# The Ontario Arbitrator

*Charted Institute of Arbitrators,*
*Toronto Chapter*
**Summer 2014**


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*November 19, 2014*
*2:30-6 pm + dinner*
*Albany Club, Toronto*

*"Listen to the Customers–International Arbitration from the Client's Perspective."*

**Chapter Elections**


## CHAIR'S MESSAGE: THOMAS HEINTZMAN, OC, QC

Dear CIArb Toronto Chapter Members:

In this Newsletter I will bring exciting news about the **Chapter's Fall Symposium to be held on November 19, 2014** which you will not want to miss. I will also bring you up to date on the activities of the Toronto Chapter of the Chartered Institute of Arbitrators (CIArb) and the proposal to establish a Canadian branch of the Institute.

The CIArb Toronto Chapter now has over 80 members which include many leading practitioners in the field of arbitration and mediation. The executive of the chapter includes the following persons: Brian Casey, Ralph Cuervo-Lorens, Doug Cutbush, Igor Ellyn, Scott Fairley, Gordon Kaiser, Kathleen Kelly, William Neville, Lisa Parliament, Paul Tichauer, Janet Walker and me.

**The 2014 Fall Symposium: November 19, 2014**

First, let me tell you about the Symposium which the Chapter is planning for November 19, 2014 at the Albany Club. The theme of the Symposium will be on **"Listen to the Customers–International Arbitration from the Client's Perspective."**

Some of Canada's outstanding international commercial arbitrators will appear on the afternoon panels, including:

- Hon. Marc Lalonde, PC, OC, QC
- David R. Haigh, Q.C., Arbitrator, Partner, Burnet, Duckworth & Palmer, LLP
- Jeffrey P. Elkinson, Arbitrator, Director, Conyers Dill & Pearman, and past president of the Chartered Institute of Arbitrators
- J. Brian Casey, B.Eng., J.D., LL.M., FCIArb.

In addition, experienced corporate counsel will give their views about the value – or lack of value – of international commercial arbitration:

- Carolyn Dahl Rees, Vice President, Regulatory and Compliance, TransAlta Corporation
- Leonora Hoicka, Associate General Counsel, Intellectual Property Law, IBM Corporation
- L. Brian Swartz, Executive Vice President, Legal & Commercial Services, Aecon Group Inc.

The Symposium will be followed by a dinner at The Albany Club. The after-dinner speaker will be The Hon. Marc Lalonde, PC, OC, QC who will speak on his "Reflections on the difference between a Politician and an International Arbitrator." You will not want to miss this address by one of Canada's foremost international arbitrators. PLEASE TURN TO PAGE 3


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## Spotlight

**on a Director of the Toronto CIArb. Chapter**

***In each issue of this newsletter, we introduce our readers to a distinguished member of the Toronto Chapter Board of Directors***

***In this issue, we are pleased to feature***

**Prof. Janet Walker**
Professor of Law,
Osgoode Hall Law School,
York University
CIArb. Academic Advisor
Chartered Arbitrator
Past Chair, CIArb. Toronto

**Janet Walker** is a full professor and past Associate Dean at Osgoode Hall Law School. She specializes in private international law, international commercial arbitration and complex litigation. Janet is the author of Castel and Walker: Canadian Conflict of Laws, the General Editor of The Civil Litigation Process and Class Actions in Canada, and author of many other publications on international dispute resolution.

Janet has served as an ICC and ICDR arbitrator in various matters and she consults and serves as expert in matters of international litigation and arbitration and complex litigation. She is a member of the panel of foreign arbitrators of the ICDR, CIETAC, SHIAC, KLRCA and a member arbitrator of Arbitration Place, Toronto, and Outer Temple Chambers, London.

In May 2014, Prof. Walker was appointed to the newly created position of Academic Advisor to the CIArb. In that role, she will assist in the enhancement and expansion of the international educational program.

The new program initiatives will broaden the course offerings beyond aspiring arbitrators to the range of participants in the arbitral process; and they will extend the global reach of the CIArb courses and increase their local relevance. Janet has been working with CIArb members from around the world to enhance the experience of the many fine participants who volunteer their valuable time to teach with the CIArb and to those who benefit from the courses that have been offered and that might be offered.

Janet has taught at Monash in Australia, at Haifa in Israel, as a Hauser Global Visiting Professor at NYU in New York and in its joint program with NUS in Singapore, as a Leverhulme Visiting Professor at Oxford, and for the past thirteen years, as a Foreign Research Professor at Tunis II. Janet has served as faculty advisor to the Osgoode Vis International Commercial Arbitration Moot for the past thirteen years. allowed to have a written copy of his address, to share with our fellow CIArb members.



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## *Chair's Message: by Tom Heintzman, OC, QC*

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You will be receiving a Save the Date Notice about this event shortly. This event will be free for the first 50 CIArb members who register. Last year's event sold out in 48 hours. So please register as soon as you receive the notice if you wish to attend.

**Canadian Branch Application**

The members of the Toronto Chapter Executive have been giving consideration to a proposal to establish a Canadian branch of CIArb. We have been canvassing CIArb members to seek their views on this proposal. You may have received an email asking for your views. I hope that you have responded so that we have the opinions of all members. So far, the response has been overwhelmingly in favour of the proposal. Please feel free to contact me or any member of the executive of the Chapter if you would like to express your views about this proposal or to get involved.

**Chapter Activities Over The Past Year**

Last fall, the Chapter co-organized a CPD program with the ADR section of the

Ontario Bar Association. The program was held on October 3, 2013 and was entitled: Successfully Navigating an International Commercial Arbitration.

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On November 21, 2013, the Chapter held a highly successful Symposium on Professionalism in International Arbitration at Arbitration Place, Toronto followed by a dinner at the National Club. The event was a sell-out.

The first panel of the Symposium discussed confidentiality issues, the second panel discussed conflict of interest and the third panel discussed counsel misconduct and professionalism in international arbitration. At the dinner, Robert B. Davidson, Executive Director of JAMS Arbitration Practice delivered a fascinating address about the evolution of the international commercial arbitration and mediation.

**Annual Meeting**

The Chapter will hold its annual meeting at the Symposium on November 19, 2014. At that time the election of the executive committee and Chair will occur. If you would like to stand for these positions please let me know as soon as possible.

Please feel free to contact me at any time about the activities of the CIArb Toronto Chapter or to indicate your interest in becoming involved in the Chapter. You may contact me at: tgh@heintzmanadr.com.

Tom Heintzman
Chair, Toronto Chapter
Chartered Institute of Arbitrators



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***SPOTLIGHT on Professor Janet Walker***
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Janet has served as an International Advisor to the American Law Institute in its project with Unidroit to develop Principles and Rules of Transnational Civil Procedure; and as a member of the Uniform Law Conference of Canada Committee on National Class Actions, of the IBA Task Force on Guidelines on Recognition and Enforcement of Collective Redress Judgments, of the ILA Committee on International Civil Litigation, of the ABA Canada/US Class Working Group on Protocols for Parallel Class Actions, and of the Uniform Law Conference of Canada's Project on Uniform International Arbitration Legislation.

Janet has been President of the Canadian Branch of the International Law Association, Chair of the Toronto Chapter of the Chartered Institute of Arbitrators, and she is Secretary General of the International Association of Procedural Law. She co-chaired the 2006 Conference of the ILA and the 2009 Conference of the IAPL. She was the Law Commission of Ontario's first Scholar in Residence and she has been the Common Law Advisor to the Federal Courts Rules Committee since 2006.

More information can be found at www.janet-walker.com.

## *SAVE THE DATE*

**CIArb. Toronto Chapter**

**Fall Symposium**

**Wednesday,**
**November 19, 2014**
**Symposium - 2:30 – 6 pm**
**Dinner – 7 pm**

***"LISTEN TO THE CUSTOMERS – INTERNATIONAL ARBITRATION FROM THE CLIENT'S PERSPECTIVE."***

***Hon. Marc Lalonde, PC, OC, QC***
***Guest Speaker***

**The Albany Club**
**91 King East, Toronto, ON M5C 1G3**
***(See Chair's message for more details)***



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## Arbitration Case Update

### B.C. Court of Appeal holds that a Mareva injunction may be issued to enforce an international commercial arbitration award:

*Sociedade-de-Fomento Industrial Private Ltd. v. Pakistan Steel Mills Corp. (Private) Ltd, , 2014 CarswellBC 1499, 2014 BCCA 205*

*(submitted by Thomas G. Heintzman, OC, QC, Toronto)*

**The British Columbia Court of Appeal recently held that a Mareva injunction may be issued to enforce an award of an international commercial arbitration.** The court overturned the lower court's decision which had denied that remedy based upon alleged material non-disclosure.

**Background Facts**

The appellant SFI is an Indian company and the respondent PSM is a Pakistani state corporation. SFI obtained an arbitral award against PSM which PSM failed to pay the award despite repeated demands for payment. SFI learned that PSM owned a load of coal which was to be shipped out of Vancouver. SFI filed a petition in the B.C. Supreme Court seeking payment of the amounts owed under the arbitral award. Before the hearing of its petition, SFI obtained an ex parte Mareva injunction preventing the vessel from leaving British Columbia or PSM from disposing of assets in British Columbia without first paying into court security for the award.

PSM alleged that SFI had wrongly obtained the ex parte injunction. It said that SFI had not explained to the judge who issued that injunction why it could not enforce the arbitral award in Pakistan, and had wrongly told that judge that it would have challenges in enforcing that award in Pakistan.

PSM effectively took the position that the award should be first enforced in Pakistan and only then should it be enforced in another jurisdiction. The motions judge hearing the motion to set aside the injunction held that the failure of SFI to explain why it couldn't enforce the award in Pakistan was a material non-disclosure and she set aside the injunction.

**Decision of the B.C. Court of Appeal**

In allowing the appeal, the Court of Appeal held that the premises of the motion judge's decision were incorrect. First, the court noted that the enforcement of international commercial arbitration awards is not based on comity arising from a connection of the dispute or arbitral award to the regime of enforcement. Rather, it is based upon an enforcement regime arising from an international treaty – the New York Convention. That regime requires the contracting states to enforce international arbitral awards made pursuant to the laws of another contracting state.

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**Case Comment continued from page 5**


***Sociedade-de-Fomento Industrial Private Ltd. v. Pakistan Steel Mills Corp. (Private)* Ltd, 2014 CarswellBC 1499, 2014 BCCA 205**

That enforcement is without regard to any connection of the dispute to the enforcing state, a connection which is presumed to exist for the purpose of enforcement, both for purposes of final enforcement and any interlocutory steps toward enforcement.

Second, the court said that the decision to issue a Mareva injunction arising from an award of an international commercial arbitration tribunal depends upon the justice and convenience in doing so. The court stated the following principles that should be applied to that decision:

"The overarching factor in granting the injunction is whether doing so achieves a balance of justice and convenience between the parties… Depending on the facts of the case important factors may include the merits of the underlying claim, the risk of dissipation of the asset, the balance of convenience and the interests of third parties…" (emphasis added)

Third, the enforcement of an international commercial arbitration award in one contracting state does not depend upon whether efforts to enforce the award have been made in another contracting state more connected to the party against whom the award was made. The court did say that the efforts to enforce the award may be relevant to a decision by the court to issue an injunction – or might be made relevant by the applicant submitting evidence about those efforts enforcement first in Pakistan.

The court said that "the chambers judge erred was in her implicit assumption that there was an onus on the appellant to turn first to Pakistan's courts because of the parties' limited association with British Columbia".

The B.C. Court of Appeal acknowledged that the availability of enforcement proceedings in Pakistan could be a factor in determining whether a Mareva injuction should be issued. However, the court held that there had been no misrepresentation about the efforts to enforce the arbitral award in Pakistan and that the motion judge had applied the wrong test to that issue: "[The motion judge] reviewed the appellant's disclosure through the lens of her erroneous conclusion that the onus was on the appellant to establish it could not enforce the award in Pakistan. As I have already said that is not the test."

**Discussion**

This decision of the British Columbia Court of Appeal provides a strong endorsement of the enforcement regime relating to international commercial arbitration awards. However, the proper place of a Mareva injunction in that enforcement process may be debatable. On the one hand, there is an award already, so that the injunction can be seen as a post-judgment enforcement of the award. On the other hand, the award has not been


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**Case Comment continued from page 6**

***Sociedade-de-Fomento Industrial Private Ltd. v. Pakistan Steel Mills Corp. (Private)* Ltd, 2014 CarswellBC 1499, 2014 BCCA 205**

recognized in the state in which it is now sought to be enforced, in this case British Columbia, so that the ***Mareva* injunction** can be seen as pre-judgment enforcement.

The British Columbia Court of Appeal effectively neutralized that debate by holding that the real question is not whether the enforcement is pre or post judgment, but whether it is just and convenient to grant such an injunction. In making that decision, the court pointed to a number of factors that are important from the standpoint of international commercial arbitration.

First, under the ***International Commercial Arbitration Act*** of British Columbia (and most Canadian provinces) and the **UNCITRAL Model Law**, the grounds for refusing to enforce the arbitral award are very limited. So the first question on the injunction motion –is there a strong case on the merits? - has to be answered from that perspective.

Second, the applicant for the injunction does not have to prove that the award can or cannot be enforced in another jurisdiction. This conclusion shows that the system for the enforcement of international commercial arbitration awards is truly an international system. It is not based upon a presumption that the enforcement of the award is tied to any specific jurisdiction.

Tom Heintzman, OC, QC, FCIArb.
Chartered Arbitrator and Mediator
Chair, Toronto Chapter, CIArb.

**The CIArb. Toronto Chapter welcomes new members.**

***Expand your knowledge of arbitration law and practice***

***Embark on the path to Fellowship and become a Chartered Arbitrator***

***Meet and network with other arbitrators***

***Become a director of the Toronto Chapter***

***Help the establishment of a new Canadian Branch of the CIArb.***

***For details, please email Tom Heintzman, Chair tgh@heintzmanadr.com***

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## Arbitration Case Update

### Deal or No Deal: Mediation, Confidentiality and the Supreme Court of Canada

*Union Carbide Canada Inc. v. Bombardier Inc. 2014 SCC 35*
*(submitted by William L Neville, Ottawa)*

**When is confidentiality absolute in mediation?**

That issue was before the Supreme Court of Canada in Union Carbide Canada Inc. v. Bombardier Inc. The parties were embroiled in a multi-million dollar lawsuit spanning a decade. Bombardier – the manufacturer of Sea-Doo personal watercraft – commenced an action in March 2000 in Quebec Superior Court ("the Quebec Action") against Union Carbide which manufactured and supplied gas tanks for the Sea-Doo.

Some of the tanks had allegedly cracked, others had exploded resulting in both property damage and personal injury and sparking product recalls by Bombardier in 1997, 1998 and 2000. In the Quebec Action, Bombardier alleged that two types of gas tanks were unfit for their intended use, the damages claimed being in excess of $30 million.

The parties finally agreed to mediate and attended a mediation session in Montreal in April 2011, executing the mediator's standard agreement ("the mediation contract") to the effect that anything transpiring at the mediation was confidential.

During the mediation, Union Carbide – by then merged with Dow Chemical Canada Inc. ("Dow") - tabled a $7 million offer to settle that Bombardier asked be left open for acceptance within 30 days. Hence, the mediation session concluded without a settlement. Within the 30 days, Bombardier advised Dow of its willingness to accept the $7 million for "capital, interest and costs".

Shortly thereafter, Dow provided a final release for Bombardier to execute which, once signed, would have absolved Dow of liability not only in Quebec and with respect to the two gas tank models but anywhere in the world and for any Dow gas tanks. Bombardier balked, - taking the position that the mediation concerned only those claims advanced in the Quebec Action.

Further dialogue foundered and Bombardier brought a motion in Quebec Superior Court to enforce the settlement and, thereby, to introduce into evidence communications both at and subsequent to the mediation. Dow counter-applied to strike certain portions of that evidence as a violation of the confidentiality clause in the mediation contract.

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Case Comment continued from page 8

***Union Carbide Canada Inc. v. Bombardier Inc. 2014 SCC 35***

The judge, at first instance, agreed with Dow but Bombardier successfully appealed to the Quebec Court of Appeal, leaving Dow no option but to appeal to the Supreme Court of Canada.

Wagner, J., in authoring the Supreme Court of Canada's judgment, acknowledged the vital role played by settlement privilege ("the Privilege") in promoting the settlement of disputes, a principle reinforced by the Court's 2013 decision in Sable Offshore Energy Inc. v. Ameron International Corp., [2013], 2 S.C.R. 623 (Sable Offshore Energy") He then identified the recognized exception to the Privilege: namely, that a party is permitted to produce confidential communications to establish the existence or the scope of a settlement ("the Exception").

The judgment, in its analysis, moved from the general to the particular: (i) does a confidentiality clause in a private mediation contract override the Exception? And (ii) did the Bombardier-Dow mediation contract specifically override the Exception? In both instances, the court answered in the negative. A communication leading to settlement, the Court stated, ceases to be privileged if disclosing it is necessary in order to prove the existence or scope of the settlement.

Thus, the Exception makes sense because it serves the same purpose as the Privilege: to promote settlements. As such, the mere fact of signing a mediation agreement with a confidentiality clause does not automatically displace the Privilege and the Exception. If parties seek to override the Exception, the parties must do so clearly by their contractual language. Otherwise, it cannot be presumed that the parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace the Exception that also serves to promote a settlement.

Drawing that conclusion, the court was not satisfied – applying general principles of contractual interpretation to the mediation contract – that Bombardier in signing that agreement, had intended to sign away its ability to prove a settlement.

The decision makes clear that only unequivocal contractual language in a mediation agreement will override the Exception. Where such language is absent from the mediation agreement, a party will still be allowed to introduce confidential communications into evidence in court in order to prove that a settlement was achieved.

William L. Neville, MCIArb.
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# Arbitration Case Update

## Supreme Court of Canada limits the basis for appeals from commercial arbitration awards

*Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53*
*(submitted by Igor Ellyn, QC, CS)*

**The Supreme Court of Canada's recent decision in *Sattva* will greatly limit appeals from commercial arbitration awards in British Columbia and in other Canadian jurisdictions whose arbitration legislation limits arbitral appeals to questions of law with or without leave.**

Prior to *Sattva*, the prevailing wisdom was that an issue of contract interpretation was a question of law. The SCC has now decided that the historical approach of treating contractual interpretation as a question of law should be abandoned.

The case turned on the arbitrator's interpretation of the date when shares of Creston should be valued to determine the amount of a finder's fee payable to Sattva. The agreement called for the finder's fee to be paid in shares of Creston.

On appeal, the BC Court of Appeal granted leave on the basis that an error of contract interpretation was a question of law. The Court then set aside the arbitrator's award on the basis that the arbitrator's interpretation of the contract produced an absurd result.

Writing the unanimous judgment of a 7-judge Supreme Court panel, Rothstein J. held that "contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in the light of the factual matrix."

The Court noted that only rarely will a question of law be completely isolated from an analysis of the facts of the case. Courts should exercise caution when attempting to isolate a question of law in a dispute over the proper interpretation of a contract.

**Analysis**

The Ontario *Arbitration Act, 1991*, SO 1991, c 17, s.45, has a very similar appeal provision as the BC Arbitration Act. Unless the arbitration specifically provides for appeals on questions of law or on mixed questions of fact and law, leave should only be granted if the court is satisfied that (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; *and* (b) determination of the question of law at issue will significantly affect the rights of the parties.

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**Case Comment continued from page 10**

***Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53***

The *Sattva* decision will make it more difficult to succeed on motions for leave to appeal from a domestic arbitral award. In most cases, appellant's counsel will be unable to isolate a question of law which can be extricated from the factual matrix and surrounding circumstances of the case. Most appeal issues are, as the SCC held, mixed questions of fact and law.

The growth of commercial arbitration was fostered by the desire for confidentiality, speedy resolution and finality. If a protracted appellate process follows the arbitral award, many of the benefits of arbitration are compromised. *Sattva* is a positive development for finality of an arbitration award without appellate intervention.

In light of this decision, counsel may have to recommend revisions to existing arbitration agreements to permit appeals without leave on mixed questions of fact and law. Counsel will also have to take *Sattva* into account when advising about new arbitration clauses. The advice will be driven by balancing the desire for finality against the benefits of scrutiny of the arbitrator's award by an appellate court.

Will an arbitrator render a better award if s/he knows that the award is subject to appeal? This question could be the subject of lively debate and a myriad of points of view.

Igor Ellyn, QC, CS, FCIArb., Toronto
Director, CIArb. Toronto Chapter
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