

# MEMORANDUM

To: NAFTA 2022 Judicial Subcommittee

Date: May 19, 2017

From: Tina Cicchetti

File/Matter No.: 999002.16767

Re: Report on Intersessional Work  
Status of Judicial Training in Canada on Arbitration Issues

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The Judicial sub-committee agreed to research work done in each country by judicial institutes and organizations on the level of familiarity, knowledge, and support judiciaries have for ADR and arbitration more generally. This memo provides a summary of the information gathered for Canada.

In Canada, the National Judicial Institute (“NJI”) has primary responsibility for designing and providing training for new judges and ongoing training for members of the judiciary in Canada. I spoke with Adèle Kent, Executive Director of the NJI, who advised that the current training for new judges does not contain any component on arbitration specifically. The view is that most judges will encounter very few arbitration-related cases over the course of their career and that counsel in such cases are well-equipped to educate the judges through their submissions on any relevant arbitration sources. The NJI does offer programs for judges on mediation skills. The approach to judicial ADR differs in each province, so training is often done at the local level and is not standardized.

Fabien Gélinas, Professor at McGill University in Montreal, and Joshua Karton, Professor at Queen’s University in Kingston, have an agreement in principle from the NJI for the production of a “bench book” on arbitration law, a guide for judges that would be publicly available. It is expected that this project will progress this year and likely be completed at some point in 2018.

In Ontario, there is a seminar being offered to superior court judges. Bill Horton, through the Toronto Commercial Arbitration Society (“TCAS”), has prepared this seminar. The first session will be held on June 28, 2017. A description of this seminar is attached to this memo.

Toronto Commercial Arbitration Society  
Seminar on Commercial Arbitration  
for Justices of the Ontario Superior Court

The growth of commercial arbitration has placed increasing demands on the bar and the bench to have an understanding of the history, values and legal framework of arbitration as a contractual form of dispute resolution, distinct from court litigation. In Ontario, we have the benefit of jurisprudence at the level of the Supreme Court of Canada and the Ontario Court of Appeal which is very supportive of commercial arbitration. However, there have been instances in which applicable legislative provisions, case law and defining concepts relating to arbitration have been overlooked – both by counsel and the court. The national and international prominence that commercial arbitration currently receives magnifies such lapses to the detriment of Ontario’s well-deserved reputation as an excellent venue for commercial arbitration.

In this course, leading members of the commercial arbitration community will review important aspects of arbitration law and practice for justices of the Ontario Superior Court. While the course is designed with three two hour sessions as described below, it is recognized that not all judges will wish to, or be able to, attend all three sessions. Therefore, the first session will be an overview of important arbitration concepts and legislation. The content for all three sessions is set out on the next page.

The faculty for the course will be:

J. Brian Casey (Author: Arbitration Law of Canada: Practice and Procedure)

William G. Horton (Course Director: TCAS Gold Standard Course in Commercial Arbitration)

Janet Walker (Author: Castel and Walker: Canadian Conflict of Laws)

#### Proposed Agenda

##### Session 1

An overview of important arbitration concepts and legislation

- A brief history of arbitration
- Present day theories regarding the nature of arbitration

- Party autonomy
- Separability of the arbitration clause or agreement
- Competence/competence
- The New York Convention
- The Model Law
- Overview of the present-day non-international legislation in Ontario and Canada

## Session 2

An examination of the role judges are called upon to play in an arbitration before an award is rendered

- The role of the Courts in institutional vs ad hoc arbitration
- Front-end involvement of the courts
  - o appointing an arbitrator
  - o challenges to arbitrators
  - o interim measures
  - o stay of court proceedings
  - o jurisdiction as a preliminary issue

## Session 3

An examination of the role judges are called upon to play after an award has been rendered

- Appeals and setting aside
- Recognition and enforcement
- [An overview of the arbitral process and market forces]