THE INTERNATIONAL ARBITRATION REVIEW

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Editor
James H Carter

THE LAWREVIEWS

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CANADA

Gordon Tarnowsky, QC, Rachel Howie, Chloe Snider and Holly Cunliffe[1]

I INTRODUCTION

Canada is a federal state composed of 10 provinces[2] and three territories.[3] Each of the country's provinces and territories, with the exception of Quebec, follows a common law tradition; provincial laws in Quebec are rooted in civil law.

Each province and territory has separate legislation for domestic arbitration and international commercial arbitration. For example, the province of Alberta has enacted the Arbitration Act[4] for domestic arbitration matters and the International Commercial Arbitration Act[5] (Alberta ICAA) for international commercial arbitration matters.[6] Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections of the Civil Code of Québec[7] (Civil Code) and the Code of Civil Procedure.[8]

Federally, international commercial arbitration is governed by the Commercial Arbitration Act[9] (CAA) if Her Majesty the Queen in Right of Canada, a departmental corporation or a federal Crown corporation is a party, or if the dispute is in relation to maritime or admiralty matters.[10] Thus, any investor–state claims brought under Articles

1 Gordon Tarnowsky, QC, Rachel Howie and Chloe Snider are partners and Holly Cunliffe is an associate at Dentons.

2 Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

3 The Northwest Territories, Nunavut and Yukon.

4 RSA 2000, c A-43.

5 RSA 2000, c I-5.

6 Similarly, the province of Ontario has legislation in the Arbitration Act, 1991 SO 1991, c 17 for domestic arbitrations, and the International Commercial Arbitration Act, 2017, SO 2017, c 2, Sched 5 (Ontario ICAA) for international commercial arbitrations.

7 CQLR, c CCQ-1991.

8 CQLR, c C-25.01 at Article 649-651. Specifically, Section 649 states:

> *If international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments. Recourse may also be had to documents related to that Model Law, including (1) the Report of the United Nations Commission on International Trade Law on its eighteenth session held in Vienna from 3 to 21 June 1985; and (2) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.*

9 RSC 1985, c 17.

10 Commercial Arbitration Act, RSC 1985, c 17 at Section 5(2).

1116 or 1117 of the North American Free Trade Agreement (NAFTA)[11] against Canada are governed by the federal CAA.[12] There is no separate federal legislation to govern domestic arbitration matters because the CAA applies to all matters where a federal entity is a party. The result is that matters of international commercial arbitration may fall under provincial (based in either civil or common law), territorial or federal law depending on the nature of the dispute and the jurisdiction involved.

The legislation governing international commercial arbitration in Canadian provincial and territorial jurisdictions is largely similar to the CAA. Each statute is based on and incorporates to some extent the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 (Model Law).[13] In March 2017, Ontario revised its international commercial arbitration legislation,[14] a key feature of which was to incorporate the Model Law as amended by the United Nations Commission on International Trade Law on 7 July 2006 (2006 Model Law),[15] making it the first jurisdiction in Canada to do so. Further, each Canadian jurisdiction has enacted in some fashion legislation that incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[16]

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to consolidate arbitrations[17] or on applications to set aside arbitral awards.[18] The local courts in each province and territory with jurisdiction to hear such matters are the superior courts of first instance, such as the Court of Queen's Bench in Alberta and the Superior Court of Justice in Ontario. The federal CAA provides recourse to superior, county or district courts, as the case may be, whereas the Model Law mentions a 'court' or 'competent court'.[19] As a result,

11 North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289 (entered into force 1 January 1994).

12 CAA at Section 5(4)(a).

13 Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985.

14 Ontario ICAA.

15 Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006.

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3, 21 UST 2517 (entered into force 7 June 1959). Canada ratified the New York Convention on 12 May 1986 with a declaration, on 20 May 1987, 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 national law of Canada'. This language is mirrored in Section 4(1) of the federal legislation implementing the New York Convention, the United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp), entitled 'Limited to Commercial Matters', which reads '(t)he Convention applies only to differences arising out of commercial legal relationships, whether contractual or not'. For more detail on the declaration, see United Nations Treaty Collection, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: United Nations, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec.

17 See the Alberta ICAA at Section 8(1)(a) and the Ontario ICAA at Section 7(1)(a).

18 See the Alberta ICAA at Schedule 'B', Article 34 and the Ontario ICAA at Schedule 'B', Article 34.

19 CAA at Section 6.

parties arbitrating under the CAA would be required to, for example, seek assistance from or bring an application to set aside an award before the provincial or territorial superior court of first instance based on the Canadian seat of the arbitration rather than the Federal Court.[20]

Although similar in many respects, there are certain marked differences in international commercial arbitration legislation among Canadian jurisdictions. This situation can create unforeseen risk to inter-jurisdictional entities that might ultimately resort to arbitration in more than one jurisdiction, or to those choosing a city in Canada as a seat of arbitration, if they are not fully aware of the variations.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

One of the more significant developments affecting international arbitration in Canada in recent years is the work of the Uniform Law Conference of Canada's (ULCC) Working Group on Arbitration Legislation[21] to address differences in international and domestic commercial arbitration legislation between Canadian jurisdictions.

The ULCC was established in 1918 to promote uniformity of law throughout Canada, including through the preparation of model statutes to be recommended for adoption by the various provincial legislatures.[22] In 1986, the ULCC sought to harmonise Canada's international arbitration legislation and developed a Uniform International Act as a template for Canadian jurisdictions to implement the Model Law.[23] While this template was adopted in most Canadian jurisdictions, the provinces of British Columbia and Quebec proceeded in a different fashion by enacting their own, separate legislation based on the Model Law.[24] Several other jurisdictions also made their own alterations to the ULCC's proposed legislation,

20 Before amendments that came into force on 2 July 2003, Section 6 of the CAA also provided for recourse to the 'Federal Court or any superior, county or district court, except where the context otherwise requires'. Canada brought an application before the Federal Court in *Canada (Attorney General) v. SD Myers Inc*, 2004 FC 38, to set aside the decisions in *SD Myers, Inc v. The Government of Canada*, Final Award (30 December 2002): International Trade Law, www.italaw.com/sites/default/files/case-documents/ita0754.pdf; *SD Myers Inc v. The Government of Canada*, Partial Award on the Merits (2000), 40 ILM 1408; and *SD Myers Inc v. The Government of Canada*, Second Partial Award (21 October 2001): International Trade Law, www.italaw.com/sites/default/files/case-documents/ita0752.pdf, because the former version of the CAA stipulated such an application could be brought before the Federal Court.

21 For more detail, see the fourth edition of this Review.

22 For more information about the ULCC, see www.ulcc.ca/en.

23 The template proposes 15 sections of legislation and appends, in full, at Schedules A and B respectively, the New York Convention and Model Law. See ULCC, Uniform Acts, International Commercial Arbitration Act 1987: ULCC, www.ulcc.ca/en/uniform-acts-en-gb-1/462-international-commercial-arbitration-act/292-international-commercial-arbitration-act-1987.

24 In British Columbia, this was accomplished through the International Commercial Arbitration Act, RSBC 1996, c 233. Quebec, however, incorporated the Model Law through amending both the Civil Code of Québec, CQLR, c CCQ-1991 and the Code of Civil Procedure, CQLR, c C-25.01. See also the ULCC Working Group on Arbitration Legislation, 'Discussion Paper: Towards a New Uniform International Commercial Arbitration Act' (January 2013): *Global Arbitration Review*, www.globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf.

leading to differences in form and substance for international commercial arbitration across the country. As a result, the lack of complete uniformity among the provinces has led to some discrepancies in how the courts have addressed arbitration issues.

In response to the amendments contained in the 2006 Model Law, the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. As a result, a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) was developed, and approved by the ULCC in 2014.[25] The Uniform ICAA attaches the New York Convention as Schedule I,[26] and the 2006 Model Law as Schedule II,[27] both of which allow limited judicial intervention in international commercial arbitration disputes. In addition, the Uniform ICAA incorporates language similar to Article 34 of the Model Law to direct a uniform 10-year limitation period for applications to recognise and enforce awards under Articles III, IV and V of the New York Convention or Articles 35 and 36 of the 2006 Model Law.[28] The Uniform ICAA also addresses the inter-jurisdictional enforcement of arbitral awards, proposing that once one Canadian court has recognised the award, it should be enforced elsewhere as a judgment of that court rather than as an arbitral award.

While there is no obligation on the provinces, territories and federal government to adopt the Uniform ICAA, its influence has already been felt. In March 2017, Ontario enacted a new ICAA, incorporating central recommendations of the Uniform ICAA (including the incorporation of the New York Convention and the 2006 Model Law, and the adoption of a 10-year limitation period for applications to recognise and enforce arbitral awards).

Following the adoption by the ULCC of the Uniform ICAA in 2014, in December 2016 the ULCC also adopted a substantially revised Uniform Arbitration Act,[29] which pertains to domestic arbitrations in Canada.[30] The revisions modernise the Uniform Arbitration Act, which had not been subject to any alterations since the 1995 amendments to the original 1990 Act. The most significant of the recent amendments clarifies and limits the scope of judicial intervention and recognises the autonomy of parties to arbitration.

ii Arbitration developments in local courts

Jurisprudential developments in recent years have affirmed Canada's status as an arbitration-friendly jurisdiction. Recent decisions have confirmed judicial respect for the jurisdiction of arbitral tribunals, the principle of competence-competence and the parties' decision to contract into an arbitration agreement.

In *Pricaspian*,[31] the Alberta Court of Queen's Bench recently held that an application to consolidate multiple international arbitral proceedings involving the same parties may be

25 ULCC, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014): www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf.

26 Ibid., pages 35–40.

27 Ibid., pages 41–58.

28 Ibid., page 52.

29 The Uniform Arbitration Act adopted 1 December 2016: www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0017.pdf.

30 The Uniform Arbitration Act may apply to arbitrations ordinarily considered 'international', provided that the parties agree in writing that the domestic Act apply, rather than the ICAA.

31 *Pricaspian Development Corp v. BG International Ltd*, 2016 ABQB 611.

commenced on a contested basis under the Alberta ICAA.[32] At issue was whether Section 8(1)(a) of that act required the consent of all parties to consolidate multiple arbitration proceedings. That section provides that '[t]he Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings may order (a) the arbitration proceedings to be consolidated, on terms it considers just…'. The court held that it would be an absurdity to require the consent of all parties. However, even though an application for consolidation may be commenced in order to reduce or prevent duplication, expense, repetition or delay, consolidation is not always appropriate and discretion will be exercised accordingly. In *Pricaspian*, the court held that the consolidation was not appropriate, as there was no indication that the issues between the two arbitrations were so 'inextricably intertwined' that prejudice would be caused by not consolidating them, or that there was such an overlap of issues that it would be more efficient or cost-effective to consolidate.

The recent decision of the Saskatchewan Court of Appeal in *Greer et al v. Babey et al*[33] considered Article 8(1) of the Model Law.[34] The parties had entered into two agreements: only one contained an arbitration clause (the Agreement). After a falling out, the Babey parties filed a claim with the Court of Queen's Bench alleging that they were induced to enter each of the two agreements by fraudulent or negligent misrepresentation. In response, the Greer parties filed an application that, in part, argued that the portion of the claim dealing with the Agreement ought to be stayed and referred to arbitration. The lower court declined to refer a portion of the claim to arbitration. On appeal, the court considered whether, given the fact that the claim was based on allegations of fraudulent or negligent misrepresentation, it was considered a 'dispute, difference or question arising […] in connection with [the Agreement]'; and whether referring a portion of the claim to arbitration would result in a multiplicity of proceedings.

On the first issue, the court held that given the wording of the arbitration clause, the ability to arbitrate the dispute would turn on the question of whether the misrepresentations allegedly made could be seen as a dispute arising 'in connection' with the Agreement. This question would require a full review of the circumstances and evidence, which, the court noted, ordinarily requires the court to refer the matter to arbitration. In addition, the court considered whether the Agreement was void *ab initio* by virtue of the misrepresentations, and whether Article 8(1) applied such that the matter would not be referred to arbitration if the Agreement was found null and void. The court determined that Article 8(1) must be read in conjunction with Article 16(1), which provides that an arbitration tribunal may rule on its own jurisdiction, 'including any objections with respect to the existence or validity of the arbitration agreement'. The court held that for that purpose, an arbitration clause is to be seen as separate from the contract of which it is a part, and that the invalidity of the contract does not necessarily entail the invalidity of the arbitration clause. Accordingly, if the Greer parties had wanted to rely on the 'null and void' exception in Article 8(1), they were obliged to ask the court to make a determination that the arbitration clause was null and void (as opposed to pleading that the Agreement as a whole was void).

With regard to the concern of a multiplicity of proceedings, the court again looked at Article 8(1), which provides that when an action is brought in relation to a matter

32 International Commercial Arbitration Act, RSA 2000, c I-5, Section 8.

33 *Greer et al v. Babey et al*, 2016 SKCA 45.

34 The Model Law is incorporated into Saskatchewan legislation: The International Commercial Arbitration Act, SS 1988-89, c I-10.2.

subject to arbitration, a court 'shall' refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. The court noted that recent jurisprudence reflects the modern trend of promoting arbitration and minimising judicial intervention. Therefore, the court referred the portion of the claim dealing with the Agreement to arbitration.

The Ontario Superior Court of Justice (Commercial List) recently granted an interlocutory injunction in advance of arbitration in *International Steel Services Inc v. Dynatec Madagascar SA*,[35] which appears to be the court's first application of Article 28(2) of the ICC arbitration rules for that purpose in Ontario. In that case, the applicant applied for an interim injunction restraining the respondent from taking steps to interfere with its contractual rights pending an arbitration to determine certain disputes between the parties regarding the continuing existence of an agreement concerning the operation and maintenance of a sulphuric acid generating facility in Madagascar. The respondent, which asserted that the contract terminated as of 1 May 2016, had been taking steps to take over the operation of the plant on 1 May 2016. The agreement provided for arbitration by a single arbitrator in accordance with the ICC rules in Toronto, Ontario. The agreement further provided that performance of the agreement would continue during the arbitration proceeding. The applicant commenced the Ontario court proceeding on 14 April 2016 and the injunction was heard on 25 April 2016. Although the parties had agreed on an arbitrator shortly before the hearing of the motion, it was not known when the arbitrator would be available to deal with the request for injunctive relief.

In the face of the looming termination date (1 May 2016), the court granted the injunction. While the court noted that the issue of interim relief should have been dealt with before an arbitrator under the ICC emergency arbitration rules, as requested by the applicant, it took into account the respondent's refusal to take any steps to respond to the applicant in that regard. The court, therefore, relied upon Article 28(2) of the ICC arbitration rules, which provides for an application to a court before a file is given to the arbitrator for interim or conservatory measures. Article 9 of the then-current version of the Ontario ICAA also provided that it was not incompatible with an arbitration agreement for a party to request from a court, either before or during arbitral proceedings, an interim measure of protection and for the court to grant such a measure.[36] The court noted that no authorities under Canadian law addressing the test for the injunction (and whether it differed from the test that is normally applied in granting an interlocutory injunction) had been found. The court held that the standard test for an injunction applied and granted the injunction on the basis that 'there is no doubt that there is a serious issue to be tried' as to whether there was an agreement made to extend the agreement.[37] Further, the applicant could suffer a loss of business reputation, which was a category of, and therefore met the requirement that there be, irreparable harm. The court also found that the respondent did not come to the court with 'clean hands' (having found that the respondent was 'dragging its heels in having this matter arbitrated'[38]), and that its plan was to take over the plant before the disputed issues could be resolved. The balance of convenience also favoured the applicant.

35 2016 ONSC 2810 (*Dynatec*).

36 No change has been made to that provision of the act.

37 *Dynatec*, footnote 35 at Paragraph 49.

38 Ibid. at Paragraph 21.

This decision is important because, while injunctions have previously been granted in the context of an enforcement proceeding for an existing arbitration award, this injunction was granted at the very outset of the proceeding. As the court itself noted, there is little to no Canadian case law on this point. This case demonstrates the ability of Canadian courts to act quickly and to grant interim relief in the context of an arbitration where the arbitrator is not yet in a position to do so.

In *Haas v. Gunasekaram*,[39] the Ontario Court of Appeal allowed an appeal from a motion judge's decision refusing to grant a stay of a court proceeding in favour of an arbitration. The Court of Appeal held that the mandatory language of Section 7 of the Arbitration Act, 1991[40] strongly favours giving effect to the arbitration agreement. That section provides that if a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall stay the proceeding. As such, the law favours giving effect to arbitration agreements.[41] The court also held that Section 17(1) of the Act codifies the common law and establishes that an arbitration agreement can survive even where the contract in which it is found is determined to be invalid (which is the same under the UNCITRAL Model Law, which is in force in Ontario). The Court of Appeal found that the motion judge erred in assuming that tort claims fell outside the scope of arbitration and that the fraud claim vitiated the arbitration agreement, since neither assumption was supported by case law. The motion judge also failed to adhere to the policy established by common law of enforcing arbitration agreements and letting arbitrators decide the scope of their authority (often known as the competence-competence principle). The court held explicitly that 'the law, both statutory and judicial, favours the enforcement of arbitration agreements'.[42] Although this is a case brought under the domestic arbitration act, the court also relied on cases concerning international arbitrations in its reasons. More generally, this decision demonstrates that Ontario is an arbitration-friendly jurisdiction.

iii Investor–state disputes

Canada signed the ICSID Convention[43] on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention and became a contracting state.[44] Several provinces and territories have passed the necessary implementing legislation to assist in bringing the ICSID Convention into force in Canada.[45]

39 2016 ONCA 744 (*Haas*).

40 SO 1991, c 17.

41 *Haas*, footnote 39 at Paragraph 10.

42 Ibid. at Paragraph 40.

43 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524: ICSID, icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.

44 ICSID, List of Contracting States and Other Signatories of the Convention (as of 3 May 2017): icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

45 In addition to the federal Settlement of International Investment Disputes Act, Ontario, British Columbia, Newfoundland and Labrador, Nunavut, the Northwest Territories, Saskatchewan and Alberta have all passed legislation to implement the ICSID Convention. See SO 1999, c 12, Sch D (Ontario); SBC 2006, c 16 (British Columbia); SN 2006, c S-13.3 (Newfoundland and Labrador); SNu 2006, c 13 (Nunavut); SNWT 2009, c 15 (Northwest Territories); SS 2006, c S-47.2 (Saskatchewan); SA 2013, c S-7.8 (Alberta, proclaimed into force on 17 February 2014).

Canada is also a party to the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention), which it ratified on 5 June 2015.[46] By adopting the Mauritius Convention, Canada ensures that the high-level transparency necessary for successful investor–state arbitration is enforced across all foreign investment promotion and protection agreements (FIPAs) and free trade agreements (FTAs). In particular, those international investment agreements referred to as FIPAs and FTAs that were concluded before 2006 and that lack the high-level transparency provisions in Canada's more modern agreements will now reflect the transparency required in the 21st century.

Canada has continued to pursue international investment agreements in the form of FIPAs and FTAs. Canada has over 30 FIPAs in place, and in the past year has brought into force agreements with Hong Kong, Mongolia and Cameroon, among others, and a number of countries are in ongoing negotiations, including India, Pakistan and the United Arab Emirates. Exploratory discussions with respect to a possible Canada–China FTA commenced in September 2016.[47]

Following seven years of negotiation, on 4 February 2016,[48] Canada, the US, Mexico and nine other states[49] signed the Trans-Pacific Partnership (TPP) free trade agreement.[50] The US withdrew from the TPP in January 2017, and it remains unratified by the remaining signatories.

The Comprehensive Economic and Trade Agreement (CETA)[51] between Canada and the EU was approved by the European Parliament in February 2017, and Canada is preparing to provisionally apply parts of CETA before the end of the year.[52] Chapter 8 of CETA dealing with investment disputes will not be applied during provisional implementation, and will only take effect after CETA is ratified by all Member States. Investment disputes under CETA are to proceed before a three-member tribunal comprising one EU national, one Canadian national and one non-party third country, with the tribunal panel being randomly selected from a pool of 15 members appointed by the CETA Joint Committee.[53] In addition to the creation of a tribunal to hear cases submitted pursuant to Article 8.23, an appellate tribunal

46 The Mauritius Convention was signed on 17 March 2015, and was ratified on 5 June 2015. For more information, see UNCITRAL, UNCITRAL Texts & Status, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014): UNCITRAL, www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

47 For a complete list of FIPAs and FTAs, see Global Affairs Canada, Foreign Investment Promotion and Protection (FIPAs): Global Affairs Canada, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

48 Global Affairs Canada, Trans-Pacific Partnership (TPP): Global Affairs Canada: international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng.

49 The other states are Australia, Brunei, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam.

50 For a full version of the text, see Global Affairs Canada, Trans-Pacific Partnership (TPP), Consolidated Text: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/final_agreement-accord_finale.aspx?lang=eng.

51 Global Affairs Canada, Canada–European Union Comprehensive Economic and Trade Agreement: international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng.

52 As of 11 May 2017, the federal legislation required to implement CETA was awaiting Royal Assent. See Open Parliament, Bill C-30, Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act: openparliament.ca/bills/42-1/C-30.

53 See footnote 51 at Article 8.27. The 15 members shall comprise five EU nationals, five Canadian nationals and five non-party third-country nationals.

has also been created that may 'uphold, modify or reverse a Tribunal's award' on any of the following:[54] (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, insofar as they are not covered by Paragraphs (a) and (b).

Current investor–state disputes

According to the government, Canada is currently a party to 10 active international investment disputes: nine under NAFTA and one under the Canada–Egypt FIPA.[55]

One of the most recent international investment disputes against Canada has been brought by Global Telecom Holdings SAE as a dispute before ICSID under the Canada–Egypt Foreign Investment Promotion and Protection Agreement,[56] one of the earlier FIPAs that Canada negotiated.[57] On 28 May 2016, the claimant filed a request for arbitration with respect to its investment in the Canadian telecommunications market and mobile services, which it provided in Canada under the name 'Wind Mobile'. The claimant alleges that from 2008 to 2014, 'Canada failed to create a fair, competitive and favourable regulatory environment for new investors in this sector'.[58] Canada's actions are alleged to have denied the claimant fair and equitable treatment and full protection and security, and to have breached the FIPA obligations by according preferential treatment to similarly situated national investors and investors from other states. Global Telecom Holdings SAE is claiming damages in the amount of at least C$1.32 billion.[59] This dispute is the first known non-NAFTA investment treaty claim against the country.[60] As a result, if the matter proceeds, the tribunal's determination on the FIPA language concerning frequently contested issues such as fair and equitable treatment will provide insight into how FIPAs with similar provisions may be interpreted.

A recent claim against Canada under NAFTA, *Resolute Forest Products Inc v. Government of Canada* (*Resolute*),[61] claims damages of at least US$70 million as a result of measures adopted by the governments of Nova Scotia and Canada that allegedly discriminated against

54 Ibid. at Article 8.28.

55 Global Affairs Canada, Cases Filed Against the Government of Canada: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng, and Global Affairs Canada, Dispute Settlement, Foreign Investment Promotion and Protections Agreements (FIPAs): Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/index.aspx?lang=eng.

56 Global Affairs Canada, Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments: treaty-accord.gc.ca/text-texte.aspx?id=101524&lang=eng.

57 Global Affairs Canada, Trade, Trade and Investment Agreements: www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

58 Global Affairs Canada, Dispute Settlement, *Global Telecom Holdings SAE v. Government of Canada*: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth_sae.aspx?lang=eng.

59 Ibid.

60 Douglas Thomson, 'Canada hit with first BIT claim', *Global Arbitration Review* (8 June 2016): globalarbitrationreview.com/article/1036392/canada-hit-with-first-bit-claim.

61 Government of Canada, Cases Filed Against the Government of Canada, *Resolute Forest Products Inc v. Government of Canada*: Global Affairs Canada,www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/resolute.aspx?lang=eng.

Resolute Forest Products Inc in favour of a local entity, ultimately depriving the claimant of its investment. In its notice of arbitration and statement of claim, the claimant alleged breaches of NAFTA Article 1110 on expropriation and compensation, Article 1105 on the minimum standard of treatment and Article 1102 on national treatment.[62] In brief, the notice of arbitration and statement of claim allege that after an unrelated pulp and paper mill in Nova Scotia found itself facing creditor protection in 2011, the provincial government undertook several measures to preserve such mill, including allegedly providing preferential electricity rates and funding assistance, and protecting the mill's assets from division and sale.[63] The claimant alleges that these government actions had consequences for its investment in three other pulp and paper mills in the neighbouring province of Quebec. As a result of the government's actions, the claimant alleges that it had to close one mill, suffering a total deprivation of its investment, and that its two other mills continue to suffer harm from the measures.[64]

Resolute is still in the early stages. However, on 18 November 2016 the tribunal rendered a decision with respect to Canada's request for bifurcation.[65] Canada raised a time-bar objection to the claim under NAFTA Articles 1116(2) and 1117(2), which impose a form of discoverability limitation period within which a claimant must bring a claim. The tribunal noted that the UNCITRAL Rules, under Article 21(4), create 'a presumption in favour of bifurcation, subject to the Tribunal exercising its discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances'.[66] To determine whether bifurcation is appropriate in a given case, the tribunal noted that it is helpful to apply the three-part test from *Philip Morris v. Australia*. In considering that test, the tribunal in *Resolute* held that it was appropriate to order bifurcation of the proceeding, noting that Canada's time-bar objection met the criteria for bifurcation.[67] Canada also raised initial objections with respect to whether the government measures at issue 'related to' the claimant or its investment under NAFTA Article 1101(2), whether Article 1102(3) should relate only to intra-provincial 'treatment' and whether Article 2103(6) required the claimant to simultaneously submit its dispute to 'the competent taxation authority' to the extent there are impugned taxation measures.[68] All of these will be decided at the initial hearing on jurisdiction, presently scheduled for July 2017.[69] The decision with respect to Article 1102(3) and whether measures adopted or maintained in another provincial or territorial jurisdiction can 'relate to' a foreign investment in a different province or territory will be important for investor-state disputes going forward as there is often industry overlap between provinces and territories in Canada.

On 27 September 2016, the tribunal in *Windstream Energy LLC (USA) v. Government of Canada* rendered an award against Canada in an amount of C$25,182,900, plus C$2,912,432 in costs, after finding a breach of the fair and equitable standard of treatment

62 *Government Resolute Forest Products Inc v. Government of Canada*, Notice of Arbitration and Statement of Claim (30 December 2015), PCA Case No. 2016-13: www.pcacases.com/web/sendAttach/2045.

63 Ibid. at Paragraphs 3-6.

64 Ibid. at Paragraph 7.

65 *Resolute Forest Products Inc v. Government of Canada*, Procedural Order No. 4 (18 November 2016), PCA Case No. 2016-13: www.pcacases.com/web/sendAttach/2045.

66 Ibid. at Paragraph 4.3.

67 Ibid. at Paragraphs 4.10-4.12.

68 Ibid. at Paragraphs 4.2.

69 *Resolute Forest Products Inc v. Government of Canada*, Procedural Order No. 3 (3 November 2016), PCA Case No. 2016-13: PCA, www.pcacases.com/web/sendAttach/2044.

under NAFTA Article 1105.[70] As we first reported in the fourth edition, this dispute involved an investment in a wind electricity project (project) in the Province of Ontario. The investment was undertaken after Ontario enacted legislation and regulations that created Ontario's Feed-in-Tariff Program (FIT Program) for offshore wind energy development. After the claimant qualified for the FIT Program, it alleged that the government delayed providing approval on required permits and then introduced a moratorium on offshore wind energy facilities, frustrating its ability to develop the project and benefit from the FIT contract.[71]

The tribunal ultimately dismissed the claims that Canada, through the Province of Ontario, unlawfully expropriated the investment and that the investment was treated less favourably than domestic investors or investors in like circumstances. This was primarily because the FIT contract was never terminated, and monetary security provided by Windstream for the FIT contract had to be returned if the contract terminated.[72] Further, Windstream was the only holder of an offshore FIT contract, so no other entity was actually 'in like circumstances' and the moratorium was applied to all offshore projects equally.[73] The tribunal's finding of a breach of fair and equitable treatment noted the moratorium in itself was not wrongful,[74] rather that it was the government's conduct with respect to Windstream after the moratorium, in failing to 'address the legal and contractual limbo' faced by the investor, passing off negotiations to another entity, and neither terminating the FIT contract as provided under law, or implementing regulations to allow the project to proceed, that was unfair and inequitable.[75] After Windstream filed an application with the Ontario Superior Court to enforce the award in February 2017,[76] the provincial government paid the award in full in mid-April.[77]

Another recent decision, *Eli Lilly and Company v. Government of Canada*,[78] saw the claims against Canada for a breach of fair and equitable treatment under NAFTA Article 1105 and expropriation in breach of Article 1110 dismissed in their entirety. The unsuccessful claimant was responsible for the costs of the arbitration in an amount of US$749,697.97, along with 75 per cent of Canada's legal costs in an amount of C$4,448,625.32. In this case, the tribunal found that the claimant's allegation that its legitimate expectations were violated by changes in Canadian patent law was not demonstrated on the facts.

As reported in last year's edition, in June 2015, the Attorney General of Canada filed a notice of application with the Federal Court to set aside the tribunal's award on jurisdiction

70 *Windstream Energy LLC (USA) v. Government of Canada* [Windstream], Award (27 September 2016), PCA Case No. 2013-22: www.pcacases.com/web/sendAttach/2036.

71 Ibid. at Paragraph 5.

72 Ibid. at Paragraph 290.

73 Ibid. at Paragraph 414.

74 Ibid. at Paragraph 376.

75 Ibid. at Paragraph 379.

76 Shawn McCarthy, 'U.S. company Windstream Energy sues Canada for $28-million in NAFTA case' (21 February 2017), *The Globe and Mail*: www.theglobeandmail.com/report-on-business/economy/us-company-windstream-energy-sues-canada-for-28-million-in-nafta-case/article34104737.

77 Allison Jones, 'Ontario pays $28-million awarded to wind company over offshore wind moratorium', (13 April 2017), *Metro News*: www.metronews.ca/news/toronto/2017/04/13/ontario-pays-28-million-awarded-to-wind-company-over-offshore-wind-moratorium.html.

78 *Eli Lilly and Company v. Government of Canada*, Final Award (16 March 2017), ICSID Case No. UNCT/14/2: icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf.

and liability in *Clayton/Bilcon v. Government of Canada*[79] alleging that it contravened Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the federal CAA[80] that, respectively, relate to awards addressing disputes outside of the submission to arbitration and awards in conflict with public policy.[81] Canada alleges, *inter alia*, that the tribunal erroneously found the conduct of the environmental assessment (and resulting recommendations) were attributable to Canada, and that it was beyond the terms of submission for the award to determine that the actions of the panel conducting the environmental assessment violated domestic Canadian law.[82] Canada subsequently attempted to stay the damages phase of the arbitration pending the determination of its application with the Federal Court. This relief was denied by the tribunal in August 2015.[83] In December 2015, the investors filed a motion with the Federal Court requesting that the set-aside proceedings be stayed pending the outcome of the damages phase. This motion was denied both in the first instance and recently on appeal,[84] which decision the investors are further appealing to the Federal Court of Appeal.[85] The final decision on the application to set-aside, which is still pending, along with the investors' application for a stay from the Federal Court of Appeal, will add to existing case law concerning public policy grounds for setting aside an award and practical considerations with respect to bifurcation of jurisdiction and liability from damages.

III OUTLOOK AND CONCLUSIONS

Canada has a well-supported reputation as an arbitration-friendly jurisdiction, and has developed significant jurisprudential authority on the importance of arbitration in the settlement of disputes. However, the existence of various provincial and federal arbitration statues, and the differences among and between them, has the potential to complicate arbitration and related proceedings in some circumstances. Ontario's recent adoption of the 2006 Model Law and the recent work towards uniformity in arbitration laws discussed in previous editions may signal that other jurisdictions will also modernise their international arbitration legislation. These efforts, combined with the ratification of the ICSID Convention and the resulting certainty and finality that is presented by this avenue of dispute resolution, suggest that international arbitration in Canada is likely to continue to gain prevalence.

79 *Clayton/Bilcon*, Award on Jurisdiction and Liability (17 March 2015), PCA Case No. 2009-04: FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-12.pdf.

80 CAA, footnote 10.

81 *Attorney General of Canada v. Clayton/Bilcon*, Notice of Application (16 June 2015), Toronto T-1000-15 (FC), Paragraph 15.

82 Ibid., Paragraph 15.

83 *Clayton/Bilcon*, Procedural Order No. 19 (10 August 2015), PCA Case No. 2009-04: PCA, www.pcacases.com/web/sendAttach/1405.

84 *Attorney General of Canada v. Clayton/Bilcon*, 2017 FC 214.

85 *Attorney General of Canada v. Clayton/Bilcon*, Notice of Appeal (3 March 2017), Toronto A-80-17 (FCA).

Appendix 1

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Gordon (Gord) Tarnowsky co-leads Dentons Canada's litigation and dispute resolution practice group, is the former co-chair for the firm's national ADR and arbitration group and is a member of the global Dentons international arbitration steering group. Based in Calgary, Gord's practice focuses on the resolution of complex corporate, commercial and energy industry disputes. Gord has served as counsel in numerous domestic and international arbitrations before many of the world's leading international arbitration institutions, including the ICC and ICSID. Gord predominantly practices in disputes arising in the energy industry including the upstream, midstream and downstream sectors and the power sector, and regularly assists in the drafting of dispute resolution provisions in major commercial contracts for Canadian and foreign clients.

Gord is a member of the Western Canada Commercial Arbitration Society, an informal assembly of some of Western Canada's most experienced domestic and international commercial arbitrators. In litigation matters, Gord has appeared before all levels of the Alberta courts, and has also represented clients before the Alberta Securities Commission and the Federal Court of Canada.

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Rachel Howie is a partner in the firm's litigation and dispute resolution practice group, and a co-leader for the Dentons Canada national ADR and arbitration group. She is based in Calgary, and her practise focuses on complex energy, environmental and commercial arbitration and litigation matters. Rachel has acted as counsel in domestic and international arbitrations involving environmental issues, such as the abandonment and remediation of contaminated sites and landowner claims regarding water and soil contamination, along with breach of contract claims, issues of operatorship, joint venture obligations and accounting and audit rights. She also regularly assists in the drafting of dispute resolution language for commercial agreements. Rachel is called to the Bar in Alberta and Ontario, and in 2012, she obtained her LLM degree with a specialisation in natural resources, energy and environmental law from the University of Calgary, where her research focused on fair and equitable treatment in international investment agreements and Alberta's regulation of oil sands royalties.

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Chloe Snider is a partner in Dentons' litigation and dispute resolution group. Based in Toronto, her practice focuses on litigating complex commercial disputes and assisting clients to manage risk.

Chloe acts as a business adviser to help clients manage risk in corporate transactions and to resolve contract and shareholder disputes. She also specialises in enforcement of foreign judgments and arbitration awards, and has a particular interest in jurisdiction and conflicts of laws issues. Chloe has experience representing financial institutions in various banking and civil fraud matters. Chloe often represents companies in litigation against their competitors in cases involving trade secrets and other business and IP disputes. She has worked for clients in the technology, manufacturing, food and agriculture, insurance, banking, professional services, entertainment and fine arts industries. Chloe is committed to helping her clients achieve their legal and business objectives. She is a strategic and critical legal thinker, and works efficiently to develop practical solutions for her clients. Chloe is an active member of her community. In her spare time, she is involved in the Advocates' Society as a member of the Young Advocates' Standing Committee and in charitable events such as Breakfast of Champions in Support of SickKids.

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Holly Cunliffe is an associate in the firm's litigation and dispute resolution group in Toronto. Her practice includes a wide variety of complex corporate, commercial and civil litigation matters, including oppression actions, asset and debt recovery and civil enforcement, fraud, estates litigation, aboriginal law and real estate disputes. She has acted as counsel on judicial reviews of arbitral awards, and on matters concerning the enforcement of arbitral awards. She was called to the Bar in Ontario in 2014, is a member of The Society of Trust and Estate Practitioners (Canada), and is a regular volunteer with the Pro Bono Duty Counsel Project, assisting self-represented parties with their civil matters in the Ontario Small Claims Court.

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