes a healthy workplace and how to move from a dysfunctional state to a more desirable one within an organization. There are seldom clearly perceived “sides” and weighing in on what is desirable is less

risky than in mediation. In workplace assessments, clients value the consultant's independence and willingness to call it as they see it.

NEUTRALITY AND IMPARTIALITY IN ADR PRACTICE

The ADR Institute's *Code of Conduct* does not speak of neutrality. It provides as follows:

4. INDEPENDENCE AND IMPARTIALITY

4.1 Unless otherwise agreed by the parties after full disclosure, a Mediator shall not act as an advocate for any party to the Mediation and shall be and shall remain at all times during the Mediation:

- (a) wholly independent; and
- (b) wholly impartial; and
- (c) free of any personal interest or other conflict of interest in respect of the Mediation.

Dispute resolution practitioners often use the terms "neutral" and "impartial" interchangeably, but there are significant differences between the origins and usage of the two adjectives.

The word "neutrality" is defined by Webster's Dictionary to mean The quality or state of being neutral especially: refusal to take part in a war between other powers. The country adopted an official policy of neutrality.

The term derives historically from times of war when a state would take a position of neutrality toward two neighbouring states at war. In short, it

means "staying strictly out of it," which is pretty much the way MSF has interpreted neutrality.

Clearly, when we are mediating, arbitrating or providing a neutral evaluation such as a workplace assessment, we are not "staying out of it." In fact, the parties invite us to interject ourselves "into it" for the purpose of working out disputes and helping them come to terms with the issues that confront them.

The better term to describe the role of a dispute resolution practitioner is the one used in the *Code of Conduct*, "impartial." Webster's Dictionary defines that word as

Not partial or biased: treating or affecting all equally.

This is a better term because it focuses attention on how dispute resolution practitioners intervene as opposed to whether they ought to do so. Generally speaking, "whether" is not a question, because the role of the third party neutral *is* to become involved, to act as a catalyst toward decision-making that leads to the resolution of disputes. And, as is the case for Doctors Without Borders, our impartiality is not a goal in itself. Rather, it is a tool that grants us the ability to learn things and to see and hear information that would otherwise not be available to us.

Treating people impartially, however, does not mean that a third party neutral must interact with each party in the

same way. For example, a mediator in a typical commercial case may justifiably engage differently with each of the parties. For the less sophisticated negotiator, the mediator might provide recommendations about when to take various steps in the negotiation. This would be in the interest of managing expectations to prevent an avoidable impasse. For the more impulsive party, the mediator allows more time for venting and then asks a variety of questions to help that party reflect or consider the implications of the situation in order to gain perspective and make better decisions.

In her paper Fiona Terry describes some limits of neutrality where the choice of not acting or not telling has moral implications such as in the face of genocide or ethnic cleansing. Are there similar circumstances that third party neutrals face?

Let me pose several examples. Suppose you believe that

- 1 One party has a lawyer who lacks a good understanding of the law.
- 2 One party is much better prepared than the other.
- 3 One party appears bullied by another psychologically.
- 4 One party is too emotionally weak to handle the stress of negotiation and "just wants it over with."
- 5 One party has lost their capacity to assess offers.
- 6 You become aware that a covert threat has been made by one party against another.



Some of these examples bring our values as mediators and arbitrators into play, and several of them give rise to ethical concerns under the ADRI Code of Conduct. Examples 3, 4, 5, and 6 cause concern about whether the compromised party is able to exercise self-determination. Items 1, 2, and 4 are the most problematic in that two of them are commonplace and inherent in civil and commercial mediations; they may make for an imperfect process but are generally seen as part of the negotiation landscape and outside the control of mediators.

Is it appropriate to remain impartial where one party has a much better lawyer than the other? What does “impartial” mean in those circumstances? Would it encompass the ability to educate the party about the law during breakout sessions? Does it make a difference that the mediator would do the same thing for the opposing party but for the fact that they are not experiencing the same disadvantage?

Is it taking sides to articulate an argument for a party or their counsel where they clearly have a good point, but they are not communicating it effectively, or does this help both parties because the opposing side can now more effectively manage the real risk that they face?

In my experience, most mediation participants (parties and their counsel) want the mediator to facilitate an environment that promotes settlement. With that in mind, helping to organize the “other side” so that they can better understand and assess offers is not generally regarded as demonstrating partiality.

Is it as simple as saying that situations 3 to 6 are capacity issues which cause me to

believe that the parties are not exercising self-determination, so I will intervene in these cases, but not in cases 1 and 2 which are based on my impressions only and are part of the negotiation process in an adversarial system? Or do *all* of the examples go to the quality of the process and not just the substance of the negotiation?

There are other areas worth exploring in relation to impartiality. Take, for instance, the practitioner’s personal preferences and needs. Most third party neutrals have a strong self-interest in appearing effective and, if they were to be honest, would say that they prefer to work with parties who

- Are flexible and willing to listen to the other side and to the mediator;
- Are prepared to bargain within a range to achieve resolution;
- Are prepared to compromise on their positions and show movement;
- Do not insist on a principle in the face of expediencies like legal costs and risk;
- Demonstrate that they can see both sides by moderating their expectations.

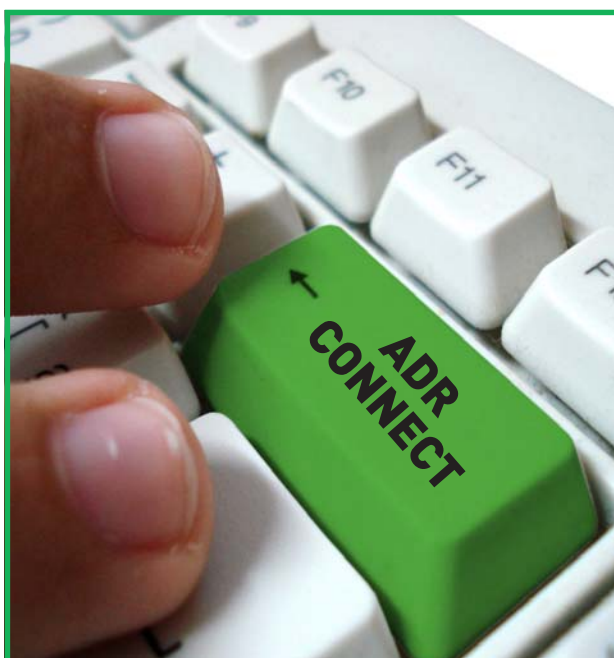
Parties who fail to demonstrate the above qualities can make our work harder and cause us to feel uncomfortable, even ineffective in our role. It is

tempting, therefore, to “turn up the heat” on the one who is not “moving” during the mediation. But, how does that fit with our responsibility to remain impartial? Are we not siding against the intransigent party and with the party who has taken more of our advice and shown a greater willingness to be and remain flexible? Are we equally respectful of a party who appears rigid as long as a principle that is important to them has not been addressed in the offers coming forward? How is a differential in respect as between the parties fair?

Dispute resolution practitioners can be influenced, even irritated, by a party’s strongly held beliefs about moral or substantive issues and frequently by procedural issues as well, especially when these things seem to impede resolution. Should we, therefore, acknowledge that it is difficult to remain impartial in the face of a party who is making your work difficult?

Despite these unanswered or unanswerable questions, in civil and commercial mediation as well as in arbitration, “impartiality” remains a useful tool that allows us to

- Learn information we otherwise would not be privy to;
- Speak with a different kind of author-



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- ity than others in the room;
- Have our message heard without the impact of reactive devaluation², based on who we are aligned with.

This article suggests areas where we dispute resolution practitioners need to honour certain values (such as self-determination and informed decision-making) because they go to the very essence of our processes and services. In other areas, the impartiality standard is difficult to apply (such as situations where one party does not appear to be bargaining in good faith). In all situations however, mediators, arbitrators and workplace consultants bring essential qualities to those they serve, namely an independent and unbiased starting point and a willingness to remain open to the points of view and arguments of all sides to a dispute. So,

instead of dispensing with the impartiality standard, it behooves those of us who practise these allied processes to educate clients about the impartiality standard we are applying and how impartiality looks in practice.

Impartiality means treating all equally in the sense of offering each party what we believe they need to arrive at an informed decision about settlement. It does not mean treating the parties identically in terms of our conversations in breakout meetings and our strategies in guiding settlement discussions.

Dialogue needs to take place amongst arbitrators, mediators and conflict man-

agement consultants to better understand

- What the dispute resolution marketplace is looking for from us;
- What principles we should use to guide us in using and protecting the impartiality we claim;
- Whether our Codes of Conduct and ethics documents reflect the reality of professional practice and the expectations of parties around impartiality and neutrality.

This article will have served its purpose if it generates some circumspection and conversation that will help dispute resolution practitioners mature as a profession and understand their values more fully. 🏠

1 <https://www.msf.fr/sites/default/files/2000-12-01-Terry.pdf>
 2 "Reactive devaluation" is the term used for one party's bias against a settlement proposal that was made by another party who is seen as an adversary or opponent.

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William Hartnett, Q.C. Retired,
vice-president and general counsel, Imperial Oil Limited



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NON-SIGNATORIES IN FRANCHISE ARBITRATIONS

INTRODUCTION

This article considers some of the issues surrounding non-signatories to arbitration agreements: whether non-signatory parties to a franchise dispute can be considered parties to an arbitration agreement.

The involvement of franchisor and franchisee affiliates in franchise disputes is a common occurrence. For example, a franchisor may allege that a corporate franchisee's principals caused the demise of the business and dissipation of assets, and may try to bring the non-signatory principals into the arbitration proceeding. A franchisee may allege that a franchisor's affiliate, such as a senior officer involved in the sale, a leaseholding company acting as sub-landlord, or a franchisor's parent company, is liable under various grounds of liability.

Each side to a typical franchise dispute may, for a variety of tactical reasons, take opposing positions on this issue. The party that prefers the court system over a multiplicity of proceedings may argue that the affiliate is not a party to the arbitration agreement because it is a non-signatory and therefore the arbitration proceeding cannot bind that party.

Courts have accepted the general proposition that a non-signatory to an arbitration agreement cannot be compelled to submit to arbitration.¹ This is tied to ordinary principles of contract law, and parties' intent, i.e. whether all parties to the contract have agreed that the non-signatory would be bound to the arbitration agreement. The question is whether affiliates of a franchisee or franchisor who are brought into a proceeding by either a franchisee or franchisor may be considered parties to the arbitration. The decisions addressed in this article focus on the issues of jurisdiction, privity and the connection between the dispute and the

franchise agreement.

Provincial arbitration statutes give arbitration tribunals the jurisdiction to determine all issues and disputes, including jurisdictional challenges (see s.17(1) of the Ontario *Arbitration Act, 1991* and equivalent provisions).² The Supreme Court has addressed this issue, otherwise known as the Competence-Competence principle, in *Dell Computer Corp. v. Union des consommateurs*³, holding that challenges to an arbitrator's jurisdiction must be resolved by the arbitrator. Challenges to an arbitrator's jurisdiction, such as that the agreement is void or inoperative, should be first resolved by the arbitrator.⁴

The Supreme Court in *Dell* held that courts should not resolve a jurisdictional challenge unless some exceptions apply, referred to in this article as the *Dell* exceptions. The *Dell* exceptions apply where the jurisdictional challenge is based solely on a question of law, or a question of fact requiring only a superficial consideration of the documentary evidence. In *Siedel v. TELUS Communications Inc.*,⁵ the Supreme Court affirmed the Competence-Competence principle and the *Dell* exceptions.

Appellate decisions support the proposition that an objection based on a party's status to participate in an arbitration proceeding is a question of jurisdiction and therefore should be first determined by an arbitral tribunal.⁶ Under the Competence-Competence principle, unless a *Dell* exception applies, the arbitrator, not a court, should determine whether it has jurisdiction over all the parties to the arbitration proceedings.

Where there is any doubt about whether a *Dell* exception applies, it is preferable to leave the jurisdictional



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* The assistance of Robert Jones, student-at-law, in preparing this article is appreciated.

question to the arbitrator.⁷ Where it is arguable that a dispute falls within the terms of an arbitration agreement, a court should grant a stay of proceedings in favour of the arbitration proceedings (In Ontario, see s.7(1) of the *Arbitration Act*).⁸

LEGAL GROUNDS USED TO DETERMINE ARBITRATION STATUS OF NON-SIGNATORIES

Procedurally, a jurisdictional challenge based on a party's status to participate in an arbitration agreement should be raised early in the proceeding. This is codified in s.17(3) of the Ontario *Arbitration Act* (see equivalent provisions in other provincial statutes),⁹ and reflects both substantive and practical concerns. Substantively, by participating in the arbitration proceeding on the merits, a respondent waives its right to later object on jurisdictional grounds.¹⁰

Practically, courts do not want parties to hedge their bets by raising jurisdictional issues only if they are unsuccessful on the merits.

As an outline of the applicable legal theories used to bind non-signatories to arbitration agreements, court decisions have generally based the analysis on the following legal grounds:

1. lifting the corporate veil;
2. incorporation by reference;
3. assumption/assignment;
4. personal representation;
5. equitable estoppel; and
6. implied consent to arbitrate.¹¹

Courts may pierce the corporate veil



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where the relationship between a parent and its subsidiary is sufficiently close as to justify holding one corporation legally accountable for the actions of the other.¹²

An arbitration agreement can be incorporated by reference in a related contract.¹³ The reference to the arbitration agreement must be clear and specific.¹⁴ General wording incorporating all the terms and conditions of a main contract may be insufficient. Related agreements can be interwoven into the franchise agreement through clear language to that effect.

There is no reason why the rights under an arbitration agreement cannot be assigned, especially where the arbitration agreement itself provides that it is binding on successors and assigns. However, an assignee under a commercial contract may argue that it only agreed to take its benefits, and not assume the obligations to arbitrate.¹⁵ A party who takes the benefits of a contract must also assume its burdens.¹⁶

Where a party has a legal authority to represent another – to act on behalf of a named party in an agreement in some representative capacity – including in the capacity of an agency, fiduciary, etc., the party in a representative capacity may have the rights and obligations under the arbitration agreement by operation of law.¹⁷

An assignee or sub-contractor which takes the benefits of an agreement without raising any objections as to its terms may be equitably estopped from denying its obligation to submit to arbitration based on not having signed the agreement.¹⁸

Courts are reluctant to imply consent to arbitrate without some evidence that the defendant intended to resolve disputes by arbitration.¹⁹

Established jurisprudence inside and outside of the franchising context provides some guidance about the issues in contention.

FRANCHISE DECISIONS

- *ADLAKHA V. MEEHAN*

In *Adlakha v. Meehan*²⁰, the Ontario Superior Court held that the arbitrator should determine whether the respondents, who were the franchisor's affiliates, were parties to the arbitration agreement, and required to submit to arbitration.²¹

The applicants in *Adlakha* were franchisees of Licks Franchising Inc., a restaurant chain. After the franchisees served notices of rescission on Licks and its affiliated companies, they commenced a court application to have those claims submitted to arbitration. Licks consented to participate in the arbitration but argued that its affiliates were not similarly obligated.

The court found it significant that the franchise agreement extensively referred to the "Franchisor/and or its affiliates", including in the arbitration agreement itself.²² The court also invoked principles of agency (representative capacity), noting that the franchisor had the apparent authority to bind its affiliates as parties to the arbitration agreement.²³

- *ALPINA HOLDINGS INC. V. DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC.*

In *Alpina Holdings Inc. v. Data & Audio-Visual Enterprises Wireless Inc.*²⁴, the Ontario Superior Court of Justice applied the Competence-Competence principle and stayed the applicant's action in favour of arbitration.²⁵

The applicant in *Alpina*, a dealer of a cellphone retail dealer, commenced an action for rescission against its alleged franchisor and the franchisor's two principals. The alleged franchisor and its principals sought a stay of the court proceeding in favour of arbitration based on an arbitration agreement contained in the dealer agreement. The dealer argued that the individual respondents were not parties to the dealer agreement and had no standing to apply for a stay of its rescission action.

The court relied on the standard indem-

nification clause in the dealer agreement where each party (dealer and alleged franchisor) agreed to indemnify each other. The clause also extended to shareholders, officers, directors, affiliates, agents and other representatives. The court held that the two individual respondents, who were senior officers, fell within the wording of the indemnity clause and that it was not clear that these individuals would not be found to be parties to the arbitration.

- KANDA FRANCHISING ET AL. V. 1795517 ONTARIO INC.

In *Kanda Franchising et al. v. 1795517 Ontario Inc.*²⁶, the Ontario Superior Court of Justice applied a *Dell* exception and concluded that the individual respondents were not parties to the arbitration agreement and could not be compelled to submit to arbitration.²⁷

The applicants, who were the franchisor and the franchisor's affiliate in an optometry business, brought an application to compel the franchisee

corporation and its two non-signatory principals to participate in the arbitration. The individual respondents argued that they were not parties to the arbitration agreement, and therefore had no obligation to submit to arbitration.

The franchisor alleged that the corporate veil should be lifted against the individual respondents, that one of them provided a verbal guarantee in respect of its company's obligations under the franchise agreement, and that the franchise agreement imposed significant responsibilities and obligations on them, making them parties to the agreement.

The court did not consider these arguments to decide the jurisdictional question. Instead, it resolved the application based on the contractual interpretation principle that an unambiguous contract must be given its literal meaning. It found that the franchise agreement unambiguously defined the franchisee corporation as the 'franchisee', and not the individual respondents personally.

The court held that there was no reason to look beyond the plain wording of the contract.²⁸ It concluded that the challenge to the arbitrator's jurisdiction could be resolved with only a superficial consideration of the documentary evidence.²⁹ The court used one of the *Dell* exceptions to dismiss the application against the individual respondents.

- RECONCILING OR COMPARING ADLAKHA, KANDA AND ALPINA

In *Adlakha* and *Alpina*, the Superior Court found that it was not clear based on the wording of the franchise agreements that the franchisor affiliates were not parties to the arbitration agreement. They stayed the court proceedings in favour of arbitration based on the Competence-Competence principle, leaving the ultimate determination of whether the non-signatories were parties to the arbitrator, i.e. without deciding the issue on the merits.

By contrast, in *Kanda*, allegations that a verbal guarantee was provided by one of the individual respondents did



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not achieve the same result. The Superior Court refused to apply the same rationale involving a franchisee's principals, and held that it was able to determine, based on the *Dell* exception, that the principals were not parties to the arbitration agreement and could not be compelled to participate in the arbitration.

NON-FRANCHISE DECISIONS

- **ONTARIO MEDICAL ASSOCIATION V. WILLIS CANADA INC.**

In *Ontario Medical Association v. Willis Canada Inc.*³⁰, the Ontario Court of Appeal upheld a decision of the Superior Court of Justice which found that, based on the Competence-Competence principle, the question of whether the Ontario Medical Association (OMA) was a party to an arbitration agreement contained in a broker/agent contract was a matter of jurisdiction to be decided by the arbitrator.³¹

The OMA brought court proceedings against Willis Canada Inc. and Aviva Canada Inc., insurance companies, for benefits under the broker-agent contract. In response, Aviva sought an order staying the action in favour of arbitration according to the arbitration agreement in the contract. The OMA argued that it was not a party to the arbitration agreement.

The OMA never signed the broker-agent contract, but did sign an addendum, which made it a beneficiary to Aviva's obligations under the broker-agent contract. The Court of Appeal upheld the finding of the Superior Court that the matter should be deferred to arbitration because it was arguable that the OMA was a party to the arbitration agreement.³² It upheld the decision to grant Aviva's application to stay OMA's action in favour of arbitration, allowing the arbitrator to determine whether OMA was a party to the arbitration agreement.³³

- **NORTHWESTPHARMACY.COM INC. V. YATES**

In *Northwestpharmacy.com Inc. v. Yates*,³⁴ the Supreme Court of British Columbia stayed the plaintiff's action against the non-signatory defendants

in favour of arbitration, finding there was an arguable case that the defendants were parties to the arbitration agreement.

The plaintiff, Northwestpharmacy, was a Panamanian company that provided low-cost prescription drugs to consumers in the United States. The plaintiff's claim was for unpaid sums under a payment processing contract with Omega Group Inc., which contained an arbitration agreement. Epic Capital Group LLC was also involved in the payment processing scheme. The plaintiff chose not to bring an action against Omega. Instead, it framed its action in tort against Omega's and Epic's principals, alleging misrepresentation, unjust enrichment, breach of trust and related causes of action.

The individual defendants sought a stay of the action in favour of arbitration based on the arbitration agreement in the plaintiff's contract with Omega. The court found that the defendants were arguably parties to the arbitration agreement because of the plaintiff's earlier allegations.³⁵ In previous applications for related injunctive relief, the plaintiff alleged that the defendants were the true parties to the payment processing contract.

In addition, the court also held that the plaintiff framed its claims in tort against the defendants primarily to avoid the arbitration agreement. The action was fundamentally for breach of the payment processing contract. The court did not agree to in effect sanction an attempt to avoid the arbitration agreement by naming related parties, but not the signatory of the contract, as defendants.

On this basis, the plaintiff was equitably estopped from denying the defendants' status to seek a stay of its tort action through the arbitration agreement contained in the payment processing contract.

- **GRAVES V. CORREACTOLOGY HEALTH CARE GROUP INC.**

In *Graves v. Correactology Health Care*

*Group Inc.*³⁶, a decision of the Ontario Superior Court of Justice released in July 2018, the court refused to stay proceedings in favour of arbitration agreements, holding that the non-signatory defendants had no standing to seek a stay of proceedings.³⁷

The plaintiffs were former students in the Correactology Practitioner Program at the Canadian Institute of Correactology. Each student signed enrollment agreements with the Institute, as well as licence agreements and confidentiality agreements with a related company, Correactology Health Care Inc. ("CHC"). The enrollment agreements and licence agreements contained arbitration agreements.

At the end of the program, students were required to complete examinations to receive a purported accreditation from the Canadian Association of Correactology Practitioners (the "Association"). The program was not licenced under the *Private Career Colleges Act, 2005* ("PCCA").

The Institute, the Association, and the CHC were controlled by the same or closely-related individuals.

The dispute arose after the Institute expelled the students for allegedly breaching their confidentiality agreements. The students brought an action against the entities and individuals involved in the Correactology program. They alleged fraud, conspiracy, breach of contract, non-compliance with the *Arthur Wishart Act (Franchise Disclosure), 2000* (the decision did not substantively address any franchise issues) and that the entire system was a sham. They also alleged that the defendants were operating an unregistered private career college.

The enrollment agreements and licence agreements contained arbitration clauses. However, they also contained contradictory jurisdiction clauses. The enrollment agreements stated that the parties must submit to the exclusive jurisdiction of the courts of Ontario. The licence agreements

WILLIAM (BILL) J. HARTNETT RETIRES FROM ADRIC BOARD

William (Bill) J. Hartnett has been a leading industry champion of ADR in Canada for decades. As one of Canada's top corporate counsel, Bill embraced ADR early on, and saw it as a preferred dispute resolution tool for the private sector. Bill created the Canadian Foundation for Dispute Resolution (CFDR), one of ADRIC's predecessor organizations, has played key roles within ADRIC, and remains a credible, tireless promoter and supporter of ADR and ADRIC in the corporate community.



Bill was presented with the 2018 President's Award by Interim President Laura Bruneau during the ADRIC 2018 AGM and Conference in Montreal, November 22, 2018.

In early 1994, Bill and John J. (Jack) Marshall of Macleod Dixon had a discussion about the need for an organization to promote the use of ADR and assist disputing parties and their lawyers in identifying qualified and capable third-party neutrals. That discussion led to the formation of a steering committee which ultimately determined there was indeed a need for such an organization. The Canadian Foundation for Dispute Resolution was incorporated in August 1994 with Bill as president.

Under Bill's leadership, CFDR established qualification criteria and created a third-party neutral panel; developed commercial arbitration rules and model arbitration clauses; mediation procedures, clauses and a model mediation agreement; held seminars with other organizations, grew membership and developed *ADR Connect* and *ADR Feedback*.

We are truly grateful for Bill's passion for ADR and all his efforts in establishing ADRIC as the pre-eminent national ADR organization in Canada.


During 1999 and 2000, mergers in the business community were having a negative impact on Foundation membership. In July 2000, the members of the CFDR and the Arbitration and Mediation Institute of Canada (AMIC) approved a consolidation of the two organizations effective August 1, 2000 to create the ADR Institute of Canada.

At their final meeting as an independent organization, the directors noted that CFDR is nationally recognized for raising the profile and increasing the practice of ADR in the business community. They thanked Bill for his leadership and the tremendous amount of work he did as president and in 2001, Bill received the prestigious National Lionel J. McGowan Award of Excellence from ADRIC and was designated Director Emeritus.

Bill provided the keynote address for the 2002 ADRIC conference, during which he stated the future will be a positive one for ADR in Canada. He described success for ADR as when it is broadly accepted, when lawyers advise clients - in every case - and at every state of litigation - of the appropriateness of using ADR; when lawyers and parties can suggest mediation without it being seen as a sign of weakness; when leaders in law, government, and business forcefully and frequently speak out in support of alternatives to litigation in order to open minds and change attitudes.

Ten years later, Bill still saw the need to participate in promoting ADR. In 2011 he put his name forward and was elected a director of ADRIC.

Since then Bill has co-chaired the Marketing and Membership committee, spoken at conferences to promote ADR, developed the Corporate Membership program, helped develop *ADR Perspectives* electronic newsletter, played a leading role in ADRIC's National Courses program, new branding, the 2014 Strategic Plan, and contributed his expertise to the language and interpretation of the new Memos of Understanding between ADRIC and all affiliates.

Bill officially retired from ADRIC's Board of Directors at the ADRIC AGM, November 22, 2018 and leaves a legacy of both leadership and advocacy for ADR as the preferred conflict resolution tool for corporate, industry and government. 

stated that parties must bring actions in the Superior Court of Justice in Sudbury. The confidentiality agreements did not contain an arbitration clause and stated that the parties agreed to the non-exclusive jurisdiction of the Ontario courts.

The conflict between the arbitration clauses and the jurisdiction clauses created an ambiguity in the agreements. In interpreting the enrollment agreements, the court applied the legal principle of *contra proferentem* against the defendants. About the licence agreements, the court held that the jurisdictional provision referring actions to the Superior Court of Justice in Sudbury was more specific than the arbitration agreement. If the court enforced the arbitration agreement, then the jurisdictional provision would be superfluous. The court was also concerned about the possibility that the agreements may be void *ab initio*.

Neither the individual defendants, nor the Association, were parties to any arbitration agreements. The students alleged that the individual defendants made material misrepresentations and engaged in coercive conduct. The court held that the individual defendants were not named just to defeat the arbitration clause. Rather, they were non-parties and could not rely on the arbitration clauses. The court held that the non-signatories to the arbitration agreements have no standing to rely on the arbitration agreement as a defence to litigation.³⁸

Finally, the court held that it would use its discretion under section 7(2) of the *Arbitration Act, 1991*, to refuse a stay. There were serious public policy concerns about whether the Institute should be registered under the PCCA. The court's decision was also informed by the serious questions about the legality of the system. The defendants were either involved in a fraudulent scheme, which would be beyond the scope of the arbitration agreements, or were operating the correology program without license from the relevant regulatory body.³⁹

UNITED STATES DECISIONS

- **MCBRO PLANNING AND DEVELOPMENT CO. V. TRIANGLE ELECTRICAL CONSTRUCTION CO. INC.**

United States case law offers additional guidance on the non-signatory problem in arbitration. In *McBro Planning and Development Co. v. Triangle Electrical Construction Co. Inc.*⁴⁰, the Court of Appeals, Eleventh Circuit, affirmed the decision of the District Court for the Northern District of Alabama, staying Triangle's action against McBro in favour of arbitration.⁴¹

Triangle and McBro each entered into contracts with a hospital to carry out renovations to the premises, which contained arbitration agreements. However, Triangle and McBro had no privity of contract as between each other. Triangle's contract with the hospital contemplated roles for both parties, but expressly stated that nothing in the documents will create any contractual relationship between Triangle and McBro.

The court emphasized the breadth of the arbitration agreement, the close relationship between the entities involved, and the fact that Triangle's tort claims against McBro implicated Triangle's contract with the hospital.⁴² It reasoned that Triangle's claims were "intimately founded in and intertwined with the underlying contract obligations".⁴³ On these grounds, the court held that the arbitration agreement extended to Triangle's claims against McBro.⁴⁴

- **DELOITTE NORAUDIT V. DELOITTE HASKINS & SELLS, US ET AL.**

In *Deloitte Noraudit v. Deloitte Haskins & Sells, US et al.*⁴⁵, the Court of Appeals, Second Circuit, reversed a decision of the District Court for the Southern District of New York, which dismissed the defendants' motion to stay the plaintiff's action in favour of arbitration.⁴⁶

The plaintiff, Deloitte Noraudit A/S, was the Norwegian affiliate of the defendants' international association of accounting firms. A dispute arose be-

tween the defendants and its affiliate in the United Kingdom and was settled with an agreement that gave the defendants a limited right to use the name "Deloitte". Noraudit brought an action against the defendants claiming the right to use the name "Deloitte" in connection with its accounting practice in Norway. The defendants argued Noraudit's action had to be submitted to arbitration in accordance with the arbitration agreement contained in the settlement agreement.

The defendants signed the settlement agreement on behalf of all its member firms. The defendants provided Noraudit with a copy of the agreement for its approval. Noraudit did not raise any objection and continued using the name "Deloitte".

The court held that Noraudit, having taken the benefit of the settlement agreement, was estopped from denying its obligation to arbitrate under the agreement.⁴⁷ The fact that Noraudit never signed the settlement agreement was not determinative.⁴⁸ Noraudit did not raise an objection at the relevant time and continued to take benefits under the agreement. On that basis, the court held Noraudit was compelled to submit its claim against the defendants to arbitration.⁴⁹

CONCLUSION

The non-signatory problem is common in franchise arbitration disputes since affiliates of both the franchisor and the franchisee are frequently brought into the dispute.

The general rule is that non-parties may not be compelled to participate in arbitration proceedings and are not bound by the result. Further, an agreement to arbitrate must be clear and specific. Under the Competence-Competence principle, a challenge based on a party's standing to participate in arbitration is a question of jurisdiction to be decided by the arbitrator. The *Dell* exceptions provide courts with ways to circumvent the Competence-Competence principle and resolve the jurisdictional challenge on limited grounds.

Where it is arguable that an arbitrator may find that a non-signatory is a party to the arbitration, the Competence-Competence principle would normally apply. Courts have compelled non-signatories to submit to arbitration proceedings under the theories of lifting the corporate veil, incorporation by reference, assumption/assignment, representative capacity, equitable estoppel and implied consent to arbitrate. Of the cases reviewed in this article, the courts appear to be more inclined to grant a stay where grounds of incorporation by reference, representative capacity or equitable estoppel are successfully invoked.

In the three franchise decisions analyzed in this article, the Ontario Superior Court in *Adlakha* and *Alpina* applied the Competence-Competence principle, holding that it was possible for an arbitrator to find the franchisor affiliates to be parties to the arbitration agreement. In *Kanda*, the Ontario Superior Court held that it was clear on a superficial analysis, applying the *Dell* exception, that the franchisee affiliates were not parties to the arbitration agreement.

Directly or indirectly, incorporation by reference, or contractual references to a franchisor's affiliates in the franchise agreement, as well as in the arbitration agreement, was likely a significant factor in *Adlakha* and *Alpina*. In *Adlakha*, the court relied on extensive references to the term 'affiliates' and noted the franchisor's apparent authority to bind its affiliates. Similarly, in *Alpina*, the court relied on the standard indemnity clause in the dealer agreement to find references to affiliates and the franchisor's representative capacity to bind them.

Incorporation by reference and equitable estoppel were factors in *Willis*, where the court relied on the fact that a non-signatory signed an addendum to the main agreement to claim certain benefits.

Representative capacity and equitable estoppel were factors in *Deloitte*, where the court relied on not objecting at the

relevant time, despite being invited to do so, and continuing to take the benefits under the settlement agreement.

In *Yates*, the court invoked the theory of equitable estoppel to prevent the plaintiff from disputing the defendants' status to seek a stay of its tort action in favour of an arbitration agreement contained in a payment processing contract.

In *Graves*, the court concluded that the non-signatory defendants lacked the standing to seek a stay of the plaintiffs' action based on the arbitration agreements. Unlike in *Yates*, the court found that the students did not add the non-signatory defendants or frame their claims in an attempt to circumvent the arbitration agreements.

The *Graves* decision is interesting be-

cause while it featured many of the legal elements analyzed in this article – (i) related agreements (some agreements contained an agreement to arbitrate), (ii) representative capacity (the defendants were not at arm's length), and (iii) piercing the corporate veil (whether the individual director or related companies should be bound by the agreement to arbitrate) – the court nevertheless exercised its discretion to refuse a stay of proceedings. The court was ultimately more concerned about the ambiguities in the agreements, the apparent legitimate grounds for adding the non-signatories, the potential for the agreements to be held void, and the overriding public policy concerns about the legitimacy of the school and its accreditation.

In *McBro*, the court relied on the close relationship between the parties, the



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broad scope of the arbitration agreement, and the fact that Triangle's action relied on alleged interference by McBro in its contractual relations with the hospital.

Any one or a combination of these legal grounds has been found by the courts as a basis for invoking the Com-

petence-Competence principle and deferring the issue of the status of non-signatories to an arbitrator. Absent overriding issues such as those in *Graves*, the courts appear to be looking for a certain level of minimum evidence to conclude that it is open for an arbitrator to find that the non-signatory is a party to the arbitration.

It remains far from clear what threshold is required for a court to reach this conclusion on a stay application: there may be significant legal differences in defining the level of threshold depending on the terms used – 'probable', 'possible', or 'likely' each may imply a varying degree of an onus of proof. 

- 1 *Novatrax International Inc. v. Hagele Landtechnik GmbH*, 2016 ONCA 771 at para 23.
- 2 Ontario's *Arbitration Act*, 1991, S.O. 1991, c. 17, s.17(1); Alberta's *Arbitration Act*, R.S.A. 2000, c. A-43, s.17(1); Manitoba's *The Arbitration Act*, C.C.S.M. c. A120, s. 17(1); Saskatchewan's *The Arbitration Act*, 1992, S.S. 1992 c. A-24.1, s.18(1); New Brunswick's *Arbitration Act*, S.N.B. 1992, c. A-10.1, s.17(1). In British Columbia (see s.15 of the *Arbitration Act*, R.S.B.C. 1996, c.55), the Supreme Court in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, held that s.15 stands for the same Competence-Competence principle. The maritime provincial statutes generally contain similar provisions to s.15 of the BC Act, which would therefore likely also incorporate the Competence-Competence principle, based on the *Telus* decision (see Newfoundland and Labrador's *Arbitration Act*, R.S.N.L. 1990, c. A-14, s. 4; Nova Scotia's *Arbitration Act*, R.S.N.S. 1989 c. 19, s.7; Prince Edward Island's *Arbitration Act*, R.S.P.E.I. c. A-16, s.6).
- 3 *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 SCR 801 at paras 84-85.
- 4 *Siedel v. TELUS Communications Inc.*, 2011 SCC 15 at para 114.
- 5 *Ibid* at para 29.
- 6 *Covanta Durham York Renewable Energy Limited Partnership v. Barton-Marlow Canada*, 2016 ONCA 558 at para 16, *Haas v. Gunasekaram*, 2016 ONCA 744, at para 15, *Ontario Medical Association v. Willis Canada Inc.*, 2013 ONCA 745 at para 23.
- 7 *Ciano Trading & Services C.T. & S.R.L. v. Skylink Aviation Inc.*, 2015 ONCA 89 at para 7.
- 8 *Supra* note 2, s.7(1).
- 9 Ontario's *Arbitration Act*, 1991, S.O. 1991, c. 17, s.17(3); Alberta's *Arbitration Act*, R.S.A. 2000, c. A-43, s. 17(4); Manitoba's *The Arbitration Act*, C.C.S.M. c. A120, s. 17(4); Saskatchewan's *The Arbitration Act*, 1992, S.S. 1992 c. A-24.1, s.18(4); New Brunswick's *Arbitration Act*, S.N.B. 1992, c. A-10.1, s.17(3). As stated in footnote 2, the British Columbia, Newfoundland and Labrador, Nova Scotia and Prince Edward Island statutes do not expressly codify the Competence-Competence principle, but contain stay provisions which based on the *Telus* decision likely have the same effect.
- 10 Arbitration Law of Canada: Practice and Procedure (Casey, Brian J., 2017, Jurisnet LLC), at pg. 200.
- 11 *Supra* note 10 at pg. 199.
- 12 *DNM Systems Ltd. v. Lock-Block Canada Inc.*, 2015 BCSC 2014 at para 77. See also *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd*, 2016 ONCA 324, where the Ontario Court of Appeal held the parent company of a franchisor may be a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c.3., although this was not an arbitration case.
- 13 *Supra* note 10 at pg. 67.
- 14 *Nodricks Norsask Seeds Ltd. v. Dyck Forages & Grasses Ltd.*, 2014 MCBA 79.
- 15 *Supra* note 10 at pg. 71.
- 16 *Supra* note 10 at pg. 72.
- 17 *Supra* note 10 at pg. 71.
- 18 *Yaworski v. Gowling Lafleur Henderson LLP*, 2013 ABCA 21; *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 1804; *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572; *Deloitte Noraudit v. Deloitte Haskins & Sells, US et al.*, 9 F (3d) 1060 (2nd Cir 1993).
- 19 *Supra* note 10 at pg. 66.
- 20 *Adlakha v. Meehan*, 2011 ONSC 444.
- 21 *Ibid* at para 13.
- 22 *Ibid* at paras 10-11.
- 23 *Ibid* at para 13.
- 24 *Alpina Holdings Inc. v. Data & Audio-Visual Enterprises Wireless Inc.*, 2013 ONSC 3087.
- 25 *Ibid* at para 39.
- 26 *Kanda Franchising Inc. and Kanda Franchising Leaseholds Inc. v. 1795517 Ontario Inc.*, 2017 ONSC 7064.
- 27 *Ibid* at para 21.
- 28 *Ibid* at para 24.
- 29 *Ibid* at para 16.
- 30 *Ontario Medical Association v. Willis Canada Inc.*, 2013 ONCA 745.
- 31 *Ibid* at para 52.
- 32 *Ontario Medical Association v. Willis Canada Inc. et al*, 2013 ONSC 2253 at para 12.
- 33 *Ibid* at para 17.
- 34 *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572.
- 35 *Ibid* at para 54.
- 36 *Graves v. Correacology Health Care Group Inc.*, 2018 ONSC 4263.
- 37 *Ibid* at para 27.
- 38 *Ibid* at para 26.
- 39 *Ibid* at para 61.
- 40 *McBro Planning & Development Company v. Triangle Electrical Construction Company Inc.*, (1984) 741 F. 2d 342.
- 41 *Ibid* at pg. 343.
- 42 *Ibid* at pg. 344.
- 43 *Ibid*.
- 44 *Ibid*.
- 45 *Deloitte Noraudit v. Deloitte Haskins & Sells, US et al.*, 9 F (3d) 1060 (2nd Cir 1993).
- 46 *Ibid* at para 1.
- 47 *Ibid* at para 20.
- 48 *Ibid* at para 19.
- 49 *Ibid* at para 20.

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THE MEDIATOR'S TOOLKIT: FORMULATING AND ASKING QUESTIONS FOR SUCCESSFUL OUTCOMES

Mediators need to formulate and ask incisive questions that challenge entrenched thinking and shift perspectives. *The Mediator's Toolkit* offers a way to do that using questions such as those that Gerry O'Sullivan calls "Journey of Inference Questions." She suggests that such questions are designed to specifically create new insight for the parties. Here is a brief extract from the book.

The concept of the "ladder of inference" was first developed by Chris Argyris and subsequently presented by Peter Senge in his book *The Fifth Discipline*. In this book I am calling it the "Journey of Inference" because I consider it to be a continuous circular journey in the mind rather than a journey to the top of a ladder and back down again. See Figure 1.

Journey of Inference questions take a party through the information they selected during a precipitating event; the interpretations they made about that information; the assumptions they made; and the conclusions they then reached which, in turn, informed any decisions or actions they took. These questions also explore the beliefs of a party and how these beliefs may have influenced his or her Journey of Inference.

This workplace scenario, with the accompanying guidelines and steps, will serve to demonstrate how Journey of Inference questions work.

Ann and Mary have both worked in a hospital laboratory for five years. The laboratory had nine members of staff in total. The working relationship between Ann and Mary was good and they even socialized together on occasions. Lately, however, Ann had noticed a slight

difference in her relationship with Mary. There was nothing that she could specifically name — it was just a niggly feeling that Ann had had for a few weeks, with nothing to back it up.

Last week when Ann arrived at work, Mary was walking towards her in the hospital corridor. When Ann was about to say hello, she noticed that Mary kept her head down and did not say hello to her. Ann was taken aback by this and continued walking towards the laboratory. Ann's first thought was that this confirmed her previous suspicions: she interpreted the incident to mean that Mary wanted to avoid her, and she then assumed that Mary did not like her anymore. Ann concluded that Mary probably wished to end their friendship but had no idea why Mary would want to do this, especially without telling her why. As she continued to reflect, Ann became convinced that Mary had been talking about her behind her back to others in the laboratory.

Ann then realized that this was just one more example of the way people behave: they never have the courage to say something to your face, but spend their time thinking negative thoughts about you, while continuing to smile and pretend that



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everything is OK with the friendship. Then they talk to others about you and try to turn them against you too. Ann immediately decided that she would stop talking to Mary and to all the other staff as well. Ann had experienced this situation many times before and she believed that she knew exactly how to deal with it!

Over the next few days, both Mary and the other staff began to wonder what was wrong with Ann. But they did not approach her, because they noticed she was bubbling over with anger and they knew she could be aggressive at times. They did not want to create a scene, but they all engaged on their own individual Journeys of Inference and took actions in line with their personal past experiences and beliefs.

Over the following days, Ann noticed more and more things that con-

firmed her suspicion that no one wished to be her friend any more. She even started to proactively look for examples to prove that her beliefs were correct. The situation became steadily worse until one day Ann completely lost her temper with Mary in the hospital cafeteria while dozens of staff looked on. Mary went to the human resources department to make a complaint about Ann, and mediation was proposed.

Selecting data and making inferences is largely an unconscious process, but it can be made conscious through mediation questions. Journey of Inference questions support parties to look for new and clarifying information that may

even prove their interpretations and assumptions to have been incorrect. The resulting re-interpretations they make may then be more accurate and balanced.

GUIDELINES FOR ASKING JOURNEY OF INFERENCE QUESTIONS

- Journey of Inference questions should be asked only after the parties have told their story. To ask them before or during this initial storytelling may appear analytical and judgmental.
- Each party may be asked about his or her Journey of Inference from beginning to end;
- or
- The parties may be asked in turn

about their interpretations, then about their assumptions, and so on. But this latter method requires very tight facilitation.

- After a party's response, and prior to asking the next question, a mediator sometimes needs to reflect back what they have heard before asking their next question so that the party does not feel like they are being interrogated.
- Parties may find it challenging to differentiate between interpretations and assumptions. One way to counteract this is to first ask, "What did you think that X meant?" when asking about interpretations, and then, "And what did you then think that would mean?", for assumptions.

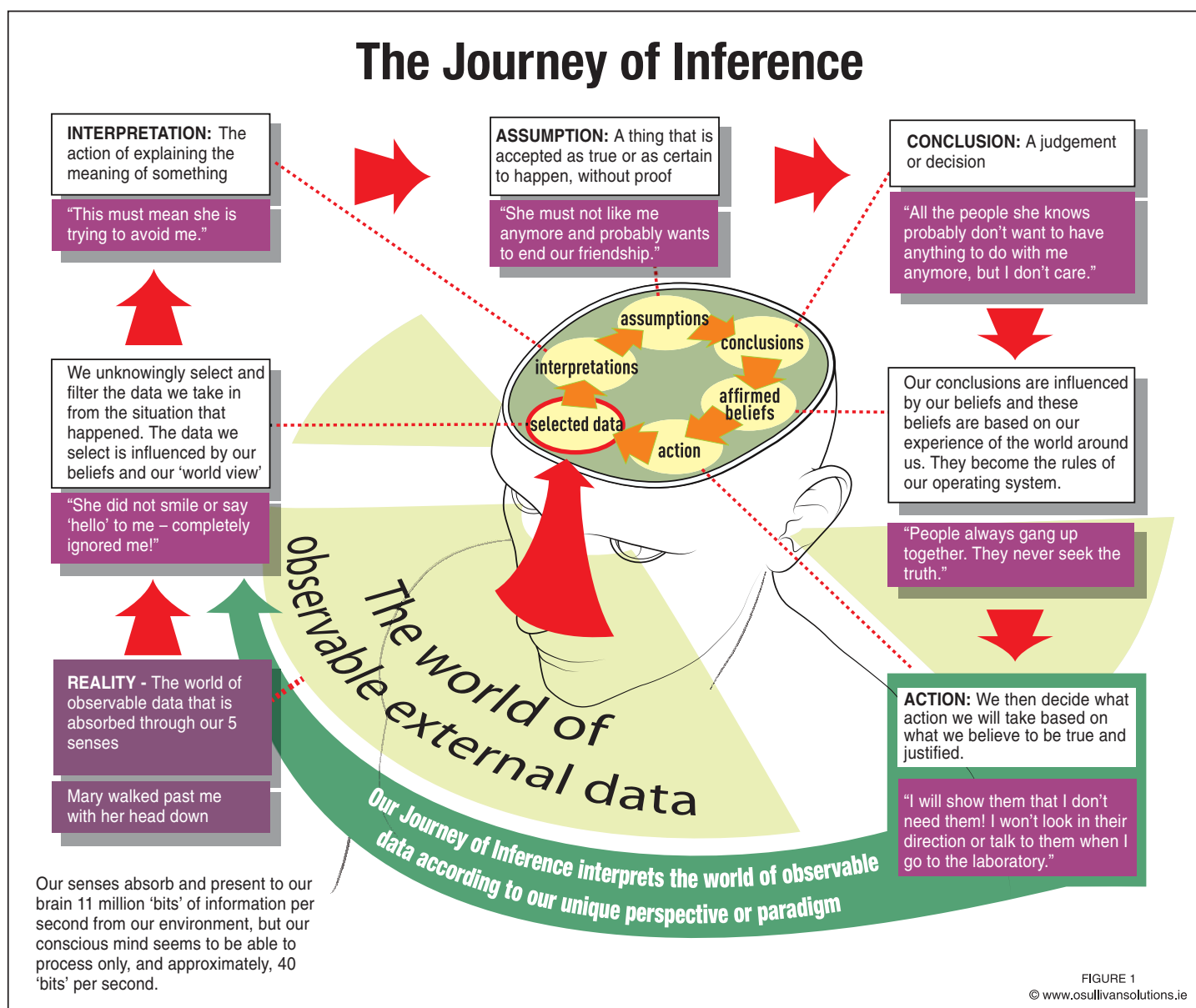


FIGURE 1
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- A party can be asked about his or her own Journey of Inference and then be asked to hypothesize about the other party's Journey of Inference. This can be helpful in a joint meeting if one party claims that the other party does not understand them, but when you as the mediator know differently.

THE JOURNEY OF INFERENCE QUESTIONING PROCESS CAN STOP AT ANY TIME, IF NECESSARY, FOR EXAMPLE:

- If understanding is reached early in the questioning process — for instance, at interpretations stage.
- If one party is finding the process too intense and difficult.

SAMPLE JOURNEY OF INFERENCE QUESTIONS

There are three steps involved in developing a series of Journey of Inference questions:

- Step 1:** Hearing the narrative of a party
- Step 2:** Challenging the narrative
- Step 3:** Building a possible new narrative

Here are some sample questions that could be asked in the workplace scenario involving Mary and Ann. [This list of questions has been condensed for this article.]

**STEP 1:
HEARING THE NARRATIVE
The Event**

- Ann, would you like to tell me what happened, please, when you and Mary passed each other in the corridor? Then what happened?

Selected Data

- What did you observe, Ann? What information or facts did you take from this event?

Interpretations

- When that happened [Mary walking past you with her head down], what did you think it meant? What brought you to this interpretation?

Assumptions

- And what did you think that meant and what assumptions did you make about what might happen? What brought you to that assumption?

Conclusions and judgments

- After you made that assumption, what conclusions or judgments did you come to? What brought you to this judgment or conclusion?

Beliefs

- What are your beliefs about the world and how people usually behave in a situation like this?

Actions

- How did these beliefs influence the decisions you made or the actions you took afterwards? What did you decide to do?
- And then what happened? What else happened?

Note:

After going through Step 1, mediators need to summarize, identify and name to parties the link between the initial interpretations made by a party and the resulting decisions or actions they took.

**STEP 2:
CHALLENGING THE NARRATIVE
Selected Data**

- What had you been thinking/feeling about Mary before/when this happened?
- On what did you base that thinking? What was the tangible evidence for this?
- What had been your expectations of Mary? What influenced those expectations?
- If you had not been concentrating on what you were expecting, what else might you have seen?
- What would others have observed, if they had been there when Mary walked past you with her head down? — On a scale of 0 to 10, with 10 indicating complete certainty, how certain can you be about...?
- What is this uncertainty about? (If the response is less than 10)

Interpretations

- Ann, what did you think might have been Mary's intention?
- What influenced or contributed to you interpreting what you observed in this way? — How might your stated niggly feeling about your friendship with Mary have influenced what you actually saw and your interpretations? If your friendship had

still been good when Mary passed you in the corridor with her head down, what might your interpretations have been?

- If you were to look at yourself and this incident from a balcony, what might you have seen and what interpretations might you have made?
- Is there a time or a circumstance that might result in you interpreting this differently?

Questions can also be asked about the perspective of the other party:

- If asked, what might Mary say about the time you saw her passing you in the hospital corridor?
- What do you think would surprise Mary the most about what you interpreted from this situation, and about what you mentioned about her intent?
- What interpretation might Mary have liked you to make?

Assumptions

- What assumptions did you make after you initially interpreted Mary's actions in that way?
- What did you think was going to happen?
- What influenced you to make this specific assumption?
- What other assumptions could you have made?
- If you had made a different assumption, what might have been the outcome?

The mediator may continue with more questions about the assumptions made, based on Ann's responses if relevant.

Conclusions

- After you made that initial assumption, what judgment or conclusion did you come to, Ann?
- What brought you to make this judgment or conclusion? What did this decision mean for you?
- What other conclusions could you have come to?

The mediator may continue with more questions about the conclusions made, and ask the party to rank their alternative conclusions, if relevant.

Beliefs

- What is it you think or believe about life or people that brought you to that conclusion? How has this belief served you in the past? Are there situations where these beliefs may be valid or invalid? What are the distinctions you make between these situations?
- What other beliefs do you have that could have resulted in your reaching a different conclusion?

Actions

- You mentioned earlier that after this event you made decisions about how you were going to respond to it and that the conflict escalated and you felt more entrenched. Having reflected on this now, what other decisions or actions could you have taken?
- How might this have impacted on the conflict situation and its progression?
- What might have been the outcomes?

At times, only one party needs to be asked Journey of Inference questions. But in this case, Mary had also made a Journey of Inference, so similar questions needed to be asked of her.

STEP 3: BUILDING A POSSIBLE NEW NARRATIVE

When the past has been deconstructed and it appears, or is stated, that new learning and insight have been gained by both parties, then it is time to start reflecting on any further mis-

interpretations that parties may have made.

- Mary and Ann, as the conflict progressed, what do you think each of you may have intended that may have been misinterpreted by the other?
- What do each of you think your misinterpretation may have meant for the other party?
- In what way might this interpretation have led to either of you employing a particular behaviour as a response?

Creating understanding between the parties is further helped by facilitating them to talk about the impact that the conflict is having on them. This may only be done if a mediator knows that each party will listen to the other respectfully.

- How has this conflict impacted on both of you?
- What has been the worst thing for each of you in all this?
- How did the impact of all this influence the thinking of both of you and the actions you took?
- With what kinds of things do you think the other party struggled?
- What do each of you need the other person to know or understand now?
- What might each of you have needed for this to happen differently?
- What could each of you now offer the other?

Facilitating regret and using the past to inform the future

If there has been a paradigm shift in one or both parties, then the following

questions may allow for some regret to be shown and may open possibilities for solutions.

- If you were to go back in time with the information that you have now, what might each of you have said/done differently?

Statement of the new narrative

- If you were to tell this story now to another person, based on the understanding you have both gained, how would you describe this story to them?

Note: Further issues may arise here and may need to be managed.

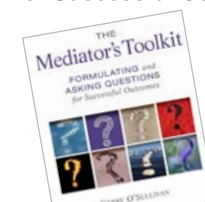
Agreements regarding the future

- If something like this were to happen again, how would you manage it? What would each of you need from the other? What could each of you offer the other?
- What can be taken from your learning to inform agreements between you for the future?

HAZARD WARNING

Do not pressure a party to answer a question—proceed carefully and gently, at their pace, and with their permission. 🏠

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Gerry O'Sullivan
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SMART OR NOT, IT'S WHAT THE PARTIES BARGAINED FOR:

A Case Comment on SMART Technologies ULC v Electroboard Solutions Pty Ltd, 2017 ABQB 559

The Alberta Court of Queen's Bench was recently asked to set aside the award of an international arbitral tribunal based on the allegation that the tribunal exceeded its jurisdiction. This is not novel. What is novel is that the award had been rendered by an appeal tribunal, created by the parties' contract, the majority of which had allowed an appeal brought from the award of the sole arbitrator at first instance on the basis of an error of law. While the court's approach does not contain any real surprises for arbitration practitioners, it does raise some issues to keep in mind when drafting arbitration agreements.

THE FACTS OF THE CASE, BRIEFLY, ARE AS FOLLOW.

SMART is a technology company that develops interactive whiteboards and group collaboration tools for classrooms and meeting rooms. Electroboard was the distributor of SMART products in Australia and New Zealand pursuant to distribution agreements that contained an arbitration clause. The arbitration agreements also provided for an appeal to an appeal tribunal of three arbitrators under the optional ICDR Rules for disputes over a certain monetary threshold. The standard of review provided for in those rules is review for "clear errors of law or clear and convincing factual errors". The rules also provide that the award of the appeal tribunal would be final and binding and not subject to appeal or further review.

Disputes arose between the parties, and SMART terminated the distribution agreements and commenced arbitration for payment of unpaid invoices.

Electroboard counterclaimed asserting issues as to the products' functionality, breach of contract, passing off and breach of the duty to negotiate in good faith. The disputes were decided by a sole arbitrator who issued a summary judgment award in favour of SMART on some issues and, after a hearing, a later award on the remaining issues in favour of SMART and dismissing the counterclaims.

Pursuant to the arbitration agreement, Electroboard then appealed the arbitral award to a panel of three arbitrators. The majority of the appeal tribunal reversed the sole arbitrator's award and found in favour of Electroboard. The third member of the appeal tribunal dissented. SMART applied to the court to set aside the appeal tribunal's award.

The law applicable to the application to set aside was the *International Commercial Arbitration Act*, RSA 2000, c I-5, which attaches as a schedule the UNCITRAL Model Law.

SMART argued that the appeal award should be set aside under Article 34(2)(a)(iii), as it alleged that the tribunal did not decide the dispute on the basis of clear errors of law or clear and convincing factual errors. On the basis of the language of the dissenting opinion, SMART argued that the majority of the appeal tribunal had sought to "do justice above all else", essentially deciding on the basis of *ex aequo et bono* thereby exceeding its jurisdiction. SMART pointed to a number of instances in the procedure that it said demonstrated that the majority of the appeal tribunal disre-



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garded the law and pursued justice on its own terms. In the alternative, SMART argued that the appeal tribunal ignored the applicable rules on costs, which amounted to an error of jurisdiction on its own.

Electroboard argued that the majority decided the appeal within the terms and scope of the submission to arbitration. It submitted that the court had very limited ability to intervene under Article 34 of the Model Law and that it could only do so if the tribunal had exceeded its jurisdiction. It also submitted that there is a powerful presumption that the tribunal acted within its powers. Electroboard argued that jurisdictional questions are narrow in scope and go to the question of whether the tribunal had the authority to hear and determine the dispute and not the manner in which it was decided. It submitted that there was no

evidence to support SMART's argument that the appeal tribunal decided on an *ex aequo et bono* basis and that it instead applied legal principles in its award. It sought an order from the court recognizing and enforcing the award.

The court reviewed the decisions of the arbitrator and appeal tribunal in order to determine whether the majority ignored the contractual standard of review and made their decision on an *ex aequo et bono* basis. The court confirmed that there was no basis to set aside an international arbitration award because it was factually or legally wrong. The court reviewed the test for a true jurisdictional error and confirmed that prior cases had confirmed that "the inquiry under Article 34(2)(a)(iii) is restricted to whether the tribunal dealt with a matter beyond the submission to arbitration, not how the tribunal decided issues within its jurisdiction." The court concluded that the appeal tribunal did not consider any matters outside its authority and that it applied the standards of review that applied to the contractual appeal. It noted that any failure to properly apply those standards of review would be an error of law, not an error of jurisdiction. The court found that the majority of the appeal tribunal applied the law and did not decide *ex aequo et bono*.

The court also found that the costs award was within the appeal tribunal's jurisdiction and thus the award itself could not be reviewed by the court. The court recognized the appeal tribunal's partial and final awards and declared that Electroboard was entitled to enforce the awards against SMART in the Province of Alberta.

These findings by the court are not surprising and are consistent with the approach of courts in Canada when asked to set aside international arbitration awards. Such applications can only be made on limited grounds and it is only in exceptional circumstances that a court will set aside an award. This is consistent with the policy considerations in the Model Law (on which the international arbitration statutes of all

Canadian jurisdictions are based) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Those instruments support the autonomy of the parties in using arbitration to resolve their disputes and in tailoring the process to meet their needs without intervention from national courts.

This case does provide an opportunity to consider the implications of the interaction between party autonomy and one of the implied fundamental attributes of International commercial arbitration proceedings – that the award will be final and binding. As explained in one of the leading texts on international commercial arbitration:

"...most institutional rules provide unequivocally that an arbitral award is final and binding. These are not intended to be empty words. One of the advantages of arbitration is that it is intended to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the case to the highest court in the land, they should opt for litigation. By

choosing arbitration, the parties choose, in principle, finality. An arbitral award is not intended to be a mere proposal as to how the dispute might be resolved, nor is it intended to be the first step on a ladder of appeals through national courts."¹

As noted, the notion that international arbitration awards are intended to be final and binding is given effect through the provisions of the Model Law that limit national courts' ability to review arbitration awards. There is no right of appeal on any grounds to any court in Canada for an international arbitration award.² The finality of an award makes good sense in the context of international parties for a number of reasons.

First, these disputes by definition arise between parties in a contractual relationship with one another and thus implies a measure of commercial sophistication. Deference to party autonomy in selecting an alternative to court litigation and supporting that choice should not offend any general public policy considerations. Supporting the finality of awards arising out of a pro-

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cess agreed by the parties promotes international commerce and parties are expected to prefer a commercially acceptable result over a legally correct result.³ Usually, the focus in such disputes is on the contractual language chosen by the parties and the facts of the particular case. Further, the resulting award has no impact on the jurisdiction on whose law is chosen even if that law is incorrectly applied by a tribunal. The resulting award in a private arbitration process has no precedential value.

Second, an international dispute necessarily implies a dispute between parties from different legal regimes. Often, those parties will select a neutral jurisdiction's arbitration (procedural) law and/or substantive law to govern their contract and their interest is in resolving the specific dispute between them. The parties are presumed to prefer an efficient and private process designed to resolve their dispute, which may include application of considerations other than the governing law (such as trade usages) to a process that is focused on correct application of the law above all else.

Third, finality of international arbitration awards reduces commercial uncertainty arising from disputes, as a definitive allocation of rights is reached in one phase. Prolonged disputes and multiple tiers of review are bad for business. Parties are also in a position to mitigate the risk of an unreasonable award through careful selection of their tribunal and preparation of their case. With the simplified processes that arbitration affords, the focus can and should be on the merits of the dispute between the parties and not procedural wrangling.


As noted, States (through the New York Convention), legislatures (through the adoption of the Model Law) and courts (through consistent application of these instruments) have all given effect to the desire for finality. It is generally accepted that parties cannot by contract confer on courts the jurisdiction to consider an appeal from an international arbitration award.⁴ If, despite all of the

reasons for finality of awards as the preferred option, parties wish to provide for a right of appeal in an international arbitration, there are two choices available. They can either choose as their seat of arbitration one of the few jurisdictions that permit an appeal⁵ or provide for an appeal by contract, which will result in a further arbitration award that will be final and binding.

This, of course, is what the parties did in the SMART case. The parties agreed by contract to allow for an appeal of the first arbitration award when an award concerned an amount over a certain threshold. Wisely, they selected a set of institutional rules designed for appeals. Like any arbitration agreement, one that provides for an appeal must be carefully drafted and consider all of the implications of such a process on the enforceability of the award (not to mention the impact on the business and relationships). For example, the ICDR Optional Appellate Rules take into consideration the issues created by having an appeal within a process that is designed to allow for a final and binding decision in a single tier process. These rules also set out a default standard of review and method for selecting the appellate tribunal. Providing for an appellate process in an ad hoc arbitration is fraught with difficulty. This is not a decision that should be taken lightly and the possible delays and complexity in the process must be carefully considered. Arbitral tribunals derive their jurisdiction from the consent of the parties and, unlike national courts, have no inherent jurisdiction. This has implications

not only for the standard of review, but also what powers an appellate tribunal may have.

However, it is interesting to note that even providing for an appeal will not necessarily culminate in a correct legal result. A contractual appeal process allows parties to fashion their own standard of review on appeal, but if the appellate tribunal misapplies that standard, it cannot be fixed by the court at the place of arbitration. Although there is a second review by another tribunal, there is no court that will ensure that the legal result is correct. The court in reviewing the appeal tribunal's award in SMART made it clear that its review was limited to whether the appeal tribunal had properly exercised its jurisdiction and not whether the appeal had been properly decided.

It is not clear from the court's decision in SMART whether the parties' appellate process resulted in the intended purpose for its inclusion in the contract. If one takes the references in the decision to the dissenting opinion of the appellate arbitrator, it would appear not. The dissenting opinion suggested that the majority had not properly applied the standard of review agreed by the parties. As the court noted, even if proved, this would have amounted to an error of law and not a basis for setting aside the award. If one considers the right of appeal to allow for a second chance to argue one's case, then perhaps it met the purpose. What is clear is that the parties in SMART got what they bargained for – an award that would be final and binding, albeit after a second level of review. 

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- 1 Redfern & Hunter, p. 569
 - 2 The situation is somewhat different for non-international arbitration awards and the discussion of possible appeal of these awards is beyond the scope of this comment.
 - 3 This comment should not be interpreted as suggesting that arbitration is anything other than an adjudicative process where an independent and impartial tribunal applies rules of law to determine party rights. It is simply meant to recognize that contractual disputes are fundamentally business problems that are transformed into legal issues and arguments in order to provide for adjudication by a neutral third party in arbitration. Commercial parties are more interested in an acceptable solution to their business problem than a correct legal result.
 - 4 US courts have considered this issue see *Kyocera Corporation v. Prudential-Bache Trade Services Inc.* 341 F.3d 987 (9th Cir. 2003) and *Hall Street Associates, LLC v. Mattel, Inc.* 552 US 576 (2008). Also see *McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586.
 - 5 England, for example, still provides for an appeal of arbitration awards in certain limited circumstances, but only on issues of English law and in circumstances where the parties have not waived their right of appeal either explicitly or implicitly through their choice of arbitration rules that provide that an award will be final and binding.

DOMESTIC COMMERCIAL ARBITRATION AWARDS: TO APPEAL OR NOT APPEAL?

With its recent decisions in *Sattva*¹ and *Teal Cedar*², the Supreme Court of Canada sent a clear message: the right to appeal domestic commercial arbitral awards should be construed narrowly. These decisions further the objectives of finality and efficiency in domestic commercial arbitration, particularly in British Columbia, where the domestic arbitration statute was at issue. In between *Sattva* and *Teal Cedar*, the Uniform Law Commission of Canada (“**ULCC**”) adopted its new Uniform Arbitration Act.³ Among other important amendments were notable changes to the appeals provision, making the right to appeal only available to those parties who explicitly choose to “opt-in” as part of their arbitration agreement. These recent developments invite a renewed consideration of the place of appellate review of private commercial arbitration disputes within our domestic judicial systems. Undoubtedly, the Supreme Court’s endorsement of the relative independence of domestic commercial arbitration and the proposed narrowing of the right to appeal by the ULCC are positive developments, but are they enough? How far must we go in order to ensure that courts recognize domestic commercial arbitration as the private, contractually-based, alternative dispute mechanism it aims to be?

SATTVA AND TEAL CEDAR: NARROWING THE SCOPE

SATTVA

In *Sattva*, the Supreme Court had to determine if, *inter alia*, the British Columbia Court of Appeal properly granted leave to appeal the award at issue under the *Arbitration Act*, R.S.B.C. 1996, ch 55 (the “**BC Arbitration Act**”). Section 31 of the BC Arbitration Act only allows appeals on questions of law on consent from both parties or with leave of the court if: (i) it is sufficiently important to the parties and determining the point of law at issue may prevent a miscarriage of justice; (ii) the point of law is important to a class or group of which the applicant is a member; or (iii) the point of law is of general public importance.

The decision in *Sattva* focused on the interpretation of subsection 31(2)(a) of the BC Arbitration Act, which requires that the importance of the result of the arbitration to the parties justify the intervention of the court and the deter-

mination of the point of law may prevent a miscarriage of justice. The first criterion was not difficult to meet: the Court took note both of the parties’ agreement that the result of the arbitration was important to each of them and of the relatively large monetary amount in dispute before concluding that intervention was justified.⁴ With respect to the criterion of preventing a miscarriage of justice, the Court held that the alleged legal error “must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case”. A point of law may only rise to this level if the appeal itself has arguable merit, i.e. there is some possibility of succeeding.⁵

These issues do not arise if the question on appeal is not a question of law. With respect to appeals generally, the Court reiterated that a central objective



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“is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation”.⁶ It is in this spirit that the Court declared that questions of contractual interpretation generally constitute mixed questions of fact and law, other than those “extricable questions of law” which include applying the wrong legal principle to the contractual analysis. In order to respect the restricted appeal rights set out by the legislature, courts should be cautious in identifying such questions.⁷

Thus, parties in British Columbia may only appeal to the courts from an arbitral award on a question of law. Where the parties do not agree, the party wish-

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ing to appeal must obtain leave. Under subsection 32(2)(a), the point of law at issue must be material and have arguable merit.⁸ Even in those cases where the legislative criteria are met, the court maintains residual discretion to deny leave. In exercising this discretion, courts should consider the traditional bases for refusing discretionary relief, including the parties' conduct, the existence of alternative remedies, undue delay, and the urgent need for a final answer.⁹

In the context of its discussion on the applicable standard of review, the Court observed that "[a]ppellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objective of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal". The Court stated that parties to commercial arbitrations generally participate by mutual agreement, as well as select the number and identity of the arbitrators. It qualified this statement, however, by adding that judicial review and appeals of arbitral awards are "analogous in some respects" because they involve reviewing the decision of a non-judicial decision-maker.¹⁰

TEAL CEDAR

In its follow-up decision to *Sattva*, the Supreme Court restored all of the arbitrator's original conclusions, as the applicant had failed to raise a question of law with arguable merit in its application for leave. The majority of the Court reiterated its conclusions in *Sattva* that a limited jurisdiction for courts on appeal and a deferential standard of review for arbitral awards "advance the central aims of commercial arbitration: efficiency and finality".¹¹

The majority clarified that extricable questions should be given a narrow

scope – consistent with finality in commercial arbitration – and that contractual interpretation remains a mixed question of fact and law.¹² It further held that questions of law are not to be conflated with errors of law, which can only be considered at the merits stage after leave to appeal has been granted. A court does not have jurisdiction to review an arbitrator's decision merely because it is allegedly incorrect or even unreasonable; rather, an arbitrator's reasons are only reviewable once a legal question of arguable merit has been identified.¹³

CANADA'S DOMESTIC ARBITRATION ACTS: AN UNEVEN TERRAIN

The pronouncements of the Supreme Court in the *Sattva* and *Teal Cedar* decisions reflect a distinct pro-arbitration stance, as well as a willingness to promote and respect the objectives of finality and efficiency in private commercial arbitrations. By declaring that questions of contractual interpretation will almost always be mixed questions of fact and law and that the generally-applicable standard of review for commercial arbitral awards is reasonableness, the Court recognizes private commercial arbitration as a valid alternate dispute mechanism and further narrows the scope of court intervention post-award. These overall themes and conclusions are universal and should apply to domestic commercial arbitral awards rendered in all Canadian jurisdictions.

That said, the Court's conclusions with respect to the test for leave to appeal an arbitral award can only be applied to domestic arbitrations governed by the BC Arbitration Act. Yet, key provisions of domestic arbitration acts vary significantly from one jurisdiction to another, making Canada's overall domestic arbitration regime difficult to navigate.

Most Canadian jurisdictions adopted a version of the appeals provision of the Uniform Law Conference of Canada's ("ULCC") Uniform Arbitration Act (1990)¹⁴. Under section 45 of the Uniform Arbitration Act, parties may provide in their arbitration agreement for an appeal as of right on a question of law, mixed fact and law, or fact. If the arbitration agreement is silent, parties may appeal an award on a question of law, with leave of the court. Leave shall only be granted if the court is satisfied that the importance to the parties is sufficient to justify an appeal and determination of the question of law at issue will significantly affect their rights. If the question of law was expressly referred to the arbitral tribunal, it may not be appealed. Parties may not contract out of the right to appeal a question of law with leave of the court. The ULCC noted among the "guiding principles" of the Uniform Arbitration Act that an "award resulting from the arbitration should be readily enforceable, subject only to review for a specific list of fatal flaws of form or procedure".

In British Columbia, as seen above, parties may only appeal a commercial arbitral award on a question of law, either on consent or with leave of the court. The BC Arbitration Act confers a broader discretion on the court considering the leave application, stating "the court *may* grant leave" rather than using the "*shall* grant *only*" formulation found in the Uniform Arbitration Act. It also adds two "categories" for granting leave: (i) importance to a class or body of persons to which the applicant is a member; and (ii) general public importance. Parties may also contract out of the right to appeal, but only once the arbitration has commenced.¹⁵ The test for leave to appeal under the BC Arbitration Act is thus at once narrower – due to the court's residual discretion to



deny leave – and also broader, as parties may be granted leave to appeal on an issue that is of importance to a class or group or the public in general.

The statutes of Alberta, Saskatchewan, Manitoba, New Brunswick and Ontario largely follow the language of the Uniform Arbitration Act. Appeals are allowed on all questions without leave if the arbitration agreement so provides. Where the agreement is silent, parties may appeal a question of law with leave. Leave is only granted if the importance to the parties of the matter at stake justifies an appeal and the determination of the question of law at issue will significantly affect the parties' rights.¹⁶ In Alberta, no appeal is permitted on a question of law that was expressly referred to the arbitral tribunal for decision.¹⁷ Parties governed by the Ontario and Saskatchewan regimes may contract out, expressly or by implication, of their right to appeal an

award on a question of law.¹⁸

In Nova Scotia, Prince Edward Island, Yukon, Northwest Territories and Nunavut, there is no right of appeal unless the parties have agreed otherwise in the arbitration agreement.¹⁹ Newfoundland and Labrador does not permit appeals but, as discussed below, appears to allow a full judicial review of domestic arbitral awards.²⁰ Quebec does not provide for any appeal rights against arbitral awards: Article 2638 of the *Quebec Civil Code* reads "An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, *to the exclusion of the courts*" (emphasis added).²¹

DOMESTIC ARBITRATION ACTS IN PRACTICE: A DIFFICULT ROAD TO FOLLOW

Just as the statutes relating to domes-

tic commercial arbitration vary across Canadian jurisdictions, so too have courts within each jurisdiction in applying the applicable appeal provisions. Regrettably, the broad concepts and teachings set out by the Supreme Court in *Sattva* and *Teal Cedar* are not consistently applied. Indeed, case law in many jurisdictions is inconsistent on several key issues, such that it remains difficult for parties to have any degree of certainty as to what their rights may be following the issuance of a domestic commercial award. Below is a brief overview of some of the persisting issues.

CONTRACTING OUT OF THE RIGHT TO APPEAL

As previously mentioned, the domestic arbitration statutes in both Saskatchewan and Ontario permit parties to agree, expressly or by implication, to exclude the right to appeal on a



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LEADING DISPUTE RESOLUTION IN CANADA

question of law. In Saskatchewan, the inclusion of a “final and binding” clause “demonstrates that the parties have made the choice to resolve disputes through the expeditious process of arbitration; a choice which reflects an intention to avoid the prospect of potentially protracted and costly litigation, even if it means there is a chance they will be bound by an unfavourable decision from the arbitrator”.²² The law remains unclear in Ontario, where courts have found that a clause containing the phrase “final and binding” with an explicit preclusion such as “and there shall be no appeal” will likely constitute an agreement to contract out of the right to appeal, but a “final and binding” clause on its own may be insufficient to oust the jurisdiction of the courts.²³

SUFFICIENT IMPORTANCE TO THE PARTIES

The requirement that the issue of law in dispute must be sufficiently important to the parties to justify court intervention is found in many domestic arbitration acts, including in Ontario, British Columbia, Alberta, Manitoba, and Saskatchewan. Its interpretation varies across these jurisdictions and even within one province.

As evidenced by the Supreme Court's reasons in *Sattva*, the criterion of importance to the parties will be easily satisfied in British Columbia if both parties agree that the issue is, indeed, important, and that a large amount of money is at stake.²⁴ Ontario courts have also accepted that the monetary amount at stake is an appropriate factor to consider.²⁵ The threshold amount, however, is a moving target. In Alberta, the Court of Queen's Bench has accepted the parties' “ongoing commercial relationship” as fulfilling the requirement²⁶, but has also insisted that “[t]he question of importance to the parties is for the Court to determine. The Court, rather than the parties, must be satisfied the issues are of sufficient importance to the parties to justify an appeal”.²⁷

An interesting trend has developed in Alberta over the past two decades

wherein courts read in a requirement of public interest to the test for leave to appeal on a question of law. The concept was first discussed in 1997 in *Warren v. Alberta Lawyers' Public Protection Association*, where the court stated that “some public interest or some resolution of some public issue must be triggered”, since most matters will already have significant monetary effects on the parties.²⁸ Since then, a majority of, but certainly not all, cases have adopted this criterion, which appears to be based on the unwillingness to accept pecuniary interest as fulfilling the requirement in Alberta's domestic act that the importance to the parties justify an appeal.²⁹ While this development demonstrates that Albertan courts are in favour of limiting court intervention with respect to arbitral awards, the parties are nonetheless left guessing as to what the actual test for leave to appeal may be in any given case.

FULL-FLEDGED JUDICIAL REVIEW

Newfoundland and Labrador's legislation states that awards are final and binding on the parties. Under section 14 of the act, however, parties may apply for an award to be set aside in cases where the tribunal has “misconducted” itself or where “an arbitration or award has been improperly procured”.³⁰ As recently confirmed by the Newfoundland Court of Appeal, this section creates “a power analogous to judicial review whereby the Court can review the arbitrator's decision respecting the facts and the law”.³¹ Misconduct and improper procurement are defined extremely broadly, and include “committing reviewable error on rulings of fact or law made within jurisdiction”.³² In essence, the setting aside recourse is an as-of-right appeal by any party, on any question. Yukon's provision relating to setting aside has been interpreted in a similar fashion: an error of law on the face of the record or the award will fall under the label of arbitrator “misconduct” or “acting inappropriately”.³³

Newfoundland and Labrador's position with respect to the court's jurisdiction to review domestic commercial arbitral

awards appears to conflate private commercial arbitral tribunals with statutorily-constituted administrative tribunals, which are part of the provincial and federal judicial systems and whose decisions are therefore properly subject to judicial scrutiny. Private commercial arbitration, on the other hand, “is not part of the state's judicial system”.³⁴

Reliance on common law prerogative remedies as the foundation for court jurisdiction should not apply to contractual, consensual commercial arbitration.³⁵ The Supreme Court of Nova Scotia held in 2010 that judicial review is inappropriate with respect to private, consensual arbitrations, and would undermine the objective of encouraging and promoting the use of private arbitration as an alternative to court proceedings.³⁶ This same view was adopted by the Alberta Court of Appeal, where it clarified that awards stemming from private consensual arbitration are “prima facie” subject only to private law remedies”.³⁷ The Court of Appeal for Ontario has also similarly held that “[commercial] arbitral proceedings are presumptively immune from judicial review and oversight”.³⁸

POST-SATTVA DEVELOPMENTS

The post-*Sattva* jurisprudence in most jurisdictions reinforces the principle that with respect to the review of commercial arbitral awards, court intervention should be limited. The Saskatchewan Court of Queen's Bench recently stated that the “scope of appeal permitted by arbitration legislation is narrow, because arbitration is intended to be a complete alternate dispute resolution mechanism, rather than simply an extra layer of litigation”.³⁹ In an earlier decision, it confirmed that the purpose of arbitration would be “undermined if a party who was unhappy with the award could have the dispute reheard in a court of law”.⁴⁰ The British Columbia Court of Appeal similarly remarked that “the scope to appeal arbitral awards is narrow because arbitration is intended to be an alternate dispute resolution mechanism rather than one more layer of litigation”.⁴¹ In Ontario, where there appears to have been an

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uptick in applications for leave to appeal commercial arbitral awards in the past few years, the Court of Appeal noted on several occasions that the parties' choice of private consensual arbitration as their dispute forum implies a preference for the outcome of that process and, accordingly, limited judicial oversight.⁴²

Despite the foregoing, some courts continue to exercise an overly-broad jurisdiction and interpret the appeal provisions in a manner that fails to accept and promote private parties' choice of forum. As one commentator put it, lower courts have creatively used the "amplified language in existing arbitration legislation to interfere inappropriately with arbitration as an independent form of dispute resolution" and, in the process, disregarded the Supreme Court's guidance with respect to the court's limited role in reviewing commercial arbitral awards.⁴³

For example, in *Louiseize v. Peel Condominium*, the Ontario Superior Court of Justice granted leave to appeal an award relating to the rental of certain condominium units. The reasons contained no analysis of the requirement that the appellant identify a question of law. Moreover, the court determined that the matter was of sufficient importance to the parties and would significantly affect their rights because the units at issue comprised "a not insignificant stream of income" for the appellant and a resolution of the issues on appeal, which were not identified at this stage, would assist the respondent "in making future decisions regarding its unit holders".⁴⁴ Although the appeal was ultimately dismissed, the court analyzed every single issue put forth by the appellant, including questions of fact.

In an earlier case, the Ontario Superior Court of Justice granted leave to appeal an arbitral award that dealt with the interpretation of minutes of settlement. Despite citing *Sattva* for the principle that contractual interpretation involves questions of mixed fact and law, the court found that there were three extricable legal errors with respect to

the arbitrator's interpretation of the minutes of settlement, two of which related specifically to how certain wording should have been interpreted or considered.⁴⁵ The court considered the criterion as to whether the determination of these issues would significantly affect the parties' rights, but failed to address whether the issue was of sufficient importance to the parties to justify judicial intervention. On further appeal, the Court of Appeal reinstated the arbitrator's award.⁴⁶

As confirmed by the Court of Appeal for Ontario, there are no appeals from decisions granting or denying leave, other than in cases involving jurisdictional errors.⁴⁷ As such, there is no binding authority as to how the leave to appeal test must be analyzed under Ontario law, leaving courts to apply the test as they see fit, on a case-by-case basis.

Even in British Columbia, despite two very recent Supreme Court of Canada decisions on the precise scope and application of the test set out under subsection 31(2)(a) of the BC Arbitration Act, there still appears to be some confusion as to the proper application of the test for leave. In *Lithium One Homes Ltd.*,⁴⁸ the Supreme Court of British Columbia granted leave to appeal an award relating to a breach of contract. While it is unclear on which issue of law leave to appeal was granted, it appears that the court allowed the appeal on the issue of the arbitrator's jurisdiction, which normally would have been an issue raised pursuant to an application for setting aside. That being said, the Court also stated that because the arbitrator's reasons with respect to this jurisdictional issue were "inadequate", this constituted an error of law.⁴⁹ The Court then went on to declare the importance of the "issue on appeal" pursuant to each, non-cumulative branch of the test set out at subsection 31(2), concluding that it was of importance to the parties, those in the construction industry, and the public in general. It failed, however, to address the second criterion of subsection 31(2)(a), being that the deter-

mination of the point of law at issue would prevent a miscarriage of justice.⁵⁰ It is of note that neither *Sattva* nor *Teal Cedar* were cited in this decision, even though the hearing was held after both decisions had been issued.

THE UNFOUNDED FEAR OF THE "INCORRECT" AWARD

On December 1, 2016, the ULCC adopted the Uniform Act (2016), which includes important amendments to the appellate regime. First, the new provision prohibits appeals on questions of fact or mixed fact and law. Second, appeals on questions of law will only be permitted with leave of the court, and only if the parties have "opted in". In other words, there will be no right to appeal at all if the parties have not so provided in their arbitration agreement.⁵¹ In essence, there would no longer be an automatic "second kick" at the proverbial can. These amendments further a new purpose of the Act – also a 2016 addition – "to facilitate the use of arbitration as an alternative to court proceedings" by recognizing two principles, including that "courts should not intervene in arbitral proceedings except as expressly authorized by this Act".⁵² In particular, the "opt-in" regime greatly restricts the right of appeal and should reduce the number of leave to appeal applications presented to the courts.⁵³

The ULCC's amendments are a welcome reform, but they still assume that private commercial arbitration is part of, rather than an alternative to, the domestic judicial system. For example, the new appeals provision adopts British Columbia's two additional categories for granting leave (importance to a class or body of persons of which the applicant is a member and general public importance). As explicitly stated by the Supreme Court of Canada in *Desputeaux*, although arbitration is recognized as a legitimate part of a broader dispute resolution system, it "is not part of the state's judicial system".⁵⁴ As later stated by the Court in *Hryniak*, private commercial arbitration is not an accessible public forum.⁵⁵ Indeed, "[a]rbitration does not exist to support the rule of law in any particular judicial

system or to advance the common law. It is a contractual process to privately settle a commercial dispute".⁵⁶

Allowing appellate review of commercial arbitral awards ignores the very purpose of appellate review. As stated by the Supreme Court of Canada in *Housen* and recently confirmed in *Sattva*, the role of reviewing courts is to intervene in cases where the law is unsettled and make law for future cases: "the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application".⁵⁷ Appellate courts, therefore, are responsible for ensuring the "proper" development of the common law and have a duty to the public at large. Conversely, commercial arbitral tribunals constituted pursuant to an arbitration agreement between private parties have only a duty to those parties. The proceedings relating to specific arbitration, as well as any awards issued thereunder, generally remain private and only bind the parties to the arbitration agreement. Thus, any errors in the interpretation of statutes or the common law that may be contained in the arbitral award are also private and affect only the parties to the dispute. To say that the courts have a role in ensuring that legally-incorrect arbitral awards do not "taint" the development of the law is to ignore the simple fact that an incorrect decision in a private commercial arbitration is only potentially problematic if a party brings an appeal. Private commercial arbitral awards are not equivalent to court decisions: they are not part of the corpus

of domestic jurisprudence and they have no precedential value. If parties who chose to submit their dispute to private commercial arbitration were not entitled to appeal awards in domestic courts, these awards and alleged errors would likely never see the light of day.

This inevitably leads one to query given the recognized private nature of commercial arbitration: how can an award truly give rise to a question of law that has any importance for anyone other than the parties?⁵⁸ In cases where an award purports to have a binding effect on third parties, that award would properly be subject to an application for setting aside. Otherwise, a private, commercial arbitral award only affects the parties to that arbitration. Given the consensual and contractual nature of private arbitration, it is rather unsettling that the court could allow an appeal on a question of law that may not even necessarily affect the outcome of the dispute between the parties, as submitted to the arbitral tribunal. Courts should not be taking advantage of private commercial disputes to resolve a controversial issue of law.

In some cases, courts may remit matters for reconsideration or redetermination. This in no way contributes to the development of law because any supplementary award will also remain private unless, of course, it is subject to a further round of appellate review. Regardless whether this process produces a more satisfactory result for the parties, it surely causes them to incur

significant additional costs and prolong the uncertainty surrounding their dispute, thereby robbing them of three important advantages of arbitration: efficiency, finality, and reduced cost. In cases where the court of appeal reinstates a tribunal's original conclusions, the parties have gone through multiple additional proceedings simply to arrive at the same result.⁵⁹ It is important to note that permitting parties to private commercial arbitrations to appeal arbitral awards can be a waste not only of their resources, but those of the domestic judicial system as well. Given current backlogs, allowing parties to have recourse to precious court resources to re-litigate private disputes that have no bearing on the development of the law as a whole and do not affect the general public seems almost irresponsible.⁶⁰

TO APPEAL OR NOT APPEAL?

The question then remains: must we do away completely with appeals from domestic commercial arbitral awards? The issue can be polarizing. While some advocate for their complete abolition, others fear that eroding court intervention will render commercial arbitration less attractive.⁶¹ In the commentary to the Uniform Arbitration Act (2016), the ULCC noted that among the members of its working group and survey respondents, more than half were in favour of prohibiting appeals on questions of law.

The purposes and advantages of private commercial arbitration suggest the abolition of appeals to domestic courts on any question. In the majority of cases, parties make a conscious decision to refer their disputes to private arbitration. They carefully select their arbitral tribunal, which is generally constituted of highly experienced, highly competent adjudicators, many of them former judges themselves. Just as the courts do, arbitral tribunals have the duty to consider, analyze and apply the law governing the dispute, a duty which they take very seriously. Sometimes, the tribunal will get it wrong. So might the courts. But the parties chose private arbitration for a reason. As stated by Redfern and Hunter: "[b]y choosing

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arbitration, the parties choose, in principle, finality. An arbitral award is not intended to be a mere proposal as to how the dispute might be resolved, nor is it intended to be the first step on a ladder of appeals through national courts".⁶² Though this comment was made in the context of international arbitration, it equally applies to domestic commercial arbitration. It is also important to recall that taking away the right to appeal does not leave parties without any recourse against an improper award: they can always move to have it set aside.

The Supreme Court of Canada's pronouncements in *Sattva* and *Teal Cedar* and the opt-in premise of the new Uniform Arbitration Act are both steps in the right direction. While the Supreme Court has declared that the objectives of finality and efficiency must be implemented, the ULCC amendments place the choice to appeal squarely on the parties' shoulders. Unfortunately, both the Supreme Court and the ULCC still implicitly treat domestic commercial arbitral tribunals like inferior courts, which are part of the established judicial system and thus

properly subject to judicial review. This position makes it more difficult to firmly establish domestic commercial arbitration as a parallel alternative dispute mechanism, especially for a losing party who is likely to take advantage of any additional recourse at its disposition, including a potentially fruitless – but costly – appeal. In order to truly further the objectives of finality and efficiency of domestic commercial arbitration, it must be left to operate as parallel to, but not part of, our domestic judicial systems. And this includes eliminating the right to appeal. 🏠

1 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. ["*Sattva*"]
2 *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32. ["*Teal Cedar*"]
3 Uniform Arbitration Act (2016), available online: https://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0017.pdf.
4 *Sattva*, *supra* note 1, at para. 41
5 *Ibid.*, at paras. 70-74.
6 *Ibid.*, at para. 51
7 *Ibid.*, at paras. 50-54.
8 *Ibid.*, at para. 79.
9 *Ibid.*, at paras. 85-89.
10 *Ibid.*, at para. 105.
11 *Teal Cedar*, *supra* note 2, at para. 1.
12 *Ibid.*, at paras. 45-46.
13 *Ibid.*, at paras. 59-60, 69.
14 Uniform Arbitration Act (1990), available online: <http://www.ulcc.ca/en/home/117-josetta-1-en-gb/uniform-acts/arbitration-act/1391-uniform-arbitration-act-1990>
15 *Arbitration Act*, RSBC 1996, ch 55, subsection 35(1).
16 *Arbitration Act*, RSA 2000, c A-43, section 44; *The Arbitration Act*, 1992, SS 1992, c A-24.1, section 45; *The Arbitration Act*, CCSM 2013, c A120, section 44; *Arbitration Act*, RSNB 2014, c 100, section 45; *Arbitration Act*, 1991, SO 1991, c 17, section 45.
17 *Arbitration Act*, RSA 2000, c A-43, subsection 44(3).
18 *The Arbitration Act*, 1992, SS 1992, c A-24.1, section 4; *Arbitration Act*, 1991, SO 1991, c 17, section 3.
19 *Commercial Arbitration Act*, NS 1999, c 5, section 48; *Arbitration Act*, RSPEI 1988, c A-16, section 21; *Arbitration Act*, RSY 2002, c 8, sections 25-26; *Arbitration Act*, RSNWT 1988, c A-5, sections 26-27; *Arbitration Act*, RSNWT 1988, c A-5, sections 26-27.
20 *Arbitration Act*, RSN 1990, c A-14, section 36.
21 *Civil Code of Quebec*, ch. CCQ-1991, art. 2638.
22 *Home Automated Living Inc. v. Securtek Monitoring Solutions Inc.*, 2017 SKQB 249, at para. 25. ["*Home Automated*"] See also *Lloyd Chypiska and Lorrain Chypiska v. Aspen Homes Ltd. et al.*, 2010 SKQB 376. ["*Chypiska*"]
23 *Peters v. D'Antonio*, 2016 ONSC 7141, at paras. 29-31. See also *Orgaworld v. The Corp. City of Ottawa*, 2015 ONSC 318; *Highbury Estates Inc. v. Bre-Ex Limited*, 2015 ONSC 4966. For a more thorough analysis as to why the language "final and binding" has proved problematic, see J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (Juris, 2017), at p. 481-484 ["*Casey*"] and J. Kenneth McEwan and Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, (Thomson Reuters Canada Limited, 2017), at 10:80.10.20. ["*McEwan and Herbst*"]
24 See *Sattva*, *supra* note 1, at para. 41.
25 McEwan and Herbst, *supra* note 23, at 10:70.40.30(c).
26 *Ainsworth Lumber Co. Ltd. v. Grant Forest Products Inc.*, 2007 ABQB 556, at para. 16.
27 *Contract Policy Committee v. FortisAlberta Inc.* (2012), 71 Alta. L.R. (5th) 170 (Alta. Q.B.) at para. 62.
28 Cited in *1016912 Alberta Ltd. v. Parkland County (Municipality)*, 2014 ABQB 266, at para. 33.
29 *Ibid.*, at paras. 35-36. See also *Capital Power Corporation v. Lehigh Hanson Materials Limited*, 2013 ABQB 413.
30 *Arbitration Act*, RSN 1990, c A-14, section 14.
31 *Layman v. Layman Estate*, 2016 NLCA 13, at para. 16. ["*Layman*"] See also *St. John's (City) v. Newfoundland Power Inc.*, 2013 NLCA 21.
32 *Layman*, *supra* note 31, at para. 16.
33 *Church v. H&R Block Canada Inc.*, 2013 YKSC 76.
34 *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, at para. 41 ["*Desputeaux*"]
35 Casey, *supra* note 23, at p. 508; McEwan and Herbst, *supra* note 23, at 10:50.10,

10:60.10.10
36 *Sharecare Homes Inc. v. Cormier*, 2010 NSSC 252, at para. 28.
37 *Knox v. Conservative Party of Canada*, 2007 ABCA 295, at para. 20. See also *Bansal v. Stringham*, 2009 ABCA 87, at para. 16.
38 *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642, at para. 14.
39 *Home Automated*, *supra* note 22, at para. 40.
40 *Chipiska*, *supra* note 22, at para. 20.
41 *Chriscan Enterprises Ltd. v. St. Pierre*, 2016 BCCA 442, at para. 29.
42 See *Popack v. Lipszyc*, 2016 ONCA 135, at para. 26. See also *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363, at para. 33; *Ledore Investments Limited (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.*, 2017 ONCA 518, at para. 17.
43 William Horton, "The Future of Canadian Arbitration", *The Lawyers Weekly*, March 31, 2017.
44 *Louiseize v Peel Condominium Corporation No. 103*, 2017 ONSC 4031, at paras. 13-14.
45 *Ottawa (City) v. The Coliseum Inc.*, 2014 ONSC 3838, at paras. 33-39.
46 *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363.
47 *Ibid.*
48 *Lithium One Homes Ltd. v. Abakhan & Associates Inc.*, 2017 BCSC 2189.
49 *Ibid.*, at paras. 26-27.
50 *Ibid.*, at paras. 28-30.
51 Uniform Arbitration Act (2016), section 65.
52 *Ibid.*, subsection 1(b).
53 That said, subsection 65(3) states that the courts may decide whether an arbitration agreement in fact provides that an appeal may be brought on a question of law. If this provision is adopted by domestic legislatures, it will likely be the foundation for many disputes.
54 *Desputeaux*, *supra* note 34, at para. 41.
55 *Hryniak v. Mauldin*, 2014 SCC 7, at para. 26
56 Casey, *supra* note 23, at p. 473
57 *Housen v. Nikolaisen*, 2002 SCC 33, at para. 9.
58 Commenting on the Supreme Court of Canada's conclusion in *Sattva* that constitutional questions and questions of law of central importance to the legal system as a whole should be reviewed on a correctness standard, Casey stated that "it is difficult to conceive of a private and confidential arbitration being of 'central importance to the legal system as a whole'". See Casey, *supra* note 23, at p. 504-505.
59 For an interesting case study on the issues of timelines, delays, and certainty, and the role of the courts with respect to the appeal of commercial arbitral awards in British Columbia, see William G. Horton, "Reforming Arbitration Appeals: The New ULCC Uniform Arbitration Act", *The Advocate*, Vol. 75 Part 1: January 2017, 37.
60 "One of the social benefits of arbitration is the lessening of the burden on publicly financed courts so that they can deal with issues that affect the public more broadly than individual commercial disputes": *Ibid.*, at p. 48
61 See, for example Joel Richler, "Abolish Appeal in Domestic Arbitration", *ADR Perspectives*, November 2014, available online: http://adric.ca/wp-content/uploads/2017/01/RichlerJoel_Abolish-Appeals-In-Domestic-Arbitration.pdf; Murray Smith, "Is Arbitration Losing its Appeal?", *ADR Perspectives*, September 2017, available online: http://adric.ca/wp-content/uploads/2017/08/Smith_Murray.pdf. See also John Hunter, "Appellate Review of Commercial Arbitral Awards – Should Appellate Review Override Party Autonomy?" in Todd L. Archibald and Randall S. Echlin, eds., *Annual Review of Civil Litigation*, 2016, (Thomson Reuters, 2016); McEwan and Herbst, *supra* note 23, at 10:10.
62 Nigel Blackaby, Constantine Partasides et al., *Redfern and Hunter on International Arbitration*, 6th ed. (Kluwer Law International; Oxford University Press, 2015), at p. 569.

ADEQUATE REMEDIAL RECOURSES FROM AN ARBITRAL TRIBUNAL MUST BE EXHAUSTED BEFORE A PARTY CAN SEEK RECOURSE BEFORE THE COURTS

The Ontario *Arbitration Act* contains provisions that allow parties to appeal an award or set aside an award where there are serious procedural irregularities. Similar provisions exist in almost all other Canadian common law jurisdictions. However, what is often ignored is that before a party can appeal an award or bring an application to set aside an award for serious procedural irregularities, they must exhaust all available remedial recourses before the arbitral tribunal. This is a prerequisite to exercising rights under both sections 45 and 46 of the Ontario *Arbitration Act*.

Within the context of administrative law, it is a well-established rule that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point.¹ The rationale is that it must be assumed that the legislator intended remedies to be exercised in order of progression, allowing specialized tribunals to resolve disputes first and the courts second. The very same reasoning is to be applied to the law of arbitration. A party to an arbitration must assess what remedies, if any, can be sought from an arbitral tribunal before turning to the courts for a remedy. Where the legislature has provided for a remedial route before the arbitral tribunal, it must be exhausted before a party can move to appeal a decision or file an application to set aside the award. This is also consistent with the underlying philosophy of the Act and more recent jurisprudence which is to limit court intervention.

For example, section 44 of the Ontario *Arbitration Act* provides that an arbitral tribunal may, on its own initiative, within thirty days after making an award, or at a party's request made within thirty days after receiving the award, amend the award so as to correct an injustice



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caused by an oversight on the part of the arbitral tribunal. There are authorities that have concluded that the inclusion of the word "oversight" in section 44 of the Ontario *Arbitration Act* - or

other equivalent term - informs the circumstance under which a party to an arbitration can request an additional award and suggests a quality of inadvertence on the part of the arbitral tri-

bunal. Thus, unless there is some inadvertence, the provision does not apply. Section 44 is intended to apply to minor corrections arising from inadvertence. Section 40 of the Ontario *Arbitration Act* is another remedial provision left to an arbitral tribunal that should be considered before appeals or bringing an application for review under sections 45 and 46. Section 40 provides that a party may, within thirty days after receiving an award, request that the arbitral tribunal explain any matter contained in the award. An arbitral tribunal is therefore not functus for the first thirty days after the issuance of an award and, if requested, it may provide an explanation on an award, without changing the substance of the award that it has issued. The explanation becomes part of the award.

Understanding the limits of sections 40 and 44 of the Ontario *Arbitration Act* is critical when seeking recourse under sections 45 and 46 of the Ontario *Arbitration Act*. If an award can benefit from either a clarification or an explanation from an arbitral tribunal, then that remedy should be exhausted before an appeal or an application can be brought before the courts. Counsel may not ignore sections 40 and 44 of the Act. The courts should also insist on having parties exhaust their remedies before the arbitral tribunal

before entertaining proceedings. An appeal or an application for a review of a serious procedural irregularity in a context where the arbitral tribunal could have provided a correction or an explanation to a party undermines the objectives of the Act.

The approach suggested in this article is by no means unique. In the case of the English *Arbitration Act*, 1996, section 70 of that Act forces parties to seek clarification from an arbitral tribunal before commencing an application to set aside an award. In the recent case of *X v. Y* [2018] EWHC 741 (COMM), the English High Court dismissed an application to set aside an arbitral award under section 68 – section 46 under the Ontario *Arbitration Act* – on the basis that the claimant should have first exhausted the remedies available to it by applying to the arbitral tribunal for correction or clarification of the award. While there is no equivalent provision in the Ontario Act or elsewhere in the other Canadian common law jurisdictions, the approach of the English courts makes an abundance of sense

and is also consistent with administrative law which requires that all adequate remedial recourses from a tribunal must be exhausted before a party can seek recourse before the courts, even in the absence of explicit statutory language.

Of course, counsel must be careful when deciding which avenue of relief to pursue under the Act. The thirty-day period for requesting a correction or an explanation from an arbitral tribunal under sections 40 and 44 and the period for bringing an appeal or filing an application for review for a serious procedural irregularity under sections 45 and 46 of the Ontario *Arbitration Act* is the same. Thus, a party may not wait until an arbitral tribunal has pronounced itself under sections 40 or 44 to commence a proceeding under sections 45 and 46. Concurrent proceedings should be commenced before different fora and the proceeding anchored on either sections 45 and 46 may have to be stayed until the arbitral tribunal has been given a chance to issue a correction or an explanation, as the case may be. 🏠

1 *Harellkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (CanLII) at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (CanLII) at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14 (CanLII); *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 (CanLII) at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 (CanLII) at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 (CanLII) at paragraph 96.

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THE ONTARIO COLLEGE STRIKE FROM THE PERSPECTIVE OF AN ALTERNATIVE DISPUTE RESOLUTION (ADR) PROFESSOR

I am an ADR Professor at two community colleges in Ontario. I have had the pleasure of teaching paralegal students ADR for the past seven years. This article addresses how the province-wide college strike in fall 2017 was analogous to content I teach in my ADR classes.

While I jokingly said to my striking colleagues that as an ADR professor I was excited by the strike, I was usually met with looks of shock and dismay. I quickly learned not to speak so excitedly about the strike's similarities to my ADR content because I was quite alone in my enthusiasm.

Within the first few weeks of the fall 2017 semester, I provided my students with a document called *The Appropriate Dispute Resolution Continuum*. Note the difference between the two titles, Alternative Dispute Resolution and Appropriate Dispute Resolution. Many Dispute Resolution practitioners believe that the word "alternative" should be dropped from the term as Dispute Resolution is no longer considered an alternative but is now main stream. Therefore, *appropriate* dispute resolution connotes a choice in dispute resolution options.

The continuum looks at a simple dispute. First, when a conflict is discovered, parties can simply choose to ignore it. If they decide not to ignore it, they move to negotiation (two parties addressing the conflict themselves),

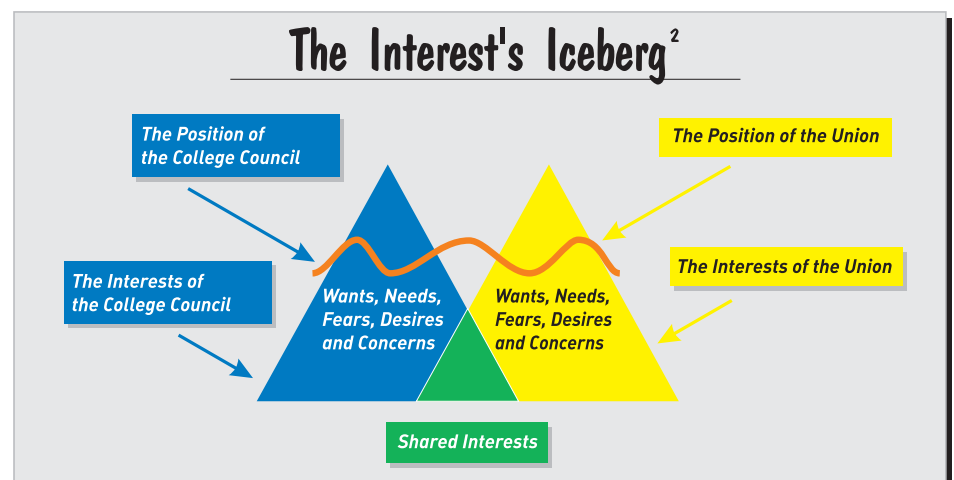
mediation (the intervention of a neutral third party), mediation-arbitration (a process whereby a neutral mediator may switch hats and make a decision), arbitration (a quasi-judicial process where a decision is made), and finally adjudication which has a definitive "you win, you lose" outcome. The continuum also demonstrates who has the power to resolve the dispute. Clearly, there is more power for the parties to arrive at a mutual resolution during negotiation and mediation. As they move along the horizontal continuum, parties lose power as they head towards mediation-



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arbitration, arbitration, court, and other power-based resolutions such as strikes, lockouts, or military coups.

It was not difficult to look at the strike and think immediately of that continuum. For example, my first class addressed positional negotiation with



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On November 22, 2018, at ADRI's Annual Conference, the Lionel J. McGowan awards were presented in recognition of leadership and excellence in the field of Alternative Dispute Resolution.

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Scott Siemens,
national McGowan
award winner, with
David McCutcheon,
ADRI Past
President

Mr. **Scott Siemens** was awarded the national McGowan award. Janet McKay, Executive Director of ADRI, commented: "Scott Siemens has worked tirelessly to strengthen both ADRI and the federation of regional ADR affiliates over many years. He is a leader, a consensus-finder, and a bridge-builder within and outside the ADRI family." Scott has served as President of ADR Saskatchewan for more than five years, and served concurrently as ADRI President for three years. He now serves as ADRI's Past President. Scott's passionate and considerate leadership has done much to advance ADR from coast to coast. Thank you, Scott, and congratulations!

2018 Lionel J. McGowan Award of Excellence FOR REGIONAL SERVICE



The Honourable
Andrea B. Moen,
regional McGowan
award winner, with
Janet McKay,
ADRI Vice-
President

The **Honourable Andrea B. Moen** received the regional McGowan award. Janet McKay, Executive Director of ADRI, stated: "It is with great pleasure we recognize Justice Moen for her outstanding contributions to Family Mediation in Alberta: her dedication to understanding the impact of family conflict on children and her ability to share the information to affect change. Through her work on Reforming the Family Justice System (RFJS) she and her co-conveners have helped develop a solid support system for families in Alberta in which family mediation plays a central role." Thank you, Justice Moen, and congratulations!

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a simple exercise of two parties negotiating over a can of Alphagetti. “I want to pay this price” versus “I want this remuneration.” During the five week strike negotiations, it was not much different: “I want to pay this price, versus I want this remuneration,” however, it was on a much larger scale and involved many more people. While “I want this” versus “I want that” is inherent in all of us, it does not address a more sophisticated method of negotiation which involves *why* we want to buy at this price or sell at that price. Focussing on the *why* is called an interest based method of resolving a dispute. “A position is what you want and an interest is why you want it.”¹ Mediation is interest based; a neutral third party assists the parties to resolve a dispute on their own, focussing on their interests rather than their positions.

A position is quite clear; “I’m right and you are wrong.” Interests are; wants, needs, fears, desires and concerns (or a combination of those) that have not been met. Thus, in mediation, a party may begin entrenched in her/his position because (unknown to the other party) the party wants, needs or fears something. The two triangles represent the two parties in dispute. The two areas that overlap (green) depict the areas that are common between them. Looking at the college strike through this lens, the first pair of triangles represents the College Council (blue) and the Union (yellow). The colleges’ position was, “No, you’re not getting that!” The Union’s position was “Yes, we are!” The overlapping area (green) was maintaining quality education. So, while the parties have different positions, they have the same interest in quality education. A resolution may be found based upon that agreed-upon statement alone.

During the strike, the province of Ontario witnessed a mediator who was unable to move the parties off their positions towards a resolution. Since the mediation process failed, the next option on the continuum would have been mediation-arbitration, or

med-arb. While this might have been a bit of a head scratcher for students (how does someone neutral suddenly become a decision-maker), this very option was introduced in Bill 178, *Colleges of Applied Arts and Technology Labour Dispute Resolution Act*, 2017 on November 19th, 2017;

11 (1) On or before the fifth day after this Act receives Royal Assent, the parties shall jointly appoint the mediator-arbitrator referred to in sec-

tion 10 and shall forthwith notify the Minister of the name and address of the person appointed.

Furthermore, Bill 178, *Colleges of Applied Arts and Technology Labour Dispute Resolution Act*, 2017 section 12(1) provides:

The mediator-arbitrator has exclusive jurisdiction to determine all matters that he or she considers necessary to conclude a new collective agreement.

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As a result of section 12(1), an appointed mediator-arbitrator mandated full and contract faculty back to work with a new collective agreement that saw advancement for job security, partial load faculty (unionized contract faculty), and the ability to grieve for more full-time positions. It also provided a provincial taskforce to address issues important to the strike such as the precarious worker, faculty numbers and other key elements.


In class, we discussed the next and more adversarial processes on the continuum, namely arbitration, litigation, and other power-based methods. The strike was without a doubt an example of a power-based method of resolving a dispute and subsequently created emotional and financial impacts on students, faculty, counselors, librarians, college facilities, administrators, parents, friends, family, the local economy, and the government. While the strike lasted for five weeks, the impact far exceeded its duration and it would be many months before the dust settled and a sense of normalcy returned to college life.

When the strike did end and we returned to college, things felt undone for the first little while. This led us to contemplate another area of our ADR syllabus, namely Best Alternative to a Negotiated Agreement, or BATNA, as it is commonly referred to, or as one student aptly suggested, a BATNA prepares us if we are unsuccessful in a negotiation setting. Unfortunately, in June 2018, there was no BATNA for the new Provincial Government disbanding the taskforce leaving many of the significant issues unanswered, and full and contract faculty wondering what they went on strike for.

There were many ways that the fall 2017 Ontario college strike caused stress for many people. However, the strike also demonstrated key ADR concepts that students could learn from. I hope some of my students said, "Hey, didn't we talk about something like that in class?", or "Isn't what is going on right

now an ADR thing?"

On my first day back in class I said to my students, "While we can agree to disagree, we cannot agree to be disagreeable." Then we debriefed the strike and its similarity to my ADR con-

tent. My students were less than enthusiastic; they wanted to put the past behind them, move on with their studies, and wrap up the delayed semester. While I was still excited about the similarities, I was pretty much alone with my enthusiasm once again. 

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- 1 (2011). Retrieved 2018, from [www.airuniversity.af.mil/ https://www.airuniversity.af.mil/Portals/10/AFNC/documents/pdf/pracguide2011.pdf](http://www.airuniversity.af.mil/https://www.airuniversity.af.mil/Portals/10/AFNC/documents/pdf/pracguide2011.pdf)
 - 2 Unknown. (2015). [https://cpb-us-e1.wpmucdn.com/ https://cpb-us-e1.wpmucdn.com/blogs.uoregon.edu/dist/8/11350/files/2015/04/Mediator-Iceberg-11m54g1.pdf](https://cpb-us-e1.wpmucdn.com/https://cpb-us-e1.wpmucdn.com/blogs.uoregon.edu/dist/8/11350/files/2015/04/Mediator-Iceberg-11m54g1.pdf)



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