“Major Milestones in Canadian Arbitration Law”: Highlights from the Canadian Journal of Commercial Arbitration’s Launch

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With a feature presentation on “Major Milestones in Canadian Arbitration Law”, the *Canadian Journal of Commercial Arbitration* launched last week before an online audience of several hundred arbitration practitioners, scholars, and students from around the world.

“Our aspiration for the Journal is to contribute materially to bringing together, and strengthening the professional bond, among all those interested in and involved with Canadian Arbitration”, stated Executive Editor Barry Leon, in his opening remarks on behalf of the Editorial team. “Canada and Canadian practitioners should speak and act together on issues on common interest. Our journal—your journal—is an important step in that direction. It is an expression our desire to build the community, and in doing so, to help raise the profile globally of Canada as a seat and venue, and of Canadian arbitration and its participants.”

The launch webinar, held on June 25th, was hosted and sponsored by Arbitration Place Virtual. Executive Editor Gerry Ghikas thanked the Editorial Advisory Board

(EAB) for its support and contributions. Speaking on behalf of the EAB, Yves Fortier remarked, “the journal is another indication that Canadians are at the forefront of arbitration, not only in Canada but throughout the world”. Another EAB member, Louise Barrington, praised the Journal for filling a notable gap in the Canadian arbitration scene: a forum for regular discussions on salient issues, to promote commercial arbitration in Canada and raise standards for Canadian lawyers. “The Journal’s launch marks”, observed Barrington, “the maturation of the Canadian arbitration community and a sign that Canadians need no longer leave home to build a practice and find success in international arbitration.”

The webinar featured a panel discussion on “Major Milestones in Canadian Arbitration Law”, for which the panelists were the contributors to Journal’s inaugural issue: J. Brian Casey (Bay Street Chambers), Joel Richler (Bay Street Chambers), Douglas F. Harrison (Harrison ADR), Prof. Alyssa King (Queen’s University), Prof. Janet Walker (Osgoode Hall Law School, York University, Arbitration Place, *CJCA* Executive Editor), and Prof. Anthony Daimsis (University of Ottawa Faculty of Law, Littleton Chambers), *CJCA* Case Comments and Recent Developments Editor). The discussion was moderated by *CJCA* Managing Editor Prof. Joshua Karton (Queen’s University).

Canadian courts and competence-competence

Joel Richler, whose article in the inaugural issue dealt with Canadian courts’ attitudes toward competence-competence, referred to two Supreme Court of Canada judgments as the key milestones: *Dell v Union des consommateurs*, 2007 SCC 34, and *Seidel v TELUS Communications*, 2011 SCC 15. Under those decisions, a Canadian court will only decide a jurisdictional question if the dispute over the tribunal’s jurisdiction relates to questions of law alone, or where, on a question of mixed fact and law, the question can be determined by a superficial review of the evidence and the stay application was not brought only for dilatory purposes.

Richler characterized the principle as signifying Canadian courts’ deference to arbitration and arbitrators’ decisions on their own jurisdiction. Pure questions of law are rare, given the Supreme Court’s decision in *Sattva Capital Corp. v Creston Moly* Corp. (2014 SCC 53) that contractual interpretation is generally a question of mixed fact and law. Richler concluded that Canadian courts are following *Dell* and

Seidel, and construing the exceptions to competence-competence narrowly. He described respect for competence-competence as a key measure metric of Canada's arbitration-friendliness. On that score, he concluded, Canadian courts are in good shape.

Setting-aside applications and the standard of review

Brian Casey also discussed the relationship between courts and arbitrators, but from the other end of the arbitral process: setting-aside applications. Casey observed that setting-aside applications under the provinces' domestic and international arbitration legislation have been confused by some courts with judicial review of administrative tribunal decisions, leading to inconsistent approaches to the standard of review. In *Sattva*, at issue was a right of appeal on a point of law from a domestic arbitration award, where the court held that on the appeal itself, the standard of review will in most cases be reasonableness; that is, courts will only overturn unreasonable determinations of law by arbitrators. *Sattva* may have led some lower courts to wrongly import the standards for judicial review into setting-aside applications. (See, *e.g.*, *FCA Canada Inc v Reid-Lamontagne*, 2019 ONSC 364; *Elchuck v Gulansky*, 2019 SKQB 23, aff'd 2019 SKCA 108.) However, the recent Ontario Court of Appeal decision in *Alectra Utilities Corporation v Solar Power Network*, 2019 ONCA 254 gives reason for optimism. The Court held that on a setting-aside application, it is irrelevant whether the arbitrator's decision was reasonable or unreasonable, correct or incorrect; it matters only whether the arbitrator had the jurisdiction to make their decision. Casey expressed a hope *Alectra* will be a milestone on the road to better judicial treatment of setting-aside applications.

Removal of arbitrators for incapacity or undue delay

Douglas Harrison's presentation examined a delicate subject, the removal of arbitrators who are unwell, overcommitted, or just plain slow. When will courts intervene to remove an arbitrator in the name of supporting the arbitration process? These cases are governed by the seldom-invoked Article 14 of the UNCITRAL Model Law, and the provisions of Canadian legislation that implement this article. Harrison's research showed that Canadian courts and arbitration

institutions will do almost anything they can to preserve ongoing arbitrations, so the bar to remove an arbitrator for incapacity or delay is extremely high. Harrison described this as a sign of Canada's arbitration-friendliness as a jurisdiction. Arbitration-friendliness is often reduced to non-intervention by courts. However, a well-functioning arbitration system needs occasional court intervention to support the arbitration process or to defeat challenges to the system.

The development of the international arbitration bar in Canada

Prof. Janet Walker's remarks were of a different character, and surveyed the development of the international arbitration bar in Canada. Not that long ago, the arbitration community was tiny, and most of the figures who developed international arbitration in Canada are still active. Professional societies like the ICC's Canadian Committee, the Chartered Institute of Arbitration (CIArb)'s Canadian Branch, and the ADR Institute of Canada—and, as in many countries, the Willem C. Vis International Commercial Arbitration Moot—have expanded, strengthened, and united the arbitration community. The newly established CanArbWeek will give Canada not just a place in the world but a place on the calendar, where the community can focus its energies and pool its talents. The *Canadian Journal of Commercial Arbitration* constitutes the last piece of the puzzle: to provide thought leadership, foster collaboration, and advance understanding of arbitration in Canada.

Contrasting perspectives on recent case law

The remaining speakers focused on some recent case law coming from the Ontario Court of Appeal. Profs. Alyssa King and Anthony Daimsis offered contrasting opinions of the 2019 ONCA decision in *Heller v Uber Technologies Inc*. (The Supreme Court's decision on the appeal in that case was released the day after the webinar, and was the subject of some speculation by the panelists; the decision has already been discussed on the Blog.) At issue in *Heller* is the enforceability of the arbitration clause in Uber's service agreement with UberEats drivers, which required all disputes be mediated and then arbitrated in the Netherlands under the ICC Rules. The majority at the Court of Appeal held that the arbitration clause was invalid both because it was unconscionable and because it purported to contract

out mandatory provisions of Ontario's *Employment Standards Act*.

Daimsis criticized the decision on a number of bases. In particular, he took the ONCA to task for ignoring the international origin of the Ontario legislation—the UNCITRAL Model Law—and failing to interpret it in accordance with the principles of uniform interpretation codified in Article 2A. Daimsis contrasted the ONCA's somewhat parochial approach in *Heller* (and in another ONCA judgment issued around the same time, *Disney v American International Reinsurance*), with a recent decision of the Eastern Caribbean Supreme Court, Commercial Division, *Hualon Corp v Marty Limited*, which he described as a positive example of a court taking the Model Law seriously. By surveying recent decisions interpreting the Model Law from around the world, considering leading treatises, and taking into account the Model Law's *travaux*, the court seated in the British Virgin Islands took an approach properly aligned with international practice.

Alyssa King put cases like *Heller v Uber* and the Supreme Court's 2019 decision in *Telus v Wellman* into an international context, contrasting them in particular with developments in the United States. The arbitration clause in *Heller* recalls the debate over arbitration clauses the United States, and the US Supreme Court's apparent hostility to class arbitration. The American courts seem to have in mind a narrow conception of arbitration as an individualized and quick system of justice outside of the courts, and have given free rein to American business to draft individual arbitration clauses, combined with class action waivers, to deter employees and consumers from making legal claims. Such arbitration clauses are, ironically, designed to prevent arbitration. King queried how Canadian courts might come up with a more nuanced response to this access-to-justice problem than the US Supreme Court's blanket pro-individual arbitration stance. Her proposed solution was to bring forward new legislation to protect parties harmed by abusive arbitration agreements, or through the development of case law such as *Uber*, in which the Ontario Court of Appeal applied the doctrine of unconscionability to preserve the ability of weaker parties to adhesive contracts to bring their claims in court.

The milestones of Canadian arbitration law mark out a road toward greater sophistication and stronger court support for arbitration. But there have been some wrong turns, especially on the confused Canadian jurisprudence on the standard of review. This issue has been further complicated by the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, which

reset the standard applied by courts when reviewing the decisions of administrative tribunals, but may (it seems unintentionally) have affected the standard of review for (at least domestic) arbitral awards as well. (The *Vavilov* controversy has previously been discussed on the Blog.) The *Uber* case as well (*Uber Technologies Inc. v Heller*, 2020 SCC 16), has generated uncertainty about the impact of unconscionability doctrine on the validity of arbitration clauses, uncertainty that may not be resolved by the Supreme Court's decision in that case. The overall trend is toward greater differentiation between domestic and international arbitrations, and between commercial and employment or consumer arbitrations. That road may lead to greater fairness, but also to greater unpredictability.

The CJCA is hosting a free webinar discussing the important new Canadian Supreme Court's decision in Uber v Heller*, and its implications for both arbitration law and the gig economy. The Webinar is* ***this Friday, July 3, from 12:00-1:30pm EDT.*** *You can view the program and register for the webinar here. Registration will be kept open until 1 hour before the webinar.*