

Canadian Arbitration and Mediation journal

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AUTHOR: "DEFERENCE DEFERENCE SHALL YOU DO, FOR THIS IS ARBITRAL REVIEW: WHY CANADIAN COURTS SHOULD EXERCISE MAXIMAL DEFERENCE WHEN REVIEWING COMMERCIAL ARBITRAL AWARDS FOR LEGAL ERRORS" - [SEE PAGE 17](#)

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234 Eglinton Avenue East, Suite 407
Toronto, ON (Canada) M4P 1K5
☎ 416-487-4733
☎ 1-877-475-4353
☎ 416-901-4736
✉ journal@adric.ca
🌐 www.adric.ca

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WHO ARE WE?

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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ADRIC 2018 IAMC 2018

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- Exciting topics on commercial arbitration and mediation, international arbitration, numerous mediation topics, as well as family, workplace and special interest topics such as construction, Aboriginal issues, other ADR processes, restorative justice, etc;
- Improved networking opportunities with lengthened breaks and the Cocktail Reception;
- Special industry exhibitors;
- CPD points accreditation from all Canadian Law Societies, plus important CEE credits from ADRIC;
- *Plus* the Pre-Conference workshop(s) Wednesday November 21.

VENUE: Hôtel Bonaventure Montréal, 900 de la gauchetière West, Montréal, Québec. Online reservations: bit.ly/2wrgguT
Toll-Free: 1-800-267-2575 / Direct: 514-878-2332
Special ADRIC group rate: \$179/night (ends October 22nd, 2018 or when block is used up - book early.)

TRAVEL DISCOUNTS: WestJet, Porter, and VIA Rail — visit mbr.adric.ca/adric2018 for details and updates.

TESTIMONIALS from our 2017 sessions:

- "Lots of food for thought." - Allison Schmidt
- "More time. I could do this for two days. Great information." - Sam Sele
- "An excellent overview of practical information and experience, and some gems too..." - Peter Bruer
- "Really enjoyed the interactions. Stretched my approach to my practice." - Andrew Butt
- "Timely topic - valuable for all sectors and roles. Very practical, interesting and relevant examples." - May Jolliffe
- "Very engaging session - so thrilled I was able to attend." - Nancy Burton



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PRESIDENT'S MESSAGE

After nine months as President of ADRI, I can attest that members of our committees, our Executive Director, my colleagues on the Board of Directors and I have not been idle!

STRATEGIC PLAN 2019-2022

As an organization, we recognize that the world of ADR is constantly evolving, the needs of our members, users of ADR services, our partners and society in general change. An important paradigm shift is currently taking place in Canada with respect to the relationship of citizens, businesses and the state of Justice.

To face this new reality and the challenges ahead, our Board of Directors has begun a strategic planning process to define our directions for the next three years, from 2019 to 2022. We identified five (5) essential directions:

1. Strengthen the position of ADRI as Canada's national ADR organization by promoting the development and use of mediation, arbitration and other ADR processes.
2. Grow the Federation (Affiliates and ADRI) and improve its functioning;
3. Ensure the financial viability of ADRI and support other members of the Federation (Affiliates) towards this goal;
4. Achieve a sustainable, productive and functional Federation.
5. Increase the value of ADRI to our members and stakeholders

Based on these five directions, an interim action plan was put in place in January 2018 by our Executive Director, Janet McKay, to implement these directions. When the strategic planning exercise is completed, this action plan will be revised and updated to align with the strategies that will define the path we will follow between 2019 and 2022.

ANNUAL NATIONAL CONFERENCE - NOVEMBER 21 TO 23 IN MONTREAL

Preparations for our annual conference are going well. This year Montreal will play

host for this unique meeting in Canada where you will be able to acquire the most useful knowledge while networking with users, professionals and specialists in mediation, arbitration and other modes of dispute resolution. There are still some sponsorship and speaking opportunities available: I suggest you express your interest without delay. Visit the "conference" section on our ADRI.ca website for more details.

OUR YOUNG PEOPLE, OUR FUTURE, A STRATEGY!

Last year, my colleague and corporate director, Michelle Maniago (British Columbia / BLG), wrote a remarkable report on the challenges facing professionals under the age of 40 who wish to develop a practice in mediation and arbitration. Following the tabling of this report, the ADRI Board of Directors created the U40 Forum, which aims to continue to analyze the situation and propose pan-Canadian strategies to support and assist professionals under 40 years of age who wish to actively participate in ADR. This committee is made up of representatives of ADRI and its affiliates, as well as our corporate member representatives. Support the U40 Forum and our young members for success!

OUR NATIONAL ASSOCIATION

Two thousand ADRI members reside and practice their profession in all regions of Canada. This would not be possible without our federative links with each of seven regional institutes: ADRI Atlantic Institute (ADRI), Institut de médiation et d'arbitrage du Québec (IMAQ), ADRI Institute of Ontario (ADRIO), ADRI Institute of Manitoba (ADRI), ADRI Institute of Saskatchewan (ADRSK), ADRI Institute of Alberta (ADRIA) and ADRI Institute of British Columbia (ADRI). In or-



THIERRY BÉRIULT,
C.MED., D.PRD., LL.L.

Thierry Bériault is a Chartered Mediator and lawyer. He is regularly mandated in complex files where there are important relational, organizational, political or financial issues to be resolved. He is a specialist in mediation processes, which he teaches at several universities in Canada, Europe and Africa.

der to update and improve the effectiveness of our mutual relationships, a renewal exercise of the agreements between each of these institutes and ADRI has been undertaken. Recently, the Presidents' Roundtable appointed Stan Galbraith (Alberta) to facilitate discussions to finalize a common framework agreement by the end of June 2018. This framework agreement will then be submitted to each of the partner Boards of Directors for ratification. Michael Schafler (Ontario / Dentons) and William Hartnett (Ontario) were mandated to represent ADRI at the negotiation table.

ADRI is also about pan-Canadian companies, organizations and professional firms whose representatives are actively involved in our committees and activities. Without them, we could not have grown and developed our programs. Year after year, our Corporate Members financially support national initiatives and our annual conference to better serve our members, Canadian businesses and citizens.

In 2017, Marketing & Member Resources Committee co-chairs William Hartnett (Ontario) and Jim McCartney (Alberta) developed a recruitment campaign to welcome new corporate members. For this campaign to be successful, we need your help: ask the organizations you're connected with to join ADRIC. More information available here: <http://adric.ca/resources/join-us/corporate-membership/>

NATIONAL EDUCATION PROGRAM

The *Arbitrators Institute Foundation* has provided a grant to support the hiring of a National Education Program Coordinator from 2018 to 2020. This grant will allow us to increase support for the day-to-day operations of the program, improve our processes, as well as enrich existing courses and develop them to their full potential. In addition, in order to fulfill the mission of ADRIC, this new resource will also analyze new opportunities to generate national courses and develop new products and webinars related to ADR. We will work closely with our affiliates to create synergies and ensure that the National Education Program is in the best interest of our members and the federation.

We want to ensure that ADRIC members receive the best training possible and those who hold our national designations have the highest skills in the country.

NEW BENEFITS

Our Executive Director, Janet McKay has negotiated new benefits for ADRIC Full members: we now have an "employee rate" for the Rogers "Share Everything" cell phone plan! Simply contact ADRIC Member Services for your special token to apply to the plan. Ms. McKay has also worked with Thomson Reuters and Éditions Yvon Blais for a 20% discount on hundreds of ADR and Legal publications! Access this valuable benefit by obtaining the discount code via the [ADRIC Online Portal](#). Stay tuned for more new benefits as we continue to make membership even more attractive!

GET INVOLVED!

Nearly a hundred volunteers are involved

in our committees and initiatives to carry out our goals. We invite you to consider joining them:

ADRIC EDUCATION PROGRAM:

- National Arbitration Course
- New Course Development
- Course Accreditations

Mediation Rules Working Group (Update Rules and Guidelines for Mediation)

To express your interest in any of these opportunities please email executivedirector@adric.ca indicating which committee/task force you might like to join and how your related experience/skills might benefit the group. Please copy your affili-

ate to keep them in the loop.

I invite you to continue your involvement in your national institute as well as your regional affiliate. Without your help, support and involvement, we would not be able to know the success we have had and want to maintain in order to ensure the development of ADR across Canada.

Hoping to meet you at our upcoming events! 🌐



THIERRY BÉRIULT, C.MED, D.PR.D, LL.L
PRESIDENT@ADRIC.CA



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*Individuals residing within Canada must apply for membership with one of ADRIC's seven [regional affiliates](#).

PROFESSIONAL DESIGNATIONS FOR MEDIATORS AND ARBITRATORS

ADRIC's professional designations in mediation and arbitration identify and differentiate their holders. They demonstrate to potential clients that you have achieved prescribed training and experience levels recognized by your peers and based on objective third party assessment by a committee of senior and highly respected practitioners.

C.Med, Q.Med, C.Arb or Q.Arb¹ after your name enhances your credibility and marketability. These national designations communicate your membership in a national organization dedicated to promoting ADR and your commitment to continuing education and engagement in the practice.

The C.Med (Chartered Mediator) and C.Arb (Chartered Arbitrator) are Canada's preeminent generalist des-

ignations for practising mediators and arbitrators and the most senior designations offered by ADRIC.

The Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are Canada's newest designations signifying requisite knowledge, skill and expertise. They provide recognition of work and experience and offer a solid foundation as you progress to the next designation.

These designations are recognized and respected across Canada and internationally. They are often accepted as the minimum criteria for membership on rosters.

For more information and criteria, visit ADRIC.ca

APPLICATION FEE

A one-time application fee is payable to your regional affiliate to cover the costs of administering the accreditation process.

ANNUAL FEE AND OTHER REQUIREMENTS

There is an annual fee to maintain your designation (see current rates at adric.ca). You must also remain a member in good standing with your regional affiliate and commit to the Continuing Education and Engagement Programme to retain your designation.

APPLICATION FORMS

Application forms for these designations may be downloaded from your regional affiliate website or you may contact your affiliate to have a copy sent to you.

BC - adrbcc.com

AB - adralberta.com

SK - adrsaskatchewan.ca

MB - admanitoba.ca

ON - adr-ontario.ca

QC - imaq.org

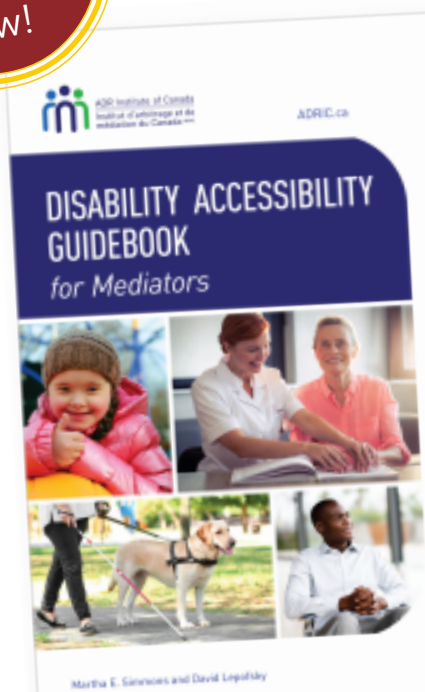
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[LEARN MORE](#)

¹All designations are TM ADR Institute of Canada, Inc.

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Disability Accessibility Guidebook for Mediators



ADRIC launched an unprecedented important new resource at the ADRIC 2017 Conference: the **Disability Accessibility Guidebook for Mediators**, during a session presented by Martha E. Simmons, one of the co-authors.

Written by Martha E. Simmons and David Lepofsky, the guide has proven very popular as there is no other resource which provides concrete information on the importance of, and how to increase accessibility in the mediation process.

Topics include:

- Why it is important to ensure that participants with disabilities can fully participate in your mediations;
- What, when and how to ask: Inquiring about disability-related accommodation in mediation;
- How it works: The mediation process and accommodation;
- Accommodating the needs of people with hearing loss, vision loss, intellectual disabilities, mental health conditions, physical and mobility disabilities, communication disabilities, autism, and learning disabilities.

THERE IS NO CHARGE FOR THE BOOK*

You may also order a book by email to admin@adric.ca. *Postage & handling charges may apply.

MESSAGE FROM THE EDITOR

A recent decision of the British Columbia Court of Appeal should raise concerns for all arbitration practitioners who would like to see arbitration grow and become the preferred method for adjudicating disputes. The case of *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 does not give rise to any cause for concern based on any analysis or decision made by the Court itself. On the contrary, the decision of the Court is exemplary and to be commended in every respect. It is the facts of the case which should raise alarm bells.

The Hunts, as owners of a strata unit, initiated an arbitration with the Strata Corporation due to concerns about the proposed installation of a heating, ventilation and air conditioning unit which they thought would disturb their enjoyment of their suite and violate the by-laws. Contrary to the Hunt's preference for a single arbitrator and a one day hearing, the Strata Corporation insisted on a three-person arbitration panel and a four day hearing. The Hunts lost the arbitration and were ordered to pay costs.

On reviewing the file of the lawyer for the Strata Corporation in connection with the cost assessment, the Hunts discovered that the lawyer had four pri-

vate communications with the arbitrators during the course of the arbitration proceeding. The communications involved separate communications with each of the three members of the tribunal. Three of the communications occurred after the appointment of the Chair of the tribunal. One of the communications was with the chair. The communications related to the implementation of the preferences of the Strata Corporation with respect to the conduct of the arbitration, including the length of the hearing, the need to pursue mediation as an option, and the possible terms of a mediated solution. These communications had never previously been disclosed to the Hunts.

The Hunts brought an application for judicial review to quash the entire arbitration on the basis of procedural unfairness and a reasonable apprehension of bias due to the *ex parte* communications. The Chambers Judge who heard the application accepted the argument that there was no prejudice to the Hunts based on the *ex parte* communications, and no reasonable apprehension of bias. The British Columbia Court of Appeal reversed that decision and set aside the award.

In a unanimous decision of the British Columbia Court of Appeal, Griffin J. made the following observations, among others:

[99] Private conversations between



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>

an arbitrator and one party to the dispute do not necessarily have to deal with the merits of the dispute or evidence in order to be disqualifying.

...
[105] In addition to the important issue of the number of arbitrators, [the lawyer's] private communications with the arbitrators discussed the prospects of mediation, including what the Strata's mediation proposal would be, and the implication that the rest of the owners supported the costs of arbitration. ... these were not trivial matters.

...
[108] But what is most telling is the Strata's concession in its factum that [the arbitrator appointed by the Strata Corporation] was viewed as its nominee. This choice of words is possessory. It implies an expectation that, as its nominee, [the arbitrator appointed by the Strata Corporation] would show some loyalty to

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the Strata and be more receptive to its viewpoint.

...
[113] The Strata's assumption that [the arbitrator appointed by the Strata Corporation], as the Strata's nominee, could engage in private communications with [the lawyer for Strata Corporation] is contrary to the expected impartiality of arbitrators.

...
[117] The Strata's private lobbying and expectation that [the arbitrator appointed by the Strata Corporation] as nominee would be influenced by the Strata's desired outcome unfortunately destroyed any appearance of adjudicative neutrality. That neither [the lawyer for Strata Corporation] nor [the arbitrator appointed by the Strata Corporation] disclosed the communication, and that [the arbitrator appointed by the Strata Corporation] did not respond by stating to [the lawyer for Strata Corporation] that it was inappropriate, made the problem worse.

...
[121] There were the following express or implicit messages arising from the *ex parte* communications between [the lawyer for Strata Corporation] and the arbitrators about mediation:

a) The Strata was reasonable and willing to consider mediation and even to make a reasonable mediation proposal. Logically, without hearing from the Hunts, this could

communicate the inference that the only reason the matter had not settled was because the Hunts were unreasonable.

b) All other owners supported the Strata's position in the arbitration and were willing to fund the three-person arbitration. Again, this could communicate the inference that the Hunts were the unreasonable parties.
c) The arbitrators were comfortable discussing the concept of mediation with counsel for the Strata, and discussing the Strata's opinion about a mediation proposal, but at the same time, the arbitrators had decided not to raise the notion of mediation with the Hunts despite the mandatory requirement to do so in s. 181 of the *Act*.

[122] As already mentioned, the Strata understood that the comparative costs as between mediation and arbitration were of strategic importance and could be used as a tool to put pressure on the Hunts.

...
[134] The chambers judge erred in failing to find that the four *ex parte* communications between the Strata's lawyer, [the lawyer for Strata Corporation], and the arbitrators, viewed practically and reflected upon, would lead an informed person to conclude that the arbitrators would likely not decide the matter fairly. These communications created a reasonable apprehension of bias.

[135] Having said this, I have no reason to believe that the arbitrators were in fact biased and deliber-

ately favoured the Strata over the Hunts. Suffice it to say, once there is a reasonable appearance of bias, it is unnecessary to embark on the impossible task of determining the actual state of mind of the decision-maker.

[136] By allowing *ex parte* communications about the arbitration proceeding to take place with [the lawyer for Strata Corporation], the arbitrators placed themselves in an impossible position and undermined their appearance of neutrality.

Arbitration is a form of dispute resolution which is based on trust. Ultimately, the success of arbitration as a form of dispute resolution does not depend on what the courts do or do not do to support arbitration. Historically, arbitration has survived periods of extreme hostility from the courts and has done so because of the trust and confidence parties placed in arbitrators of their choosing to act independently and impartially. Today, for the most part, arbitration enjoys unprecedented support from Canadian Courts and the Courts of important trading nations around the world. But arbitration cannot long survive the injuries which we as arbitration practitioners do to it when we are going about our business.

Arbitration is extremely vulnerable to the type of conduct among counsel and arbitrators which the Court of Appeal unambiguously found to be inappropriate, and disqualifying in this case. The more troubling question is how extensively such conduct is engaged in, particularly between counsel their clients' appointees, in other cases. There is a particular concern in situations where there is an imbalance in power or representation. The confidential nature of arbitration, which is often cited as a principal reason for choosing arbitration, serves only to make such behaviour even more opaque.

Had the Hunts not looked into the files of the Strata Corporation's lawyers in assessing the costs, they would never have learned of the circumstances which made the proceedings against them unfair.

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I would suggest that a crucial responsibility of the Chair of any arbitration tribunal is to establish explicitly at the outset that all members of the tribunal are subject to the same duties of independence and impartiality with respect to all parties regardless of how they were appointed, and must desist from *ex parte* communications with either side on any matters or procedure, substance or strategy.

For the same reasons, on another aspect of the problem which does not relate to the reported facts of the *Hunt* case, the practice of party nominees having a separate contract for remuneration and indemnity with the party that appointed him or her should also be strongly discouraged. All tribunal members should enter into the same contractual arrangements with regard to all such issues with both sides once the tribunal has been formed.

The Terms of Appointment are a convenient place in which to affirm the obligations owed by each tribunal member to all parties, as well as to confirm that all relevant conflict related disclosures have been made by the tribunal members, as well as by the parties and their counsel. This is an important first step in ensuring that those who are new

to serving as arbitrators will be informed as to the expected standard of conduct, and experienced arbitrators will receive a beneficial reminder.

THIS EDITION OF CAMJ

In this edition of the *Canadian Arbitration and Mediation Journal*, we have a number of articles that should be of great interest to those interested in both mediation and arbitration.

Diane Mainville has written a thoughtful and authoritative guide to the subject of good faith in mediation. This is a core issue in all mediation, and indeed, in all forms of ADR. However, it is rarely examined with the practicality and specificity as it has been by Ms. Mainville in her article.

James Plotkin has written a vigorous and thought provoking article on the decision of the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.* Although the literature on *Sattva* has become extensive, Mr. Plotkin brings a unique perspective, suggesting that *Sattva* may have, if anything, fallen short in its deference to arbitrators.

Roger Hughes, as a former judge of the Federal Court of Canada, is well qualified to write in favour of using pri-

vate sector referees more extensively to assist the Courts in dealing effectively with commercial disputes.

René Cadieux has broadly canvassed the fascinating, and often contentious, issue of dissents in his article on that topic. He brings to light, in an elegant and erudite manner, the cultural differences that lie beneath some of the conflicting attitudes to dissents.

Michael Schafler and Christina Porretta have contributed a case comment on the recent decision of Justice Perell in *Heller v Uber Technologies Inc.* This case comment may in some ways be seen as a sequel to the article in our last edition on the *Wellman v. Telus* case which was written by Mr. Schafler and Ms. Barbara Capes. Now that Telus has obtained leave to appeal the latter decision of the Court of Appeal to the Supreme Court of Canada, we may expect much more interest in this field, and in the possibility of legislative reform.

I hope you enjoy this edition of *CAMJ*. As always, we look forward to receiving your contributions and hearing your ideas for articles. We are particularly interested in receiving articles from diverse parts of Canada and reflecting various fields of dispute resolution. 🌐

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WHAT IS GOOD FAITH NEGOTIATION AND MEDIATION?

As a practitioner of an internal ADR service program for contractors and federal departments in the context of a government contract, I have been involved in interesting situations.

The most challenging included parties who appeared to be mediating a dispute mainly to satisfy the terms and conditions of their contract. Luckily, most parties are genuinely interested in collaboratively resolving issues.

While cases that call into question a party's good faith may be few and far between, they can nevertheless challenge ADR professionals the most. This article outlines a number of actions that practitioners can take to minimize the likelihood of having to mediate parties who are not negotiating in good faith. It includes suggestions to internal processes, what to discuss with parties and how to better prepare them to negotiate in good faith during mediation. The article also proposes a standard of conduct against which to assess good faith performance in a mediation setting and offers ideas on how to address perceptions of bad faith.

This article, which was written in the context of commercial disputes, is not intended to be an exhaustive list of bad faith practices or of options, including legal implications, for addressing them. Nor do the tools and strategies contained herein guarantee that parties will mediate in good faith. Nevertheless, the article will hopefully serve as a useful reminder, offer food for thought and provide some insight for dealing with challenges under such circumstances.

REQUIREMENT TO NEGOTIATE IN GOOD FAITH

The issue of good faith has taken on added importance in Canada. This

heightened importance can be observed in many areas. One such area is the 2014 Bhasin v. Hrynew Supreme Court of Canada decision. The 2014 SCC ruling states that parties have an obligation to conduct themselves with a "basic level of honesty and good faith in contractual dealings"¹. It remains unclear however what consequences the decision will have in contract law. Furthermore, it is not clear what may or may not be acceptable.

THE CHALLENGE

Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. It is an absence of bad faith that can be treated as equivalent to 'honestly and decently'.²

Negotiating in bad faith means misleading another, entering into an agreement without the intention or means to fulfill it, intentional dishonest act (i.e. not fulfilling obligation or commitment), or violating basic standards of honesty with others.³ Those negotiating in bad faith are "merely going through the motions"⁴ for appearance's sake. They may even consciously use strategies to derail the negotiation.

It is not possible to know what someone's motives truly are. Motives and intentions are "invisible" and often include a mix of good, and bad. Therefore, the challenge is not so much how to define it, but how to *recognize* bad faith.



DIANE MAINVILLE, C.MED, CPA-CA, CTPC

Diane Mainville is a Chartered Mediator, Chartered Professional Accountant and a Certified Team Performance Coach. She is the Manager of the Business Disputes Management Program at Public Works and Government Service Canada. She mediates contract disputes and provides conflict coaching and training. For information about the Program, refer to [\[Link\]](#).

MEDIATING IN GOOD FAITH

People do not usually enjoy sitting across the table talking to someone who disagrees with them. Nevertheless, they do so anyway for many reasons. Maybe they don't want to go to court. Maybe they want to sleep better at night or, they believe it will make them look good in their boss' eyes if they reach an agreement. Whatever their motivation, they have concluded that it is in their best interest to genuinely give it a serious attempt to resolve the matter. Some even decide to pursue their negotiation through mediation when they reach an impasse.

By the time parties reach the point of assisted negotiations, motivations are rarely simple and straightforward. Expectations, beliefs and assumptions are subjective and open to interpretation during the best of times. This is especially so in conflict situations. It also makes it more difficult for anyone to

really know when a disputing party's intentions are less than sincere.

Mediation can be used for less than obvious, and productive reasons. For example, some people may only participate to obtain new information that they can use for their own benefit. Others may want information to use against the other party if the matter ends up in court. Some, despite not having any interest in changing their views, go through the exercise to avoid being accused of not being collaborative. Others simply don't have a choice because of mandatory mediation.

Mediators are often "eternal optimists"⁵. Providing hope to disputing parties is helpful, especially when they cannot see "the light at the end of the tunnel". However, mediators also need to be mindful to do no harm. When a party's actions and behaviours are not congruent with someone who is supposedly there in good faith, mediators have an ethical obligation to intervene. There are many situations where an interven-

tion may be necessary. For example, when a party

- says they want to mediate but imposes several conditions before agreeing to proceed;
- says all the "right things" but the mediator is constantly having to re-schedule meetings because of them;
- is genuinely curious and asks many questions of the other party but offers little answers of their own in return;
- acknowledges written information presented to them but denies knowing about or remembering certain facts;
- does not send the document they committed to sending before the next meeting, despite being reminded to do so;
- is unwilling to discuss issues beyond their desired outcomes;
- does not provide helpful information or say what is wrong with the other party's proposal;
- makes unrealistic requests by asking the other party to do something they know cannot be accomplished

before an important deadline.

Mediators who have been in practice long enough have all come across similar situations. Taken in isolation, any of these situations may not be cause to end the mediation. However, they may cause doubts about that person's sincerity by both the mediator and the other party. If asked about these inconsistencies by the mediator, some parties may not hesitate to call into question his/her neutrality or impartiality, especially if they are not participating in good faith. It may be more convenient to use the mediator as a scapegoat rather than admitting the truth.

HOW TO INSTILL GOOD FAITH DURING A MEDIATION PROCESS

As the "keeper of the process", mediators need to ensure a common understanding of roles, responsibilities and expectations when participating in a mediation. Mediators can also take incremental steps throughout the process to instill good faith. These include:



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1. DEVELOPING GUIDELINES TO DETERMINE WHEN A DISPUTE SHOULD NOT BE RESOLVED THROUGH MEDIATION

Identify circumstances under which ADR may *not* be appropriate and use it as guidance material to help assess whether to take on a case. Having ready access to such guidelines from the very beginning during intake can be very beneficial.

While every dispute is unique and each situation needs to be assessed on its own merit, having a list of such circumstances to refer to helps make more efficient decisions about whether to make mediation available to parties requesting mediation services.

Circumstances where it may not be appropriate to mediate include:

- when there is need to establish precedent or legal framework;
- where the issue is non-negotiable or if an issue is beyond the control of the parties;
- when ADR is only being used as discovery;
- if a party wants punitive or deterrent results (for example when a party's primary intention is for the other party to be reprimanded or have disciplinary measures imposed);
- when a person would still not be satisfied, even if they get what they want during the mediation (for example, if the other party agreed to doing the project the way the person is asking however the person's *genuine* interest is that the project not proceed at all);
- if key elements of a statute's interpretation is under dispute;
- where the outcome of the case could affect a great number of people;
- where a broadly applicable solution is required;
- when the matter is about a perceived systemic issue rather than a specific disagreement; or
- where parties would benefit from procedural features of litigation (i.e. injunction, court enforcement).

Reviewing the list of circumstances after a challenging case to assess if ad-

ditions or changes are warranted is also a good practice. Unless lessons learned are documented, they can be forgotten over time and/or may not be passed on to other practitioners who would also benefit.

2. DISTRIBUTE AN INFORMATION PACKAGE DURING THE CONSULTATION PHASE

Distribute an information package to parties as early as possible during the consultation phase to educate them about their options and to let them know what is expected of them. It is important that they be made aware of the role of a mediator, the approach and attitude that is required when mediating. Once parties understand, they are more likely to decide to pursue other recourses if the process does not meet their objectives.

Documents in the information package should provide an opportunity to better prepare the parties to be collaborative. Be selective about which document to include. More importantly, which sections of the documents to review with parties when meeting with them initially.

The following documents are often included in our information package:

- i. "ADR and Litigation: Key features and Considerations"⁽⁶⁾ is used to help parties decide which approach is best suited to manage their conflict, meet their objectives and to obtain satisfaction with the chosen process. It also helps to drive home the importance of a collaborative approach in ADR processes.
- ii. "What is Interest-Based Negotiating?" is a quick reference guide used to help parties understand the principles of an interest-based approach. IBN principles will be new to most parties. It will likely also provide value to them whether or not they decide to pursue mediation.
- iii. A template agreement to mediate
- iv. Participation Guidelines: While it is common practice for mediators to verbally go over ground rules at the beginning of a mediation during opening remarks, it is not so common to put them in writing and re-

view these with the parties early in the process. Participation guidelines serve as another friendly reminder of the importance of good faith participation. Further, distributing the guidelines early gives parties time to reflect on specific needs/concerns and to request meaningful additions for added assurance at the beginning of the mediation session before discussions start.

- v. "What is Meant by Mediating in Good Faith?" (see document below) is used to define and explain the specific behaviours, actions and language that the mediator will be looking for to assess good faith participation. It provides direction to parties and can help curb less desirable conduct.

As the person responsible for facilitating an ADR process, it is especially important that it at least be clear in the mediator's mind what is meant by "mediating in good faith". Without that clarity, it will be more difficult for the mediator to consistently advocate for a fair process and determine the appropriateness of continuing with the mediation. Further, should the need arise for the mediator to have to address a party's behaviours, actions or language that could undermine or interfere with collaborative problem solving, it will be easier to do so without calling into question his/her impartiality if expectations have previously been communicated and agreed to by the parties.

3. FORMALISE THE USE OF AN INTEREST-BASED NEGOTIATION APPROACH

Agreements to mediate state that parties are responsible for acting in good faith. However, no information is provided that explains what good faith participation means and what it looks like.

One way to provide clarity is to include the use of an interest-based negotiation approach in the agreement to mediate. For example,

- i. Wording could be added in the clause dealing with the role of the parties that states "The parties will act in good faith, by engaging in

candid, honest, meaningful and respectful communication using an interest-based negotiating approach. The parties will make a serious attempt and be committed to efficiently and cooperatively work toward a settlement as soon as possible. The parties will each select individuals they believe would be helpful in resolving the issues between them. The parties will not knowingly compromise the neutrality of the mediator.”

- ii. Annexes explaining what is meant by mediating in good faith, interest-based negotiating and participation guidelines (i.e. ground rules) could also be added.
- iii. If annexes are added, wording to the effect that parties acknowledge that they have read the agreement to mediate *and the annexes* and consent to be bound by the terms therein could also be added.

Another way to insert IBN in mediation is to include them in participation guidelines. For example, written guidelines could state that parties are to:

- i. Focus on interests, not positions and seek to understand the other person’s interests.
- ii. Be open to other points of view, offer and encourage creative possibilities with mutual gains to help reach agreement.
- iii. Use objective criteria to assess options.

The above helps the parties make a more informed decision about participating in mediation and, creates an obligation to refrain from negotiating in bad faith.

4. PROTECT THE CONFIDENTIAL NATURE OF THE MEDIATION PROCESS

Privacy and confidentiality are essential components for ensuring parties’

trust and confidence in the integrity of ADR processes. It is also vitally important if parties are to candidly and honestly communicate all relevant information during discussions. However, let’s face it, confidentiality is a double-edged sword in ADR as it also makes it easy for disingenuous parties to undermine the process without accountability. Also, perceptions of bad faith can increase a party’s concerns about how information shared may be used against them by other.

Below are suggestions that are likely to signal to everyone involved the importance of respecting the confidential nature of the process and increase the comfort level of those who may have concerns about the level of confidentiality afforded with mediation:

i. Share jurisprudence

Distribute the ruling in *Union Carbide Canada Inc. v. Bombardier Inc.* [2014] SCC No. 35008 to parties who have concerns about confidentiality and encourage them to consult with their legal counsel if necessary. This important ruling upholds the principle of confidentiality in ADR processes in Canada. Knowledge of this ruling can provide much needed assurance to parties who are assessing their options. Parties may decide to mediate instead of using a less formal negotiation approach simply because of the confidentiality protection afforded to them through mediation.

ii. Specify the limits of confidentiality in the agreement to mediate

Agreements to mediate typically include a clause about the confidential nature of the mediation process. The wording in the agreement needs to be specific about the limits confidentiality. Further, any exceptions intended by the parties

should be explicitly stated.

For example, the confidentiality clause could state that all information disclosed in the process of mediation will be considered information submitted “without prejudice” **except**

- (a) for this agreement to mediate,
- (b) where authorization has been given by the parties,
- (c) where information provided suggests an actual or potential threat to oneself or another human life or safety,
- (d) where required to do so by law or ordered to do so by judicial authority,
- (e) where the disclosure is necessary for the implementation and enforcement of any agreement reached, and
- (f) the notice of conclusion.

Also, “Confidentiality **will not be construed to limit** effective reporting, monitoring and training. Only non-identifying information for research, reporting, statistical or educational purposes may be disclosed.”

Further, the agreement to mediate should include a clause for the termination of mediation that specifies what the mediator will be reporting to whom once the mediation process concludes. For example:

- “In the event that no agreement is reached, or an agreement is reached on some but not all of the issues, the written notice of conclusion **will only state that** no agreement was reached on some or all of the outstanding issues.”, or
- “If no agreement is reached, or an agreement is reached on some but not all of the issues, the mediator **will provide the reason(s) for the termination**”,



- In some instances, it might also be necessary or desirable to include wording such as ***“In the event of a partial resolution, the areas of agreement and remaining issues in dispute will be included”***.

iii. Take the time to explain the limits of confidentiality to the parties

While absolute confidentiality is the goal, it cannot be guaranteed. This is especially true for written records and more so for mediations subject to the provisions of applicable legislations such as the Privacy Act and the Access to Information Act.

Confidentiality is a key attraction of ADR processes. Therefore, when going over the agreement to mediate, the confidentiality section needs to be given appropriate air time. Parties also need to be asked if they have questions or concerns about confidentiality. Adjustments to wording in standard agreements may be necessary to accommodate the specifics of the case.

Despite the safety mechanisms built into the process, if parties

continue to have concerns about confidentiality, mediators may want to suggest that, for the more sensitive information, the parties may want to assess the risk and consider how much information they are willing to divulge, and in what format, regarding a specific issue.

iv. Notetaking

Some mediators limit notetaking. Some even include wording in their agreement to mediate that state “neither party shall make transcripts, minutes or other records of mediation conference”. Other mediators take detailed notes and have no or little concerns when parties do the same. There is no right or wrong way of handling notetaking. In the end, what matters is the parties’ level of comfort with such practice. As every situation will be different, a good practice is to ask about parties’ expectations in this area and to reach an agreement about notetaking that satisfies all parties.

v. Post-process satisfaction questionnaire

Add the wording “confidential

when completed” to your mediation satisfaction questionnaires. This wording coupled with the wording in the confidentiality clause in the agreement to mediate should leave no doubt that the satisfaction questionnaire is also protected by the confidential nature of the mediation process (unless stated otherwise).

This simple addition to the questionnaire minimises the risk of the information in the questionnaire being used for reasons other than assessing parties’ satisfaction with the services received. It can also reassure parties who may have concerns about the other party including comments about their negotiating approach during the mediation in the questionnaire and using it against them if ever the matter ended up in court.

5. GET PARTIES TO COMMIT BEFORE THE MEDIATION SESSION

Have the parties sign the agreement to mediate as early as possible, preferably before individual pre-mediation session consultations. Asking someone to sign on the dotted line increases assurances that they will take their com-



mitment more seriously. This will also provide more time to make any needed changes to the document. It can also make it easier for the mediator to assess parties' intentions and address concerns earlier.

6. EDUCATE AND COACH PARTIES

Take advantage of, and create, opportunities to build rapport with parties and to improve collaboration between them through education and coaching.

Meet with parties individually in pre-mediation consultations, preferably in person. If a party is unsure about going forward, remind them that they can withdraw at any time. If they have concerns about being singled out as the one responsible for putting an end to the process, suggest that they use the mediator to do so instead. Let them know that a mediator's role also includes helping parties save face.

Review key terms of the agreement to mediate with parties. Emphasize the importance of good faith participation. Let them know that you will address language and actions you believe may undermine parties' efforts to have a collaborative and productive discussion.

Explain the principles of interest-based negotiating to parties. Also, offer to coach them so they are better prepared to use this approach.

7. ADDRESS PERCEPTIONS OF BAD FAITH THROUGHOUT THE PROCESS

There are all kinds of reasons why mediators may not wish to address a party's actions or impressions of bad faith. For instance, mediators in private practice may not want to offend the lawyer who was responsible for getting them appointed. A mediator may not want to have his/her reputation damaged. Other mediators may simply lack the ability for dealing with such circumstances.

Lawyers often provide advice to clients about actions that may go against their legal obligations and can be helpful under such circumstances. So can union representatives and subject matter ex-

perts when involved.

Give parties the benefit of the doubt when addressing perceptions of bad faith. Be transparent about your motivation and obtain their permission to discuss the issue further. For example, "I am noticing a pattern that may be getting in the way of you achieving your objective. Are you interested in hearing more?" If the person says yes, provide more details. Then, try to find out what is motivating (or triggering) the person's behaviour.

If the party is operating in good faith but simply coming across as not, let the person know how their behaviour could impact the other party, or them, and discuss other more productive alternatives. For example, "I have seen many instances when using this negotiating strategy has back-

fired on others. What other strategies have you considered?"

If however the party is not negotiating in good faith, try to find out what is getting in the way of them doing so. What would need to be different from their perspective?

While each situation is unique, it is best to address these matters tactfully, after building rapport with the party and, to do so in a private setting. It may also be necessary to intervene several times. If, despite a mediator's best efforts there is no improvement, then the mediator needs to evaluate all of the factors and circumstances, and determine whether or not it is appropriate to continue with the mediation.

CONCLUSION

Parties are now legally required to ne-



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gotiate in good faith. It is therefore more important than ever that mediators create a process and an environment that helps them to do so.

Mediators can provide much value added by helping parties to avoid conducting themselves in ways that go against their own self-interest and avoid incorrect perceptions of bad faith. Doing so could prevent parties having to also defend their negotiating tactics if the matter ends up in court after mediation.

Putting parties' legal obligations aside, it remains in the best interest of ADR professionals to improve the odds of parties to mediate in good faith. This minimizes the risk of parties taking advantage of the other party, the mediator and the process itself. After all, if mediators cannot be counted on to do so and protect the integrity of the process, then who will?

The author would like to offer a sincere thank you and recognize the input of two esteemed ADR colleagues, namely Serge Roy and especially Linda Foley, whose feedback and contribution was invaluable in writing this article. 🙏

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What is meant by mediating in good faith?

Mediating in good faith means more than speaking and acting respectfully and giving others the opportunity to express perspectives and important matters to them. Acting in good faith also includes a commitment throughout the process to the following:

1. Coming to the mediation process with a sincere commitment to working toward a mutually acceptable outcome.
2. Being readily available for pre-mediation discussions and/or meetings to discuss issues and concerns.
3. Keeping commitments.
4. Adhering to the terms of the agreement to mediate and participation guidelines.
5. Giving serious consideration of others' perspectives, concerns and requirements.
6. Being candid and honest, and communicating all relevant information for collaborative problem solving.
7. Working cooperatively to meet the interests and needs of all stakeholders.
8. Making plausible requests.
9. Following through on assignments and responding to emails/calls within a reasonable time frame with minimal delay.
10. Generating realistic and viable options.
11. Demonstrating flexibility and giving serious consideration when options are presented.
12. Using objective standards/criteria (such as regulations, precedents, professional standards) to evaluate the feasibility of options.

Where the above factors are not present, the mediator will assess the situation and address language and actions s/he perceives may undermine or interfere with a collaborative and productive discussion.

In addition to the above list, other actions and behaviour that may be addressed include perceptions by the mediator of intimidation, threats and abuse of power, as well as posturing (take it or leave it attitude), an unwillingness to discuss issues beyond the desired outcomes and making implausible demands.

Following an evaluation of all factors and circumstances, the mediator will determine the feasibility and appropriateness of continuing the process.

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DEFERENCE DEFERENCE SHALL YOU DO, FOR THIS IS ARBITRAL REVIEW:

Why Canadian Courts Should Exercise Maximal Deference when Reviewing Commercial Arbitral Awards for Legal Errors

But I have never been able to love what was not lovable or hate what was not hateful, out of deference for some general principle.
- Joseph Conrad in "Some Reminiscences", p.9

1. INTRODUCTION

Canadian judges sitting in judicial review of administrative action regularly grit their teeth and declare "reasonable" decisions they might disagree with. Deference has come to define the Canadian approach to administrative law, requiring judges to abstain from substituting their views on the law for those of putatively expert tribunals.

In *Sattva Capital Corp. v Creston Moly Corp.*, the Supreme Court of Canada recognized that private commercial arbitration tribunals are due similar deference, albeit for somewhat different reasons.¹ As the Court did in *Sattva*, one might draw parallels between administrative tribunals and arbitral tribunals, most notably the presumptive expertise attributable to the decision-maker. But important differences also exist.

This paper contends that while the Supreme Court's standard of review framework for appeals of commercial arbitral awards on questions of law set out in *Sattva* is largely apt, it contains a flaw rooted in overreliance on administrative law principles. Specifically, the Author argues the Court erred in retaining wholesale two categories of questions calling for non-deferential correctness review inspired by the Court's decision in *Dunsmuir v New Brunswick*: 1) constitutional questions; and 2) questions of central importance to the

legal system and outside the decision-maker's expertise ("central importance/outside expertise questions").²

The paper proposes to modify the *Sattva* framework in two ways. First, the central importance/outside expertise category should be discarded entirely as inapplicable to commercial arbitration in principle, and logistically harrowing in practice. Second, correctness review on constitutional questions, to the extent they exist, should only apply when a state entity is party to the arbitration. The proposed dichotomy between "private-private" and "public-private" commercial arbitration is inspired by the Supreme Court's recent decision in *Teal Cedar Products Ltd. v British Columbia* wherein it applied *Sattva* to an arbitration mandated by statute between a forestry company and the provincial Crown.³

Before discussing *Sattva* and the standard of review applicable to commercial arbitration awards, this paper briefly unpacks arguably the paramount principle undergirding arbitration law in Canada and the world over: party autonomy. Two embodiments of this principle are the well from which the following critique draws its power.

The Author wishes to clarify that this paper speaks only to the standard of review applicable to appeals on ques-



JAMES PLOTKIN, LL.L., J.D., LL.M.

James Plotkin is an Associate at Caza Saikaley LLP/srl. James has a broad litigation and arbitration (international and domestic) practice covering commercial, intellectual property, bankruptcy/insolvency and administrative law.

tions of law challenging the arbitral award's merits.⁴ The standard(s) of review applicable to grounds for setting aside or appealing an award on, *inter alia*, arbitrability⁵, jurisdictional, public policy or due process grounds lie(s) beyond the scope of this paper.⁶

2. RELEVANT ARBITRATION PRINCIPLES

Canadian Courts have long recognized arbitration as a dispute resolution system running parallel to the public judicial system.⁷ They also readily acknowledged the need to accord weighty deference to a domestic commercial arbitral tribunal's decision on the merits.⁸ While this may seem extreme to some, it is worth noting that in international commercial arbitration, there is generally no merits review at all. Further, grounds for setting aside or refusing to enforce an arbitral award are limited to due process violations, invalidity of the arbitration agreement due to

party incapacity, improper composition of the arbitral tribunal, non-arbitrability and public policy.⁹ Even then, relief from the competent court remains discretionary.¹⁰ Given the level of deference associated with international arbitral awards, Canada's domestic arbitration acts, which allow appeals on questions of law—some acts even allow appeals on factual and mixed fact and law determinations by agreement—might seem interventionist to the international arbitration practitioner. That said, as the Supreme Court confirmed in *Sattva*, deference to the arbitral tribunal is the rule when one challenges an arbitral award's legal merits on appeal.

The justification for conferring maximal deference on a commercial arbitral award is rooted in the party autonomy principle (a.k.a. contractual freedom), which is one of arbitration law's cornerstones.¹¹ Party autonomy was described by one prominent arbitrator and academic as the notion that "people are free to arrange their private affairs as they see fit, provide they do not offend public policy."¹² This overarching principle instantiates itself in two ways relevant to the discussion below: 1) deference to the parties procedural choice; and 2) the tribunal's presumptive expertise.

First, party autonomy manifests as deference to the parties' choice to arbitrate rather than bring their dispute before a civil court or another alternative dispute resolution forum. Arbitration is procedurally flexible, especially compared to civil court proceedings. The Canadian domestic and commercial arbitration acts do not set out detailed procedures akin to the rules of civil procedure that apply in courts.¹³ Parties opting for arbitration thus manifest an intention to engage in efficient and final dispute resolution.¹⁴ Choosing arbitration also demonstrates a desire for a private process since arbitration is private by design.¹⁵ There is even some authority in other jurisdictions for the proposition that an arbitration proceeding's existence and substance are implicitly confidential, though that matter remains unsettled in Canada.¹⁶

The second embodiment of party autonomy is the arbitral tribunal's presumptive expertise. As Justice Rothstein put it in *Sattva*: "...it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties."¹⁷ The last part, acceptability to the parties, is critical. Arbitrators are not held to a generally applicable professional competency or experience standard. Parties can appoint whomever they please to arbitrate their dispute. An arbitrator can only be challenged based on qualifications if he or she lacks the qualifications the parties "have agreed are necessary".¹⁸ Absent such agreement, a party cannot impeach an arbitrator on that basis. As proposed in Section 4a(ii) below, courts should apply an irrebuttable presumption that the arbitral tribunal is expert, and refrain from ever looking behind the parties' choice by assessing whether a given legal question is outside the tribunal's expertise. An irrebuttable presumption of expertise also concords with the efficiency and finality goals discussed above as it diminishes the allure of challenging an award in court.

3. SATTVA'S STANDARD OF REVIEW FRAMEWORK FOR APPEALS FROM COMMERCIAL ARBITRAL AWARDS

Sattva Capital Corp. v Creston Moly Corp. is best known for its contribution to Canadian contractual interpretation. Tucked away at the end of the reasons are five paragraphs in which Justice Rothstein succinctly sets out the standard of review applicable to appeals on questions of law from commercial arbitration awards and the reasoning supporting his conclusion.

Creston wished to acquire rights in a molybdenum mining property. It contracted to pay Sattva a US\$1.5 million finders fee on the acquisition's closing. The fee was payable in Creston shares, or, at Sattva's election, cash or a combination of the two. The parties disagreed on the applicable valuation date for the shares and submitted their dispute to arbitration under the British Co-


lumbia *Commercial Arbitration Act* (renamed the *Arbitration Act*).¹⁹ The arbitrator decided in Sattva's favour. Creston sought leave to appeal before the British Columbia Supreme Court, which was denied. The British Columbia Court of Appeal overturned the leave decision and remanded the matter to the lower court judge to hear the appeal on the merits. The B.C. Supreme Court denied the appeal. It applied the correctness standard to the contractual interpretation question and found the arbitrator interpreted the contract correctly. The Court of Appeal overturned the lower court judge again. The Supreme Court of Canada had to decide, among other things, whether contract interpretation is a pure legal question or a mixed question. It held that contractual interpretation is generally a mixed question of fact and law, but that a decision-maker might commit an extricable legal error, such as "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor."²⁰ Whether the question is characterized as purely legal or mixed was essential to the outcome since the *BC Act* only allows appeals from arbitral awards on questions of law.²¹

After dealing with the contractual interpretation aspect of the reasons, Justice Rothstein addresses the standard of review under the B.C. *Arbitration Act* on questions of law. He begins by observing that commercial arbitration is different from administrative proceedings in that parties to an arbitration may select "the number and identity of the arbitrators."²² As a result, the *Dunsmuir* administrative law judicial review framework is not entirely applicable. In the next breath, however, he likens the two processes on the basis that both are non-judicial and involve expert decision-makers.²³ At paragraph 106, Justice Rothstein imports the *Dunsmuir* reasonableness review presumption, and two of its exceptions:

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would

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attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (citation omitted). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case. (Emphasis added)

At paragraph 119, Justice Rothstein confirms that reasonableness carries the same meaning as in administrative law: the decision is reasonable if it is justified, transparent, intelligible and “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.”²⁴ Justice Rothstein did not directly reference the whole definition (although he did cite the paragraph in *Dunsmuir* containing it), only the justification transparency and intelligibility portion. Appellate courts applying *Sattva*, and most recently the Supreme Court in *Teal Cedar*, have nonetheless applied the full reasonableness definition set out in *Dunsmuir*.²⁵

Before moving on, the Author notes that, in his view, the *Sattva* standard of review framework applies only to appeals on questions going to an arbitral award's merits, thus excluding review on jurisdictional grounds. Justice Rothstein does not make this clear in the five brief yet dense paragraphs he allocated to the standard of review discussion. This position is nonetheless founded in the peculiar, though seemingly deliberate, way he chose to describe the exceptions to presumptive reasonableness review.

At paragraph 106, Justice Rothstein offers an abridged list of the correctness review categories the Supreme Court identified in *Dunsmuir*, but leaves room for additional categories. In *Dunsmuir*, constitutional questions and central importance/outside expertise question—those expressly retained in *Sattva*—are named alongside “true questions of *vires*”²⁶ and “questions re-

garding the jurisdictional lines between two or more specialized competing tribunals”.²⁷ While the latter has no apparent application in the arbitration context, jurisdictional questions arise regularly. Why, then, did Justice Rothstein not name jurisdictional questions along with constitutional questions and central importance/outside expertise question in *Sattva*?

Justice Rothstein interestingly plucked from the *Dunsmuir* list the only two categories speaking to merits review. He appears to have differentiated those from jurisdictional questions, even though these are sometimes pure questions of law, and therefore potentially within the appeal provision at issue in the case.²⁸ Although one does not usually apply the *ejusdem generis* principle to judicial reasons, since the general language (“such as”) precedes two categories that are linked by the fact that they apply to the arbitral award's merits, any new correctness review category should also relate to the award's merits. The absence of jurisdictional questions from the correctness review categories named in *Sattva* (despite its inclusion in *Dunsmuir*) strengthens this conclusion.

One might speculate that Justice Rothstein had a more practical reason for treating jurisdictional questions differently from appeals on the merits relating to differences in drafting between the various domestic arbitration statutes. Nearly all Canadian domestic arbitration legislation, including the statutes based on the Uniform Law Conference of Canada *Uniform Arbitration Act*, contain separate provisions for appeals and applications to set aside an award.²⁹ Jurisdictional challenges are usually treated as a set-aside ground.³⁰ Indeed, under the British Columbia *Arbitration Act* pursuant to which *Sattva* was decided, the tribunal commits an “arbitral error” when it exceeds its jurisdiction, giving rise to the right to request the Court set aside the award.³¹ The only provinces whose arbitration laws do not contain separate appeal/set-aside provisions are Quebec, Newfoundland and Labrador and Prince Edward Island.³² Based on this legisla-

tive distinction observed in most, but not all, Canadian domestic arbitration legislation, perhaps the Supreme Court in *Sattva* thought it best to leave the standard of review applicable to jurisdictional issues for another day, even if it said so by saying nothing at all.

4. FLAWS IN THE SATTVA STANDARD OF REVIEW FRAMEWORK: DEFERENTIAL, BUT NOT DEFERENTIAL ENOUGH

Although the Supreme Court rightly proclaimed deference as the rule, its standard of review framework is flawed in two respects: 1) the central importance/outside expertise category has no place in arbitration law; and 2) to the extent constitutional issues can arise in private commercial arbitration, correctness review is only appropriate when one of the parties is a state entity.

The reader is urged to bear in mind that *Sattva*, *Teal Cedar* and the myriad appellate decisions cited above confirm the deference due to commercial arbitration tribunals under Canadian law. That deference is conferred in acknowledgment of the parties' choice to have their disputes resolved efficiently and expertly.³³ Any correctness review exception to the reasonableness review rule must be sufficiently important to displace those principles. In the Author's view, it is insufficient to simply transpose correctness review categories from the administrative law context without analysing their propriety in light of arbitration law principles. With respect, the Supreme Court in *Sattva* appears to have done just that. At a minimum, it failed to explain how the retained correctness review categories were supported (or at least not hindered) by arbitration law principles.

4a. Correctness review on questions of central importance to the legal system beyond the arbitrator's expertise: a non-existent category

When one considers the above-referenced arbitration principles, it becomes apparent that the central importance/outside expertise correctness review category does not (and should not) exist in arbitration law for two rea-

sons: 1) issues decided in private (and often confidential) arbitration are by definition not centrally important to the public legal system because they stand outside that system; and 2) the presumption that the tribunal is expert in the relevant subject-matter should be irrebuttable. Since the central importance/outside expertise correctness category is two-pronged, accepting either of these arguments suffices to preclude it from applying to commercial arbitral awards.

4a(i). Issues decided in private arbitration are never centrally important to the legal system

At first glance, one might write off this objection as misguided. Surely an issue's importance to the legal system inheres in the question and not the forum in which it is answered! Within the administrative law arena, from which this correctness review category is derived, that proposition is undoubtedly correct. However, because this category derives from administrative law (i.e. public law), it silently presupposes that the "issue" will be decided by a public body that renders a reported (or at least publicly available) decision. A decision's potential importance to the legal system is inextricably linked with that publicity.

One of the main justifications for applying the correctness standard to general law issues is that "there should be consistency across the legal system."³⁴ An issue is centrally important because of its "impact on the administration of justice as a whole."³⁵ Whether and to what degree an issue is important to the legal system depends on its locus of legal effect.³⁶ When the decision-maker is a public authority whose decisions are included in the corpus of Canadian jurisprudence, there will always be potential for legal effect (and consequently some "importance", no matter how minimal) as those decisions may be cited and considered in future cases.³⁷ Whether a case addresses an issue of "central importance" is another matter.

Unlike administrative decision-making,

arbitration is private by nature and exists outside the public justice system.³⁸ Many arbitral awards, which are shrouded in privacy and often protected by confidentiality agreements, never see the light of day. Nothing contained in an award, no matter how important the issue would be if decided by a public authority, can have any impact on the greater legal system if it is never made public.³⁹

Even though some commercial arbitral awards become public for one reason or another, they still bear little importance to the public legal system. For obvious reasons, commercial arbitration awards are not systematically reported; indeed, they rarely are. That lack of consistent publication prevents one from knowing whether the treatment given to an issue in a published award stands alone or forms part of a true "arbitral *jurisprudence constante*".⁴⁰ In that regard, the lack of a cohesive and accessible body of arbitral jurisprudence lessens the value, even persuasive value, of any given arbitral award. Although neither administrative decisions⁴¹ nor commercial arbitral awards⁴² attract *stare decisis*, the fact that most Canadian administrative tribunals' decisions are systematically reported and publicly available boosts each decision's credibility and value via the ability to check it against others. The private commercial arbitration system, for lack of a better term, offers no such institutional transparency and cohesion. As a result, even a publicized commercial arbitration award should be seen to have a negligible impact on the public legal system, if any.

Commercial arbitration disputes could not have been within the Supreme Court's contemplation in *Dunsmuir* and previous cases espousing the central importance/outside expertise category in the administrative law setting. Since questions adjudicated by commercial arbitral tribunals categorically fail to meet the "central importance" criterion, this correctness review category cannot apply to commercial arbitral awards.

4a(ii). The arbitral tribunal's expertise should be presumed in all cases

There should be an irrebuttable presumption that the tribunal is expert on the legal issue it adjudicates for two reasons. The first is principled and the second is pragmatic.

As a matter of principle, the arbitral tribunal is deemed expert in the subject-matter before it.⁴³ As explained above, this presumptive expertise rests on the parties' right to personally select the members of the arbitral tribunal.⁴⁴ One might also observe that the presumption of expertise in *Sattva* does not depend on whether the arbitrator(s) possess(es) legal training. The Supreme Court must be taken to have known that legal training or expertise in a given area of law, while common in practice, is not a prerequisite to sit as an arbitrator. This exemplifies the notion that arbitration, as an institution, commands deference. Stated differently, the court is deferring more to the party autonomy principle and less to the person selected through the exercise of that autonomy.

The administrative law regime also aims to enhance efficiency.⁴⁵ But there is a critical difference: the parties choose neither the forum nor the individual decision-maker. When the legislature makes a lawful delegation to an administrative body and grant it exclusive jurisdiction over a given issue, people have no choice but to address themselves to that body. In arbitration, one can conceptualize the parties' right to select their adjudicator (in conjunction with the presumed efficiency and finality goals) as a basis for waiving the right to challenge that person's expertise. One cannot impute the same waiver in the administrative law context.

Finally, on this point, scrutinizing an arbitrator's expertise might make sense if there were a broader social implication flowing from a private commercial arbitration award. As amply explained above, there is not. Since the award has no legal value to anyone outside the arbitration, the party's agreement that an arbitrator is competent should

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be enough for the Courts not to dissect a given arbitrator's expertise on the subject-matter before the tribunal.

As a practical matter, determining whether a given issue is within the tribunal's expertise represents a procedural nightmare. First, what if the tribunal consists of three members? Each member's experience and credentials might, and likely will, be unique. What if two members are deemed "expert" on a given legal issue, but not the third? What if the Court only qualifies one member of a three-member tribunal as sufficiently expert? What if the only expert dissents? Maintaining the presumption of expertise bypasses the judicial alchemy required to answer these questions.

Second, and regardless of whether the award under appeal was rendered by a sole arbitrator or a three-member panel, it is desirable to avoid a situation in which a reviewing court conducts essentially an *ex post facto voir dire* on the arbitrator's credentials.⁴⁶ Instead of scrutinizing the award's merits, the gaze now shifts to the arbitrators, who are presumably absent and unable to defend themselves in the appeal. The alternative is for the arbitrators to appear as witnesses or to swear affidavits and submit to cross-examination. Such a process is singularly unappealing to the arbitrator, whose award has already been appealed, and now must stand trial in defence of his or her credentials.

Needless to say, a public finding that an arbitrator lacks sufficient expertise in an area of law would embarrass the arbitrator and potentially damage his or her professional reputation.

Abstaining from engaging in an expertise assessment is also consistent with the judicial and administrative contexts. Reviewing courts do not scrutinize the individual judge or administrative decision-maker's background to determine whether to defer on a given legal point. The court's expertise in general law (or the areas in which it exercises its jurisdiction) and an administrative entity's expertise within its legislatively curated domain are institutional.⁴⁷ For judicial review purposes, that institutional expertise is presumptively imbued in the individual decision-maker by dint of the office alone, not their personal expertise, which may range.⁴⁸ To do otherwise would undermine the Court or administrative entity's institutional integrity and invite attacks on decision-makers based on their personal and professional backgrounds.

Likewise, to preserve arbitration's institutional integrity as a parallel private justice system, the Court should assess the tribunal's expertise at the institutional level, not the individual level.⁴⁹ By its very nature, institutional expertise cannot be rebutted because it is deemed. As stated above, Justice Rothstein recognized a commercial arbitral tribunal's presumptive expertise knowing full well that parties are free to name an arbitrator who is illiterate, let alone one without a legal education and specialized expertise in the applicable substantive law. Accordingly, the arbitral tribunal's institutional expertise should be presumed in all cases.

4b. Correctness review on constitutional questions and the lack of distinction between "private-private" and "private-state" arbitration

Unlike the central importance/outside expertise correctness review category, constitutional questions can theoretically arise in commercial arbitration. Yet, the question remains as to whether there is a reason to import this correct-


ness review category from administrative law in light of arbitration law principles. Before addressing that question head-on, two preliminary observations are in order: 1) constitutional issues are uncommon in commercial arbitration, especially between private parties ("private-private" arbitration); and 2) If a constitutional issue should arise, a commercial arbitral tribunal has the authority to decide it.

4b(i). Preliminary observations

Constitutional questions surely cannot arise frequently in commercial arbitration, particularly private-private arbitration. Since private persons do not owe each other constitutional obligations, no claim for breaching a *Charter* right can be made in private-private commercial arbitration. Private persons are also obviously unconstrained by the constitutional division of power. The Author can conceive of only one (rather unlikely) scenario in which a constitutional issue could arise in private-private arbitration: when the claimant relies on a statutory cause of action, and the respondent argues it is unconstitutional.

Suppose a dispute submitted to arbitration over an alleged copyright infringement in which the claimant argues that, in addition to infringing its copyright, the respondent is liable for circumventing a "technological protection measure" (TPM) pursuant to section 41.1 of the *Copyright Act*.⁵⁰ Among its defences, the respondent might argue that section 41.1 is unconstitutional on the basis that it encroaches on the provincial authority to regulate property and civil rights in the province under subsection 92(13) of the *Constitution Act, 1867*.⁵¹ In such a case, the tribunal could conceivably conduct a constitutional analysis to determine whether section 41.1 of the *Copyright Act* trespasses on provincial legislative authority. The foregoing scenario (or one like it) cannot be common since the majority of claims in private-private arbitration are based on contractual rather than statutory causes of action.⁵² In light of the foregoing, arbitrators in private-private commercial arbitration cases likely will not have to dust off their constitutional law texts with any regularity.

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That said, in the unlikely event that a commercial arbitral tribunal does face a constitutional question, it possesses the authority to decide the issue. Given that the Supreme Court named constitutional questions in *Sattva* as one of the correctness review categories, this point seems too obvious to mention. But since this paper relies upon a divergence between administrative law and arbitration law principles as the basis for critiquing the standard of review framework set out in *Sattva*, intellectual rigor demands authority other than the Supreme Court's implicit recognition in the case under critique that an arbitral tribunal may decide constitutional questions.

The tribunal has a general authority to decide legal questions,⁵³ which presumably includes constitutional legal questions.⁵⁴ A law's constitutionality or lack thereof does not depend on a court's declaration; it is either constitutional or not.⁵⁵ In public law, the constitutional supremacy principle dictates that courts and administrative entities cannot apply an unconstitutional law and therefore must be permitted to assess constitutionality to assure compliance.⁵⁶

Instead of constitutional supremacy, an arbitrator might reason his or her way to the same conclusion based on the parties' agreement—the arbitrator's "enabling legislation" and "supreme law". Suppose an arbitration agreement naming Ontario law as the substantive law applying to the dispute. Unless the parties deliberately stipulate that the tribunal should apply the law in force at some other point in time, this can only reasonably mean Ontario law that is both valid and in force when the claim is brought.⁵⁷ If a party argues that a statute the other party relies upon is invalid, constitutionally or otherwise (e.g. it was

repealed or amended), it behooves the tribunal to make the determination to assure it does not exceed its jurisdiction by applying legal rules the parties did not agreed to.

4b(ii). Reasonableness for private-private arbitration, correctness for public-private arbitration

In assessing the appropriate standard of review for constitutional questions, the court ought to distinguish between private-private and public-private arbitration. The key difference is that in public-private arbitration, one of the parties (i.e. the public entity) is beholden to the *Charter* and can only operate within the constitutional authority consigned to its level of government, federal or provincial.

In the case of private-private arbitration, the reasonableness standard should apply to all legal determinations, even ones interpreting the constitution. As noted, any derogation from presumptive reasonableness should be justified in light of arbitration law principles. The constitutional questions category falls short in two respects: 1) The key justification for applying correctness to an administrative tribunal's constitutional determinations—maintaining constitutional supremacy and the rule of law by denying governmental overreach—does not manifest in private-private commercial arbitration; and 2) since party autonomy permits the parties to select whatever law or body of rules they please (Canadian or otherwise) to resolve their dispute, there is no absolute requirement that the tribunal correctly apply the laws of Canada at all, including the Constitution.

Recall that an arbitral award is authority between the parties only and has no public existence, at least until a party undertakes proceedings to enforce, ap-

peal or set aside the award.⁵⁸ Since the tribunal's authority is derived entirely from the parties' agreement, concerns over governmental (legislative or executive) overreach are foreign to private-private commercial arbitration. In contrast, judicial review of administrative action is primarily concerned with maintaining the rule of law by assuring that state entities do not overstep their authority, and by safeguarding legislative/constitutional supremacy.⁵⁹ Constitutional supremacy is a vital public law principle as public order demands courts and administrative entities exercise their coercive power within constitutional limits.⁶⁰

That importance does not translate to arbitration, which, as a private justice system running parallel to the public system, is arguably the furthest thing from public law. Arbitration's private nature means that if a commercial arbitral tribunal misinterprets the Constitution, there is no greater incidence on the rule of law than if the tribunal misinterpreted another law. The legal error is contained as its effects cannot extend beyond the parties to the arbitration agreement. One might argue that public policy requires an appellate court to assure that all adjudication in Canada under Canadian law, including private-private commercial arbitration, correctly interpret the Constitution. However, it is unclear what that policy might be and whether it could override the competing policy favouring curial deference based on the expertise, efficiency and finality principles. As with the "central importance" criterion discussed above, private-private commercial arbitration's distance from the public justice system renders it materially different from administrative proceedings such that the principles underlying one do not necessarily apply to the other.



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In keeping with the established theme, the second reason constitutional questions should not alter the deference due an arbitral tribunal in private-private arbitration relates to party autonomy. The arbitral tribunal is bound to decide the dispute based on whatever body of rules the parties tell it to. They may instruct the tribunal to decide their commercial matter in accordance with sharia⁶¹, halachic⁶² or Ferengi law.⁶³ Parties are literally free to ask the tribunal “what would Jesus do?” and accept whatever answer it provides.⁶⁴ The tribunal is therefore only beholden to substantive Canadian law if the parties choose it to resolve their dispute. In fact, there is nothing in principle preventing a party from expressly directing an arbitral tribunal to decide a dispute in accordance with a defunct law or one that a court has struck down as unconstitutional.⁶⁵ This last observation reveals that the Constitution, while sacrosanct in the public justice system, is just another law that could apply, or not, to a commercial arbitration. The justification for placing constitutional questions on a pedestal for curial review falls away when shifting from the administrative law setting to a private-private commercial arbitration.

Public-private commercial arbitration is another matter. In theory, the above reasoning pertains to public-private arbitration as well. After all, the arbitration principles discussed at length in this paper do not cease to apply simply because the proceedings involve a state entity. The difference is that unlike in the private-private arbitration context, there is an overriding public policy interest in holding the state to its constitutional obligations and jurisdiction. Courts should not allow the cloak of arbitration to permit the state to achieve privately what it cannot do pub-

licly. In other words, state entities should not be permitted to insulate themselves from the constitutional ramifications of their legislative or executive action through deference to an arbitral tribunal that would not exist if an administrative board, tribunal or commission decided the very same dispute.

The scenario in *Teal Cedar* offers a fitting example. A private party entered into a commercial arbitration with the government of British Columbia. The statute at issue, the *Forestry Revitalization Act*⁶⁶, required the parties to submit to arbitration a dispute relating to compensation for the appellant’s reduced access to certain improvements it made on Crown. The statute could just as easily have named an administrative tribunal to adjudicate the claim. Instead, the B.C. Legislature opted for commercial arbitration under the *BC Act*. No constitutional issue arose in *Teal Cedar*, but if one had, applying deference to the arbitral tribunal’s decision on that point would mean that the Province of B.C. could get away with acting unconstitutionally (either by violating a person’s *Charter* rights or by exceeding its legislative authority) and escape the non-deferential superintending authority of the section 96 court. In the Author’s view, the public interest in assuring that the state complies with the Constitution overrides the competing policy interests underpinning curial deference to commercial arbitral tribunals. Reviewing courts should thus apply the correctness standard to an appeal on a constitutional question of law arising out of a public-private arbitration.


5. CONCLUSION

The Supreme Court of Canada and other Canadian courts have rightly applied a deferential approach when re-

viewing arbitral awards for legal errors. Adopting the above-recommended changes strengthens that approach by attempting to rid from the arbitral standard of review framework the inapplicable vestiges of administrative law that *Sattva* preserved.

There is no such thing as a legal question falling outside the arbitral tribunal’s expertise. Absent party agreement to the contrary, that expertise is unimpeachable. Nothing an arbitral tribunal decides is centrally important to the public Canadian legal system, ever. A tribunal’s award does not exist within the public Canadian legal system from a jurisprudential perspective, and thus bears no (or at least virtually no) importance to it.

Only when a state actor is party to an arbitration should the Tribunal’s constitutional pronouncements attract correctness review because those actors cannot escape their constitutional limitations by opting for arbitration over administrative or judicial proceedings. In contrast, when only private parties are involved in an arbitration, the tribunal’s “constitutional interpretation” should be treated like any other since the Constitution is but another law to which the parties might subject their dispute, or not.

Judges are practiced hands at exercising restraint when exercising their superintending authority over administrative tribunals. Since *Sattva*, they have demonstrated no difficulty in extending that practice to commercial arbitral tribunals. In light of this, retooling the *Sattva* standard of review framework as suggested poses little additional burden on the courts, but goes a long way in preserving commercial arbitration’s institutional integrity. 

1 2014 SCC 53 (*Sattva*).

2 2008 SCC 9 (*Dunsmuir*).

3 2017 SCC 32 (*Teal Cedar*). Although *Teal Cedar* served as the impetus for this writing, the Supreme Court does not expressly address any of the following, opting instead to straightforwardly apply the *Sattva* standard of review framework. *Teal Cedar* is referenced in Section 4b below, however, to assist in illustrating that the private-private/public-private distinction is relevant to the standard of review on constitutional questions.

4 As discussed in section 3 below, the Author is incidentally of the view that the *Sattva* standard of review framework only applies to questions going to the merits of an arbitral award.

5 The Author refers to *arbitrability* in the sense used to mean what types of disputes parties may resolve by arbitration.

6 Jurisdictional questions, or “true questions of *vires*”, is another correctness review category listed in *Dunsmuir* and is discussed briefly in Section 3 below.

7 *Desputeaux v Éditions Chouette (1987) inc.*, 2003 SCC 17, at para 40 (*Desputeaux*); *GreCon Dimter inc. v J.R. Normand inc.*, 2005 SCC 46, at para 38 (*GreCon*); *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, at para 132 (*Dell*); *Seidel v TELUS Communications Inc.*, 2011 SCC 15, at para 99 (*Seidel*).

8 For example: *Ledore Investments Limited (Ross Steel Fabricators & Con-*

- tractors) v *Ellis-Don Construction Ltd.*, 2017 ONCA 518, at para 19 (Ledore); *Popack v Lipszyc*, 2016 ONCA 135, at para 26; *Inforica Inc. v C.G.I Information Systems and Management Consultants Inc.*, 2009 ONCA 642, at para 14; *Chriscan Enterprises Ltd. v Bricor Mechanical Ltd.*, 2016 BCCA 442, at paras 28-29 (Chriscan); *Quintette Coal Ltd. v Nippon Steel Corp.* (1990), 1991 CanLII 5708 (BC CA); *Rh  aume c Soci  t   d'investissements l'Excellence inc.*, 2010 QCCA 2269, at para 57 (Rh  aume).
- 9 See Article V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), better known as the "New York Convention". The New York Convention is in effect in all Canadian provinces and territories (except Quebec where it is considered an interpretative aid) and has been signed by 157 contracting states as of this writing. See also Articles 34 and 36 of the *UNCITRAL Model Law on International Commercial Arbitration* (1985), which, as of this writing, has been adopted in 106 jurisdictions, including all Canadian provinces and territories, again, except Quebec where it is considered an interpretative aid only). See: *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5 (Ontario); *International Commercial Arbitration Act*, RSA 2000, c I-5 (Alberta); *International Commercial Arbitration Act*, RSNL 1990, c I-15 (Newfoundland & Labrador); *International Commercial Arbitration Act*, RSNS 1989, c 234 (Nova Scotia); *International Commercial Arbitration Act*, RSBC 1996, c 233 (British Columbia); *International Commercial Arbitration Act*, RSNB 2011, c 176 (New Brunswick); *International Commercial Arbitration Act*, RSPEI 1988, c I-5 (Prince Edward Island); *The International Commercial Arbitration Act*, CCSM c C151 (Manitoba); *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2 (Saskatchewan); *International Commercial Arbitration Act*, RSNWT 1988, c I-6 (Northwest Territories); *International Commercial Arbitration Act*, RSY 2002, c 123 (Yukon); *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c I-6 (Nunavut); *Code of Civil Procedure*, CQLR c C-25.01, arts 649 and 652 (CCP).
 - 10 Gary B. Born, *International Commercial Arbitration*, 2nd edition (Alphen aan den Rijn: Kluwer Law International, 2014) at 3176, 3427 and 3445; Teresa Cheng, "Celebrating the Fiftieth Anniversary of the New York Convention", in Albert Jan van den Berg eds., *50 Years of the New York Convention: ICCA International Arbitration Conference 680* (ICCA Congress Series No. 14, 2009).
 - 11 *Desputeaux*, at paras 22 and 67-69; *Arbitration Law of Canada: Practice and Procedure*, 3rd ed (Huntington, New York: Juris, 2017), at p 49 (*Arbitration Law of Canada*). Several cases discuss the contractual freedom principle in relation to arbitration in the context of stay or award recognition proceedings. See: *Deuterium of Canada Ltd. v Burns and Roe, Inc.*, [1975] 2 SCR 124 ("There may be cases where it would be palpably futile and ineffective to submit the matter to arbitration and in such event it might be desirable to refuse a stay of proceedings under s. 5 notwithstanding the existence of a Scott and Avery clause, but in my opinion this is not such a case and indeed I am satisfied that where, as here, a contract has been concluded between two substantial corporations, acting at arm's length and no doubt with advice, it would constitute an encroachment on freedom of contract if it were held that the courts were at liberty to interfere with a condition precedent freely accepted by both parties for the purpose of limiting the conditions under which an action could be brought under the contract."); *Rh  aume*, at para 80; *MacKinnon v National Money Mart Co.*, 2004 BCCA 473, at para 36.
 - 12 *Arbitration Law of Canada*, at p 2, citing Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013), at p 5.
 - 13 *Ibid.* at p 49. Many of Canada's domestic arbitration acts grant broad procedural discretion to the arbitral tribunal. See for example the domestic arbitration legislation in force in Ontario, New Brunswick, Alberta, Saskatchewan and Manitoba, which are based on the 1990 *Uniform Arbitration Act* promulgated by the Uniform Law Conference of Canada (*Arbitration Act*, 1991, SO 1991 (*Ontario Act*), c 17; *Arbitration Act*, SNB 2014, c 100; *Arbitration Act*, RSA 2000, c A-43; *The Arbitration Act*, 1992, SS 1992, c A-24.1; *The Arbitration Act*, CCSM c A120).
 - 14 *Teal Cedar*, at para 74; *Wolfe et al v Taylor et al*; *Fat Cat Farms Ltd et al v Wolfe et al*, 2017 MBCA 74, at para 74; *On Call Internet Services Ltd. v Telus Communications Company*, 2013 BCCA 366, at para 57 (*On Call*); *Broadband Communications North Inc. v I-Netlink Incorporated*, 2017 MBQB 146; *Park v Insurance Corporation of British Columbia*, 2002 BCSC 611, at para 22.
 - 15 *On Call*, at para 57; *Arbitration Law of Canada*, at p 271 et seq.
 - 16 The Ontario Superior Court of Justice and the British Columbia Supreme Court respectively discuss implied confidentiality in arbitration in *Gea Group AG v. Ventra Group Co.*, 2009 CanLII 17992 (ON SC) and *Hi-Seas Marine Ltd. v. Boelman*, 2006 BCSC 488, though neither court weighs in definitively. In *McHenry Software Inc. v. ARAS 360 Incorporated*, 2014 BCSC 1485, at para 35, the B.C. Supreme Court said that "...there is no general principle that the confidentiality of arbitration proceedings carries over to court proceedings when the arbitration is appealed". In that case, the BCICAC Rules, which contain a built-in confidentiality provision, applied to the arbitration. For the UK perspective, see: *Arbitration Law of Canada*, at 274, citing *Dolling-Baker v Merrett*, [1991] 2 All ER 890 (CA); *Hasseh Insurance Co. of Israel v Mew*, [1993] 2 Lloyd's Rep 243 (Q.B.). Further, some arbitral institutions incorporate confidentiality provisions into their arbitration rulesets.
 - 17 *Sattva*, art para 105.
 - 18 For example: *Ontario Act*, paragraph 13(1)2. See also *Arbitration Law of Canada*, at p 177, citing *Tankoos Yarmon Ltd. v T. Eaton Co.* (1981), 33 OR (2d) 480 (HC).
 - 19 RSBC 1996, c 55 (*BC Act*).
 - 20 *Sattva*, at para 53, citing *King v Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, at para 21.
 - 21 The characterization is also relevant to determining the applicable appellate standard of review from a judicial appeal on contractual interpretation. The normal appellate standard of review set out in *Housen v Nikolaisen*, 2002 SCC 33 applies (i.e. palpable and overriding error standard on mixed question, unless an extricable legal error is identified, in which case the correctness standard applies).
 - 22 *Sattva*, at para 104.
 - 23 *Ibid.*, at para 105.
 - 24 *Dunsmuir*, at para 47.
 - 25 *Teal Cedar*, at para 84; *Ledore*, at para 20; *Chriscan*, at paras 60-61; *The City of Ottawa v The Coliseum Inc.* 2016 ONCA 363, at para 35; *Layman v Layman Estate*, 2016 NLCA 13, at para 20.
 - 26 *Ibid.*, at para 59.
 - 27 *Ibid.*, at para 61.
 - 28 When the arbitral tribunal draws its authority from an arbitration agreement (rather than a statute), assessing its jurisdiction is a contractual interpretation matter. In accordance with *Sattva's* primary ratio, contractual interpretation is a mixed question of fact and law from which one might identify an extricable legal error. See: *Sattva*, at paras 50-53.
 - 29 Sections 45 and 46 of the *Uniform Arbitration Act* (1990). The statutes in the following jurisdiction contain separate provisions for appeals and applications to set aside an award: Ontario, BC, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories, Nunavut, New Brunswick and Nova Scotia.
 - 30 This is the case for the statutes based on the *Uniform Arbitration Act* (1990). See for example: *Ontario Act*, s 46(1)3 "The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement."
 - 31 *BC Gas Inc. v Westcoast Energy Inc.*, [1990] BCJ No 2924, at para 22, 21 ACWS (3d) 154; *DNM Systems Ltd. v Lock-Block Canada Ltd.*, 2015 BCSC 2014, at para 84; *Arbutus Software Inc. v ACL Services Ltd.*, 2012 BCSC 1834, at para. 80.
 - 32 CCP, arts 646 and 648. *Arbitration Act*, RSPEI 1988, c A-16, s 12(2); *Arbitration Act*, RSNS 1989, c 19, s 15(2). In *Nova Scotia Liquor Commission v Nova Scotia Government Employees' Union*, Local 470, 1990 CanLII 2469 (NS CA), the Supreme Court of Nova Scotia (Appeal Division) stated that jurisdictional challenges fall under s. 15(2) ("setting aside an arbitration") of the Act.
 - 33 *Sattva*, at para 105; *Teal Cedar*, at para 1.
 - 34 Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009), at 14:4410; *Dunsmuir*, at para 60; *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225, at para 47.
 - 35 *Dunsmuir*, at para 60; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, at para 66 (*Irving Pulp & Paper*); *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13, at para 43 (*Loewen*).
 - 36 The Author insists on legal effect. In *Irving Pulp & Paper*, the Supreme Court of Canada made clear that a decision's direct effect on the public is not what renders it a question of general importance. Rather, it is the decision's potential effect on the legal system as a whole that matters.
 - 37 Even if a decision does not attract *stare decisis*, it might nonetheless have persuasive effect on future panels of the same tribunal, and even reviewing courts. Though not speaking directly to administrative law, for a thoughtful perspective on judicial decision-making as an act of cannon formation constructing a "precedential lineage" see: Elizabeth F Judge, "Precedent and the Individual Opinion: Judges Judging Judgments and the Creation of the Law Canon", (2008) *Western Humanities Review*, 61, Available at: <https://ssrn.com/abstract=1956589>.
 - 38 *Desputeaux*, at para 40; *GreCon*, at para 38; *Dell*, at para 132, *Seidel*, at para 99; *Arbitration Law of Canada*, at 283.
 - 39 It is acknowledged that the award might become "public" to some extent when it is appealed, although the parties can request a confidentiality order, which should generally be granted, especially if the arbitration process and award are covered by confidentiality agreements. One might argue that "central importance" should not come about as a result of an appeal being filed. The above cited authorities, including *Dunsmuir* and *Irving Pulp & Paper* suggest that the central importance must be intrinsic to the decision.
 - 40 To illustrate: if one panel of the Public Service Labour Relations and Employment Board interprets a statutory provision as meaning "X", but the panels in 12 other Board decisions read the provision as saying "Y", a



litigant can identify the former case as an outlier. Likewise, one can imagine a similar scenario in commercial arbitration: an issue is adjudicated 13 times by different commercial arbitral tribunals, and one outlier tribunal decides the issue differently from the other 12. The difference is that in the arbitration context, it might turn out that the outlier is the only award that gets published. This could create a distorted picture of the representative legal view on an issue.

- 41 See *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, at para 91, where the Supreme Court affirmed the principle that administrative tribunals are not bound by *stare decisis*. Since they cannot bind other panels of the same tribunal or a higher court, their decisions never gain the force of precedent. See also: *Syndicat de l'enseignement des Vieilles-Forges (CSQ) c Commission scolaire du Chemin-du-Roy*, 2015 QCCA 106, at para 18; *Transcanada Pipelines Ltd. v Beardmore (Township)*, [2000] OJ No 1066, at para. 129, 186 DLR (4th) 403.
- 42 *Desputeaux*, at para 62.
- 43 *Sattva*, at para 105; *Intact Insurance Company v Allstate Insurance Company of Canada*, 2016 ONCA 609, at para 50; *The Dominion of Canada General Insurance v Aviva Canada et al.*, 2015 ONSC 6195, at para 18.
- 44 Various arbitration institution rulesets provide a role for the institution in selecting a panel. In any event, in choosing to arbitrate under the auspices of an institution playing such a role, the parties have expressly delegated their right to select an arbitrator to the institution. The parties therefore still exercise party autonomy, albeit by proxy.
- 45 Guy Régimbald, *Canadian administrative Law*, 2nd ed (Markham, Ontario: Lexis Nexis Canada, 2015) at p 3; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at paras 1 and 55.
- 46 The Author notes that the Manitoba Court of Appeal in *Loewen*, at para 60 frames the presumption of expertise as rebuttable. With respect, the Court bases this comment on administrative law cases that do not actually support that conclusion. Indeed, one of the cases the Court of Appeal cited, *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, 616, 2011 SCC 59, at para 53 (*Nor-Man*), directly contradicts that proposition by explaining that a labour arbitrator's expertise is institutional, not personal to the individual arbitrator.
- 47 Regarding courts, see *House v Nikolaisen*, 2002 SCC 33, at para 9 where the Supreme Court describes an appellate court's institutional "law-making" function. The Court does not explicitly state that the law-making expertise is institutional rather than inherent in the appellate court members themselves. However, that the appellate court's law-making expertise is institutional follows *a fortiori* since members of appellate courts, though all highly qualified jurists, are not inherently more studied in the law than lower court judges; they are therefore not inherently better "law-makers" than lower court judges. Indeed, appellate judges often start their judicial careers in the lower court. In light of this, the appellate court's expertise in law-making must flow from the court's institutional role and is not inherent in the appellate court members, expert though they may be. Regarding administrative decision-makers, see: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at para 33; *Dunsmuir*, at para 68.
- 48 *Nor-Man*, at para. 53.
- 49 As noted above, in *Nor-Man*, at para 53, the Supreme Court of Canada recognized the that labour arbitrators benefit from an institutional, rather than personal expertise. Although labour arbitration is not commercial

arbitration, they bare many similarities, including, those Justice Rothstein referenced in *Sattva*.

- 50 RSC, 1985, c C-42.
- 51 30 & 31 Victoria, c 3 (UK). The author takes no position on whether such an argument is well-founded. As of this writing, only one case has applied the *Copyright Act's* TPM protections and no constitutional argument was made. See: *Nintendo of America Inc. v King*, 2017 FC 246.
- 52 Intellectual property cases are perhaps a notable exception to an otherwise broad rule.
- 53 *Arbitration Law of Canada*, at p 378. In some instances, this power is expressly conferred in the domestic arbitration acts. See for example: *BC Act*, s 23(1); *Ontario Act*, s. 38(2).
- 54 This is the law with respect to administrative tribunals: *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, at para 39; *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 9 *Cuddy Chicks*). The Author sees no reason to distinguish commercial arbitral tribunals from administrative decision-makers in this regard.
- 55 *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 (*Martin*).
- 56 *Ibid*, at para 34, citing *Cuddy Chicks*.
- 57 The flexibility of arbitration theoretically allows the parties to make a statement in the arbitration agreement like "the arbitral tribunal will apply the law of Ontario in force on January 1, 2002". Such a stipulation would defeat the presumption that "Ontario law" means the law in force when the claim is brought.
- 58 *Desputeaux*, at para 62. Parties can also include in their confidentiality agreements an obligation that necessary steps be taken to maintain confidentiality in the event court proceedings relating to the arbitral award arise.
- 59 *Dunsmuir*, at paras 27-30.
- 60 *Ibid*.
- 61 *Mroue v Mroue*, 2016 ONSC 2992, aff'd 2017 ONCA 517.
- 62 *Gerstel v Kelman*, 2017 ONSC 214. The arbitration agreement provided for a decision on the basis of *psara krava l'din* ("judgement based on compromise close to the letter of the law") or *l'fee ha-tzedek ve'hyasher* ("justice and righteousness.").
- 63 For a complete description of the Ferengi "Rules of Acquisition", see Ira Stephen Behr, *The Ferengi Rules of Acquisition* (New York: Simon & Schuster, 1995).
- 64 The parties can empower the tribunal to decide *ex aequo et bono*, or according to its conscience. Various international and domestic arbitral institutions have promulgated rulesets expressly speaking to this point. They generally say that the tribunal is not to decide the dispute *ex aequo et bono* unless the parties specifically agree. See for example: ICDR Canada, art 31(3); UNCITRAL Arbitration Rules, art 35(2); ICC Arbitration Rules, art 21(3).
- 65 Since none of the domestic arbitration acts empower a reviewing court to set aside an award for offending public policy, there does not appear to be a basis in any Canadian domestic arbitration legislation upon which to challenge an award decided pursuant to a law that has been struck down as unconstitutional so long as the parties agree that law should apply to their dispute. In contrast, the New York Convention and Model Law allow a court to refuse to recognize an award or set it aside if the award contravenes public policy at the arbitral seat or the enforcement jurisdiction.
- 66 SBC 2003, c 17.

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TIME TO CALL IN THE REFEREES

It is said that judges, and to that I would add arbitrators, are the only people who attend sporting matches and cheer for the referee. And here is a plea for greater use of the referee.

INSPIRATION

Inspiration for the plea comes from many sources, but I will cite two. The first is an interview conducted and reported by the Canadian Broadcasting Corporation of the Chief Justice of the Federal Court of Canada, my former Court, on June 27, 2017. The Chief Justice was making a plea for greater funding for the Court – twenty-five million dollars. He said, in part:

We don't have enough staff in the courtroom. We don't have enough staff in the registry. And this is going to give rise to delays. It comes right back to access to justice.

He noted in particular an anticipated rise in intellectual property disputes in light of the agreement between Canada and the European Union.

The second inspiration is a Special Report in The Economist magazine of July 8th, 2007 titled "The Economies of Longevity". This report noted that, in the rich world people were leading longer, healthier lives with much energy, experience and knowledge within them, yet forced by various systems to retire at an age far too early, letting these resources go to waste. Having given the expected examples of the Rolling Stones", the report says, at page 4:

...The key to unlocking this longevity dividend is to turn the over-65s into more active economic participants.

Thus, on the one hand, overly-busy,

underfunded Courts, and on the other, unused talent.

FOCUS OF THIS PAPER – REFEREES

The focus of this paper is the provisions in the Rules of many Canadian Courts for the appointment of a referee.

It goes without saying, particularly to the participants of this Conference, that parties engaged in a dispute have ample opportunity to settle that dispute between themselves or to seek the assistance of a third party, such as an arbitrator or mediator, to do so. Sometimes the parties are obliged to do so by contract, sometimes particular legislation requires them to do so, or to do so before going to Court.

The situation which I wish to discuss is one where the parties find themselves engaged in the Court process. One has commenced a lawsuit against the other. The judicial process is involved. Is there a way to achieve a prompt, least expensive and just resolution of the dispute while placing less burden on the Court itself? Bring on the reference.

WHAT IS A REFERENCE?

The rules of most of the Courts in Canada provide that a referee may be appointed to hear evidence in respect of certain matters and to provide a report to the Court. The Court may adopt, modify or reject the report; if it does nothing within a stipulated period, the report is



HON. ROGER T. HUGHES (RET.)

The Honourable Justice Roger T. Hughes (Ret.) is a Mediator and Arbitrator at JAMS. Judge Hughes has over a decade of experience as a judge on the Federal Court (Canada). A recognized expert in intellectual property matters, Justice Hughes brings the perspective of a longtime federal practitioner — as advocate, judge and neutral — to each of his matters.

deemed to be adopted.

The referee has pretty much all the procedural powers of a judge, including compelling the appearance of witnesses and the production of documents. Disputes as to procedure and pleadings may be resolved. The powers to compel compliance are the same as those of a Judge.

The costs of a reference can be allocated or awarded by the Court.

WHO CAN BE A REFEREE?

The Rules of the various Courts vary as to who can be a referee. Manitoba Rule 54.03 is quite restrictive: a referee must be a Master of the Court. Ontario Rule 54.03, on the other hand, is quite open: it is a person agreed upon by the parties. Nova Scotia Rule 11 is the most specific: it is any person with the neces-

sary skills in respect of the matter to be determined. That Rule lists a number of persons, including chartered accountants, engineers and lawyers, but the list is not limited to such persons. The point is, with the exception of Manitoba, a referee does not need to be a Court official, or even a lawyer. As a practical matter, one would expect a referee to be a person with skills appropriate to determine the matter at hand.

WHO APPOINTS THE REFEREE?

The Federal Court Rules, Rule 153, requires the Chief Justice to appoint the referee. Other Court Rules – Ontario, Nova Scotia, and Newfoundland, for instance – simply require that the Court, or a Judge, appoint the referee.

Again, as a practical matter, a motion would be made to the Court for an appointment. The Judge seized of the case, or, if no such Judge, the Motions Judge, would order the appointment if appropriate or refer the matter to the Chief Justice.

SCOPE OF THE REFERENCE

The scope of the reference may be constrained by the Order granting the reference or by the Rules of the Court. Federal Court Rule 153(1) limits the scope to “any question of fact”. Ontario Rule 54.02 permits a reference to be directed to “the whole proceeding or to determine an issue”. Nova Scotia Rule 11 requires the scope to be “a question within the expertise of the referee”.

The Nova Scotia Rule expresses it best; the matter must not only be constrained by what is at issue in the Court proceeding, but must also be within the scope of expertise of the referee. The Federal Court Rule is the most confining: the reference must be as to “fact”, thus, presumably, not “law”. The overlap between fact and law has been debated for a long time. Where does “opinion” fit in, for instance, where experts disagree as to what should or should not have been done, or what was, or was not, obvious? Presumably a referee, in the report, could set out the findings, including opinions, and

leave it to the Judge reviewing the report to consider the matter, including whether the Judge wants to conduct a hearing as to the point or opinion given.

COSTS

The costs of the reference could be set out in the Order directing the reference or by the Judge who reviews the report, or a combination. It may not be unreasonable for the parties to bear the

costs associated with the reference in some proportionate way.

Some Examples of where a Reference Could be Directed

- **Matters of accounting** are an obvious example. Books and records could be examined and best principles of accounting applied. Was the formula in the contract properly applied to the calculation of royalties?

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- **Trademark Matters** – What was the state of the marketplace? What products and services were supplied? By whom and when?
- **And the list goes on...**

WHY ONE OF US AS A REFEREE?

Most members of this organization will consider themselves an appropriate candidate for appointment as a referee. We have skills in conducting a hearing, writing a report, and in making procedural determinations. No doubt some of us are better at it than others.

A more important question is how to match the particular skills of a candidate to those required of a referee addressing the particular problem – skills in accounting, science, navigation, intellectual property.

Special consideration should be given to matters concerning Indigenous peoples, where a depth of knowledge and empathy is required. In one case which I handled as a Judge, I asked another Judge, himself an Indigenous person, to join in resolving the dispute. He went and lived with the parties on the reserve, meeting and eating with each of the disputing factions. Eventually, they

all met and ate together. A dispute that had festered for about three score years was resolved.

HOW TO DO IT


I believe that greater use of references can bring about quicker, cheaper and more satisfactory resolution of many disputes. Underused, competent people will have been utilized appropriately.

We need to make the Courts more aware that they have this resource available to them. The Chief Justices

should be lobbied to make them particularly aware of this resource.

We need to make our particular skills in the fields of accounting, engineering, navigation, intellectual property, Indigenous peoples' issues known and publicized so that litigating parties have access to, and knowledge of, the great resources available to them.

This is our chance to make a difference, to make a change for the better, to put our resources to full and proper use. 🌐



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DISSENT IN INTERNATIONAL ARBITRATION IN CANADA

I. INTRODUCTION

Dissent. According to Le Robert, the word is [Translation] “rare before the end of the 18th century”; it is also ancient – from the Latin *dissidentia*. It is the action or state of the one or of those who do not agree. So, it’s a complicated word – and why not, in international arbitration, as well?

Complicated indeed, beginning with *the* question: is dissent allowed, yes or no, in international arbitration in Canada in the first place? We have examined this question and it does actually arise. We bring to you here what we have found in order to answer it.

Having set out the question in the introduction about what we will be focusing on (I), we will first look at the principled positions on the subject that are specific to our bi-legal heritage in Canada (II). Given the subject-matter, we will then have a quick look at the international scene (III), and then dwell more specifically on Canadian legislation (IV) – in Quebec (IV-A) and in the rest of Canada (IV-B). Lastly, we will have to resign ourselves to only be “good” dissenters (V), and then draw the conclusion as to this inevitable necessity in this matter (VI).

II. COMMON LAW AND CIVIL LAW

In the common law tradition, and as a general rule, the answer is yes. *Redfern and Hunter on International Arbitration* provide us with the following:

“No prohibition against dissenting opinions is known in the common law countries. Indeed, it is not unusual for common law arbitrators to consider themselves under a duty to inform the parties of their reasons for dissent.”¹

Where dissent is not expressly prohibited in the contract or arbitration agreement and where the rules of arbitration that the parties have otherwise conferred upon themselves are silent on the question, the common law rule is that dissent in arbitration is not only permissible, but there actually may even be a *duty* to express dissent, at least in the appropriate circumstances. In so doing, one would be in effect implicitly demonstrating a certain form of loyalty to the party that appointed the arbitrator, while nevertheless respecting a certain limit as to a certain form of legitimate expectation, already plainly expressed by a renowned author in the following manner:

“[W]hen I am representing a client in an arbitration, what I am really

looking for in a party nominated arbitrator is someone with maximum predisposition towards my client, but with the minimum appearance of bias.”²

From this perspective, an arbitrator’s published dissents can thus play a certain “marketing” role as to what can be expected from the person, in the future and in particular.

On the other hand, according to a certain expression of the civil law tradition, and again as a general rule, the answer is no. This is so because a dissent necessarily betrays deliberative secrecy. It reveals what the arbitrators did not agree upon as a result of their deliberations. In requiring in this manner that the integrity of the secrecy of deliberations be preserved, one is focussing loyalty – not in relation the party who appointed the arbitrator – but rather in relation to the other arbitrators on the panel, and to its necessary collegiality, because [Translation] “what constitutes the secrecy of deliberations is not so much that there was a minority, but rather the terms of discussion that took place during the deliberations, a discussion that is thereby as exposed as if



ME RENÉ CADIEUX, BLAKES LLP
(MONTRÉAL)

Me René Cadieux is a Counsel in the Litigation group at Blakes. René’s practice focuses on complex litigation, including investor-state arbitration before the ICSID.

the deliberation had been public.”³ By its very nature, a dissent reveals the content of the discussions amongst the arbitrators, thereby necessarily revealing the disagreement between them.⁴

Here then is where the tectonic plates of the two legal systems come into contact. The civil law and common law lawyers do not agree. They dissent from each other. But in Canada, as we will see, it’s not a stalemate. Before looking more closely at the Canadian legislative framework, let us undertake a quick look at the international scene, because of the nature of the subject-matter itself.

III. INTERNATIONAL LAW

We will not linger on the International Court of Justice (as well as the International Tribunal for the Law of the Sea, the International Criminal Court and the European Court of Human Rights),

where dissent and minority opinions are expressly permitted and where their simple existence does not otherwise cause any real controversies. We will rather examine an instance where they visibly sparkle.

One of the major criticisms of the Investor-State Dispute Settlement System (ISDS), which is served in the form of an “Accusation” worthy of (or copied from) Zola, is that it lacks impartiality and independence. Although – or rather, since – the Conseil Constitutionnel de France, by its decision of July 31, 2017 on CETA Canada-EU,⁵ has come to modestly endorse this system, including simply because its arbitrators are required to abide by a code of ethics, it is clear that there will still be a great deal of dissent in accepting this type of international arbitration. And perhaps for good reason, since one of the weaknesses of the system would paradoxically be revealed by an observation of the dissents occurring in the arbitral awards *themselves*:

“Commentators have suggested

looking at dissenting opinions by arbitrators for evidence that party-appointed arbitrators tend to favor the party that appointed them. Dissenting opinions are relatively rare in international arbitration (although the degree of rarity depends on the baseline for comparison used). The ICC reported that 44 of the 263 (16.7%) partial and final awards issued in 2015 included a dissenting opinion. Albert Jan van den Berg found that roughly 22% of a sample of 150 investment arbitration awards included a dissenting opinion. By comparison, 62% of U.S. Supreme Court opinions include a dissent, while only 2.6% of U.S. court of appeals opinions (but 7.8% of published court of appeals opinions) include a dissent.

If party-appointed arbitrators consistently vote to decide cases the same way as other arbitrators, one would expect dissents to be randomly distributed among arbitrators—e.g., a party-appointed arbitrator would be

as likely to dissent to a ruling in favor of the appointing party as one against. But that is not the observed pattern. Of the 34 dissenting opinions in the sample of investment arbitration awards studied by van den Berg, ‘nearly all ... were issued by the arbitrator appointed by the party that lost the case in whole or in part.’ According to van den Berg: ‘That nearly 100 percent of the dissents favor the party that appointed the dissenter raises concerns about neutrality.’ That said, the fact that most international arbitration awards are unanimous means that in most cases one of the party-appointed arbitrators voted against the party that appointed him or her (although unanimous awards certainly might mask disagreement among arbitrators in making the award).”⁶ [Our emphasis].

A windshield tour assessment of this international scene, where dissent in international arbitration is most in evidence, leaves one to ponder.

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IV. CANADIAN LEGISLATION

OK - What do the Canadian statutes say about it?

A. QUEBEC

Article 945 of the previous *Québec Code of Civil Procedure*⁷ stated in its time that “[t]he arbitrators are bound to keep the advisement secret. Each of them may nevertheless, in the award, state his conclusions and the reasons on which they are based” and, in French, « les arbitres sont tenus de garder le secret du délibéré. Chacun d’eux peut cependant, dans la sentence, faire part de ses conclusions et de ses motifs ».⁸

As at January 1, 2016, article 644 of the new Code⁹ reformulates the principle in its own way as follows: “The arbitrator is required to preserve the confidentiality of the arbitration process and protect deliberative secrecy but violates neither by stating conclusions and reasons in the award”, and in French, « L’arbitre est tenu de respecter la confidentialité du processus et le secret du délibéré, mais il n’y manque pas en exprimant ses conclusions et ses motifs dans la sentence ».

One can notice from the onset that the formulation of the conclusion and reasons of a dissent is set out as an *exception* to the principle of deliberative secrecy, thereby recognizing the very authority of the governing civil law principle in the first place. However, it is only in such manner that the Code reflects a certain civil law tradition, parting company with it by otherwise expressly authorizing dissent. By formulating a “dissent”, one therefore does not legally violate (“ne manque pas”) either the confidentiality of the process or the secrecy of the deliberations.

But there is more. Without nevertheless abandoning oneself entirely into the arms of the common law, if in Quebec dissent is therefore also permitted, once it has been formulated, however,

it becomes not only an integral part of the arbitral award itself (the Code says, before as now, “*in the award*”), it participates in it as of right. There is therefore no need to go begging cap in hand for any permission from the other arbitrators forming the majority in order to have the dissent form part of the award: they are required by law to accept it as automatically forming an integral part of it.

Our Code appears to stand out on this issue from other arbitration regimes, as can be observed from the following authors:

“Where this is done [a dissident] the dissenting opinion may generally be annexed to the award if the other arbitrators agree; or it may be delivered to the parties separately. In either case, the dissenting opinion does not form part of the award itself; it is not an “award”; it is an “*opinion*”.”¹⁰ [Our emphasis].

By way of further and particular illustration, one can then observe the arbitration rules of the ICC International Court of Arbitration:

“The [ICC] Rules nevertheless do not themselves preclude the communication to the parties of dissenting opinions, and such opinions are issued together with a small fraction of ICC Awards each year. However, a dissenting opinion is not considered by the Court to form part of the Award and, thus, while read by the Court, is neither formally scrutinized nor approved by it pursuant to Article 27 (...) [art. 34 of the rules in force on March 1, 2017]. The Court nevertheless communicates such dissenting opinions to parties, unless there appears to be a possible legal impediment to its doing so.”¹¹ [Our emphasis].

In short, dissent in arbitration in Quebec not only has a chair at the table (that is not “below the salt” either), it also has a voice, and that voice cannot later be gagged either. Indeed, to the extent that one would like to have an arbitral award judicially recognized and enforced, it is impermissible to exclude the dissent from the body of the award at that time, since it is already

an integral part of the award in the first place, that “must” then necessarily be “accompanied” into the application filed before the Court, so as to have it integrated as a domestic law judgement (art. 652(2) of the Code). One can therefore not even be tempted to seek to gain a “head start” over the dissent, by attempting to shield it from the curious eyes of the Court in the first place, which is legally entitled to read it, and to hear about it. And why not? The common law reminds us of our biology: The ears of England cannot trespass (Sir Robert Megarry V.-C. in *Malone v. Metropolitan Commissioner*, [1979] Ch. 344, p. 369) – So there’s nothing wrong with hearing it, which also prevents anyone from proposing or otherwise suggesting that it be otherwise.

The Code thus fully values the action of anyone who separates himself in this way. But that is all that the Code does, being otherwise unambiguous – under article 653(1), the court hearing an application for recognition and enforcement of an arbitral award “cannot review the merits of the dispute”. It cannot therefore allow itself to use a dissent (or a minority opinion) to exonerate itself from doing indirectly what the Code (and the *1958 New York Convention* on which the applicable provisions are based; discussed *infra*) expressly forbid it to do: to question the authority of the award rendered by the majority of arbitrators. Then why allow dissent if, in the end, it serves no purpose? Because it actually does serve a purpose. We return to this further below.

B. CANADA – OTHER JURISDICTIONS

Meanwhile, what about the applicable statutes in the other Canadian jurisdictions, including at the federal level? We already know the principled position of the common law in this respect. At the legislative level, the domestic statutes of the other Canadian jurisdictions follow a same pattern of essentially stapling the Model Law of the United Nations Commission on International Trade Law¹² of June 21, 1985,¹³ by way of recourse to the proven method of legislative incorporation by reference (subject to specific exceptions detailed

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by the laws of incorporation themselves).¹⁴ From there however, the Model Law is remarkably silent on the concept of deliberative secrecy, and is equally modest on the issue of dissent (and minority opinions).

Here are the laws that incorporate the Model Law in the other jurisdictions in Canada.¹⁵ See Figure 1.

As noted earlier, the Model Law is silent on the issues of deliberative secrecy and on the right to formulate a dissent. But even here, black holes draw light. In the discussion that follows, we will presume that the parties have not, by specific agreement, excluded from the arbitration agreement or from the arbitrators' mission statement the ability to provide reasons, let alone the right to formulate dissenting or minority opinions, which they are otherwise and entirely entitled to do.

Let us first recall that article 54(3) of the Statute of the International Court of Justice states that the "deliberations of the Court shall take place in private and remain secret". This provision is considered to be a mere codification of a general principle of law (articles 38(1) b. and c. of the ICJ Statutes), which participates in the elaboration of international public order.¹⁶ And as is known, the common law (like the civil law) welcomes and then automatically imbeds within itself international public order, without the need for any direct legislative action, its door being already and for ever wide open to continually greet its arrival.¹⁷

The *raison d'être* of the universal rule is simple: to allow a true collegial exchange between the arbitrators sheltered from external pressures or influences. Echoing this universal rule in the particular with specific reference to deliberative secrecy in arbitration matters, the "soft law" of article 9 of the International Bar Association (IBA) *Rules of Ethics for International Arbitrators* adds an additional layer of varnish to the canvas of customary international law that we have just already framed. This provision specifies that:

"The deliberations of the arbitral tri-

bunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose misconduct or fraud on the part of his fellow arbitrators."

With respect to dissent itself, we have discussed above the general position of the common law principle. While accepting the principle of deliberative secrecy, the common law, however, is not otherwise unduly reverential to it with respect to dissent. At common law, deliberative secrecy and

dissent are separate and different concepts. With regard to the UNCITRAL arbitration rules themselves, the following in particular is reported:

"The Preliminary Draft of the Rules provided that the award "shall not include dissenting opinions". This prohibition was ultimately removed from the text of the Rules for two reasons. [...] Committee negotiators expressed concern that disallowing dissenting opinions would leave an arbitrator who disagreed with the majority opinion no choice but to express his dissent by refusing to sign the award. The other reason was the plain fact that the majority of negotiators favoured dissenting opinions. Accordingly, the prohibition was removed from the Rules and

FIGURE 1

JURISDICTION	OFFICIAL ENGLISH VERSION	OFFICIAL FRENCH VERSION (where required or otherwise permitted)
CANADA (Federal Court)	Arbitration Act, R.S.C. 1985, c. 17 [2 nd Suppl.]	Loi sur l'arbitrage commercial, L.R.C. (1985), ch. 17 [2 ^e suppl.]
ALBERTA	International Commercial Arbitration Act, R.S.A. 2000, c. I-5	
BRITISH COLUMBIA	International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 International Commercial Arbitration Regulation, B.C. Reg. 168/86 Foreign Arbitral Awards Act, R.S.B.C. 1996, c. 154	
PRINCE EDWARD ISLAND	International Commercial Arbitration Act, R.S.P.E.I. 1988, c. I-4	
MANITOBA	International Commercial Arbitration Act, C.C.S.M., c. C151	Loi sur l'arbitrage commercial international, C.P.L.M. c. C151
NEW BRUNSWICK	International Commercial Arbitration Act, R.S.N.B. 2011, c. 176	Loi sur l'arbitrage commercial international, L.R.N.-B. 2011, c. 176
NOVA SCOTIA	International Commercial Arbitration Act, R.S.N.S. 1989, c. 234	
ONTARIO	International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5	Loi de 2017 sur l'arbitrage commercial international, L.O. 2017, chapter 2, Schedule 5
SASKATCHEWAN	The International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2. The Enforcement of Foreign Arbitral Awards Act, 1996, S.S. 1996, c. E-9.12	
NEWFOUNDLAND AND LABRADOR	International Commercial Arbitration Act, R.S.N.L. 1990, c. I-15	
NUNAVUT	International Commercial Arbitration Act, R.S.N.W.T. (Nu) 1988, c. I-6	Loi sur l'arbitrage commercial international, L.R.T.N.-O. 1988 (Nu), ch. I-6
NORTHWEST TERRITORIES	International Commercial Arbitration Act, R.S.N.W.T. 1988, c. I-6	Loi sur l'arbitrage commercial international, L.R.T.N.-O. 1988, ch. I-6
YUKON	International Commercial Arbitration Act, R.S.Y. 2002, c.123 Foreign Arbitral Awards Act, R.S.Y. 2002, c. 93	Loi sur l'arbitrage commercial international, L.R.Y. 2002, ch. 123 Loi sur les sentences arbitrales étrangères, L.R.Y. 2002, ch. 93

“the question of whether an arbitrator may add his dissenting opinion to the award is left for decision to the law applicable at the place of arbitration”.¹⁸

Since the Model Law is silent on the subject, for provinces with a common law tradition, the common law of this regime authorizing dissent would therefore apply – being otherwise entirely consistent with the basic principle that what is not expressly prohibited is therefore entirely permitted (according to the well-known principle of British constitutional law¹⁹). In the absence of an express contractual injunction by the parties binding the arbitrators to the contrary, the arbitrators are therefore individually free to express themselves. And indeed, who exactly could actually “stop” them?

The question is slightly more difficult with respect to the federal statute, itself subject to articles 8.1 and 8.2 of the *Interpretation Act*,²⁰ which do not automatically designate the common law as being necessarily applicable to fill in the lacunae formed within the statutory interstices of the federal statutes in all Canadian jurisdictions. Rather, it is the seat (place) of the arbitration and its resulting award that will point to the applicable residual law, whether civil or common law (since the award is deemed to be made at the seat

(place) of arbitration: art. 31(3) of the Model Law). If the seat is located in Quebec, should we then apply the doctrinal civil law from France – which rejects arbitral dissent – or should we instead apply the “legislative” provisions of the *Code of Civil Procedure of Québec*, which embraces dissent in its own right, and which adds and innovates on this issue in relation to the deafening silence of the Model Law? In our view, it is necessary to apply the *Code of Civil Procedure of Québec*, which forms the “complete code” *par excellence* of the “ordinary law” principles applicable in this matter, thereby meeting the “rules, principles and concepts in force in the province” within the meaning of section 8.1.²¹

V. SO, HAVE WE DECIDED YET? DISSENT: YES OR NO?

In Canada, it is permitted. So, let’s go for it. But then again: when and how?

We have seen above that, except perhaps in the investor-state arbitration context, statistics dealing with dissent in international arbitration are not exactly widespread.

At least in appearance – which leads us to our first *observation*. The best dissent is, in fact, completely and totally invisible. It manages to convince the majority of their error, thereby producing a unanimous award. It then disap-

pears completely into oblivion, to then reappear alive and well in unanimity. So statistics do not necessarily tell the whole story – they look only to what they are specifically required to merely simply calculate.

Next, let us recall that arbitral awards, being generally confidential, are not automatically destined to set precedents, and thus to participate in the development of case law, in judicial systems that benefit from the accumulation of precedents to build their legal orders. A published dissent, which becomes immortal and which may one day represent a majority opinion, provides an essential contribution to such a system. Nevertheless, large arbitration institutions increasingly want their users (and the arbitration community in general) to benefit precisely from established case law, which develops gradually through resolution over time of conflicts in its contradictions. More and more, in one way or another, awards are being published or otherwise made accessible and reported (often subject to redaction to protect anonymity and business secrets). The best rules are those that emerge in a context of changes proposed by the effect of the contradictions of dissent as they relate to one another, whether they are individually recorded by unanimous or in majority awards. In order to achieve stability in *consistency*, we

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must know how we got to where we are. Because arbitral awards are increasingly being reported more and more systematically by the systemic pull, existing statistics present merely a provisional assessment of a system that can only be destined to become more and more dynamic. Even in arbitration, dissent not only has its own *raison d'être*, but it may eventually become useful well beyond the purpose for which it was originally formulated.

Which brings us to our final comments on the issue. Pleasing the appointing party, and torpedoing the majority by providing reasons and justifications to the losing party in order to overturn the award, are clearly among the greatest horrors that continually haunt the very notion of dissent in arbitration. Even before you read a dissent, that is what you first think the minute you learn it exists (especially when you don't know yet who actually won). It is thus awaited. An arbitrator who writes a dissent cannot, however, easily hide this kind of intent: there are too many people to fool, starting with the other arbitrators, the parties themselves, and the Court of review, if the dissent ever winds its way up there.

The Model Law and the Code stipulate that if an arbitrator refuses to sign an award, the other arbitrators must state the reason for the omission (Model Law, art. 31(1); Code, art. 642(1), preferably above their own signature, so that it forms an integral part of the award). But this simple "notation" can in no way replace the "reasons" for the dissent itself. We have seen above that the *rapporteurs* of the UNCITRAL Arbitration Rules reveal to us that choosing to prohibit dissent leaves the arbitrator who wishes to express it with no option but refusing to sign the award in complete silence. Not prohibiting dissent thus implies allowing to do more

than just sulk. Nevertheless, even if the law does not actually require that one stand fast steaming piping hot in deafening silence, what it does, however, is to actually have confidence in the power to go beyond, and not just simply abandon oneself to delivering sore-looser tirades that witness an opportunity lost in contemplating some of the virtues of the sounds of silence, mainly in keeping one's trap shut. One must therefore prove worthy of the opportunity presented by a deliberate refusal to prohibit dissent, and seize it justly – for only the right reasons, and in the right way. (For a striking example of the opposite situation, in which it would have been better to have opted to sulk in deafening silence, see the explosive conduct of the dissenting arbitrator in the CME case, which the Svea Court of Appeal (Sweden) resolved with meticulous care²²).

Normally, "[i]f a formal dissent is contemplated it is preferable for the decision of the majority and the dissent to be drafted simultaneously so that each can take into account the reasoning of the other. This enables the common ground to be identified and perhaps for the points of divergence to be narrowed and eliminated."²³

In this way, dissent "can have a sobering effect on the majority" for the purposes of encouraging "the author of the award to be sure that his reasoning is as thorough and persuasive as possible."²⁴

It is thus the role of the majority – especially the Chair of the panel (who is first charged with its collegiality) – to seize this opportunity and try in this way to find common ground, which may include "(...) the separation of the issues in dispute into different compartments: if a solution to a particular question does not receive majority support, it is

rejected, as is the next question and so on until all questions are so decided. Since it is the Chair of the panel who normally dictates the wording of the issues to be resolved, the precise wording can be particularly critical to the outcome desired by the Chair. Moreover, in situations where the arbitrators decide on sums of money and when no majority is formed on the amount of a particular sum to be allocated, the votes cast for the highest amount may then be counted as having also been cast for the amount immediately below it, until a majority is formed. In any event, it must always be borne in mind that the ultimate objective is unanimity, since the award will then be perceived as the final authority that decides the dispute (...)."²⁵

If, despite the colossal efforts of the arbitrators, dissent must necessarily subsist, and except in cases where there is an ethical duty to denounce reprehensible conduct, such as deliberately excluding an arbitrator from the deliberations, *ex parte* communications with counsel by only one of the parties or where fraud, including through other kinds of undue influence on majority arbitrators is detected,²⁶ the dissent should be neither brash nor timid, but essentially modest:

"(...) [A] long dissent can be more distracting than it is useful. The longer the dissent, the less likely it will be read, unless it is especially compelling. Short dissents always get read, even when they aren't particularly compelling."²⁷

Ultimately, and when appropriate, dissent will allow the losing party to understand that it has indeed been heard, which will enable it – as desire beckons – to willingly accept and enforce the award as final, which is exactly what the arbitration system itself is all about. More often than not, having decided to

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voluntarily engage *with* arbitration, it is not so much “*the*” decision – exquisite and perfect – that is desired by the parties, but rather “*a*” decision, with the precise aim of putting a complete and final end to their dispute. A reviewing judge must thus appreciate the award in this context, and

not seek to seize the opportunity of dissent – however shrewd and clever it may be – in order to see in it a motive of his own for rendering sublime justice beyond the initial expectations of the parties, thereby making himself a dissenter against the *raison d’être* of the arbitration system itself.

VI. CONCLUSION

So to conclude, let’s be brief about it. In Canada dissent in international arbitration is permitted, but then again, dissent if necessary, but not necessarily dissent. And if necessary, be respectful and modest. 🙏

- 1 2009, OUP, p. 575, para. 9.190.
- 2 Martin Hunter, “Allies of the International Arbitrator”, [1987] 53 Arb. 219, p. 223. The “problem” with the age-old perception of the arbitrator’s loyalty to the party appointing him does not appear to be close to receiving a definitive solution, if a solution is actually required in the case of a panel of three arbitrators, where the ideal in this structure is sought to be achieved precisely by the effect of the balance of counterweights. A recent illustration of an attempt to deal with this issue appears in the relatively closed circle of arbitration within the reinsurance industry, more particularly when one applies to it what emerges as an elaborate and indeed haloed-looking legal definition of “impartiality” in arbitration, and where the Court has, accordingly, come to a conclusion as to what one can therefore fully expect: “The fair-minded and informed observer would expect [the arbitrator], with his extensive experience and high reputation, to treat as second nature the fact that his duty of impartiality was entirely unaffected by the identity of the party appointing him, and would expect such independence to inform his entire approach to the subject reference”, because the Court considers that it would otherwise be “offensive to the international arbitration community in general” to actually question the fact that it is “well understood [that] party appointed arbitrators are not, and should not be seen to be, party pris” – See: H v. L., [2017] EWHC 137 (Comm), in paragraphs 19 and 30, *our italics*; the controversial decision (including by reason of its facts) is under appeal. By analogy, one could observe that, as with the commitment to adhere to a code of ethics, one can indeed expect that a witness who swears to tell the whole truth will do so, but that does not mean that one will necessarily obtain it.
- 3 Jean Robert, *L’Arbitrage : Droit interne, droit international privé*, Dalloz (6ème édition), 1993, p. 176, para. 205.
- 4 See also on the issue: *Rhéma v. Société d’investissements l’Excellence inc.*, 2010 QCCA 2269 (CanLII).
- 5 Decision No 2017-749 DC.
- 6 Drahozal, Christopher R., “Empirical Findings on International Arbitration: An Overview”, December 21, 2016, *Oxford Handbook on International Arbitration (Forthcoming)*. Online: <https://ssrn.com/abstract=2888552>. References omitted. CQLR, c. 25.
- 7 Raymond Tremblay, « Commentaire des articles du Code civil et du Code de procédure civile en matière d’arbitrage », reprinted in Frédéric Bachand [now The Honourable] and Fabien Gélinas [now Ad. E.], *D’une réforme à une autre - Regards croisés sur l’Arbitrage au Québec*, Yvon Blais, 2013, p. 418: [Translation] “This article is intended to authorize dissent”.
- 8 CQLR, c. 25-01, the “Code”.
- 9 N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, 2009, OUP, p. 575, paragraph 9.188.
- 10 Y. Derains and E. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd Edition, 2005, Kluwer Law International, p. 308; references omitted. The current internal practice of the ICC is stated to be even more elaborate.
- 11 “UNCITRAL”
- 12 The “Model Law”, with modifications where applicable.
- 13 The Code also adopts the Model Law, but incorporates its principles through the codification technique (Book VII, Title II), rather than by way of incorporation by reference that is the method used in the other Canadian jurisdictions (except for British Columbia, which also sets itself apart in its own way by adopting and adjusting the Model Law itself). Quebec also “codifies” in its way the same *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention)*. In relation to the *1958 New York Convention*, “The Government of Canada declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation”. Given this statement (20 October 1987), and with respect to federal law only, subsection 5(4) of the federal statute (*Figure 1*) has therefore been continually amended accordingly so that the term “commercial arbitration” specifically “includes” complaints submitted under the various free trade agreements to which Canada has committed itself over time, which is something that Quebec did not have to do within its own jurisdiction, the Convention’s reservation with respect to “commercial” disputes never having applied to it in the first place. This leaves only these two jurisdictions as the only ones in Canada that can accept ISDS disputes, since the other provinces specifically limit their laws only to disputes arising out of legal relationships that are strictly commercial, unless the ISDS claim is itself specifically deemed “commercial” in the imbedding Treaty in the first place, as in the case with Article 1136(7) of the NAFTA (see: AB, subsection 2(2); BC, subsections 1(1), 1(6) and art. 3; PE, subsection 2(2); MB, subsection 2(2); NB, subsection 3(2); NS, subsection 3(2); ON, subsection 2(1); SK., art. 5; NL, subsection 3(2); NU, subsection 4(2); NT, subsection 4(2); YT, art. 3). See also: Henri C. Alvarez, “The Implementation of the New York Convention in Canada”, (2008) 25(6) *J. Int. Arb.* 669. A recent confirmation of the clear separation between the two regimes (“commercial” / non-commercial, in an arbitration involving States bound by treaties governed by international law) can be found in the Judgment of the European Court of Justice: *Slowakische Republik v. Achmea BV*, ECJ (Grand Chamber), in Case C 284/16, ECLI:EU:C:2018:158, March 6, 2018, at para. 55. See also Article 422 of the 2008 Constitution of Ecuador and current issues therein involved with respect to the exact same problematic and the return of Ecuador to ICSD.
- 15 The table also refers to statutes that incorporate the *1958 New York Convention*, where legislation separate from that incorporating the Model Law itself is used. In addition to the fact that laws that are legally bilingual must necessarily be applied together where Canadian jurisdictions adopt them, because they are “exactly on an equal footing” and “must [therefore] be equally authoritative” (*Reference: Language Rights of Manitoba*, [1985] 1 S.C.R. 721, p. 774, letters h to i, and 775, letter b; *Attorney General of Quebec v. Blaikie*, [1978] C.A. 351, p. 361), the English and French versions of the Model Law and of the *1958 New York Convention* themselves have equal independent legal value (as official languages of the United Nations), including in Canadian jurisdictions that are legislatively unilingual (English). For the interpretation and application in domestic law of these international instruments according to the rules applicable to them, we direct in this matter to: The Honourable Mr. Justice Michel Bastarache, Naomi Metallic, Regan Morris et Christopher Essert, *The Law of Bilingual Interpretation*, LexisNexis (2008), Chapter 4 – “The Interpretation of Multilingual International Law Norms”, p. 157, pp. 160 and ss.
- 16 Jean-Denis Bredin, « Le secret du délibéré arbitral », in : *Études Offertes à Pierre Bellet*, 1991, Litec, p. 71.
- 17 *R. v. Hape*, 2007 SCC 26; [2007] 2 S.C.R. 292, p. 316, para. 39; illustration: pp. 319-320, para. 46. “In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.” (LeBel J., for the majority).
- 18 David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules – A Commentary*, OUP, 2006, p. 814; references omitted.
- 19 Hals. Vol. 8, Fourth ed., 1974, para. 828; *R. c. Mann*, [2004] 3 S.C.R. 59, p. 69, para. 15.
- 20 R.S.C. 1985, ch. 1-16.
- 21 *Canada (Attorney General) v. St Hilaire*, [2001] 4 FC 289, 2001 FCA 6: “[33] In Quebec it is trite law that the “ordinary law” of the province is constituted by the *Civil Code* and the *Code of Civil Procedure*, although these are statutory documents. (See *Exchange Bank of Canada v. R.* (1886), 11 App. Can. 157 (P.C.); « La Couronne en droit canadien », Ministère de la Justice du Canada (Cowansville: Éditions Yvon Blais, 1992), p. 148.)”
- 22 See *Czech Republic v. CME Czech Republic B.V.*, judgment of the Svea Court of Appeal, reported in 42 I.L.M. 919 (2003), more specifically on pages 942 and 945.
- 23 David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules – A Commentary*, OUP, 2006, p. 815, note 138.
- 24 David D. Caron, Lee M. Caplan, Matti Pellonpää, *The UNCITRAL Arbitration Rules – A Commentary*, OUP, 2006, p. 815, note 138.
- 25 R. Cadieux, « La sentence arbitrale », *LegisPratique - Guide de l’arbitrage*, Lexis Nexis, 11 November 2014, p. 248, para. 8-96, note 675.
- 26 See to this effect the propositions of Jacques Werner, “Dissenting Opinions : Beyond Fear”, (1992) 9-4 Int’l Arb. 22, p. 25-26. We do not pursue here the separate, but sometimes inter-related question of the appropriateness of a dissenting arbitrator stepping-down from the panel before the signing of the final award, including for such reason, by directing instead to a recent analysis of the issue: T.G. Nelson (2017, forthcoming) “Boycotts and Walkouts in International Arbitration” (TDM, ISSN 1875-4120) August 2017.
- 27 Hon. Paul E. Pfeifer with Robert L. Burpee, Dissenting, American Bar Association, Litigation, Summer 2017, Vol. 43, No. 4, 20, p. 27.

HELLER V. UBER TECHNOLOGIES INC.: MORE ON ARBITRATION & CLASS ACTIONS

The relationship between arbitration clauses and class actions has been the subject of numerous proceedings in recent years.

Canadian courts have considered, with varying outcomes, the enforceability of arbitration clauses in the consumer and non-consumer context. These decisions have raised the question as to whether arbitration clauses are facing increasing vulnerability in Canada, particularly in the non-consumer context. Notably, the decisions of the Supreme Court of Canada in *Seidel v Telus Communications Inc.*,¹ and the Court of Appeal for Ontario in *Wellman v. Telus Communications Co.*² (in which leave to appeal to the Supreme Court has recently been granted) have triggered much discussion regarding policy and legislative considerations that may preclude the applicability of mandatory arbitration provisions.

Heller v Uber Technologies Inc. is a recent decision of Justice Perell of the Ontario Superior Court of Justice, which provides clarity on the legal framework for determining the applicability of arbitration clauses in class proceedings in the non-consumer context.³ In that case, Justice Perell confirmed that unless the legislature has specifically provided that such clauses are unenforceable, courts will enforce arbitration clauses and stay potential class actions.

THE FACTS

The plaintiff, David Heller, a resident of Ontario, entered into several contracts with Uber (the "Service Agreement"), and using the Uber Apps, he delivered food from restaurants to customers. Mr. Heller commenced the putative class action on behalf of Uber Drivers alleging that he and his fellow Class Members were employees of Uber and entitled to the benefits under Ontario's



MICHAEL D. SCHAFLER, Q.ARB

Mike's practice at Dentons Canada LLP focuses on commercial dispute resolution, including international and domestic arbitration (ad hoc and institutional). He is a member of Dentons' national management board. Mike has been interested in the intersection of class actions and arbitration for several years and has previously written and presented on class arbitration. In 2017 he received his Q.Arb designation. He is currently a Director of ADRIC.



CHRISTINA PORRETTA

Christina is a Partner in the Advisory Research group at Dentons Canada LLP, which provides opinions on complex or novel legal issues to clients and lawyers within the Firm. Christina works closely with the litigators to provide strategic support to clients engaged in litigation and arbitration. She is regularly called upon to prepare written materials for arbitrations and has played a significant role in cases involving professional negligence, complex commercial disputes and insurance matters.

*Employment Standards Act, 2000.*⁴

The Service Agreements between Mr. Heller and Uber were governed by the law of the Netherlands and included an agreement to arbitrate disputes in the Netherlands pursuant to the *International Commercial Arbitration Act, 2017*⁵ or, if necessary, the *Arbitration Act, 1991*.⁶ While the issue of which Act applied was a matter of dispute between the parties, ultimately not much turned on this point because under either legislation, when there is an arbitration agreement, then upon the request of one of the parties, the court must refer the matter to arbitration, subject to certain exceptions.⁷ As a result, Uber brought a pre-certification motion to

stay Mr. Heller's proposed class action in favour of arbitration.

Mr. Heller opposed the stay motion on the basis that the *International Commercial Arbitration Act, 2017* was not applicable to employer-employee relationships and, as a result, the claim fell outside of the arbitrator's jurisdiction. In addition, Mr. Heller argued that the arbitration agreement was unconscionable. Uber, however, argued that the Service Agreement with the company was, on its face, a commercial agreement and the principle of competence-competence requires giving the arbitrator the opportunity to resolve any jurisdictional challenges.

THE DECISION

Justice Perell held that absent legislative language to the contrary, courts must enforce arbitration agreements and refer a dispute to arbitration unless it is clear that the matter falls outside the agreement. As a result, Justice Perell granted Uber's motion and stayed the putative class action in favour of arbitration on the basis that (1) the proposed class was subject to the *International Commercial Arbitration Act, 2017*, and any issue as to jurisdiction was to be decided by the arbitrator pursuant to the competence-competence principle because the *ESA* did not expressly preclude arbitration; and (2) the arbitration clause was not unconscionable.

Justice Perell held that the *International Commercial Arbitration Act, 2017* was applicable because the Service Agreement was both "international" and "commercial" in nature. The Service Agreement was international because the parties' place of business was in different countries. The proposed plain-

tiff was situated in Ontario while Uber's management and operational headquarters were based in the Netherlands. The Service Agreement was commercial in nature because it was a commercial contract "... for the sale for the use of intellectual property, a software program, for a fee."⁸ Characterizing the Service Agreement as commercial was also supported by the fact that it expressly stated that it did not create an employment relationship.⁹

Notably, Justice Perell held that even if the Uber agreements did create an employment relationship, "it does not follow that all employment relationships are not commercial agreements nor that employment agreements are inimical to arbitration."¹⁰ He analogized this situation to collective agreements between a union and an employer, as well as individual contracts with professional athletes and entertainers, which he noted are examples of employment relationships subject to commercial agreements "that almost invariably include arbitration."¹¹ As a result, he con-

cluded that it could not be determined that not all employment relationships are outside the reach of the *International Commercial Arbitration Act, 2017*.

Justice Perell went on to address Mr. Heller's argument that the court has jurisdiction to determine whether the matter should proceed to arbitration because it is a matter of statutory interpretation involving the *ESA*. In rejecting Mr. Heller's position, Justice Perell referred to the Supreme Court of Canada's decision in *Seidel*, as well as the Court of Appeal for Ontario's decision in *Wellman*, which both held that absent legislative language to the contrary, courts must enforce arbitration agreements.¹² The *ESA* does not explicitly preclude arbitration. Rather, Justice Perell held that the arbitrability of employment claims "is a complex issue of mixed fact and law to be determined in the first instance by the arbitrator; it is not a simple matter of statutory interpretation to be resolved by the court."¹³

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Lastly, Justice Perell rejected Mr. Heller's argument that the arbitration was illegal on the basis of unconscionability. He noted that the elements of contractual unconscionability are: (1) pronounced inequality of bargaining power; (2) a substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff. While there was an inequality of bargaining power, Justice Perell held that there was insufficient evidence to establish that Uber took advantage of Heller or that the insertion of the arbitration provision made the agreement improvident.¹⁴

COMMENT

Justice Perell's decision in *Heller* aligns closely with the general principle that arbitration clauses are presumptively enforceable as expressed by the Courts in both *Seidel* and *Wellman*.


In *Seidel*, the Supreme Court of Canada found that a partial stay was appropriate. *Seidel* involved consumer and non-consumer plaintiffs seeking class certification of their claims against the defendants. The Supreme Court viewed the matter largely as a question of statutory interpretation, reaffirming the principle that arbitration clauses are enforceable, absent legislative language to the contrary.¹⁵ In *Seidel*, the central question was whether British Columbia's *Business Practices and Consumer Protection Act* manifests a legislative intent to intervene to relieve consumers of their contractual commitment to private arbitration.¹⁶ The Court held that the *BPCPA* constituted a legislative override of the arbitration clause. Accordingly, claims falling within the scope of the relevant *BPCPA* provision would be allowed to proceed to court while claims falling outside of that provision would be governed by the arbitration clause.

Wellman also involved a class action, including both consumer and non-consumer plaintiffs. In that case, Telus conceded that the effect of Ontario's *Consumer Protection Act, 2002* was that claims in respect of consumer contracts could proceed to court.¹⁷ It argued, however, that the non-consumer claims

were governed by the mandatory arbitration clause and ought to be stayed. The motion judge refused to grant the partial stay and certified the class. She found that it would be unreasonable to separate the non-consumer claims from the consumer claims, as it could lead to "inefficiency, risk inconsistent results and create a multiplicity of proceedings". The Court of Appeal agreed and dismissed the appeal.

While *Heller* does not involve consumer protection legislation, the analysis undertaken by Justice Perell is consistent with the reasoning used in both *Seidel* and *Wellman*. *Heller* confirms that the court will first review the legislation at issue to determine whether resort to

arbitration is precluded. If arbitration is expressly precluded, the matter will proceed to court (with a separate analysis involving whether claims not precluded by the legislation should also proceed to court). If the legislation does not preclude arbitration, then the issue of jurisdiction is subject to the competence-competence principle. This is a complex issue of mixed fact and law to be determined in the first instance by the arbitrator, and not a statutory interpretation issue to be resolved by the court.¹⁸

Mr. Heller has appealed Justice Perell's decision and so we will await further instruction from the Court of Appeal for Ontario. 

- 1 2011 SCC 15 [*Seidel*].
- 2 2017 ONCA 433 [*Wellman*], leave to appeal granted to the SCC on March 22, 2018. See Michael Schaffer and Barbara Capes, *Is Canada Ready for Class Arbitration? A Discussion about the Implications of the Ontario Court of Appeal decision in Wellman v. TELUS Communication Company*, Canadian Arbitration and Mediation Journal, (2017) Vol. 26, No. 2, for an analysis of the *Wellman* decision.
- 3 2018 ONSC 718 [*Heller*].
- 4 S.O. 2000, c. 41 [ESA].
- 5 S.O. 2017, Sched. 5.
- 6 S.O. 1991, c. 17.
- 7 *Ibid.* at para. 35.
- 8 *Ibid.* at para. 46.

- 9 *Ibid.* at para. 45.
- 10 *Ibid.* at para. 48.
- 11 *Ibid.*
- 12 *Ibid.* at para. 51.
- 13 *Ibid.* at para. 57.
- 14 *Ibid.* at para. 70.
- 15 This principle was central to two previous Supreme Court of Canada decisions addressing arbitration in Quebec: *Dell Computer Corp v Union des consommateurs*, [2007] 2 SCR 801 and *Rogers Wireless Inc v Muroff* [2007] 2 SCR 921.
- 16 *Business Practices and Consumer Protection Act*, [SBC 2004] Chapter 2 [BPCPA].
- 17 SO 2002, c. 30, Sched. A, s. 7(2).
- 18 *Heller*, *supra* note 3 at para. 65.

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