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.

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Canada is a federal state composed of 10 provinces and three territories. 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 for domestic arbitration matters and the International Commercial Arbitration Act (Alberta ICAA) for international commercial arbitration matters. Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections of the Civil Code of Quebec (Civil Code) and the Code of Civil Procedure.
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
consolidate arbitrations\textsuperscript{15} or on applications to set aside arbitral awards.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.

\section{II THE YEAR IN REVIEW}

\subsection{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)\textsuperscript{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.\textsuperscript{20} In 1986, the ULCC sought to harmonise Canada’s international arbitration legislation and developed a Uniform International Act as a template

\begin{itemize}
  \item \textsuperscript{15} See the Alberta ICAA at Section 8(1)(a) and the Ontario ICAA at Section 7(1)(a).
  \item \textsuperscript{16} See the Alberta ICAA at Schedule ‘B’, Article 34 and the Ontario ICAA at Schedule ‘B’, Article 34.
  \item \textsuperscript{17} CAA at Section 6.
  \item \textsuperscript{19} For more detail, see the fourth edition of this Review.
  \item \textsuperscript{20} For more information about the ULCC, see www.ulcc.ca/en.
\end{itemize}
for Canadian jurisdictions to implement the Model Law. 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. 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), 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. The Uniform ICAA attaches the New York Convention as Schedule I, and the 2006 Model Law as Schedule II, 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. 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.

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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), 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) and began providing, through ICDR Canada, administrative support and services for arbitration and mediation throughout the country. 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*, 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,

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

30 ICDR, About ICDR Canada, online: ICDR, www.icdr.org/icdr/faces/icdrservices/icdr canada; jsessionid=y0V-bd050znWQEu97Qin2dvANwYWACpojmAOllpBnSg_WwoHM My6Df877808853?_afrLoop=395344106572578&_afrWindowMode=0&_afrWindowId=null #%64%3F_afrWindowId%3Dnull%26_afrLoop%3D39534410657257%26_afrWindow Mode%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 TTTWI 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. TTTWI 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. TTTWI 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 TTTWI was entitled to specific performance was contingent on the outcome of the arbitration.39 The Court thus directed that the arbitration between TTTWI 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 TTTWI 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.
40 Ibid., Paragraphs 82–83.
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, 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 similarly concludes that where a valid arbitration agreement exists, the Court must refer the parties to arbitration. While determined under the domestic Arbitration Act, 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.

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, 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. 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. 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. 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.

41 Ibid., Paragraph 72–75.
42 Ibid., Paragraph 75.
43 2016 SKCA 46.
44 Ibid., Paragraph 54.
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*\(^\text{52}\) 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’\(^\text{53}\). 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).\(^\text{54}\) 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.\(^\text{55}\) 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.\(^\text{56}\) 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.\(^\text{57}\) The application judge’s decision was upheld.

iii Investor–state disputes

Canada signed the ICSID Convention\(^\text{58}\) on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention (which came into force on

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\(^{52}\) 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.


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

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. 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.

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

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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).


63 The other states are Australia, Brunei, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam.
agreement. The TPP contains 30 chapters covering trade and trade-related issues, and it includes a detailed dispute resolution mechanism to allow investment disputes to be addressed through investor–state dispute settlement. 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 2016 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). As part of the legal review, Canada and the EU agreed on modifications related to investment protection and investment dispute resolution provisions. 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). 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

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66 Ibid., Chapter 9: Investment.


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: trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [CETA].

70 CETA, footnote 69 at Article 26.1.
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.
74 For a more comprehensive discussion on the Eli Lilly dispute, see the sixth edition of this Review.
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)xcpect 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,
to hear its objection to jurisdiction based on Article 1120(1) as a preliminary matter, was ultimately denied, with the tribunal stating that if this argument was ultimately successful, it ‘may take steps to accommodate’ Canada’s costs.

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). 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’. 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.

After considering a further temporal objection by Canada, 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. 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. These reasons will add to the growing body of determinations on the content and scope of Article 1105 of NAFTA.


Ibid., Paragraph 310.

Ibid., Paragraphs 311–313.

Ibid., Paragraphs 319–338.

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).

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

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92 Ibid., Paragraph 172.
93 Ibid., Paragraph 440.
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. 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.

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. 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.

In March 2015, the tribunal's award on jurisdiction and liability in Clayton/Bilcon v. Government of Canada concluded that Canada had breached both Article 1105 (minimum international treatment standard) and Article 1102 (national treatment standard) while completing an environmental assessment of the investor's quarry project in the province of Nova Scotia. 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, 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.
103 Ibid., Paragraphs 23–24.
104 Ibid., Paragraphs 588–604.
105 CAA, footnote 10.
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. 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.

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107 Ibid., Paragraph 15.
Appendix 1

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Dennis Picco, QC, M CIArb, is a partner in the firm’s litigation and dispute resolution group in Edmonton and served as managing partner of Dentons Canada LLP’s Edmonton office for a number of years. His practice focuses on litigation and dispute resolution in the areas of contract disputes, construction, software development and intellectual property, risk management and insurance, and he is called to the bar in both Alberta and the Northwest Territories. Mr Picco has an extensive arbitration practice involving construction, shareholder and contract disputes, and is a member of the Chartered Institute of Arbitrators, International Arbitration. He also represents various companies in the construction industry, including architects and engineers in professional liability disputes. In his litigation practice, Mr Picco has appeared at all levels of court in Alberta and before the Supreme Court of Canada. He is recognised by _Best Lawyers in Canada_ as one of Canada’s leading lawyers in the areas of alternative dispute resolution (2014–2016) and corporate and commercial litigation (2012–2016), and he received the distinction and recognition of Queen’s Counsel in 2012.

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Rachel Howie is a partner in the firm’s litigation and dispute resolution group in Calgary where her practice focuses on complex energy, environmental and commercial arbitration and litigation matters. She 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. Ms Howie 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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