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Faceoff: Behind The Feud For The Vancouver Canucks

(from left to right):
Irwin Nathanson;
Nathanson, Schachter & Thompson LLP
Hein Poulus;
Stikeman Elliott LLP
Bill Kaplan;
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TWO TRENDS FLYING HIGH:

ARBITRATION & INTERNATIONAL EXPOSURE FOR CANADIAN LITIGATORS

Savvy litigators are finding two ways to grow their practices: First, private arbitration is growing like litigation on steroids. Secondly, Canadians are litigating cross-border disputes here and international cases and arbitrations abroad. The thing that's downright puzzling is why more Canadian law firms aren't true believers

By Sandra Rubin

Earl Cherniak of Lerners LLP is one of the contemporary legends of Canadian litigation. He may not believe it (and he definitely won't like it) but in the course of a long and highly technical hearing some years ago, he picked up the nickname God, as in "'Who's up today?' 'God.'" Well, when it comes to God here's a little something that might surprise believers and non-believers alike. About half of Cherniak's practice these days is nowhere near a courthouse. It's doing private arbitration. A minority of those arbitrations are international.

Meanwhile, John Lorn McDougall of Fraser Milner Casgrain LLP, a corporate litigator of choice for Canada's accounting firms, is spending about one-third of his billable time working on international arbitrations.

David Wingfield, a litigator at WeirFoulds LLP in Toronto, may accumulate more than half his hours in 2008 at the other end of a trans-Atlantic flight. David Haigh, a prominent Calgary litigator with Burnet, Duckworth & Palmer LLP, is now spending two-thirds of his billable time on international work that takes him away from home.

With the pool of large corporate clients shrinking in Canada, count them among the scores of Canadian litigators who are finding that some of the most fertile land for growing their practice is abroad.

The world is becoming a pretty mixed up place — and it turns out that's a good thing.

Going global can mean building in Africa, sourcing in Brazil, manufacturing in China or Mexico or Thailand, servicing in India and listing on New York or London as well as Toronto. From a litigator's point of view, it doesn't get better than that.

From international class actions and trade tribunals to the 2,000 or so multilateral treaties that rule international investment and the private arbitrations that govern so many international business relationships, the work is positively gushing. As a growth area, it's a corker.

It's a wonder more Canadian law firms aren't paying serious attention.

Ogilvy Renault LLP is one of a handful of mainstream corporate law firms that places obvious strategic focus on international arbitration. Pierre Bienvenu, one of Ogilvy's marquee names in the field along with Yves Fortier, says as Canadian corporate clients go global their law firms would be wise to follow if they don't want to lose business to the international behemoths.

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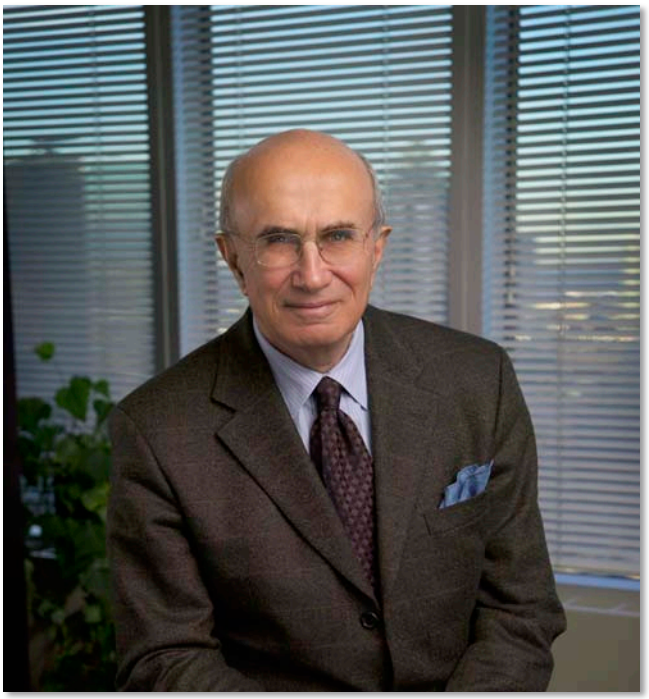

Earl Cherniak; Lerners LLP

"It used to be when there was a case in London or Paris or Zurich, the first reaction was to go to an English, French or Swiss firm — but that's not necessarily true anymore," says Bienvenu, Ogilvy Renault's managing partner and chair of the executive committee as well as co-chair of the arbitration group. "The growth in this area parallels the growth in globalization. So as your clients expand internationally, if you're not there or if you don't have the expertise to service them, someone else will.

"I won't hide the fact the strategy for our international arbitration team started with capturing all of the arbitration work of our institutional client base. That's the low-hanging fruit. So the first step is to convince your client that you have the expertise and there's no need to turn to an international firm because in all these cases, the firm on the other side are the Clifford Chances and White & Cases and the like."

What Bienvenu is saying with his trade-mark diplomatic flair is that with Canada's top-end legal market becoming so competitive, no one ought to be inviting the fox into the henhouse.

Canada's national inferiority complex is one of the things that unites us, a collective joke. We never quite believe we're in the major leagues. But believe this: Private international arbitration is an area where Canadian litigators are punching above their weight, both as neutrals running an arbitration or as counsel to one side or the other.

And these days, private arbitration is growing like litigation on steroids.

The rise in popularity can be traced to a 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (dubbed the New York Convention). Signed by 142 countries literally from Afghanistan to Zimbabwe, it makes an arbitration award in one country automatically enforceable in the courts of another country — which is more than you can say for court awards.

"That's a huge advantage in international arbitration," says Cherniak. "An arbitration may be in Switzerland or Canada between a Dutch and a French company and if it wasn't enforceable in either Holland or France, it would be useless."

Few corporations that do business around the world are eager to submit to the jurisdiction of a local court, says Cherniak, and an arbitration clause allows them to pick the courts – and the law – that will apply.

Cherniak says of the vise of arbitration generally: "You get to pick your judge, you get to pick your rules, and you get to pick your place."

"It can be much more efficient and maybe even less costly, and is mostly much faster than the court system. So if you have a construction project in Africa and companies from all over are taking part in it, financing it and building it and doing the engineering, it would be a very unusual group of contracts that didn't have a very strong arbitration clause. I mean who wants to have their case decided by the courts of Tanzania? You'd almost be negligent not to include an arbitration clause."

"Arbitration is increasingly becoming the *lingua franca* of doing business around the world."

Private arbitrations are also confidential, which means no

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documents will end up as weapons in the hands of plaintiffs' firms.

Cherniak and McDougall see enough potential that they teamed up a few years ago to form Cherniak McDougall Arbitration Services to market themselves both here and abroad, even though they work at different law firms.

McDougall, who is chairman of the Canadian National Arbitration Committee (part of the Canadian Chamber of Commerce, a branch of the International Chamber of Commerce), says the emergence of China and India as potential economic superstars is only going to mean more work for lawyers who do arbitration.

"Globalization has made a real difference," he says, "because countries like China, for example, don't have the rule of law the way we do. For them, the law of contract is not an absolute the way it is for us, and culturally, they are perfectly used to negotiating in the middle of a contract if a change is needed.

"It's hard to bring people of different legal cultures together to agree on a dispute-resolution mechanism that will work so arbitration is increasingly becoming the *lingua franca* of doing business around the world."

All those factors go a long way to explaining the rise in the popularity of international arbitration. But it doesn't explain the popularity of Canadian litigators in the field.

"The growth internationally is in cross-border litigation and, typically, it's acting for large corporations involved in litigation that transcends boundaries."

When two countries are arbitrating, says Cherniak, "they usually want a third-party neutral. And Canadians are very often picked."

John Lorn McDougall; Fraser Milner Casgrain LLP

At the risk of sounding like Yogi Berra, it's because of what we are and we aren't.

"Canadians are tailor-made for international arbitrations because we have common and civil law, we have French and English and we're also a respected jurisdiction which is neither American nor English," says Simon Potter, a litigation partner at McCarthy Tétrault LLP in Montréal.

"That generates a level of comfort in some quarters and we're seeing a corresponding growth in the interest of our international clients willing to have Canadians involved in international work."

This appears true in both international arbitrations and courtrooms.

Wingfield of WeirFoulds has parlayed that growth in interest into billings. He figures anywhere from 25 per cent to 50 per cent of his practice in any given year is work outside Canada, be it Zaire, the UK, the Chanel Islands, Singapore or Delhi. In fact, this year, he may docket more hours away than at home because he's just about to start a trial in London over control of a hedge fund.

Wingfield believes it's the marriage of history and geography that has made Canadians a hot commodity.

"We're trained in law school under the English common law so we know English common law very well. Modern Canadian business statutes and our rules of procedure are derived from American statutes so the oppression sections, a director's fiduciary duties, and the business judgment rule

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David Wingfield; WeirFoulds LLP

— all that stuff is American and we know that stuff really well too.

"Now, Americans don't understand how the British work and the British don't really understand how the Americans work because the legal systems, the traditions and the principles are really, really different. There are a lot of areas of the law where Canadian lawyers have a tremendous advantage — Canadians probably don't appreciate how truly sophisticated we are with leading-edge legal problems."

How surprising (not). But others do, which is presumably why Sheila Block, chair of the litigation group at Torys LLP, took off to Lausanne, Switzerland for the weekend recently in the middle of a long trial. She was teaching lawyers from Switzerland, Germany, France, England and Brazil examination, cross-examination and redirect techniques.

"There's a lot Canadians have to offer in the field," says Block. "The issue in international arbitration these days is that whereas years ago, cross-examination was considered bad form, it's now very much a part of international arbitration. And common law-trained lawyers have an advantage because they know how to cross-examine."

The Geneva-based Foundation for International Arbitration Advocacy sponsored the workshop. It's an organization fairly crawling with Canadians. Block and Yves Fortier of Ogilvy Renault sit on the board of trustees while Block is also on the executive committee along with partner John Terry, David Roney, a former Toronto lawyer now at Schellenberg Wittmer in Geneva, and Andrew McDougall, another Canadian at White & Case LLP in Paris.

> "Billings. That will get their attention. I think that's ultimately always what gets the attention."

Just as arbitration and courtroom litigation are rising abroad, so too are Canadian litigators finding "international" litigation is rising in Canadian courtrooms.

Blame it on the Internet, which is not constrained by newsprint costs, but with all the real-time legal news services and the dedicated legal blogs, it's become awfully tough to contain corporate lawsuits in the original jurisdiction. As business and listings cross borders, so does litigation.

"For me, the growth internationally is in cross-border litigation and, typically, it's acting for large corporations involved in litigation that transcends boundaries," says Kent Thomson, head of the litigation practice group at Davies Ward Phillips & Vineberg LLP in Toronto. "The cases are usually take-over bid cases like, as an example, BCE, where the company has shares that trade on the New York Stock Exchange as well as the TSX. Those cases are a breeding ground for that sort of litigation.

"Then you've got the other type of cases, securities class actions, where you've got shareholders of public companies that again trade on a US and Canadian exchange. You've almost always got cross-border elements. One example I'm wrestling with right now are the Biovail securities class actions centered both in New York and Toronto."

Thomson, who docketed up to 50 per cent of his time last year on cross-border matters, says he is doing substantially more international work than a few years ago partly because his clients know and trust him. But it's also because they understand it's no longer always possible to keep high-stakes commercial litigation in one jurisdiction from spilling into another, and someone needs to quarterback.

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"A great deal of what I do involves what I would call trans-border issues: counsel from other jurisdictions, co-ordinated strategies and things like that. You don't have to be a lawyer called to the Bar at Delaware to understand the way Delaware works and you don't have to be a lawyer called to the Bar at Delaware to understand evidence and witnesses and trial dynamics. It's what I do for a living. So my clients tend to look to me to play a very active role in proceedings in the US even though I'm not going to be the guy in court in the US who's going to stand up and cross-examine the witness or make the arguments."

The sizzle surrounding cross-border securities suits, at least, seems to have been dying down in the last few years as in the US, the combination of unfavourable rulings and plaintiffs' firms shooting themselves in the foot has led to a drop in filings just as Canada is prepared to kick up.

Glenn Smith, a partner at Lenczner Slaght Royce Smith Griffin LLP in Toronto, sees more growth potential coming in international anti-combines, or price fixing suits.

"I think Ottawa is becoming a lot more active with respect to anti-combines than it has been and I think US regulators are a little more aware of anti-combines than they may have been previously as well," says Smith.

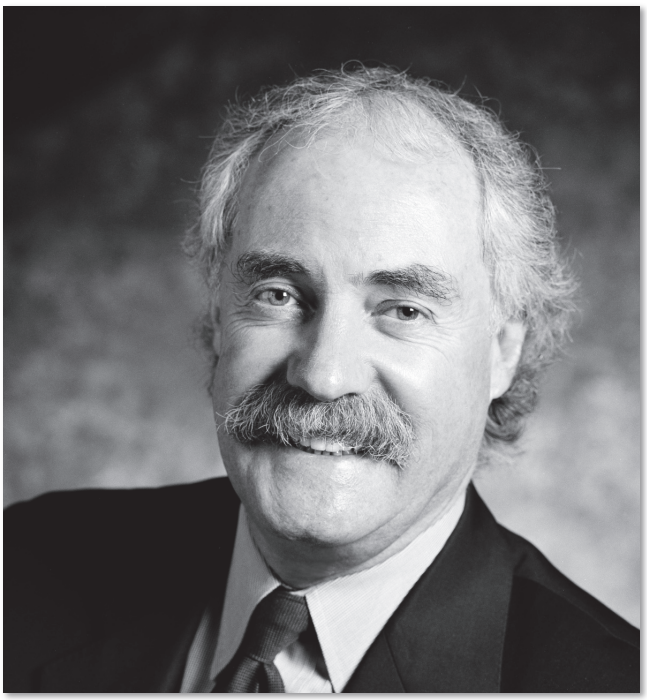
US plaintiff lawyers are certainly more aware of the potential in following anti-combines investigations. He points to a case he's working on. It involves allegations that several airlines including Air France, Café Pacific, Lufthansa, United Airlines and Korean Airlines as well as Air Canada conspired to fix prices.

"It's an example of civil actions being brought following the Department of Justice in the United States. The DOJ will start a prosecution and the civil action will follow the results of that prosecution, pleading damages because of the excess revenues charged to people and corporations as a result of alleged price fixing."

Smith got the call from Skadden, Arps, Slate, Meagher & Flom LLP in New York.

Another area generating a lot more work these days is international disputes over the North American Free Trade Agreement and World Trade Organization treaties, says Simon Potter of McCarthy Tétrault. "Another major element of that is the growth of India and China who are both WTO partners and have signed trade treaties, including investment treaties. So we are going to see the increase in trade with China and India lead to an increase in litigation involving those countries."

The number of trade disputes being filed and arbitrated has dropped in the last few years as the economy roared along,



David Haigh; Burnet, Duckworth & Palmer LLP

Potter acknowledges. But with the global economy turning down, most lawyers expect trade-related litigation to pick up.

That should be music to any partner's ears.

International arbitration and trade disputes can be lucrative work. So inside most corporate law firms, where billings are king, it's a bit of a mystery why the area doesn't get more respect.

Now into his third year as chairman of the Canadian National Arbitration Committee of the Canadian Chamber of Commerce, McDougall of Fraser Milner Casgrain can frequently be found at international conferences working his contacts and watching what other law firms are doing.

"I'm at ground zero in this, and it's very much a growth area in the United States and has been for years in London and Paris — Paris being the seat of the ICC [International Chamber of Commerce]. The Americans have taken to this in a major way, they've got major international arbitration departments at the big firms, and New York has become an important centre. The Canadian firms are not as up on it except for Ogilvy Renault and Stikeman Elliott in Montréal. They've been particularly quick."

Which isn't to say Canadian firms are completely clueless. Many seem to be making tentative swipes at the low-hanging fruit that Bienvenu talked about.

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Pierre Bienvenu; Ogilvy Renault LLP

But that's different from putting it on the litigation department's, and the firm's, front burner.

McDougall, who helped Fraser Milner Casgrain pull together an alternative dispute resolution team, is now trying to build a counsel practice. Asked whether his partners – or most Canadian law firms – really get the growth potential in the area, he pauses for a good long moment. "I don't know," he says finally. "My sense is more and more people *are* getting it. The litigators know all about the growth. I don't know about the corporate guys. I mean, we have a hell of a time getting them to even look at putting the proper clause in the agreements let alone talking about how it's going to work."

In one way, McDougall answered with his feet, in teaming up with Cherniak to form Cherniak McDougall Arbitration Services. They call it a "virtual" arrangement to market themselves. They bill separately (the revenues go to their respective firms) and don't exchange information on files with one another.

It would be tough to imagine two M&A partners or two tax partner from separate firms setting up their own marketing alliance. They wouldn't have to. Which begs the question, why do Cherniak and McDougall?

David Haigh of Burnet, Duckworth & Palmer in Calgary says for all the growth potential, agrees many Canadian law firms still don't seem to recognize the potential of international arbitration. He's asked what it will take to get people's attention.

"You want the honest answer?" he asks. "Billings. That will get their attention. I think that's ultimately always what gets the attention."

But it's a bit of a conundrum. Pushing billings past the tipping point is going to take some serious internal buy-in.

Gerald Ghikas, head of litigation in the Vancouver office of Borden Ladner Gervais LLP has been building an international arbitration practice that focuses on existing clients. Once he sold BLG's litigators on the notion, he staged a series of cross-country road shows complete with power points for an entirely different constituency: the firm's business lawyers.

"We see huge growth potential in this area so the first thing we did was set about educating our business lawyers that we can represent the firm's clients anywhere in the world as counsel when they get involved in international arbitrations," says Ghikas, also chair of the firm's commercial arbitration group.

"We've been talking to our clients, too, because there's been an understandable tendency on their part to assume that because the contract's governed by foreign law and the arbitration's taking place in London or Paris or someplace like that, they have to hire local counsel there. Of course that's not true, and I think bridging that gap is simply a matter of educating the clients as well as the business lawyers."

Ghikas says he suspects the disconnect between the enormous growth potential of international arbitration and the way the area is viewed by many Canadian lawyers comes from the fact it is not always a team sport.

"In some firms, senior litigators are looking to develop second careers as commercial arbitrators, and there's not much possibility of teamwork in that role," he says.

"It's sort of a stand-alone practice, and it can be kind of isolating. That seems to be where a lot of firms have put their emphasis. They'll have two or three senior people pursuing mandates as arbitrators and it doesn't have the spinoffs that a counsel practice does.

"We're one of the firms that's focused on getting the counsel mandates in, which have all the broader benefits that litigation does. What I expect is there is going to be a transition in the broader marketplace and the firms that haven't focused on the counsel work at this point are going to get religion and see the potential."

If you build it, they will come. Cherniak is confident the growth is there. "Arbitration itself has been around since biblical times but for a number of reasons, it's really come to its fore. I see international arbitration growing by leaps and bounds."

It may indeed be time for more Canadian law firms to find some of that old time religion.

Sandra Rubin is a freelance legal affairs writer.

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