

CANADA'S ARBITRATION PRACTICES – RATED

Few Canadian firms market arbitration as a speciality. David Samuels and David Vascott report on those who could soon

The bulk of Canadian firms consider arbitration a subset of dispute resolution, not a unique skill set. As a result, few firms give arbitration its own turf and encourage their partners to become known as 'arbitration advocates', rather than simply advocates. Those lawyers who build such a reputation tend to pursue this work for personal reasons – a pet project within their other duties.

Explains one prominent counsel, who earned his stripes on trial work. "Arbitration is now part of everyone's litigation practice – but there's no exclusive club like there is in other practice areas," he says. "To make it in dispute resolution in Canada you still have to have a litigation background."

Brian Casey who enjoys working in the field of international arbitration and who is managing partner at Baker & McKenzie's Toronto office agrees that the building blocks are still seen as court work: "It would be difficult to specialise in arbitration when starting out," he says. "You need to learn to be a barrister first, you need grounding as a trial attorney – how to present evidence, how to cross-examine and how to make submissions."

Confirms William Rowley QC, chair of McMillan Binch Mendelsohn: "Most Canadian practitioners in commercial arbitration have a broader dispute resolution practice which includes counsel work in litigation, arbitration and may include work as an arbitrator".

Marc Lalonde, until recently of Stikeman Elliott LLP and now an independent arbitrator, agrees: "In Canada, international arbitrators generally grow from other areas of practice, or from academia."

The lure of international arbitration as a specialisation, however, is great. Cosmopolitan-minded law students, in particular, like to imagine it lies in their future. What is such a student to do if they are Canadian and have their heart set on entering a field that, locally, is still not treated as a full-time job?

One option is to go abroad. Start in Canada and acquire the building blocks of a contentious practice. Then, relocate to Europe to build international arbitration skills and specialist knowledge. At the moment, some of the best known Canadian arbitration advocates work outside Canada. Robert Volterra at Latham & Watkins in London, springs to mind. Sophie Nappert, who leads international arbitration at Denton Wilde Sapte is also of Canadian extraction.

John Lorn McDougall of Fraser Milner Casgrain LLP says there is little choice for those who are truly serious about developing in the field other than to go abroad. Once, that is, they

have the fundamentals of contentious work down: "Young lawyers who want to build an arbitration practice should spend a few years in Canada, then go to a big firm in Europe," he says.

McDougall's nephew, Andrew de Lotbinière McDougall, has taken his uncle's advice. After four years with McCarthy Tetrault LLP in commercial litigation, he moved to Paris in 2000 to focus on international arbitration. "In Canada there aren't a lot of opportunities to practice as counsel full-time. But over here, 100 per cent of my time is dedicated to international arbitration," he says.

Canada is indeed a good jurisdiction to acquire the basics of contentious practice. The profession is fused, allowing youngsters to build both client management (solicitor-type) skills, and also practice advocacy. Furthermore, the advocacy is before judges rather than juries, which can make the translation into international arbitration, with its typically austere panel members, easier.

Change ahead?

Arbitration may be *becoming* a field that can sustain lawyers full-time. At several firms, you can now find a lawyer whose arbitration hobby is becoming a principal focus.

Babak Barin of Woods LLP is one example. He is regarded by most as an international arbitration specialist. He also so happens to have a cosmopolitan background of the type that propels a lawyer to this field. Born in Iran and educated in Switzerland, Barin left a career in Toronto to work in Switzerland in order to pursue an interest in international arbitration that had developed, as he tells it, out of his Iranian background. He had become curious about the US-Iran claims tribunal during his studies.

In Switzerland, Barin worked at both the Claims Resolution Tribunal for Dormant Accounts (as a senior counsel) and at Froriep Renggli, a large Swiss law firm. He has continued to encourage an arbitration practice since returning to Canada. Barin was one of three Canadian lawyers featured in *Global Arbitration Review's* '45 Under 45'. He also chaired the host committee behind the International Council of Commercial Arbitration Meeting that took place in Montréal in 2006. He pursues his academic interest in the field by teaching at Montréal and Sherbrooke universities.

Barin says that more arbitration occurs in Canada than is generally perceived: "There is definitely more arbitration work here than people think. There is certainly lots of arbitration work for good and experienced counsel and, down the road, for the right individual as arbitrator."

Is there enough work to allow young lawyers

to train in Canada? "As long as you don't mind rolling up your sleeves and working hard, I'd say 'yes'. There is now enough arbitration work – in certain firms – to train young lawyers." The emphasis perhaps is on certain firms. It is worth noting that Barin himself opted to move firms about 18 months ago.

Serendipitously, Canada is developing focal points upon which those with an interest in arbitration can gather. Barin and Todd Weiler (another Canadian who featured in *GAR's* '45 Under 45') and some other young practitioners recently founded the Young Canadian Arbitration Practitioners group. It is inspired by the various groups in Europe, such as the London Court of International Arbitration's Young International Arbitrators Group, and 'PIDA' at the International Chamber of Commerce's court of arbitration. Barin, while in Switzerland, co-founded the 'ASA Below 40' group, with two Swiss colleagues. He hopes to emulate that success in Canada.

The Young Canadian Arbitration Practitioners Group is for any young lawyer "working in private practice and with corporations and government" who wishes to learn about the world of international arbitration. Membership has exceeded expectations, indicating that in time attitudes to arbitration may change.

Reverse brain drain

It may become easier, then, for young Canadians to have a decent training in international arbitration in Canada, at the feet of Canadian specialists. But even then, many may still choose a period abroad as Barin did. Indeed, he says he has recently helped two of his students to find work abroad: one went to Sullivan & Cromwell LLP in New York, the other to Freshfields Bruckhaus Deringer in Paris.

If the level of work picks up, such that senior Canadian lawyers begin to need support teams of arbitration-specialised associates, then it will become possible to speak of groups, with 'turf' and legitimacy in Canadian firms. One place where something approaching that appears to have occurred is Ogilvy Renault LLP. It now has a triangle of figures each of whom has a name for the field. Yves Fortier QC stands at the pinnacle of the triangle, with Stephen Drymer and Pierre Bienvenu on either side.

Stephen Drymer notes with pride that the quality of the arbitration now being handled at Ogilvy Renault means that it has been able to recruit "three or four lawyers [Canadians] who were working in other countries in this field and wanted to come back but to continue using their arbitration skills." Stikeman Elliot and Fasken Martineau are also

examples of practices with at least two partners who are regarded by others as specialists.

Bienvenu says that if arbitration continues to gain momentum at the same rate among Canadian firms then “returning to Canada after a couple of years working in international arbitration in the US or Europe may become the norm.”

Barin agrees. “My generation will be the first without a career ‘prior’ to arbitration” he says. He envisages a Canadian market in which it is possible to travel from trainee to advocate to arbitrator, “although it may be that some people turn to other things mid-career and then circle back to arbitration in their senior phase.”

William Rowley QC, who is chair of McMillan Binch Mendelsohn and takes a keen interest in the firm’s arbitration work, also sees changed levels of demand: “Fifteen years ago, commercial arbitration would still have formed a relatively small part of a sophisticated, commercial litigation practice. But in recent years, it has assumed a much more significant portion than it has in the past.”

Rowley says he can “easily foresee” the day when Canada has a reputation for producing fine arbitration advocates, much as today it seems to produce fine arbitrators: “Canadian law firms are becoming increasingly aware of fielding a stand-alone arbitration practice – and this means more opportunities for young lawyers.”

“Do Canadians have the chance to build an arbitration practice? I used to think not. But I’m changing my mind because of the number of calls we’re getting.”

Marc Lalonde, however, isn’t so sure a surge in demand that would build a freestanding advocacy bar for younger arbitration specialists is imminent: “I’m afraid I will have retired for a good time before Canada becomes a significant site for international arbitration, although it has everything to become

one.” He finds this a source of regret: “The issue is mainly one of educating foreign lawyers and firms about the advantages of choosing Canada as a site.” And he notes that having the International Council of Commercial Arbitration hold its meeting in Montréal is a great starting point towards marketing Canada as an arbitral destination.

“There is a younger generation of Canadian lawyers who are quite knowledgeable and interested in the field” he adds “I have little doubt that they will make their mark internationally. Some of them already have done quite well.”

Market analysis

Our study of arbitration groups within Canadian firms confirms the positive mood, but also provides a reality check. We found that independent arbitration groups remain the exception.

As ever, we used two lenses to grade the local practice groups: size and peer review. Size indicates how many lawyers spend 60 per cent or more of their billable hours on international arbitration. And peer review tracks responses to questions such as: “Whom do you consider your major rival in international arbitration?” and “Whom would you short list if you were a client with an important matter and carte blanche hiring a firm?”

We had to adjust both lenses to reflect the realities of the Canadian arbitration market. First, nobody is thinking in terms of arbitration groups – where ‘group’ means a collective of partners who are equi-specialised and oversee a pyramid of other specialised associates.

In fact, when asked our peer review questions, most sources would reply in the form of individual names rather than firms. Or by saying that it was impossible at this point to talk of ‘brand name’ firms: “I’m sorry, but we just tend to think of people for these sorts of cases, not firms” apologised one source. So, our peer review lens has been

adjusted on this occasion to focus on individuals.

Second, the criterion of 60 per cent was resisted by many, who said it was too high for present activity levels. (Indeed, a few thought nobody would be able to qualify under it). Despite those concerns, we have succeeded in collecting figures using the 60 per cent figure, making sure that firms with large headcounts double-checked their figures and supplied names of those whom they had identified as specialists. The result, however, stands at odds with the peer review research. So we would caution readers about this discrepancy. One local source who looked over the size table (Table 2) in advance said it could be “potentially misleading” if read alone. He described it as more a depiction of the wider dispute resolution market.

Third, a clutch of senior Canadian figures recently left their law firms. William Horton, for example, left Blake Cassels & Graydon LLP, citing conflict problems. Marc Lalonde QC left Stikeman Elliott for the same reasons. Edward Chiasson QC left Borden Ladner Gervais LLP to join the British Columbia appellate bench. These departures have something of a disproportionate effect on the size results.

For these three reasons, we’ve opted to give the peer review research greater weight in our analysis of the market. We have also opted to focus the peer review research on people, rather than firms. It is given as ‘Canada’s top 21 arbitration names’. A section on firms will close this article. This will look at the results of the size survey, pointing out a few of the discrepancies between it and the “Top 21”.

The three tiers

We present the Top 21 in three grades: superarbitrators, highly regarded arbitrators and notable arbitrators. See Table 1.

Babak Barin

getting cases as an arbitrator.

At Fasken Martineau DuMoulin LLP, he leads his firm’s Latin America and international dispute resolution practice groups. His credits as a counsel in arbitration include acting for US company Metalclad in the Canadian Supreme court, when the government of Mexico attempted (with a degree of success) to overturn an arbitral award issued by a NAFTA tribunal.

Yves Fortier QC

Top of the Top 21 is Yves Fortier QC of Ogilvy Renault LLP in Montréal. Fortier is “the king of Canadian arbitration” as one source put it. He arrived in the field as an ex-diplomat: he was for many years Canada’s ambassador and permanent representative at the United Nations in New York. In that capacity, he had chaired the UN’s security council. He had also been counsel to Canada for various governmental commissions and on public international law cases. Upon leaving the UN, legend has it that Fortier preferred to try a change of direction, rather than resume

Superarbitrators

Henri Alvarez

Henri Alvarez of Fasken Martineau DuMoulin LLP has mixed French-Spanish parentage and is fluent in English, French and Spanish. Alvarez came to the business by accepting arbitral appointments from employment law and academia. He has also appeared as counsel in some leading Canadian court cases, such as *United Mexican States v Metalclad*. Sources describe his success as arising from the mix of language skills and the energy he has devoted to organisations such as the International Bar Association. Alvarez has devoted enough time to the association’s Arbitration and Dispute that he is now its co-chair. Another notes that partners on the west coast of Canada are able to begin accepting appointments at an earlier age because the economics of those offices are different: on the east coast, partners face pressure to fee the firm’s

leverage structure; and on the west coast, partners have more flexibility to be barristerial and do what interests them.

Alvarez says: “I think my language skills and exposure to civil law have been particularly helpful to my emergence as an arbitrator.” His interest in international arbitration grew while undertaking graduate studies in Geneva. “I was going to write a PhD in it” he says. He studied under the famous Pierre Lalive. On his return to Canada, he maintained his interest through academic work – writing and lecturing about developments, while working in employment law and later litigation. The two came together as employment arbitration, which was no bad training for international arbitration, it emerged: “In our part of the world, labour arbitration has no discovery or document production and goes very quickly.” He practised for 12 to 13 years before

the reins of his commercial practice. So he spent a day testing the water in London, to see if he could become an arbitrator. He visited contacts at Magic Circle firms: he would, from now on, be available for arbitral appointments, and might they be interested in appointing him? By 4pm, someone had. Contemporaries expected him to succeed. Comments one: “Fortier has had stardust sprinkled on him from the very first.” In addition to his professional credentials, he speaks native French and accent-less English. Once he had committed to pursuing this new direction, he committed large amounts of time to the London Court of International Arbitration. His contribution to the life of the organisation was recognised in his appointment as its president. According to one source, “nobody should underestimate the commitment Fortier made to London”.

As mentioned earlier, Fortier’s firm has now created two further lawyers with a reputation in the field. Inevitably they have gained from his contacts and transferred legitimacy. Even so, Fortier’s arbitral work is seen as somewhat freestanding from the life of his partners. “It is a cottage industry” says one observer.

Marc Lalonde PC OC QC

The third superarbitrator is Marc Lalonde QC. Conflicts – a testament to his success in attracting appointments – prompted him to leave Stikeman Elliott LLP last year, and set up on his own. Lalonde arrived at the field from federal politics: for two decades he held a variety of posts in the Trudeau administration and was, as one describes it, “for many years Canada’s second most important minister” after Trudeau. He also now has “a big reputation in Canada and worldwide” in his new career. Lalonde estimates that at this point he has participated in well over 100 cases worldwide. “I cannot identify a particular moment of breakthrough” he says. “For me it was a matter of keeping at it on a consistent basis, doing the best job I could and working well with my co-arbitrators and counsel.” One part of keeping ‘at it’ was contributing to the life of the arbitral institution. Although he has now scaled back his commitments at various institutes, he was for many years on the board of directors of the American Bar Association and the Canadian Institute of Arbitration and Mediation (the first Canadian on the AAA’s board), chair of the London Court of International Arbitration’s North American Users’ Committee and an elected member of the International Council of Commercial Arbitration. Some of these roles he campaigned for and others were “a matter of answering the telephone at the right moment”. The benefit of taking such a position is that “you both learn and get recognition, which can be difficult to obtain otherwise.” Lalonde spends around 35 per cent of his time abroad and the rest in Canada “preparing for cases and drafting awards”.

Lalonde is at present appointed to a host of ICSID panels. One of the more high-profile

decisions he helped write last year was *Azurix Corp v Argentina*. Lalonde has used his connections to improve Canada as a destination for arbitration hearings. He was instrumental in lobbying for the Model Law (Canada was the first state to adopt the law), and he spearheaded the effort that brought the International Council of Commercial Arbitration meeting to Montréal.

William Rowley QC

Our final featured Canadian superarbitrator is William Rowley QC, who is also chair of *Global Arbitration Review’s* editorial board. Rowley becomes the first person to qualify as a superarbitrator in two such reports: he was cited in a similar list about the UK that we published in early 2006 (“London or Paris?” *Global Arbitration Review* vol 1 edition 2 page 11).

Although his base of operations as an arbitrator

Table 1: Canada’s Top 21 arbitration names for international work

| SUPERARBITRATORS | | |
|-------------------------------|--|------------------------------------|
| Henri Alvarez | Fasken Martineau DuMoulin LLP | Vancouver |
| Yves Fortier QC | Ogilvy Renault LLP | Montréal |
| Marc Lalonde PC OC QC | Independent | Montréal |
| William Rowley QC | McMillan Binch Mendelsohn LLP and 20 Essex Street | Toronto/London |
| HIGHLY REGARDED | | |
| Babak Barin | Woods LLP | Montréal |
| Pierre Bienvenu | Ogilvy Renault LLP | Montréal |
| Stephen Drymer | Ogilvy Renault LLP | Montréal |
| Benjamin Greenberg QC | Stikeman Elliott LLP | Montréal |
| David Haigh QC | Burnet Duckworth & Palmer LLP | Calgary |
| Claude Thomson QC | Independent | Toronto |
| Todd Weiler | NAFTAclaims | London (Ontario)/ Washington DC |
| NOTABLE | | |
| Nabil Antaki CM FRSC | Independent | Montréal |
| Barry Appleton | Appleton & Associates | Toronto/Washington |
| Earl Cherniak QC | Lerners LLP / Cherniak McDougall | Toronto |
| William Horton | Independent | Toronto |
| Colin Irving | Irving Mitchell Kalichman | Montréal |
| John Keefe | Goodmans LLP | Toronto |
| James Redmond QC | Independent | Edmonton |
| John Lorn McDougall QC | Fraser Milner Casgrain LLP / Cherniak McDougall | Toronto |
| Christopher Thomas QC | Thomas & Partners | Vancouver |
| James Woods | Woods LLP | Montréal |

is London chambers (20 Essex Street), Rowley is a Toronto resident, where he is partner and chair of McMillan Binch Mendelsohn. Rowley came to arbitration after more than a decade as one of Canada's best known competition lawyers. He also came with extensive credentials developed with the International Bar Association's section of business law, which he has helped to propel to its present level of importance, and of which he is a past chairman. Indeed, his connections at the association brought his first appointment: "An arbitrator had died, right on the point of writing his award." The case was between an oil producer and the government of Thailand. The sides had sunk millions into a hearing and were reluctant to start again. They wanted someone who could pick up "the reins of a rider-less horse, near where the rider had been thrown." George Seward, founder of the International Bar Association, recommended Rowley: "George's recommendation seemed to persuade". The parties took a chance, and a gradual shift in career had begun. "It was pure luck," he says. That was 15 years ago. Since then, Rowley has taken steps to attract further appointments and engineer a slow transition from his main career into a new full-time role that he regards as a suitable professional denouement for someone with his interests and constitution. The investment appears to have paid off. A few years ago, Rowley attained particular prominence when he was named on the tribunal on *Methanex v United States of America*. This groundbreaking NAFTA case attracted considerable



Henri Alvarez

attention within the community because of the transparency of its procedure.

He is also chair of a tribunal constituted to hear the resubmitted claim *Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (better known as *Vivendi 2*). He has chaired or been a member of commercial and investment panels from Peru to the Philippines.

Many sources in Canada mention Rowley's easy shift to a new field with awe. They attribute it to his charismatic personality and the hefty contacts book compiled at the International Bar Association. Rowley himself thinks that the bar association work has helped build skills at navigating cultural differences. He also mentions commitments made to London, and the energy he has invested in its work; he is a member of the court of the London Court of International Arbitration and the NAFTA



William Rowley

2022 Committee; and has considered similar work at the International Chamber of Commerce ("sadly, not enough time"). "International arbitration will not come to Canada – at least for now" he says "so those Canadians who wish to reach their potential in this field have to get out of Canada." Wherever 'International Arbitration plc' – also known as the international arbitration mafia is gathering next – "that's where you need to be." Above all, it takes commitment: "You have to be prepared to invest for the long haul. You have to put down roots outside Canada. And those roots have to be watered." It is pointless he says "going to one or two events and expecting appointments then to turn up". Too many people get despondent too easily he says. He now estimates that he spends half of his professional year outside Canada.

Highly regarded

The source of Barin's interest in arbitration was mentioned above. Today, he is partner and head of the arbitration and ADR practice at Woods LLP, a Montréal boutique practice, which he joined in 2005 from Osler Hoskin & Harcourt LLP. Barin teaches international arbitration at Montréal and Sherbrooke universities. He chaired the local organising committee for the International Council of Commercial Arbitration event in Canada in 2006. Barin was included in *Global Arbitration Review's* '45 Under 45' survey and teaches arbitration at McGill University. His practice combines advocacy and sitting as an arbitrator. He is counsel for Louis Dreyfus before the Quebec courts in a leading case, unfolding; he was also the lead advocate on Canada's famous *Dell Computer* case about the use of arbitration clauses in consumer contracts.

Pierre Bienvenu and Stephen Drymer

Bienvenu and Drymer are at Ogilvy Renault LLP in Montréal, where they have had the benefit of working in the orbit of Yves Fortier QC.

Ogilvy Renault is the only firm with three individuals included in the Top 21. (Woods LLP has two).

Although at the same firm as Fortier, Drymer and Bienvenu's reputations exist in their own right. Drymer was included in *Global Arbitration Review's* '45 Under 45', but Bienvenu just missed out (too old, by a month).

One source described Bienvenu as "undeniably one of the best arbitration counsel in Canada".

Perhaps modelled upon those who have attained 'superarbitrator' status, Bienvenu invests time in extra-curricular arbitration work – he is, for example, senior vice chair of the International Bar Association's arbitration committee and a member of the NAFTA 2022 Committee, a group set up to promote the use of arbitration and other dispute resolution tools. He is also said to be developing links in London, particularly at the London Court of International Arbitration.

On the work side, recently Bienvenu helped an airport operator to win US\$80 million in restitution-style damages from an ICSID panel in a case against Hungary. Bienvenu and his associates collaborated with a team from Fasken Martineau DuMoulin LLP and two non-Canadian counsel on the matter. *ADC Affiliates v Hungary* is notable as a rare instance in which a tribunal was prepared to consider lost profits when assessing due

compensation. He is a member of the American College of Trial Lawyers.

His younger colleague, Drymer featured in *Global Arbitration Review's* '45 under 45' feature. He also pursues extensive extra-curricular work. His projects mix an interest in public international law, such as advising the secretary general of the UN on a border dispute between two African states, and in sports arbitration, with more traditional work on behalf of associations and arbitral institutes. For example, Drymer was part of the task force on conflicts, organised by the International Bar Association.

The Honourable Benjamin Greenberg QC

Greenberg became the sole leader of Stikeman Elliott's arbitration practice when Marc Lalonde QC departed in August. Greenberg returned to the firm in 1999 after stepping down as a Quebec Superior Court judge. His credits in the area include appearing alongside Henri Alvarez as counsel in the ground-breaking litigation over *United Mexican States v Metalclad*, a NAFTA chapter 11 case that reached the Supreme Court of British Columbia. Among the arbitral institutes, Greenberg has ties to the London Court of International Arbitration and the Canadian Chamber of Commerce.



Babak Barin

David Haigh QC

Haigh works from Calgary, and is the most prominent west coast Canadian lawyer in the Top 21. He chairs the Canadian National Committee for the ICC and is on the NAFTA 2022 Committee. A rival describes him as “outstanding in every area of this field.” Haigh’s work spans commercial and investment arbitration as counsel



Stephen Drymer

and arbitrator. He is admitted to the American College of Trial Lawyers. He works from Burnet Duckworth & Palmer LLP.

Claude Thomson QC

Thomson is chairman of ADR Chambers, probably Canada’s leading provider of arbitrators – indeed many featured in the Top 21 are on its books.

Thomson is a past chair of Fasken Martineau DuMoulin LLP, and now sits regularly as an arbitrator.

Todd Weiler

Weiler is an Ontario-based lawyer and academic who runs the popular naftaclaims.com and investmentclaims.com websites. At 37, Weiler is the youngest lawyer to appear in the Top 21. He is a member of *Global Arbitration Review’s* editorial board and was selected for the ‘45 Under 45’. Weiler’s entrée to the field was through public international law. His expertise meant that he was retained on several early NAFTA cases. These days he provides a bolt-on treaty arbitration service to other firms. He continues to teach arbitration and international public law at Washington College of Law, at the American University (Washington, DC), and at the University of Western Ontario, Canada. His professional credits include serving as counsel on *SD Myers v Canada*, in which the company was awarded US\$8 million because it had been discriminated against under NAFTA rules.

Notables

The remainder of the Top 21 attracted good reviews, but without the same intensity as the preceding groups. They are mentioned more briefly.

Nabil Antaki

Antaki is the professor of international transactions and arbitration at Université Laval in Quebec. Of Syrian descent, his work as arbitrator and counsel often features one party from the Gulf region. Antaki sits on the ICC’s Syrian national committee. In 1986, Antaki founded the Quebec National and International Commercial Arbitration Centre. He served as its president until 2001.

Barry Appleton

Appleton received stronger support from sources outside Canada than inside it. Canadians who mentioned Appleton said they admired him as an innovator and for his entrepreneurship. Appleton is founder and leader of Appleton & Associates, a firm that specialises in representing companies seeking to enforce international law rights. He brought – and won – some of the earliest NAFTA cases. He has since diversified into bringing claims under bilateral investment treaty, maintaining a healthy win–loss record.

The next five

The following are all commercial litigators, whose legitimacy for disputes work is leading to a spin-off reputation, at least within Canada, for arbitration

Earl Cherniak QC is a partner at Lerner LLP. He was recently named as one of Canada’s

100 most creative lawyers. Cherniak accepts arbitral appointments through Cherniak & McDougall, an entity shared with John Lorn McDougall QC of Fraser Milner Casgrain LLP.

Colin Irving has appeared frequently before Canada’s Supreme Court. He has taught and written on civil procedure. He is a name partner at disputes boutique Irving Mitchell Kalichman, but maintains links with the London Court of International Arbitration and the International Chamber of Commerce.

John Keefe is a past director of the Arbitration and Mediation Institute, a provider of arbitration and other related services in Toronto. He is also a past director of the Advocates’ Society, an umbrella body for trial lawyers in Ontario.

James Redmond is a member of the American College of Trial Lawyers, and is a former president of the Canadian Law Society.

John Lorn McDougall is also a member of the American College of Trial Lawyers. He is the current chair of the ICC’s Canadian panel of arbitrators, and a past director of the ‘advocates society’.

William Horton.

Horton, 57, recently left Blake Cassels & Graydon LLP so he could give more focus to working as an arbitrator and mediator. He offers his services through Alternative Dispute Resolution Chambers in Toronto; he is director of the chambers’ new international arm, Alternative Dispute Resolution Chambers International. Horton continues to accept some work as counsel. He says that he left

chambers because of conflict issues: “I am told that my experience has been worse than most,” he said in an interview for *Global Arbitration Review* at the time. A peer described him as “a very capable arbitrator and counsel”, adding “if his move means that he is more readily available to sit as an arbitrator, that is a welcome development for the rest of us.”

Christopher Thomas QC

Thomas was a senior policy adviser to the Canadian government during the Canada–US free trade negotiations. He took part in negotiations on the General Agreement on Tariffs and Trade (GATT). Later, the government of Mexico retained him as adviser during negotiation of the North American Free Trade Agreement, and has continued to provide Mexico with advice on the negotiation of supplementary agreements to the NAFTA. He is on the WTO’s roster of non-governmental panelists and also on the World Intellectual Property Organization’s internet domain dispute settlement panel. He has worked as counsel in various state-to-state dispute settlement proceedings and investor-state arbitrations. He often counsels the government on its anti-dumping matters. He is a member of the American Arbitration Association and the Canadian Council on International Law.

James Woods

Woods, by rights, should fit into the group of commercial litigators now developing a second string to their bow, as aggregated above. As he is the second name from Woods LLP to appear in the Top 21 (after Babak Barin), however, it is worth mentioning him apart.

Size survey

Osler Hoskin & Harcourt LLP emerges as the biggest arbitration group by head count. But the firm is notably absent from the Top 21. This owes in part to historical accident: Babak Barin was at Olser.

The firm explains that its impressive figures are driven by a string of domestic and international arbitrations that are keeping between “eight to 12 lawyers” working at a level of 60 per cent of more of their billable hours on arbitrations. This set of cases includes advising Canwest Global Communications in an international arbitration with Hollinger International; and representing Louis Dreyfus & Cie in an arbitration relating to a German oil refinery. On the courts side, Osler’s lawyers have been appearing for Dell Computer Corporation in the Supreme Court of Canada. The case concerns whether online arbitration agreements preclude consumers from filing class actions before state courts. Osler also has an affiliated, though independent, alternative dispute resolution service called the Osler ADR centre, whose members include arbitrators Peter Cory QC and Edward Saunders QC.

Stikeman Elliott LLP has numbers and would have had two names in the Top 21, had this survey been run a year ago. Now Benjamin Greenberg QC runs the practice without the aid of Lalonde. Still, signs are positive. The firm recently appointed Patrick Giraud to partner in its Montréal office. Giraud, 35, could well be an arbitration specialist in waiting. Much of his work hitherto has been on international arbitration. The firm is also home to partner John Judge, who undertakes regular work in the field.

Ogilvy Renault LLP has three partners in the Top 21. As mentioned, a clear message during the peer review survey was that Ogilvy Renault is the firm others need to catch.

Borden Ladner Gervais posted the largest firm figures from Canada’s west coast. It too has recently seen a key figure leave: Edward Chiasson QC, who was appointed to the Court of Appeal. Gerald Ghikas QC is now head of the practice. Indeed, Borden Ladner Gervais maybe a practice to watch. According to Ghikas, partners will be discouraged from accepting arbitral appointments in favour of counsel work. Ghikas says this strategy will develop a fuller practice more rapidly: “After our merger in 2000 to become a national firm, we realised that this practice area, by which I mean practice as arbitration counsel, has huge growth potential.”

Next by size is Fasken Martineau DuMoulin LLP. Partners taking arbitration work benefit from proximity to Henry Alvarez. Alvarez says that Donald Short, Peter Kirby and Rene Cadieux will also become major players in the field. Kirby and Cadieux are able to boast investment treaty arbitration experience, having worked for Champion Trading Company on its ICSID dispute with Egypt. Until 2004, the firm was also home to chair of ADR Chambers’ Claude Thomson QC. He left citing rising conflicts of interest.

Blake Cassels & Graydon LLP asserts having four partners who specialise in arbitration, who are

spread among its Toronto, Calgary, Vancouver and Ottawa offices. It did have five partners, but recently lost William Horton who is now an independent practitioner. The firm says its arbitration practice remains vigorous. Recent work includes a win on behalf of MTI technologies in a licensing dispute against Xerox. The award survived challenge before a national court.

William Rowley QC oversees the international arbitration side of McMillan Binch Mendelsohn. Rowley himself takes only a limited amount of advocacy work now; but at least two other partners, he says, can now be counted as arbitration specialists by our criteria: Brad Hanna and Leonard Ricchetti. Meanwhile, partners David Kent and Markus Koehnen are all round advocates who are also receiving arbitration work. McMillan Binch lawyers benefit from the presence of associate Lisa Parliament who teaches alternative dispute resolution at Osgoode Hall Law School in Toronto.

John Keefe leads the arbitration practice at Goodmans LLP. According to the firm, partner Jessica Kimmel and consultant Judge Sydney Robins also devote the majority of their time to arbitration.

Baker & McKenzie in Toronto has two partners specialising in arbitration: Brian Casey and Janet Mills. Both divide their time between arbitration and

litigation work. Casey describes the pair’s practice as “boutique within a major”, meaning that it is driven by personal reputation rather than fed by the network. That said, he is able to draw on the Baker & McKenzie specialist in other jurisdictions whenever required – a luxury none of his local rivals has. Casey is one of the charter members of the Arbitration Roundtable of Toronto – a group that promotes Toronto as a seat of arbitration, and aims to increase the profile of Canadian arbitrators.

Torys LLP’s international arbitration practice is driven by Barry Leon and John Terry, who work closely with general commercial disputes specialists Sheila Block and Patrick Flaherty. The group’s recent work includes representing a multinational brewing company in a complex international commercial arbitration concerning trademark and restraint of trade issues, and a dispute before the LCIA concerning mining properties in southern Africa. The firm was also co-counsel with Appleton & Associates on *Canada v SD Myers Inc*, a landmark NAFTA case.

Boutique firm Appleton & Associates International Lawyers in Toronto, was mentioned above (see Barry Appleton). The firm is also home to Robert Wisner, who was once a competition and litigation specialist at McMillan Binch Mendelsohn. The size list is rounded out by Woods LLP.

Table 2 – Size survey (lawyers who exceed the 60 per cent threshold)

| We asked Canadian firms to report how many arbitration specialists they had. But on this occasion, is biggest the best? Several reviewers told us our size chart “could potentially be misleading” if read alone. Do you agree? | | |
|---|--|----------------------------|
| Firm | Head of practice | Specialists |
| Osler Hoskin & Harcourt LLP | Randy Pepper | 7p, 5a |
| Stikeman Elliott LLP | Benjamin Greenberg QC, John Judge, Bradbrooke Smith QC, Hein Poulus | 6p, 4a |
| Ogilvy Renault LLP | Piere Bienvenu, Stephen Drymer | 5p, 5a |
| Borden Ladner Gervais LLP | Gerald Ghikas, QC | 4eq p, 1p, 2a |
| Fasken Martineau DuMoulin LLP | Henri Alvarez | 4eq p, 1sa, 2a |
| Blake Cassels & Graydon LLP | Joel Richler | 4p |
| McMillan Binch Mendelsohn | William Rowley QC | 3eq p, 1a |
| Goodmans LLP | John Keefe | 2eq p, 1 cons |
| Torys LLP | Barry Leon, John Terry | 2eq p, 1sa |
| Baker & McKenzie | Brian Casey | 2p |
| Appleton & Associates International Lawyers | Barry Appleton | 1eq p, 1sa, 3a, 2cons |
| Woods LLP | Babak Barin | 1eq p, 1sa |
| Fraser Milner Casgrain LLP | Jean Bazin QC, David McCutcheon, John Lorn McDougall QC, David Tavender QC | All partners < 60 per cent |