2024 CANADIAN COMMERCIAL ARBITRATION CASE LAW: A YEAR IN REVIEW

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I. INTRODUCTION

Canadian courts released relatively few decisions in 2024 that broadly advanced or changed the arbitration landscape in Canada. However, a lack of true blockbusters does not mean a lack of relevant case law. Several decisions issued by trial and appeal courts in 2024 assist in clarifying judicial interpretation and application of significant cases from prior years, including those that caused much discussion and, in some cases, concern in the arbitration community.

The standout exception is the Ontario Court of Appeal's decision in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.* ("*Aroma*").[1] This much-anticipated multiple appointments decision confirmed that an arbitrator has no general duty to disclose a second appointment by a party or counsel during the pendency of an arbitration in which that party or counsel is involved.

In this 2024 case law review, I canvass the most recent jurisprudence on key issues that have been the subject of interest in prior years. In addition to the Court of Appeal's decision in *Aroma*, I check in on how courts are applying the unconscionability doctrine to arbitration clauses in the wake of the Supreme Court of Canada's 2020 decision in *Uber Technologies Inc. v Heller* ("*Uber*")[2] and comment on the tension

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[1] *Aroma Franchise Company Inc et al v Aroma Espresso Bar Canada Inc et al,* 2024 ONCA 839 [*Aroma*].

[2] *Uber Technologies Inc v Heller,* 2020 SCC 16 [*Uber*].

between Ontario and British Columbia case law with respect to identifying extricable errors of law for purposes of arbitral appeals.

II. THE RETURN OF *AROMA*

Another year gone by, and *Aroma* continues to be the talk of the Canadian commercial arbitration community. In 2024, the Court of Appeal for Ontario weighed in on the case.

The facts and the Ontario Superior Court decision in *Aroma* were detailed in last year's case law year-in-review.[3] In brief, the case arose from a franchisor-franchisee dispute with a sole arbitrator appointed by party agreement. During the arbitration, the arbitrator accepted an appointment in another, unrelated arbitration from a law firm that represented one of the parties in the *Aroma* arbitration, and did not disclose it to the other party. The Ontario Superior Court set aside the arbitrator's awards based on reasonable apprehension of bias, finding that he should have disclosed the second appointment to the parties.[4]

This result was surprising to many. In particular, it was not the expected outcome when compared to the facts and outcome in the the leading United Kingdom case on multiple appointments, *Halliburton Company v Chubb Bermuda Insurance Ltd.*, which the Superior Court decision cited extensively.[5] Additionally, the decision turned largely on pre-appointment correspondence between counsel to which the arbitrator was not privy, which indicated the importance the parties placed on appointing an arbitrator with no connection to the parties or counsel.

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[3] Lisa C Munro and Rebecca Shoom, "2023 Canadian Commercial Arbitration Case Law: A Year in Review" (2023) 4:1 Can J Comm Arb 76.

[4] *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc,* 2023 ONSC 1827 [Comm List] at paras 91-92.

[5] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

In November 2024, the Court of Appeal overturned the Superior Court decision, finding no reasonable apprehension of bias.[6] The court confirmed that the scope of an arbitrator's duty to disclose is determined objectively, so that it was an error of law for the application judge to consider subjective party expectations that were not communicated to the arbitrator. Applying an objective test, the arbitrator was not required to disclose the second appointment, as there were no overlapping parties or issues and the arbitrator and law firm did not have an extensive history with each other.

This is the first time that a Canadian appellate court has provided guidance on the test applicable to an arbitrator's duty of disclosure. However, the result is more of a return to the norm than a step forward. We now have confirmation that the test is the same under both Ontario's domestic legislation and the *UNCITRAL Model Law*, thus improving consistency across the two statutes on a matter where there is no principled reason to distinguish between domestic and international arbitrations.[7] The test requires consideration of "the relevant circumstances from the standpoint of a fair-minded and informed observer, applied against the backdrop of a strong presumption that an arbitrator is impartial."[8] Moreover, where that test dictates a duty to disclose, the failure to disclose does not in itself give rise to a reasonable apprehension of bias; it is a "relevant, but not determinative" factor.[9]

Notably, this test contrasts with that in the *IBA Guidelines on Conflicts of Interest in International Arbitration*, which approach

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[6] *Aroma*, *supra* note 1 at paras 145-47. The arbitrator's awards were reinstated, subject to remitting to the Superior Court certain issues other than reasonable apprehension of bias on which the application judge did not adjudicate.

[7] *Arbitration Act, 1991*, SO 1991, c 17, at s 11(2)-(3); *UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006).

[8] *Aroma*, *supra* note 1 at para 13.

[9] *Ibid* at para 122.

the duty of disclosure through a subjective lens focused on the parties' perceptions.[10] However, the Court held that the *IBA Guidelines* may provide guidance in determining what matters may require disclosure, but they cannot supplant or change the objective test in the applicable legislation unless they have been expressly adopted by the parties.[11]

III. THE LEGACY OF *UBER*

The Canadian arbitration landscape changed in 2020 with the Supreme Court of Canada's decision in *Uber.*[12] *Uber* established that an arbitration clause could be rendered unenforceable on the basis of unconscionability, such that a court is not required to stay a proceeding and refer to arbitration where an arbitration agreement may apply. In other words, the Court held that unconscionability can be an exception both to the enforceability of an arbitration agreement (which always was true in principle, although it seldom came up in practice)[13] and to *competence-competence* (which was new).[14] The Court held that the arbitration clause in a standard form services agreement between Uber and an Uber food delivery driver was unenforceable. The majority grounded that finding in the doctrine of unconscionability, finding the clause to be unfair because of the parties' unequal bargaining power and the disproportionately high fees and other onerous terms that

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[10] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014), online: <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918>. Subsequent to the Ontario Superior Court's decision in *Aroma*, the IBA released an updated version of these guidelines: see International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (25 May 2024), online: <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>.

[11] *Aroma*, *supra* note 1 at para 74.

[12] *Uber*, *supra* note 2.

[13] *Ibid* at paras 92-98.

[14] *Ibid* at paras 37-39.

would apply to an arbitration, which made arbitration prohibitive in the driver's circumstances. Justice Brown, in his concurring opinion, would have found the clause to be void as contrary to public policy because, by simultaneously foreclosing litigation and raising practically insurmountable hurdles to arbitration, it denied access to justice and thereby undermined the rule of law.[15]

In the wake of *Uber*, it was unclear how far this expansion of the unconscionability doctrine might go. It became prudent for every contracting party, particularly those using standard form contracts and those seeking to include arbitration clauses in employment and consumer contracts, to assess their arbitration clauses for potential unenforceability under this new principle. Many arbitration clauses were modified to build in safeguards to accessibility to mitigate the risk of unconscionability, such as by providing for virtual hearings where parties are geographically disparate, arbitration seats that are local or may be changed by party agreement, or coverage of upfront costs.

Predictably, parties seeking to overcome arbitration clauses and resolve their disputes in court have attempted to expand the boundaries of the principles established in *Uber*, advocating for the unconscionability of arbitration clauses with varying features and in different contractual contexts. Court decisions on these applications have turned on the themes of fairness and access to justice that characterized the majority and concurring opinions in *Uber*.

Several decisions released in 2024 join the growing group of cases confirming that, while *Uber* opened the door for courts to deal with issues of arbitral jurisdiction themselves rather than referring the matter to the arbitrator in accordance with the *competence-competence* principle, the door has not been thrown wide open. [16] Courts remain cautious about overstepping party

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[15] *Ibid* at para 110.

[16] See, for example, *Difederico v Amazon.com, Inc.*, 2023 FCA 165, leave to appeal to SCC ref'd 2024 CanLII 43121; *Williams v Amazon.com Inc.*, 2023

autonomy and finding unconscionability where the facts do not clearly and demonstrably meet the test established in *Uber*.[17] For example:

- In *Lin v Uber Canada Inc.*, an individual that used the Uber Eats platform (as opposed to a driver, as in *Uber*) alleged that the arbitration clause in Uber's terms and conditions was unconscionable.[18] There was no evidence of dependency or a special relationship of trust between the consumer and Uber, nor was there an informational or cognitive asymmetry between the parties. Uber's arbitration clause could have been more generous to consumers, such as by incorporating access to small claims courts for claims within its jurisdiction, a right to opt out of arbitration, or prevention of a possible costs award against the consumer. However, the clause did not "unduly" advantage Uber or disadvantage the consumer. The Federal Court therefore found that the clause was not unconscionable and stayed the claims in favour of arbitration.

- In *Spark Event Rentals Ltd. v Google LLC*, a corporate user of Google Ads alleged that the arbitration clause in Google's Advertising Program Terms was unconscionable.[19] In the absence of evidence of the plaintiff's financial constraints or inability to afford the applicable arbitration fees, the British Columbia Court of Appeal ruled that there was no "brick wall" of the kind identified in *Uber* preventing determination of a jurisdictional challenge within the arbitration.

BCCA 314, leave to appeal to SCC ref'd 2024 CanLII 43110; *Petty v Niantic Inc.*, 2023 BCCA 315, leave to appeal to SCC ref'd 2024 CanLII 43098.

[17] The test for unconscionability requires (1) inequality of bargaining power, and (2) a resultant improvident bargain: see *Uber*, *supra* note 2 at para 79.

[18] 2024 FC 977 [*Lin*].

[19] 2024 BCCA 148, leave to appeal to SCC ref'd 2024 CanLII 122490.

Therefore, it was appropriate to refer the threshold jurisdictional challenge to arbitration.

- In *Tahmasebpour v Freedom Mobile Inc.*, a Freedom Mobile account holder alleged that the arbitration clause in Freedom Mobile's Terms of Service was unconscionable.[20] The Supreme Court of British Columbia disagreed, staying the litigation. It found no particular vulnerability or dependence on the account holder's part, and no evidence that the upfront costs of arbitration would prevent the claim from proceeding in arbitration.

- In *Wasylyk v Lyft*, a driver on the Lyft rideshare platform alleged that the arbitration clause in Lyft's Terms of Service was unconscionable.[21] The Ontario Superior Court found no unconscionability. Even assuming an inequality of bargaining power (despite the contract containing a right to opt out of arbitration), the arbitration agreement contained none of the "pitfalls" or "sinkholes" related to time, place, cost, procedure, or law that existed in the clause at issue in *Uber*.

Despite the cases cited above, where an arbitration clause contains procedural features like those at issue in *Uber*, courts are prepared to find unconscionability. For example, in *Pokornik v SkipTheDishes Restaurant Services Inc.*, the arbitration clause in the agreement between the SkipTheDishes delivery platform and its couriers was held to be unconscionable.[22] The Manitoba court noted that, while the arbitration agreement in *Pokornik* was "not as lopsided" as that in *Uber*, the plaintiff would need to pay for legal representation to successfully advance the claims through arbitration. Those costs would be beyond her financial means and disproportionate to the small monetary value of her

[20] 2024 BCSC 726.

[21] 2024 ONSC 664, leave to appeal to SCC ref'd 2024 CanLII 85665 [*Wasylyk*].

[22] 2024 MBCA 3, leave to appeal to SCC ref'd 2024 CanLII 80700.

claims. Forcing the action into arbitration therefore would likely deny the plaintiff access to any dispute resolution process.[23]

While courts may draw comparisons to the facts of other cases, the doctrine of unconscionability ultimately will be applied based on the facts of each case. Not all arbitration agreements in standard form contracts, nor in all consumer or employment contracts, will be unconscionable.[24] Each arbitration clause will be assessed on its own terms, and courts will require specific evidence on which they can determine that the arbitration clause is improvident, such as the costs of the arbitration process contracted for and the significance or impact of those costs on the party. Ultimately, the question will be whether a particular clause, in the particular circumstances of the party and the dispute, blocks access to dispute resolution.

In sum, while *Uber* undoubtedly opened the door for courts to address arbitral jurisdiction under the doctrine of unconscionability, they are exercising restraint in when they choose to step through that door.

IV. *SATTVA* AND THE CONUNDRUM OF THE EXTRICABLE ERROR

In *Sattva Capital Corp. v Creston Moly Corp.*, the Supreme Court of Canada confirmed that domestic commercial arbitration awards involving an alleged error on a matter of mixed fact and law may be appealed only where there exists an "extricable error of law".[25] The Court's emphasis that appellate courts should "exercise caution in attempting to extricate a question of law" appeared to be a win for arbitration enthusiasts, promoting finality in commercial arbitrations.[26]

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[23] *Ibid* at para 92.

[24] *Ibid* at para 85; *Wasylyk*, *supra* note 21 at paras 6, 91; *Lin*, *supra* note 18 at para 171.

[25] 2014 SCC 53 [*Sattva*].

[26] *Ibid* at paras 54-55. See also *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 45.

Ontario courts have continued down that road by taking a narrow approach to the identification of extricable errors of law, as reflected in *Tall Ships Development Inc. v Brockville (City)*.[27] By contrast, in British Columbia, most notably in the 2022 decision *Escape 101 Ventures Inc. v March of Dimes Canada*, courts have taken a more expansive approach, finding that "a misapprehension of evidence that goes to the core of the outcome is an extricable error of law", including if an arbitrator's conclusion is not reasonably supportable on the available evidence.[28]

This split between two of the most active appellate courts for arbitration matters has left the arbitration community hoping for the country's highest court to provide guidance on the issue and confirm Canada's commitment to an effective arbitration regime.[29] That hope remains unfulfilled: the Supreme Court of Canada denied leave to appeal in both *Escape 101 Ventures* and *Tall Ships*. However, recent case law from British Columbia may be cause for some optimism.

Desert Properties Inc. v G&T Martini Holdings Ltd. arose from arbitration awards related to a real estate development transaction.[30] The parties sought leave to appeal and cross-appeal different aspects of the award.[31] The British Columbia Court of Appeal dismissed both parties' leave applications on the basis that they failed to disclose extricable errors of law.

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[27] 2022 ONCA 861 at para 16.

[28] 2022 BCCA 294 at paras 43, 71-74 [*Escape*].

[29] See, for example, Joshua Karton et al, "Arbitration Appeals on Questions of Law in Canada: Stop Extricating the Inextricable!" (2023) 3:2 Can J Comm Arb 138.

[30] 2024 BCCA 320 [*Desert Properties*].

[31] One party also sought leave to appeal the Supreme Court of British Columbia's refusal to set aside a subsequent award related to interest. That leave application, which also was dismissed, is not addressed here.

The court acknowledged the province's existing jurisprudence on extricable errors of law, including that "[m]isapprehensions of evidence that go the core of the outcome of a case are extricable errors of law" and that an error of law may arise where there is "no evidence to sustain [an arbitrator's] conclusion or if his conclusion was not reasonably supportable on the available evidence."[32] However, the court does not appear to have actually engaged with or evaluated the evidence underlying the arbitrator's award. It seems the court's determination that the arbitrator's conclusions were open to him on the evidence was based entirely on the award itself. That review satisfied the court that the arbitrator had sufficiently considered the evidence and arguments, and did not interfere with his factual determinations.[33]

In *Farrow v RLG International Inc.*, the British Columbia Court of Appeal reached the same outcome on different grounds. It refused leave to appeal an arbitration award relating to a share purchase transaction.[34] One error asserted by the applicants related to the arbitrator's alleged misapprehension of certain evidence. There was no dispute that the arbitrator had misstated evidence in various passages of the award, which was clear on the face of the award. However, the court found that these misstatements were inconsequential; they neither went to the core of the arbitrator's reasoning nor affected the outcome of the case. Other alleged errors relied on characterizations of the evidence that contradicted factual findings made by the arbitrator, with which the court did not interfere. These alleged errors therefore did not raise an extricable error of law.

Parties retain their right to contract out of appeals if they wish to avoid this scheme. British Columbia's *Arbitration Act*

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[32] *Ibid* at paras 49-50, citing *Escape*, *supra* note 28.

[33] This issue was not addressed in *Escape*, because it was undisputed that the judge had misapprehended the evidence. Such circumstances are unlikely to be replicated in most cases, making the analysis in *Desert Properties*, *supra* note 30, particularly useful.

[34] 2024 BCCA 198.

provides that there can be no appeal on a question of law where appeals are expressly disallowed by the arbitration agreement.[35] Where the parties agree to adopt procedural rules that foreclose appeals on questions of law, this may fulfill that statutory requirement, as confirmed in *Bollhorn v Lakehouse Custom Homes Ltd.* [36] In that case, the British Columbia Court of Appeal dismissed an application for leave to appeal an arbitral award where, by party agreement, the arbitration was pursuant to the VanIAC Expedited Procedures of the Domestic Arbitration Rules, which foreclose appeals on questions of law.[37]

These recent decisions indicate that at least some British Columbia courts may be reluctant to go beyond an arbitral award and wade into the evidentiary record to identify extricable errors of law, despite being empowered to do so. In most cases, they defer to the arbitrator's factual assessments, conduct their review on the face of the award, and maintain a meaningful standard for appealing arbitration awards, closer to the less intrusive approach taken in Ontario.

The law on this point continues to be inconsistent between Ontario and British Columbia, potentially due to discomfort among British Columbia judges with the regime in British Columbia's 2020 arbitration statute, which provides for appeals only on questions of law. However, in practice, their approaches may not be as far apart as many feared in the wake of *Escape*.

V. CONCLUSION

Although they address disparate subjects, the cases reviewed above all reflect the respect that Canadian judges generally afford to the arbitration process and to arbitrators. In

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[35] *Arbitration* Act, SBC 2020, c 2, s 59(3).

[36] 2024 BCCA 192.

[37] *Ibid* at para 62. See Vancouver International Arbitration Centre, *Domestic Arbitration Rules* at Rule 27 (1 September 2020), online: <https://vaniac.org/arbitration/rules-of-procedure/domestic-arbitration-rules/>.

Aroma, the Ontario Court of Appeal overturned the lower court's subjective approach to the arbitrator's disclosure duty, which had risked setting up arbitrators to fail in meeting that duty by measuring it in reference to matters which they could not have knowledge about. *Uber* created a new avenue through which courts may intervene in determinations of arbitral jurisdiction, but the case law following it reveals that judges exercise restraint in using that tool, generally granting stays in favour of arbitration unless the arbitration clause under consideration contains the specific features that were present in *Uber*: arbitration costs and burdens (including, eg, initiation fees, costs for travel to a foreign seat, accommodations, legal representation, lost wages) that are significantly disproportionate to the monetary value of the claim. Even British Columbia courts appear reluctant to reevaluate evidence when seeking to identify extricable errors of law, including where *Escape* permits them to do so, instead deferring to arbitrators' determinations and assessments of the facts.

These 2024 cases should engender optimism among arbitration practitioners. Certainly, some Canadian case law is not as deferential to arbitral proceedings as some see necessary to maximize its effectiveness and efficiency. Nevertheless, judges appear to be trying to interpret and apply that case law in a manner that protects and promotes the arbitration process.