



TCAS NEWSLETTER - FALL 2021

Welcome to what we hope will be a semi-regular newsletter for TCAS members. We have a number of interesting dinners and seminars planned for this year, along with other projects that are underway including seeking leave to intervene at the Supreme Court of Canada in *Peace River Hydro Partners v. Petrowest Corporation*. See all the news below, and catch up on what your fellow members have been up to. If you have any items for future newsletters, please be sure to send them along to one of our executive members or our consultant/administrator, Tracy Thompson-Demeter (emails listed at the end of this newsletter).

CONTENTS

- Dinner Series
- Seminars
- Intervention - *Peace River Hydro Partners v. Petrowest Corporation*
- CanArbWeek Webinar
- Website Update - Arbitration Matters
- Canadian Journal of Commercial Arbitration - New Issue
- Gold Standard Course
- Vis and Vis East Moots
- *Tall Ships* Sailing to the Court of Appeal
- Member News
 - Recent Moves
 - Upcoming Speaking Engagements
 - Prior Speaking Engagements
 - Honours
 - Publications
- Membership
- The 2021-22 Executive

DINNER SERIES

The popular TCAS dinner series returns on November 4, 2021, in collaboration with the Queen & Beaver Pub. Join us to hear Frank Newbould QC's presentation, "What I Wish I Knew Then", on making the transition from counsel to judge to arbitrator. The evening starts at 5:30 pm. The event is free but if you're in the City of Toronto, you can order dinner from the Queen & Beaver for \$30. Check your email Inbox for the event announcement and menu or go to the [Upcoming Events](#) page on the website. Please email Tracy Thompson-Demeter at tracy@arbitrateintoronto.ca to reserve your place (payment via e-transfer to tcaspayments@gmail.com).

SEMINARS

TCAS is planning a slate of seminars for the 2021-22 season – webinars for now, but hopefully transitioning to in-person soon.

First up, TCAS is planning a webinar together with the New York International Arbitration Center on witness memory in arbitrations. We're hoping to hold it the first week of December.

And early in the new year, we are anticipating hosting an event with Arbitral Women on Diversity and Allyship.

Stay tuned for details!

INTERVENTION - *Peace River Hydro Partners v. Petrowest Corporation*

The intersection of insolvency and arbitration will soon be considered by the Supreme Court of Canada, which in early June 2021 granted leave to appeal from the B.C. Court of Appeal's decision in *Peace River Hydro Partners v. Petrowest Corporation*, 2020 BCCA 339.

In this case, a receiver (appointed by the Alberta Court of Queen's Bench) purported to disclaim several arbitration clauses while seeking to enforce the agreements in which they were contained, in an action in the B.C. Supreme Court. The counterparties unsuccessfully sought a stay of the litigation under s. 15 of the B.C. *Arbitration Act*, a decision that was upheld (albeit for different reasons) on appeal. The Supreme Court will consider not only whether receivers enforcing contractual agreements that contain arbitration clauses are bound as parties to arbitration clauses but also whether the doctrine of separability allows the disclaiming of an arbitration agreement while pursuing rights under the same agreement.

TCAS has applied for leave to intervene in this important case and is being represented (pro bono) by former TCAS co-chair Rahat Godil and Justin Manoryk of Blake, Cassels & Graydon LLP. Other TCAS members acting for parties who have also filed motions for leave to intervene are Christina Doria of Baker & McKenzie LLP (for the Chartered Institute of Arbitrators (Canada)

Inc.), Lisa Munro, Earl Cherniak QC and Cynthia Kuehl of Lerner's LLP (for Arbitration Place), and Eric Morgan of Kushneryk Morgan LLP (for Young Canadian Arbitration Practitioners).

CanArbWeek WEBINAR

A lot of very useful, practical advice was imparted during the TCAS CanArbWeek webinar on drafting arbitration clauses, held September 23. Among the takeaways from the discussion among Melissa Catalano (SVP & Associate General Counsel, Great-West Lifeco Inc.), Ben Knowles (Co-Chair International Arbitration, Clyde & Co LLP) and Luis Sarabia (Partner, Davies Ward Phillips & Vineberg LLP), moderated by Doug Harrison:

- A well-thought-out tiered clause can meet a major corporate objective of resolving disputes without putting the matter into the hands of a third party;
- Be careful about adding tribunal qualifications that end up overly reducing the pool of available arbitrators;
- Speak with local counsel before selecting a seat; and
- Be wary about limiting the scope of the tribunal's jurisdiction.

The recording will be available on the TCAS website soon.

Since there was no in-person event to cater as CanArbWeek was entirely virtual, TCAS made a \$1,500.00 donation to Lawyers Feed the Hungry (Toronto chapter).

WEBSITE UPDATE – Arbitration Matters

New content has been added to the [TCAS website](#) and some of what was already there is being re-organized.

The content of the website's Facilities, Articles and Resources sections has been updated and a new section was added earlier this year to provide access to the TCAS Arbitration Act Reform Committee's report and supporting documents. The report and next steps were a focus of the AGM in May. Thanks once again to Bill Horton for chairing the committee and guiding this vital report through to its conclusion.

In addition, there is now a link under the Articles section to Arbitration Matters (<https://arbitrationmatters.com/>), which provides timely summaries of key decisions on arbitration issues as they are released by courts across Canada. Originally started by Hon. Daniel Ubas, now of the Superior Court of Québec, Arbitration Matters contains over 500 searchable case summaries. It is edited by TCAS member and Gold Standard Course faculty member Lisa Munro. Other TCAS members contributing to Arbitration Matters are Cynthia Kuehl, Eric Morgan and Myriam Seers. You can sign up for Arbitration Matters updates by emailing Lisa Munro at lmunro@lerner.ca.

CANADIAN JOURNAL OF COMMERCIAL ARBITRATION - NEW ISSUE

Volume 2, Issue 1 of the *Canadian Journal of Commercial Arbitration* is now available at <https://cjca.queenslaw.ca/issues>, and features an article co-authored by TCAS executive committee member, Alison FitzGerald, “First Appellate-Level Decision on *Vavilov* and Arbitration Muddies Already Murky Waters”.

The CJCA's editors are always interested to receive articles, case comments and other submissions or expressions of interest. Anyone interested in discussing potential topics, should feel free to contact Prof. Josh Karton, the Managing Editor at joshua.karton@queensu.ca.

Also, be sure to check out the CJCA Blog at <https://cjca.queenslaw.ca/news>, which now includes an article on the TCAS CanArbWeek webinar. Submissions to the blog are also welcomed, allowing for comment on a fresh topic if you are not ready to commit to writing a whole article.

GOLD STANDARD COURSE

TCAS's Gold Standard Course in Commercial Arbitration is now in its sixth year of operation. This year, course co-founder Bill Horton and co-directors Joel Richler and Cynthia Kuehl handed over the reigns to Doug Harrison, who is overseeing the course with other TCAS faculty members Lisa Munro, Megan Keenberg and Eric Morgan, along with Prof. Josh Karton of Queen's University Faculty of Law.

The course got underway on September 11 with a presentation on the background and meaning of arbitration by one of TCAS's founding members, Brian Casey, and continues until May 7, 2022. Guest lecturers this year include a number of TCAS members including Louise Barrington, Stephanie Cohen, Christina Doria, Rahat Godil, Marc Goldstein, Bill Horton, Cynthia Kuehl, Barry Leon, David McCutcheon, Stephen Morrison, Joel Richler, Myriam Seers, Junior Sirivar and Janet Walker.

By teaching the class on Zoom, the geographic reach of the course has expanded – some of this year's 25 students sign on from St. John's, Ottawa and Vancouver. Students who complete the course are eligible to apply to the ADR Institute of Canada for the Q.Arb designation.

VIS & VIS EAST MOOTS

The problem for the 2022 Vis Moot and Vis East Moot was released on October 8. Many TCAS members participate each year as volunteer arbitrators for these moots, which will once again be held virtually. To register as an arbitrator, visit the moots' websites, www.vismoot.org and <https://cisgmoot.org/>.

TCAS member Louise Barrington is the founder and director of the Vis East Moot.

TALL SHIPS SAILING TO THE COURT OF APPEAL

In July, the Ontario Court of Appeal granted leave to appeal in *Tall Ships Landing Development Inc. v. The Corporation of City of Brockville*, 2019 ONSC 6597. This case concerns the standard of review of an arbitrator's decision. At first instance, Gomery J. found that the arbitrator determined the case on theories of law neither pleaded nor argued by the parties, thereby committing an error of law, which is subject to the correctness standard, not reasonableness.

MEMBER NEWS

Recent Moves

Ayodele Akenrole has recently joined the Arbitration Place roster and is currently teaching International Criminal Law at U of T's Centre for Criminology and Sociolegal Studies.

In July, John Judge became a founding arbitrator member of Arbitra International, which is based in London and Washington, DC (<https://arbitra.co.uk>).

Also in July, Myriam Seers joined Savoie Laporte, as the firm's resident partner in Toronto (<https://savoielaporte.com/>).

Arbitration Place launched its NextGen roster in April 2021, which includes TCAS members Robin Dodokin, Christina Doria, Megan Keenberg, Eric Morgan and Myriam Seers.

Upcoming Speaking Engagements

Barry Leon will be speaking at BVI Arbitration Week, on November 2 at 11 am AST, on a panel presented by Caribbean Arbitrators and the International Trust Arbitration Organisation (ITAO), "The Arbitration of International Trust Disputes: a dispute resolution opportunity for the Caribbean".

Louise Barrington will also be speaking at BVI Arbitration Week, on November 2 at 2 pm AST, on a panel presented by Arbitral Women, "ArbitralWomen on Diversity".

Paul Bates will be speaking at the Transparency Task Force's Symposium, on December 2 at 1:20 EST, on "How Would You Reform the Financial Sector in Canada".

Stephanie Cohen is a member of the Organizing Committee of New York Arbitration Week, scheduled for November 15-19, 2021.

Marv Huberman will be speaking at ADRIO's webinar, ADR Myths & Facts, Part 2, Arbitration, on October 27 at 5:30 pm.

Howard Krupat is one of three program directors of the Osgoode PD Certificate in Construction Law and will be presenting on alternative project delivery models and construction liens during this 5-day program running during October.

Prior Speaking Engagements

Alison FitzGerald and Janet Walker both spoke at Teynier Pic's Paris Arbitration Week webinar on September 22, "International Arbitration in Canada: Your Yearly Check-up".

Marc Goldstein and Myriam Seers both spoke at GAR Live New York on October 7, on the Year in Review panel.

Many TCAS members spoke at events during CanArbWeek: Ayodele Akenroye, Rahat Godil and Louise Barrington (ICDR Canada, September 20), Lisa Munro, Christina Doria, Brian Casey and Joel Richler (CIArb Canada Branch, September 20), Mike Schafler, Megan Keenberg, Bill Horton and Brian Casey (ADRIC, September 21), Rob Patton, Mike Schafler, Paul Tichauer and Janet Walker (Experts Panel, September 23), Doug Harrison (TCAS, September 23), and Janet Walker, Stephen Drymer and Myriam Seers (ICC Canada).

Cynthia Kuehl chaired the Law Society's Twelve-Minute Civil Litigator 2021 on September 28

Eric Morgan moderated a debate on the constitution of the arbitral tribunal at the 8th ICC YAF Global event in September and also spoke at The Advocates' Society's 11th Annual Securities Symposium on September 23 on directors & officers liability and risk management in securities litigation.

Myriam Seers moderated a panel on the current state of third-party funding in international arbitration during the World Arbitration Update on October 12.

Vandana Taxali spoke about NFTs on a panel for the International Trademark Association and at NFTCon, held in October.

Janet Walker spoke on the panel "Expert Evidence in International Arbitration: Saving the Party-Appointed Expert", at Bryan Cave Leighton Paisner's launch event for the 2021 Annual Arbitration Survey, held September 30, and also co-chaired GAR Live Atlanta on September 13.

Todd Weiler spoke on a panel, "The End of NAFTA Chapter 11 – Transition to USMCA, the Final NAFTA Legacy Disputes and the Future of US-Mexico Investment Disputes" during the World Arbitration Update on October 11.

Honours

Ricardo Alcolado Perez received his Q.Arb designation in August.

Brian Casey received the CIArb Award for Distinguished Service in Canadian Arbitration from

the CIArb Canada Branch at its annual symposium during CanArbWeek, September 20.

Christina Doria was named a Rising Star by Expert Guides in July.

Marina Sampson, one of Benchmark Canada's recently named top 50 Women Litigators in Canada, has been appointed Lead of Dentons Canada LLP's Litigation and Dispute Resolution group in Toronto.

Moataz Sherif received his Q.Arb from ADRIC in September.

Emily Sherkey was appointed as an ICC YAF Forum Representative 2021-23 for the North America Chapter in August.

Publications

Alison FitzGerald (co-author), "First Appellate-Level Decision on *Vavilov* and Arbitration Muddies Already Murky Waters", 2(1) Canadian Journal of Commercial Arbitration 142 (October 2021) (see link above).

Christina Doria (co-author), Canada chapter in *Chambers Global Practice Guide: Enforcement of Judgments 2021*.

Igor Ellyn and Robin Dodokin have launched a blog, Arbitration & Business Cases, about Ontario and other Canadian cases of interest to arbitration and litigation counsel:
<https://arbitrationandbusinesscases.ca/>

Scott Fairley, "International Law Matures within the Canadian Legal System: *Araya et al. v Nevsun Resources Ltd.*" 99(1) Canadian Bar Review 193 (2021), available at 2021 CanLIIDocs 102.

Megan Keenberg, "You Don't Look Like a Lawyer", *The Advocates' Society's Advocacy Matters* (Summer 2021) .

Cynthia Kuehl (co-author), chapters on Proportionality in Discovery and Trial Procedure, in Noel Semple (ed.), *Civil Procedure and Practice in Ontario*, 2021 CanLIIDocs 1981, available at <https://www.canlii.org/en/commentary/66972/>

Kathryn Manning (co-author), chapter on Enforcement of Orders, in Noel Semple (ed.), *Civil Procedure and Practice in Ontario*, 2021 CanLIIDocs 1981, available at <https://www.canlii.org/en/commentary/66972/>

Majid Pourostad, "The Parallel Proceedings between Litigation and Arbitration in International Business Disputes" in the third Iranian Yearbook of Arbitration (2019), just released by the Arbitration Center of Iran Chamber of Commerce.

Joel Richler, "A Second Kick: Appeals in Canadian Domestic Commercial Arbitration", 51

Advocates Quarterly 342 (2021).

Rebecca Shoom, chapter on Prevention of Proceedings That Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings), in Noel Semple (ed.), *Civil Procedure and Practice In Ontario 2021* CanLIIDocs 181, available at <https://www.canlii.org/en/commentary/66972/>

Chris Milburn and Eddie Tobis, “The Role of Experts in Mining Arbitrations”, in Global Arbitration Review’s *The Guide to Mining Arbitrations* (2d ed., 2021).

Janet Walker, “The Prague Rules: Fresh Prospects for Designing a Bespoke Process”, in Global Arbitration Review’s *The Guide to Evidence in International Arbitration* (2021).

MEMBERSHIP

Following the amendment to the TCAS Constitution made at the AGM in May, there are now three types of memberships available:

Full: Available to (i) Individuals having a designation equivalent to or higher than the Qualified Arbitrator designation conferred by the ADR Institute of Canada (ADRIC) (e.g., Qualified Arbitrator (Q. Arb.) or Chartered Arbitrator (C. Arb.) from ADRIC, or Membership (MCIArb) or Fellowship (FCIArb) in the Chartered Institute of Arbitrators); (ii) Lawyers in good standing who demonstrate a minimum of two years of experience in practising or managing domestic or international commercial arbitration; or (iii) Individuals who are active participants, or who have a strong interest in, the commercial arbitration process, demonstrated through a minimum of two years of experience engaging with domestic or international commercial arbitration processes, organizations, courses or conferences. Full Members with a recognized designation have the right to be listed on the TCAS website’s roster of arbitrators. Only Full Members in good standing have the right to vote at meetings or hold a position in TCAS, including on the Executive Committee. Annual fee: \$200.

Associate: Available to individuals who do not meet any of the criteria of Full Membership or who otherwise opt for Associate status. Annual fee: \$100.

Young Associate: Available to individuals who do not meet any of the criteria of Full Membership or who otherwise opt for Associate status, who are also 35 years of age or younger as at the date of membership or renewal. Annual fee: \$75.

Payment for membership (and all other TCAS fees and tickets) can now be made via e-transfer to tcaspayments@gmail.com.

As of October 19, TCAS has 128 members.

THE 2021-22 EXECUTIVE

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