

## NAFTA Canada Update 2016

### INTRODUCTION

In 2016 Canada continued its modernization of the arbitration legislation in effect federally, provincially and territorially. The courts continued to make decisions which support effective arbitration processes. Canada received its first non-NAFTA arbitration claim and one of the primary institutional providers of arbitration services, the ADR Institute of Canada adopted new arbitration rules.<sup>1</sup>

### THE ADRIC ARBITRATION RULES

The ADRIC arbitration rules were initially adopted in late 2015 and were updated in late 2016. This is the first full revision of the rules since the first ADRIC national arbitration rules were developed in the late 1990's. The new ADRIC arbitration rules were designed with several goals in mind. The first was to have arbitration rules which were consistent with the practice federally and in all Canadian provinces, including Quebec. The second was to adopt modern best practices for the conduct of arbitrations and third was to provide an institutional framework for international arbitration by adopting the UNCITRAL arbitration rules where the dispute is international.

Major changes to the existing Rules and practice included the following:

- (a) The appointment of interim arbitrator where Urgent Interim Measures are required (Rule 3.7)
- (b) A new process for production of documents based on the exchange of lists and request to produce (Rule 4.13)
- (c) A new process to deal with pre-hearing examinations and written examination where the default position is no right to pre-hearing oral examinations except by order of the tribunal (Rule 4.14)
- (d) A new privacy and confidentiality requirement (Rule 4.18)
- (e) A provision for tribunal experts (Rule 4.21)
- (f) Incorporation of a process of formal settlement offers both with prejudice and without prejudice (Rule 4.22)
- (g) A specific immunity provision (Rule 6.1)
- (h) A simplified arbitration procedure (Rule 6.2)

The ADRIC Arbitration Rules can be found on the ADRIC website [www.adric.ca](http://www.adric.ca).

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<sup>1</sup> The writer acknowledges the contribution of Dentons Canada lawyers Gordon Tarnowsky, QC, Rachel Howie, Chloe Snider and Holly Cunliffe

## TRENDS IN LEGISLATION IN THE COURTS

Canadian legislation governing international commercial arbitration is governed by the Federal *Commercial Arbitration Act*<sup>2</sup> and individual statutes in Canadian provincial and territorial jurisdictions which are similar to the Canadian Arbitration Act. Canadian legislation is largely based on the Model Law<sup>3</sup> and incorporates the New York Convention<sup>4</sup> on the recognition and enforcement of foreign arbitral awards (“New York Convention”). Since the provincial and territorial legislation is not uniform and where the assistance of the court is required, such assistance is usually sought from the provincial or territorial Superior Courts rather than the Federal Court of Canada.

Following the adoption by the Uniform Law Conference of Canada (ULCC) of the Uniform International Commercial Arbitration Act (Uniform ICAA) in 2014<sup>5</sup> the ULCC also adopted a substantially revised Uniform Arbitration Act<sup>6</sup> in December 2016.

The proposed Uniform ICAA includes the New York Convention and the 2006 Model Law. The proposed Uniform ICAA incorporates a 10 year limitation period for applications to recognize and enforce awards under Articles III, IV and V of the New York Convention or Articles 35 and 36 of the 2006 Model Law and provides for interjurisdictional enforcement of arbitral awards. The ULCC also took steps to modernize the domestic practice of arbitrations in Canada by adopting a revised uniform *Arbitration Act* which confirms the principle of party autonomy and sets boundaries to the scope of judicial intervention. Many of the key elements of the uniform ICAA were incorporated into a new ICAA enacted by Ontario in March 2017. It is anticipated that further legislative revisions will follow in other Canadian provinces.

## INVESTOR-STATE DISPUTES

Canada ratified the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (the Mauritius Convention) in 2015.<sup>7</sup> Since then Canada has entered into a number of foreign investment promotion and protection agreements (FIPAs) and free trade agreements (FTAs). Canada has entered into more than 30 FIPAs and in 2016 brought into force agreements with Hong Kong, Mongolia

<sup>2</sup> Commercial Arbitration Act, RSC 1985, c 17 [CAA] at Section 5(2)

<sup>3</sup> 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 [2006 Model Law].

<sup>4</sup> 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&mtdsg\\_no=XXII-1&chapter=22&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec).

<sup>5</sup> ULCC, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), online: [http://www.ulcc.ca/images/stories/2014\\_pdf\\_en/2014ulcc0014.pdf](http://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf).

<sup>6</sup> The Uniform Arbitration Act adopted December 1, 2016, online: [http://www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0017.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0017.pdf).

<sup>7</sup> The Mauritius Convention was signed on 17 March 2015, and was ratified on 5 June 2015. For more information, see UNCITRAL, UNCITRAL Texts & Status, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), online: UNCITRAL, [www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html).

and Cameroon. Canada continued to negotiate with a number of other countries, including India, Pakistan and the United Arab Emirates.<sup>8</sup> Early discussions on a Canada-China FTA commenced in 2016.

In February 2016, Canada, the USA, Mexico and 9 other states signed the Trans-Pacific Partnership (TPP). In January 2017, the USA withdrew from the TPP and it is unratified by the other states.<sup>9 10 11</sup>

In February 2017, the EU parliament approved the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. After CETA is ratified by all member states, disputes under CETA will be heard by 3 member tribunals and there will be an appellate tribunal with power to uphold, modify or reverse a Tribunal's award.<sup>12 13</sup> There are nine (9) current NAFTA Disputes.<sup>14</sup>

The first non-NAFTA investment treaty claim made against Canada is a dispute before ICSID under the *Canada-Egypt Foreign Investment Promotion and Protection Agreement*. It was commenced on May 28, 2016 by a Request for Arbitration in connection with the Canadian telecommunications market. The claim is for CAD \$1.32 billion.<sup>15</sup>

A discrimination claim under NAFTA was made by Resolute Forest Products Inc. claiming USD \$70 million based on breaches of NAFTA Article 1110 (expropriation and compensation), Article 1105 (minimum standard of treatment) and Article 1102 (national treatment). Canada requested bifurcation on the basis of a limitations argument and Article 21(4) of the UNCITRAL Rules. The bifurcation order was made by the tribunal. It is likely that the initial matter will be heard during the course of 2017.<sup>16 17</sup>

In April 2017, the Ontario government paid approximately CAD \$28 million to Windstream Energy LLC (U.S.A.) arising from a tribunal ruling based on an Ontario moratorium on offshore wind energy

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<sup>8</sup> For a complete list of FIPAs and FTAs, see Global Affairs Canada, Foreign Investment Promotion and Protection (FIPAs), online: Global Affairs Canada, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>.

<sup>9</sup> Global Affairs Canada, Trans-Pacific Partnership (TPP), online: Global Affairs Canada: <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng>.

<sup>10</sup> The other states are Australia, Brunei, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam.

<sup>11</sup> 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](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/final_agreement-accord_finale.aspx?lang=eng).

<sup>12</sup> Global Affairs Canada, Canada-European Union Comprehensive Economic and Trade Agreement, online: Global Affairs Canada, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

<sup>13</sup> *Ibid* at Article 8.27. The 15 members shall be comprised of: 5 EU nationals, 5 Canadian nationals, and 5 non-party third country nationals.

<sup>14</sup> 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](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng) and Global Affairs Canada, Dispute Settlement, Foreign Investment Promotion and Protections Agreements (FIPAs), online: Global Affairs Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/index.aspx?lang=eng>.

<sup>15</sup> Global Affairs Canada, Dispute Settlement, *Global Telecom Holdings S.A.E. v. Government of Canada*, online: Global Affairs Canada, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth\\_sae.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth_sae.aspx?lang=eng).

<sup>16</sup> Government of Canada, Cases Filed Against the Government of Canada, *Resolute Forest Products Inc. v. Government of Canada* [Resolute], online: Global Affairs Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/resolute.aspx?lang=eng>.

<sup>17</sup> *Resolute Forest Products Inc. v. Government of Canada*, Procedural Order No. 3 (3 November 2016), PCA Case No. 2016-13, online: PCA, <http://www.pccases.com/web/sendAttach/2044>.

development under Ontario legislation and regulations. The award was founded on a breach of the fair and equitable standard treatment under NAFTA Article 1105.<sup>18 19 20</sup>

A claim for breach of fair and equitable treatment under NAFTA Article 1105 and expropriation and breach of Article 1110 against Canada were dismissed in the *Eli Lilly and Company v. Government of Canada* case. Canada was awarded legal costs and costs of the arbitration totaling in excess of CAD \$5,000,000.00.<sup>21</sup>

The *Clayton/Bilcon v. Government of Canada*<sup>22</sup> application under Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the federal CAA continues in 2016 with Canada applying to set aside the tribunal's award on the basis that it relates to awards on disputes outside of the submission to arbitration and awards in conflict with public policy.<sup>23</sup> In August 2015, Canada unsuccessfully attempted to stay the damages phase of the hearing pending the result of its application in Federal Court. The Investor's motion in Federal Court requesting a stay of the set aside proceedings pending the outcome of the damages phase was denied, but the Investors are appealing to the Federal Court of Appeal.<sup>24</sup> It is anticipated that the results of these applications will elaborate on the public policy grounds for setting aside an award and provide some guidance with respect to bifurcation practices.

## OUTLOOK AND CONCLUSION

The arbitration law and practice in Canada continues to evolve in an arbitration-friendly direction. The development of new national and international arbitration rules by the ADR Institute of Canada together with the trend toward legislative adoption of the recommendations of the Uniform ICAA (including the incorporation of the New York Convention, the 2006 Model Law and the 10 year limitation period are progressive steps in that evolution. Further direction from the Courts in 2017 is likely to add predictability on issues of public policy and bifurcation in connection with Investor-State disputes.

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<sup>18</sup> *Windstream Energy LLC (U.S.A.) v. Government of Canada* [Windstream], Award (27 September 2016), PCA Case No. 2013-22, online: PCA, <http://www.pcacases.com/web/sendAttach/2036>.

<sup>19</sup> Shawn McCarthy, "U.S. company Windstream Energy sues Canada for \$28-million in NAFTA case" (21 February 2017) *The Globe and Mail*, online: *The Globe and Mail*, <http://www.theglobeandmail.com/report-on-business/economy/us-company-windstream-energy-sues-canada-for-28-million-in-nafta-case/article34104737/>.

<sup>20</sup> Allison Jones, "Ontario Pays \$28-million awarded to wind company over offshore wind moratorium," (13 April 2017) *Metro News*, online: *Metro News*, <http://www.metronews.ca/news/toronto/2017/04/13/ontario-pays-28-million-awarded-to-wind-company-over-offshore-wind-moratorium.html>.

<sup>21</sup> *Eli Lilly and Company v. Government of Canada*, Final Award (16 March 2017), ICSID Case No. UNCT/14/2, online: ICSID, [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf).

<sup>22</sup> *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](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-12.pdf).

<sup>23</sup> *Attorney General of Canada v. Clayton/Bilcon*, Notice of Application (16 June 2015), Toronto T-1000-15 (FC), Paragraph 15.

<sup>24</sup> *Attorney General of Canada v. Clayton/Bilcon*, Notice of Appeal (3 March 2017), Toronto A-80-17 (FCA).