
THE
INTERNATIONAL
ARBITRATION
REVIEW

SEVENTH EDITION

EDITOR
JAMES H CARTER

LAW BUSINESS RESEARCH

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2016

Chapter 8

CANADA

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I INTRODUCTION

Canada is a federal state composed of 10 provinces² 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 Act⁴ for domestic arbitration matters and the International Commercial Arbitration Act⁵ (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 Quebec⁷ (Civil Code) and the Code of Civil Procedure.⁸

1 Dennis Picco, QC and Rachel Howie are partners, and Lauren Pearson and Barbara Capes are associates at Dentons Canada LLP.

2 The 10 provinces are Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

3 The three territories are the Northwest Territories, Nunavut and Yukon.

4 RSA 2000, c A-43.

5 RSA 2000, c I-5 [Alberta ICAA].

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, RSO 1990, c I.9 (Ontario ICAA) for international commercial arbitrations.

7 CQLR, c C-1991.

8 CQLR, c C-25. Specifically, Section 940.6 states 'Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where

Federally, international commercial arbitration is governed by the Commercial Arbitration Act⁹ (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 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 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).¹⁴

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to

applicable, shall take into consideration: (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985; [...].

9 RSC 1985, c 17.

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

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) [NAFTA].

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 [Model Law].

14 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, online: United Nations, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdtsg_no=XXII-1&chapter=22&lang=en# EndDec.

consolidate arbitrations¹⁵ or on applications to set aside arbitral awards.¹⁶ 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'.¹⁷ As a result, 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.¹⁸

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 (ULCC)'s Working Group on Arbitration Legislation (Working Group)¹⁹ to address differences in international 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.²⁰ In 1986, the ULCC sought to harmonise Canada's international arbitration legislation and developed a Uniform International Act as a template

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

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

17 CAA at Section 6.

18 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), online: 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), online: 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.

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

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

for Canadian jurisdictions to implement the Model Law.²¹ 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.²² Several other jurisdictions also made their own alterations to the ULCC's proposed legislation, 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 led to some discrepancies in how the court addressed arbitration issues.

In response to the 2006 amendments to the Model Law (2006 Model Law),²³ the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. In March 2014, the Working Group delivered a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) to the ULCC, which has now been approved by the ULCC.²⁴ The Uniform ICAA attaches the New York Convention as Schedule I,²⁵ and the 2006 Model Law as Schedule II,²⁶ 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.²⁷ 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.

21 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, online: ULCC, www.ulcc.ca/en/uniform-acts-en-gb-1/462-international-commercial-arbitration-act/292-international-commercial-arbitration-act-1987.

22 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 Quebec, LRQ, c C-1991 and the Code of Civil Procedure, RSQ, c C-25. See also the ULCC Working Group on Arbitration Legislation, 'Discussion Paper: Towards a New Uniform International Commercial Arbitration Act' (January 2013), online: *Global Arbitration Review*, www.globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf.

23 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.

24 ULCC, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), online: ULCC, www.ulcc.ca/images/stories/2013_pdfs_en/2013ulcc0040.pdf.

25 *Ibid.*, pages 35–40.

26 *Ibid.*, pages 41–58.

27 *Ibid.*, page 52.

While there is no obligation on the provinces, territories and federal government to adopt the Uniform ICAA and it has not yet been enacted by any Canadian jurisdiction, it is likely that it will be influential and persuasive in all Canadian jurisdictions.

In December 2014, the ADR Institute of Canada (ADRIC) implemented the ADRIC Arbitration Rules (ADRIC Rules),²⁸ which Canadian parties have the option of using when submitting a domestic dispute to arbitration. The ADRIC Rules were originally drafted in 2002. The most recent revisions take into account modern arbitration practices, including the application of current technology, simplified document production, expedited arbitration procedures and the availability of interim arbitrators for applying urgent interim measures.

In January 2015, the International Centre for Dispute Resolution (ICDR) implemented the Canadian Dispute Resolution Rules and Procedures (Canadian ICDR Rules)²⁹ and began providing, through ICDR Canada, administrative support and services for arbitration and mediation throughout the country.³⁰ The Canadian ICDR Rules are based almost entirely on the ICDR International Arbitration Rules, meaning they contain elements of international arbitral best practices. For example, and similar to the International Arbitration Rules, the Canadian ICDR Rules provide for an expedited process for claims of less than US\$250,000, or the parties may agree to use the expedited process on matters of any claim size, that mediation may be used at any time during the arbitration proceeding, and recognition that oral and documentary discovery developed for court proceedings is generally not appropriate for arbitration.

ii Arbitration developments in local courts

Jurisprudential developments in local courts over the past few 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.

The enforcement of an agreement to arbitrate between parties where there is competing and overlapping litigation is an issue that appears before the courts in Canada and one that poses difficulty when there are multiparty disputes where not all parties in the dispute are subject to the agreement to arbitrate. In *Toyota Tsusho Wheatland Inc v. Encana Corporation*,³¹ the Alberta Court of Queen's Bench recently performed an analysis in exactly this type of scenario as to whether the dispute should be determined through arbitration,

28 ADR Institute of Canada, ADRIC Arbitration Rules, effective 1 December 2014, online: ADR Institute of Canada, adric.ca/wp-content/uploads/2015/11/ADRIC_Arbitration_Rules_Booklet.pdf.

29 ICDR Canada, Canadian Dispute Resolution Procedures (Including Mediation and Arbitration Rules), effective 1 January 2015, online: ICDR, www.adr.org/aa/ShowProperty?nodeId=/UCM/ADRSTAGE2026457&revision=latestreleased.

30 ICDR, About ICDR Canada, online: ICDR, www.icdr.org/icdr/faces/icdrservices/icdrcanada;jsessionid=y0V-bd050znWQEu97Qin2dvANwYWACpojmA0llpBnSg_WwoHMy6D!877808853?_afLoop=39534410657257&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D39534410657257%26_afWindowMode%3D0%26_adf.ctrl-state%3D18zgphoxwc_4.

31 2016 ABQB 209.

litigation or a combination of both. As noted by the Court, this case provides an example of the ‘complexities that can occur in disputes which involve parties to an arbitration agreement as well as third parties who are not subject to that arbitration agreement’.³²

Encana Corporation (Encana) and Toyota Tsusho Wheatland Inc (TTWI) were both parties to several agreements for the payment of royalties for natural gas from certain lands. Certain of these agreements contained an arbitration clause governed by the Alberta ICAA, and directed that neither party would dispose of any portion of the lands or its interests in the agreements without prior written consent of the other party.³³ Through a series of transactions, Encana transferred its interest in the lands to what was a wholly owned subsidiary, PrairieSky Royalty Ltd (PrairieSky) and then proceeded to sell its interest in PrairieSky.³⁴ A dispute arose, and TTWI commenced both a civil action against Encana and PrairieSky for various forms of relief, including specific performance, as well as arbitration proceedings against Encana seeking different forms of relief.³⁵

Before the Court were a series of cross-applications over the correct forum for the disputes. Encana applied to have the civil action stayed pending determination of the arbitration. PrairieSky sought to have the civil action proceed and cross-applied to stay the arbitration (in which it was not a party) with respect to issues that were common to the civil action. TTWI opposed both stays, and argued that both the arbitration and the civil action should proceed as it was seeking different relief in each proceeding that was not available in the other.³⁶

The Court recognised that as a matter of law and policy, the role of the courts in relation to arbitration in Canada has been one of non-intervention. Where parties have agreed to resolve disputes via arbitration, the Court has limited ability to intervene.³⁷ This principle is more strictly applied where the dispute is governed by the Alberta ICAA.³⁸ The Court reviewed the claims against Encana in the civil claim and the terms of the arbitration clause, and determined that most of the claims advanced against Encana should be referred to arbitration as the parties had intended that arbitration was their agreed-upon method to resolve disputes on the agreement at issue. TTWI was not entitled to specific performance under the arbitration agreement and so, that claim was stayed pending the completion of the arbitration, as determining whether TTWI was entitled to specific performance was contingent on the outcome of the arbitration.³⁹ The Court thus directed that the arbitration between TTWI and Encana would proceed as it did not have the jurisdiction to interfere with the arbitration process.⁴⁰ With respect to the remainder of the litigation advanced by TTWI against PrairieSky, Encana sought to stay this proceeding pending the determination of the arbitration. The specific prejudice faced by Encana was the risk of becoming embroiled in this litigation as a third party while simultaneously participating as a respondent in the

32 Ibid., Paragraph 1.

33 Ibid., Paragraphs 8–10 and 48.

34 Ibid., Paragraphs 11–14.

35 Ibid., Paragraphs 12, 15–16.

36 Ibid., Paragraphs 21–24.

37 Ibid., Paragraph 47.

38 Ibid., Paragraphs 48–49.

39 Ibid., Paragraphs 61–65.

40 Ibid., Paragraphs 82–83.

arbitration.⁴¹ The Court found the prejudice to TTWI and PrairieSky if the civil action was stayed would be greater than the prejudice to Encana if the litigation proceeded at the same time as the arbitration. Therefore, the Court directed that the action as between TTWI and PrairieSky should not be stayed,⁴² with the result that there would be parallel litigation and arbitration, with the potential for Encana to participate in both.

The decision in *Saskatchewan Power Corp v. Alberici Western Constructors*⁴³ similarly concludes that where a valid arbitration agreement exists, the Court must refer the parties to arbitration.⁴⁴ While determined under the domestic Arbitration Act,⁴⁵ the Court nonetheless referenced case law on international commercial arbitration concerning the UNCITRAL Model Law, which confirms that a court should refer civil actions to arbitration where there is an arbitration agreement between the parties.⁴⁶

These decisions confirm that domestic courts in Canada will continue to respect the jurisdiction of arbitral tribunals and will not interfere where a valid arbitration agreement is in place. Where parties choose to resolve their disputes via private arbitration, Canadian courts will hold the parties to that decision and will not permit them to use the courts to circumvent their arbitration agreement.

The Ontario Superior Court of Justice has recently issued a decision that places limits on the disclosure required of arbitrators prior to accepting an appointment and challenges for an apparent lack of independence or impartiality. In *Jacob Securities Inc v. Typhoon Capital BV and Typhoon Offshore BV*,⁴⁷ Jacob Securities Inc sought to set aside the award of a sole arbitrator pursuant to Articles 34 and 36 of the Model Law, arguing that the arbitrator was not objective due to connections between his former law firm, from which he had retired prior to being appointed as arbitrator, and parties related to the respondents. The claim before the tribunal was for compensation for introducing a third party to the respondents as a potential investor to the respondents' wind power project.⁴⁸ Shortly after the arbitrator dismissed the claim, the claimant learned that the arbitrator's former firm had acted in the past for both the third party and the underwriters to the wind power project.⁴⁹ The Court found that on the specific facts in issue, the alleged relationship between the arbitrator and the underwriters was too remote to give rise to a reasonable apprehension of bias, in particular because the arbitrator was unaware of his former firm's work for the third party and the underwriters.⁵⁰ The Court also dismissed the argument that there was a positive obligation on the arbitrator to check for conflicts with his former firm. An arbitrator who is unaware of any conflict of interest does not need to make any effort to search for such conflicts with their former firm.⁵¹

41 Ibid., Paragraph 72–75.

42 Ibid., Paragraph 75.

43 2016 SKCA 46.

44 Ibid., Paragraph 54.

45 1992, SS 1992, c A-24.1.

46 Ibid., Paragraph 52.

47 2016 ONSC 604.

48 Ibid., Paragraph 1.

49 Ibid., Paragraphs 7–15.

50 Ibid., Paragraph 50.

51 Ibid., Paragraph 58.

The Ontario Court of Appeal's decision in *Popack v. Lipszyc*⁵² highlights a court's residual discretion to refuse to set aside an award pursuant to Article 34(2) of the UNCITRAL Model Law, despite the applicant establishing one of the enumerated grounds therein; in this case a procedural error by the arbitral tribunal. The tribunal met *ex parte* with the arbitrator from a previously attempted arbitration, without notice to either party, before rendering its award. Popack applied under Article 34(2)(a)(iv) of the Model Law to set aside the award on grounds that this *ex parte* meeting occurred in violation of the arbitration agreement, which stipulated that the parties had the right to appear before the tribunal at all 'scheduled hearings'.⁵³ The application judge found that the *ex parte* meeting without notice to the parties breached the procedure agreed to by the parties and, as a result, constituted a ground upon which she could set aside the award under Article 34(2)(a)(iv).⁵⁴ After considering several factors, she refused to do so, in large measure due to the subsequent death of a material witness and the actual prejudice that would result if the award were set aside and the matter was heard afresh.⁵⁵ On appeal, the Court of Appeal did not find a bright line rule across Canadian jurisdictions when it comes to applications to set aside awards under Article 34(2) on grounds involving procedural errors in the arbitration process.⁵⁶ The Court concluded that recent Canadian and international decisions reveal an approach that looks to both the extent that the breach undermines the fairness or the appearance of fairness of the arbitration, and the effect of the breach on the award itself.⁵⁷ The application judge's decision was upheld.

iii Investor–state disputes

Canada signed the ICSID Convention⁵⁸ on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention (which came into force on

52 2016 ONCA 135 [*Popack*].

53 *Ibid.*, Paragraphs 1–6.

54 *Popack v. Lipszyc*, 2015 ONSC 3460, Paragraph 61.

55 *Ibid.*, Paragraph 70.

56 *Popack*, footnote 52, Paragraph 30.

57 *Ibid.*, Paragraph 31 et seq. The Ontario Court of Appeal considered the following Canadian cases: *Rbéaume v. Société d'investissements l'Excellence inc.*, 2010 QCCA 2269, Paragraphs 50–61; *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, Paragraphs 127–129. The Court of Appeal considered the following international cases: *Kyburn Investments Limited v. Beca Corporate Holdings Limited* [2015] NZCA 290, Paragraphs 28, 47 (New Zealand Court of Appeal); *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* [2014] FCAFC 83, Paragraphs 111, 154 (Federal Court of Australia).

58 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524, online: ICSID, icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

1 December 2013) and became a contracting state.⁵⁹ Several provinces and territories have passed the necessary implementing legislation to assist in bringing the ICSID Convention into force in Canada.⁶⁰

Canada is also a party to the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention) which was ratified on 5 June 2015.⁶¹ 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 also continued to pursue international investment agreements in the form of FIPAs and FTAs. Canada currently has 30 FIPAs in place (in 2015, agreements with Côte d’Ivoire and Serbia were brought into force), has signed a further seven and has concluded negotiations on five more. Additionally, negotiations are ongoing for another 10 treaties.⁶²

On 5 October 2015, it was announced that Canada, the USA, Mexico and nine other states⁶³ had concluded negotiations on the Trans-Pacific Partnership (TPP) free trade

59 ICSID, List of Contracting States and Other Signatories of the Convention (as of 28 April 2014) online: ICSID icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates &ReqFrom=Main.

The federal Settlement of International Investment Disputes Act (SC 2008, c 8) was given royal assent on 13 March 2008 and came into force on 1 November 2013, the same day the ICSID Convention was ratified. See laws-lois.justice.gc.ca/eng/acts/S-8.5/page-1.html#docCont.

60 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).

61 The 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), online: UNCITRAL, www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

62 For a complete list of FIPAs, see Global Affairs Canada, Foreign Investment Promotion and Protection (FIPAs), online: Global Affairs Canada, www.international.gc.ca/trade-agreement-s-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

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

agreement.⁶⁴ The TPP contains 30 chapters covering trade and trade-related issues,⁶⁵ and it includes a detailed dispute resolution mechanism to allow investment disputes to be addressed through investor–state dispute settlement.⁶⁶ Under Section 4 of Article 9.19 of the TPP, a claimant may submit a claim to arbitration under:

- a* the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the party of the claimant are parties to the ICSID Convention;
- b* the ICSID Additional Facility Rules, provided that either the respondent or the party of the claimant is a party to the ICSID Convention;
- c* the UNCITRAL Arbitration Rules; or
- d* if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.

The TPP was signed on 4 February 2016⁶⁷ and is still subject to ratification by the signatories, including Canada.

On 29 February 2016, Canada announced the conclusion of the legal review of another significant trade agreement with the EU: the Comprehensive Economic and Trade Agreement (CETA).⁶⁸ As part of the legal review, Canada and the EU agreed on modifications related to investment protection and investment dispute resolution provisions.⁶⁹ The dispute resolution provisions in the CETA can be contrasted with those in the TPP, as investment disputes under the CETA are to proceed before members of a tribunal established by the CETA Joint Committee (comprising representatives of both Canada and the EU).⁷⁰ In addition to the creation of a tribunal to hear cases under Article 8.27, Article 8.28 of the CETA directs the creation of an appellate tribunal that may, under Subsection 8.28(2), ‘uphold, modify or reverse a Tribunal’s award’ on any of the following:

- 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

64 Global Affairs Canada, Trans-Pacific Partnership (TPP), Chronology of events and key milestones, online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/rounds-series.aspx?lang=eng.

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

66 Ibid., Chapter 9: Investment.

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

68 Global Affairs Canada, Canada–European Union Comprehensive Economic and Trade Agreement, online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng.

69 Ibid. For a full version of the text after legal review, see: European Commission, In focus: Comprehensive Economic and Trade Agreement (CETA), online: European Commission see: trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [CETA].

70 CETA, footnote 69 at Article 26.1.

- 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) through (b).

This dispute settlement procedure is unique and novel when compared with the procedures set forth in Canada's other FIPAs and FTAs. Notably, Article 8.29 states that Canada and the EU are to 'pursue the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes'. The CETA is currently being translated, and remains subject to the domestic processes required to approve the agreement in both Canada and the EU.⁷¹

Current investor–state disputes

According to the government,⁷² Canada is currently a party to nine active international investment disputes. Of these, we will discuss the most recent dispute filed against the government – *CEN Biotech Inc v. Government of Canada* – along with the recent decision rendered in *Mesa Power Group LLC v. Government of Canada*. We will also discuss Canada's applications to set aside the decisions issued in *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada* and in *Clayton/Bilcon v. Government of Canada*. One further dispute, *Eli Lilly and Company v. Government of Canada*, is scheduled to be heard in May 2016.⁷³ The ultimate determination in *Eli Lilly* will help to further define the minimum standard of treatment required under Article 1105 of NAFTA and the limits for expropriation under Article 1110.⁷⁴

CEN Biotech Inc v. Government of Canada deserves mention because it is the most recent dispute initiated against the government and for the quantum of damages sought. In this case, four American investors delivered a notice of intent to submit a claim to arbitration under NAFTA claiming US\$4.8 billion in damages as a result of an inability to obtain a licence for a medical marijuana facility in the province of Ontario.⁷⁵ The government's overview of the claim states that in September 2013, CEN Biotech applied under the Marijuana for Medical Purposes Regulations (MMPR) to become a licensed producer of medical marijuana.⁷⁶ It is a requirement under the MMPR that senior personnel of an entity

71 Ibid.

72 Global Affairs Canada, Cases Filed Against the Government of Canada, online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng.

73 Global Affairs Canada, Cases Filed Against the Government of Canada, *Eli Lilly and Company v. Government of Canada*, online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng.

74 For a more comprehensive discussion on the *Eli Lilly* dispute, see the sixth edition of this Review.

75 Government Affairs Canada, Cases Filed Against the Government of Canada, *CEN Biotech Inc v. Government of Canada*, Notice of Intent (1 September 2015) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/cen-bio-01.pdf.

76 Global Affairs Canada, Cases Filed Against the Government of Canada, *CEN Biotech Inc v. Government of Canada*, online: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/cen-bio.aspx?lang=eng.

applying for a licence apply for and obtain certain security clearances. In February 2015, Health Canada advised CEN Biotech that it would not issue a security clearance to its CEO, and shortly thereafter the company's application for a licence was denied. In the notice of intent, the investors allege that the regulatory process undertaken by Health Canada was inconsistent with Article 1105 (minimum standard of treatment) along with Article 1102 (national treatment) and Article 1103 (most favoured nation treatment).⁷⁷

Mesa Power Group LLC v. Government of Canada was a dispute involving the provincial government of Ontario's Feed-in-Tariff Program (FIT Program) and regulatory process for wind power.⁷⁸ In this dispute the claimant alleged that Canada, through various sub-national entities within the province of Ontario, 'imposed sudden and discriminatory changes to the established scheme for renewable energy' under the FIT Program that breached several obligations under NAFTA.⁷⁹ In an early objection as to jurisdiction, Canada alleged that the claimant failed to respect the minimum six-month time period set out in Article 1120(1) of NAFTA.⁸⁰ This Article states, in relevant part, '(e)xcept as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration'.

While some of the investor's claims met this six-month requirement, the claimant served its notice of intent to submit a claim to arbitration on 6 July 2011, only two days after certain events relating to the FIT Program. The Notice of Arbitration, dated 4 October 2011, also included mention of various alleged actions in August 2011 as part of the claim.⁸¹ Canada raised an early objection that the tribunal did not have jurisdiction to hear any claims that failed to meet this six-month time period.⁸² Canada's request to bifurcate the proceedings,

77 Ibid.

78 See the discussion in the fourth edition of this Review. Government Affairs Canada, Cases Filed Against the Government of Canada, *Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 2 (18 January 2013) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ mesa-po-03.pdf; and Government Affairs Canada, Cases Filed Against the Government of Canada, *Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 3 (28 March 2013) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ mesa-po-04.pdf.

79 Government Affairs Canada, Cases Filed Against the Government of Canada, *Mesa Power Group LLC v. Government of Canada*, Notice of Arbitration (4 October 2011) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ mesa-02.pdf, Paragraph 6 [*Mesa*].

80 Government Affairs Canada, Cases Filed Against the Government of Canada, *Mesa Power Group LLC v. Government of Canada*, Government of Canada Objection to Jurisdiction (3 December 2012) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ mesa-04.pdf, Paragraph 2 [*Mesa* Government of Canada Objection].

81 *Mesa*, footnote 79 at Paragraph 15.

82 *Mesa* Government of Canada Objection, footnote 80 at Paragraphs 33–38.

to hear its objection to jurisdiction based on Article 1120(1) as a preliminary matter,⁸³ was ultimately denied, with the tribunal stating that if this argument was ultimately successful, it ‘may take steps to accommodate’ Canada’s costs.⁸⁴

The tribunal held that on the specific facts in this matter, the events giving rise to the claim had occurred more than six months prior to the submission of the claim to arbitration, and within the requirements of Article 1120(1).⁸⁵ The two specific events at issue within the six-month period were ‘merely developments of events that had taken place earlier’ and were ‘interrelated with earlier events’.⁸⁶ Further, as a matter of jurisdiction the tribunal confirmed that it is not necessary for the claimant to suffer a loss or damage for a claim to exist under Article 1116. This provision ‘merely requires the investor to ‘claim’ that it has incurred harm due to the breach’, and it is not necessary to prove a loss or damage prior to the merits phase of the arbitration.⁸⁷

After considering a further temporal objection by Canada,⁸⁸ and finding against Canada’s objections that the acts of certain entities involved in the FIT Program could be attributed to the state, the tribunal ultimately held that the FIT Program constituted procurement by the government of Ontario. Accordingly, the obligations under Articles 1102 on national treatment and 1103 on most favoured nation treatment of the NAFTA did not apply to the claimant’s investment.⁸⁹ This decision is also noteworthy for the majority’s finding that there was no breach of Article 1105, as despite issues with the manner in which the government of Ontario implemented its non-renewable energy programme, the effects of these issues did not amount to a breach of Article 1105.⁹⁰ These reasons will add to the growing body of determinations on the content and scope of Article 1105 of NAFTA.

83 Government Affairs Canada, Cases Filed Against the Government of Canada, *Mesa Power Group LLC v. Government of Canada*, Government of Canada Request for Bifurcation (3 December 2012) (UNCITRAL), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ mesa-05.pdf, Paragraph 12.

84 *Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 3 (28 March 2013) (UNCITRAL), online: Permanent Court of Arbitration, PCA Case No. 2012-17, www.pccases.com/web/sendAttach/294, Paragraphs 75, 77, 81(vii).

85 *Mesa Power Group LLC v. Government of Canada*, Award (24 March 2016) (UNCITRAL) online: Permanent Court of Arbitration, PCA Case No. 2012-17, www.pccases.com/web/sendAttach/1675, Paragraphs 308–318.

86 *Ibid.*, Paragraph 310.

87 *Ibid.*, Paragraphs 311–313.

88 *Ibid.*, Paragraphs 319–338.

89 See *Ibid.*, Paragraphs 387–460 for the full discussion. Canada also alleged that NAFTA Article 1106(1)(b) on domestic content did not apply as a result of Article 1108 and the FIT Program being a matter of procurement; however, the tribunal found it did not have jurisdiction over matters until there was an investment by the claimant within Canada (see *Ibid.* Paragraphs 324–338 and 466).

90 *Ibid.* Paragraph 682. See also *Mesa Power Group LLC v. Government of Canada*, Concurring and Dissenting Opinion of Judge Charles N Brower (25 March 2016) (UNCITRAL) online: Permanent Court of Arbitration, PCA Case No. 2012-17: www.pccases.com/web/sendAttach/1676, Paragraphs 2–24.

In February 2015, the *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada* case came to an end almost eight years after the dispute arose. The claimants in *Mobil* were American investors in two offshore oil production projects. The regulatory scheme for offshore oil production at the time of investment subjected the investors to certain performance requirements, including research and development (R&D), and education and training (E&T) expenditure requirements.⁹¹ Several years after the claimants' initial investment, the regulatory agency overseeing these R&D and E&T requirements adopted new guidelines (2004 Guidelines), compelling the claimants to spend considerably more on R&D and E&T than required previously. The tribunal was asked to consider whether Canada had imposed on the investors impermissible performance requirements within the meaning of Article 1106(1)(c), subject to the exceptions to such performance requirements within Article 1108.⁹²

In 2012, the majority decision of the tribunal on liability and principles of quantum concluded that on the claimants' specific facts, the 2004 Guidelines were inconsistent with the exceptions enumerated in Article 1108(1) of NAFTA, and therefore remained an impermissible performance requirement. The majority of the tribunal determined that the claimants were only entitled to 'actual damages' that 'occur when there is a firm obligation to make a payment and there is a call for payment or expenditure, or the occurrence of payment or expenditure has transpired'.⁹³ Following submissions on the actual damages that had been suffered by the claimants,⁹⁴ in February 2015 the tribunal issued its final award, where, by majority, it awarded Mobil Investments Canada Inc C\$13.893 million plus interest and Murphy Oil Corporation C\$3.401 million in damages plus interest for the period 2004 to 2012.⁹⁵

In May 2015, Canada filed a notice of application in the Ontario Superior Court of Justice to set aside the tribunal's final award on the grounds that it contravened Article 34(2)(a)(iii) of the federal Commercial Arbitration Act,⁹⁶ alleging that the award addressed a dispute outside of the submission to arbitration.⁹⁷ Canada argued that the tribunal used the wrong criteria to determine whether the 2004 Guidelines fell within Canada's reservations under Article 1108 of NAFTA with the effect that Article 1106(1)(c) could not apply and

91 *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada*, Decision on Liability and on Principles of Quantum (Public Version) (22 May 2012) (ICSID Case No. ARB(AF)/07/4), online: ICSID, icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2933_En&caseId=C262 at Paragraphs 34–93.

92 *Ibid.*, Paragraph 172.

93 *Ibid.*, Paragraph 440.

94 *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada*, Award on Quantum of Damages (Public Version) (20 February 2015) (ICSID Case No. ARB(AF)/07/4), online: ICSID, icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC6732_En&caseId=C262, at Paragraphs 3–26.

95 *Ibid.*, Paragraph 178.

96 CAA, footnote 10.

97 *Attorney General of Canada v. Mobil Investments Canada Inc and Murphy Oil Corporation*, 2016 ONSC 790.

there could be no breach or basis to award damages.⁹⁸ This amounted to a jurisdictional issue because, in Canada's submission, the matter went to the existence of obligations under Article 1106 of NAFTA. The Court dismissed Canada's application, finding it failed to raise a 'true jurisdictional' issue and that this was a challenge to the merits of the decision.⁹⁹

In October 2014, both claimants delivered separate, new notices of intent to submit a claim to arbitration against the government for damages suffered from 2012 to 2014 due to the continued application of the 2004 Guidelines.¹⁰⁰ Both claimants are seeking damages for expenditures that would not have been made in the ordinary course of business in the absence of the 2004 Guidelines since 2012 until the date of a future award, and their respective portions of both offshore oil production projects' outstanding obligations under the 2004 Guidelines as of the date of a future award.¹⁰¹

In March 2015, the tribunal's award on jurisdiction and liability¹⁰² in *Clayton/Bilcon v. Government of Canada* concluded that Canada had breached both Article 1105 (minimum international treatment standard)¹⁰³ and Article 1102 (national treatment standard) while completing an environmental assessment of the investor's quarry project in the province of Nova Scotia.¹⁰⁴ In a decision discussed in detail in last year's chapter, the tribunal ultimately found that Canada, through the regulatory environmental assessment process, had breached both NAFTA Article 1102 (national treatment), and a majority found the state in breach of Article 1105 (minimum standard of treatment).

In June 2015, the Attorney General of Canada filed a notice of application with the Federal Court to set aside the tribunal's award alleging that it contravened Articles 34(2)(a) (iii) and 34(2)(b)(ii) of the federal Commercial Arbitration Act,¹⁰⁵ which, respectively, relate to awards addressing disputes outside of the submission to arbitration and awards in conflict

98 Ibid., Paragraphs 15–30. This argument mirrors the findings of Professor Sands, QC, in dissent, as noted at Paragraph 27.

99 Ibid., Paragraph 40.

100 Government Affairs Canada, Cases Filed Against the Government of Canada, *Mobil Investments Inc v. Government of Canada*, Notice of Intent (16 October 2014) (ICSID), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/20141016MobilCanadaNoticeofIntent.pdf; Government Affairs Canada, Cases Filed Against the Government of Canada, *Murphy Oil Corporation v. Government of Canada*, Notice of Intent (16 October 2014) (ICSID), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/20141016MurphyOilNoticeofIntent.pdf.

101 In January 2015, Mobil filed a notice of arbitration for damages in excess of C\$20 million. Government Affairs Canada, Cases Filed Against the Government of Canada, *Mobil Investments Inc v. Government of Canada*, Notice of Arbitration (16 January 2015), (ICSID), online: Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/MobilRequestArbitrationREDACTED.pdf.

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

103 Ibid., Paragraphs 23–24.

104 Ibid., Paragraphs 588–604.

105 CAA, footnote 10.

with public policy.¹⁰⁶ 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.¹⁰⁷ At the time of writing, this matter has yet to proceed beyond the filing of the application to set aside.

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. Unfortunately, specific differences among Canadian jurisdictions retain the potential to complicate arbitration and related proceedings in some circumstances. To the extent such differences are of concern to inter-jurisdictional or foreign entities looking to arbitrate in Canada, the work of the ULCC in this regard is promising. The Uniform ICAA will, if adopted by Canadian governments, form a strong basis for more unified international commercial arbitration legislation throughout Canada. These efforts, combined with the recent 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 become more prevalent.

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

107 *Ibid.*, Paragraph 15.

Appendix 1

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