

Removal of an Arbitrator for Reasonable Apprehension of Bias

By V.A. (Bud) MacDonald, Q.C., Rosalia Nastasi and Bottom Line Research

Summary

Section 13 of Alberta's *Arbitration Act*, R.S.A. 200, c. A-43, allows a party to challenge an arbitrator on the grounds of an apprehension of bias. The Court also has the power to remove an arbitrator under section 15 of the *Act* and to set aside an arbitral award under section 45. There is a 30 day time limit on the commencement of an application to set aside the award from the time the award is given or explained, in section 46.

The test for determining whether a reasonable apprehension of bias exists in an arbitrator is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the arbitrator may have an attitude or predilection for bias, whereby the arbitrator may have prejudged the matter. The test is objective and no actual or intended bias need be established. The apprehension of bias must be based on substantial grounds and a "mere suspicion" or the subjective view of a party is not sufficient for removal. Nor is the subjective opinion of the arbitrator that he or she is not biased a determining factor.

The Legislation

Section 13 of Alberta's *Arbitration Act*, R.S.A. 200, c. A-43, allows a party to challenge an arbitrator on the grounds of an apprehension of bias:

13 (1) A party may challenge an arbitrator only on one of the following grounds:

(a) circumstances exist that may give rise to a reasonable apprehension of bias;

(b) the arbitrator does not possess qualifications that the parties have agreed are necessary.

...

The Court has the power to remove an arbitrator under section 15 of the Act and may give directions on the conduct of the arbitration:

15 (1) The court may remove an arbitrator on a party's application under section 13(6), or may do so on a party's application if the arbitrator becomes unable to perform the functions of an arbitrator, commits a corrupt or fraudulent act, delays unduly in conducting the arbitration or does not conduct the arbitration in accordance with section 19.

(2) The arbitrator is entitled to be heard by the court on an application under subsection (1).

(3) When the court removes an arbitrator, it may give directions on the conduct of the arbitration.

(4) If the court removes an arbitrator for a corrupt or fraudulent act or for undue delay, it may order that the arbitrator receive no payment for services and may order that the arbitrator compensate the parties for all or part of the costs, as determined by the court, that they incurred in connection with the arbitration before the arbitrator's removal.

(5) Within 30 days after receiving the court's decision, the arbitrator or a party may, with the permission of the Court of Appeal, appeal to the Court of Appeal an order made under subsection (4) or the refusal to make such an order.

(6) Except as provided in subsection (5), there is no appeal from the court's decision or from its directions under this section.

[Emphasis added]

The legislation also allows for an application to court for an arbitration award to be set aside on a number of grounds, including a reasonable apprehension of bias in s. 45. However, if the challenge could have been made under section 13 before the award was made, and that did not occur, or if the grounds were the subject of an unsuccessful challenge, the court will not set aside an award for bias:

(4) **The court shall not set aside an award on grounds referred to in subsection (1)(h) [a reasonable apprehension of bias] if the applicant had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.**

...

(7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.
[Emphasis added]

Section 45 is subject to section 46, which places a 30 day time limit on the commencement of an application to set aside the award from the time the award is given or explained:

46 (1) The following must be commenced within 30 days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based:

- (a) an appeal under section 44(1);
- (b) an application for permission to appeal under section 44(2);
- (c) an application to set aside an award under section 45.

...

The Test for Reasonable Apprehension of Bias

An early decision from the Supreme Court of Canada emphasized the importance of impartiality in an arbitrator, noting a reasoned suspicion of bias is a sufficient disqualifier. The headnote to ***Szilard v. Szasz*** [1955] S.C.R. 3, [1955] 1 D.L.R. 370, summarizes the finding of the case aptly:

From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. **The arbitrators are to exercise their function not as the advocates of the parties nominating them and a fortiori of one party when they are agreed upon by all, but with**

as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair-minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. **In order to disqualify an arbitrator the Court does not necessarily have to infer that the arbitrator would not act in an entirely impartial manner; it is sufficient if there is the basis for a reasonable apprehension of so acting.**

Rand J. held that “[e]ach party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs”, at para. 16.

This standard was cited with approval in Alberta in *McPeak v. Herald Insurance Co.* (1991), 115 A.R. 83, 1991 CarswellAlta 400 (ABQB), at para. 30.

A recent case from Ontario (whose legislation is very similar to that of Alberta) discusses the test and shows how it applies: *MDG Computers Canada Inc. v. MDG Kingston Inc.*, 2013 ONSC 5436, 2013 CarswellOnt 13907. The applicant, MDG Computers, sought to remove the arbitrator from an ongoing arbitration on the basis of a reasonable apprehension of bias. The arbitrator, Mr. Goldman, was a lawyer who was involved in franchise agreements. Mr. Goldman was involved as counsel in another proceeding where he had hired an accounting expert to discuss damages from rescission of a franchise agreement. The allegation of bias arose because the expert Mr. Goldman had hired for the other proceeding was the same expert that would be appearing in the MDG arbitration. The concern was articulated as follows, at para. 9:

Upon learning that the respondent’s expert for this arbitration was the same as retained by Mr. Goldman in the other action, the applicants took the position that a reasonable apprehension of bias had arisen, in that Mr. Goldman, who was relying on an expert in the other action with respect to his client’s position, would, as arbitrator, be considering the evidence of the same expert in the arbitration, regarding similar issues, and would be called upon to determine the expert’s qualifications, expertise and credibility, and to assess the expert evidence proffered in the proceeding.

MDG asked Mr. Goldman to remove himself voluntarily but he refused. MDG then brought an application to have him removed, before the arbitration commenced.

The Court stated that the test for determining whether a reasonable apprehension of bias exists in an arbitrator is “whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the arbitrator is seized with an attitude or predilection for bias, whereby the arbitrator must be taken to have prejudged the matter”, at para. 14.

The test is objective and no actual or intended bias need be established. However, the apprehension of bias must be based on substantial grounds and a “mere suspicion” or the subjective view of a party is not sufficient for removal, at para. 16.

The Court also reviewed the duties of the arbitrator which are set out in the *Arbitration Act*, and which are nearly identical in substance and numbering to Alberta’s *Act*. An arbitrator is to be independent of the parties and act impartially. A court may remove an arbitrator where there is a reasonable apprehension of bias or where the arbitration is not conducted in accordance with equality and fairness, at para. 17:

Pursuant to the Arbitration Act, 1991, S. O. 1991, c. 17, the duties of an arbitrator are set forth at s. 11. An arbitrator shall be independent of the parties and shall act impartially. Before accepting an appointment as arbitrator, a person must disclose to all parties to the arbitration any circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias. During an arbitration, where an arbitrator becomes aware of circumstances that may give rise to a reasonable apprehension of bias, he or she shall promptly disclose them to all parties. Pursuant to s. 6 of the Act, the court may intervene in an arbitration proceeding “to prevent unequal or unfair treatment of parties to arbitration agreements”. Section 13(1)(1) of the Arbitration Act provides that the court may remove an arbitrator upon the challenge of one of the parties where “circumstances exist that may give rise to a reasonable apprehension of bias”. Further, pursuant to s. 15(1), a court may remove an arbitrator upon the application of a party where the arbitrator “does not conduct [the arbitration] in accordance with section 19 (equality and fairness).”

The Court found that a reasonable apprehension of bias existed on the facts of the case. An informed person, viewing the matter realistically and practically, would conclude that the arbitrator may have an attitude of bias based on the fact that he had hired the expert to advance his client's case. No actual or intended bias was established, and was not necessary to meet the test, at para. 30:

However, I am of the view that a reasonable apprehension of bias does arise in the circumstances of this case. I find that the test as set forth in *Simcoe Condominium Corp. No. 78*, supra, and *Szilard v. Szasz*, supra, is met. **I am of the opinion that an informed person, viewing the matter realistically and practically, and having thought the matter through, would, on the facts as presented herein, conclude that the arbitrator may have an attitude or predilection for bias, based on his retainer of Mr. Stulberg as an expert to advance his clients' cases in the past. While no actual or intended bias is established, such is not required:** *Szilard v. Szasz*, supra. It is the probability or the reasoned suspicion of biased appraisal and judgment by Mr. Goldman in assessing the opinions of both experts, including the qualifications, expertise, credibility and accuracy of the opinion of Mr. Stulberg, which gives rise to a reasonable apprehension of bias, whether conscious or subconscious. [Emphasis added]

The Court referred to *Szilard v. Szasz* and noted that it was the reasoned suspicion of bias, even if unintended, that defeated Mr. Goldman's appointment, regardless of whether Mr. Goldman himself honestly believed he was not prejudiced, at para. 31. This underscores the objective nature of the test.

As a result, the Court ordered Mr. Goldman removed as arbitrator and urged the parties to attempt to agree on one of three proposed arbitrators as a replacement, failing which the first arbitrator on the list would be appointed.

Selected Case Law

In *Starr v. Gordon*, 2010 ONSC 4167, 88 R.F.L. (6th) 54, the mother, Ms. Starr, sought to set aside the arbitration award in a child support matter on the basis that there was a reasonable apprehension of bias. Ms. Starr argued that the arbitrator's past association with the other mother's lawyers led to the apprehension of bias (this appears to be a same-sex relationship). Ms. Starr also raised the issue of improper communications between the arbitrator and the other party's lawyer.

In the motion being considered by the Court, the other mother, Ms. Gordon, brought a motion for summary judgment seeking to dismiss Ms. Starr's application.

The parties had cohabitated for 11 years and had a seven year old child. After separation, they agreed to joint custody of the child and that the child would spend equal time with each parent. There was a consent order to this effect which also provided for a mediator/arbitrator to set the terms of the equal time arrangement. In terms of child support, a different arbitrator, Mr. Kronby, decided the child support issues. A couple of weeks after the arbitration hearing, Ms. Starr's lawyer wrote to Mr. Kronby advising that they had discovered facts that led to a reasonable apprehension of bias on his part. Mr. Kronby ruled that there was no bias, and issued an arbitration award and a costs decision. Ms. Starr then filed an application with the court to set aside the arbitration. The history of the case showed that there were bitter and protracted procedural fights between the parties concerning the disclosure of evidence and disagreements on the merits of financial issues.

The Court identified the relevant provisions of the *Arbitration Act*, including the duty of an arbitrator to be independent of the parties and to act impartially, the requirement of disclosing any circumstances that could give rise to a reasonable apprehension of bias, and the ability to challenge an arbitrator for bias and have an award set aside.

In terms of bias, Ms. Starr's evidence was that there was a familiarity between the arbitrator and Ms. Gordon's counsel, such as the arbitrator asking counsel if she would join him on the patio for lunch, and mentioning "you know where the fridge is". She also noted that the lawyer and arbitrator met for an hour alone on the first day of arbitration, without her present. Ms. Starr noted that she felt uncomfortable and left out. Ms. Starr later found out that the arbitrator had a previous professional connection with Ms. Gordon's lawyer. The arbitrator was a partner at two firms where Ms. Gordon's lawyer worked as an associate from 1998 to 2007. They had been a part of a small family law group at the firm, consisting of four lawyers, and had both switched from one firm to another firm together during that period of time.

Ms. Starr's position was that she would not have agreed to an arbitrator that the opposing lawyer had previously worked for or had a significant amount of social contact with. She was also unhappy when she found out that the person who chose Mr. Kronby as arbitrator was his former assistant, who was working at Ms. Gordon's lawyer's firm, and had only recently stopped working for Mr. Kronby. There was also other evidence regarding the closeness of Mr. Kronby with others lawyers and legal staff that Ms. Gordon worked with.

The arbitration commenced in 2008, and the arbitrator argued that he had no continuing professional or social relationship with the lawyer.

It also came to light that in the meeting prior to the arbitration, Ms. Gordon's lawyer had raised the issue of her prior relationship to the arbitrator with him, in Ms. Gordon's presence, asking if he was going to disclose that fact. However Mr. Kronby seemed insulted and said he did not need to disclose the issue.

The Court agreed that the test for a reasonable apprehension of bias " is whether a reasonable and right minded person, informed of all the circumstances, viewing the matter realistically and

practically, and having thought the matter through, would conclude it was more likely than not that the arbitrator, whether consciously or unconsciously, would decide fairly”, at para. 28.

The Court was blunt in noting that it had never before seen the series of interconnections between the arbitrator, his former colleagues and his former staff and the manner in which this came to light for Ms. Starr (who had to investigate on her own), at para. 27.

As this was a summary judgment motion, the task for the Court was to determine whether the facts put forward by Ms. Starr could meet the legal test for apprehension of bias. The Court found that the legal threshold had been passed. This was not simply a case of prior professional association, but one where the arbitrator was the senior lawyer in the respondent’s firm when she was a junior in a small four member department, and one where they all moved together to another firm. There was also an issue that the assistant recommended Mr. Kronby, her former employer, even though a list of other arbitrators had been provided to her. As a result, an informed person could conclude that the arbitrator could be influenced unconsciously by past association such that he may not be able to be impartial. The issue of the familiarity between the lawyer and arbitrator during the arbitration and the conversation before the arbitration also raised an apprehension of bias, at para. 34:

This is all most unfortunate. However, I think that “an informed person, viewing the matter practically and realistically - and having thought the matter through” would conclude the arbitrator could be expected to be influenced unconsciously by past associations so as to not be able to remain impartial. If that was not, by itself, enough, I think the combination of the prior and longstanding close association, the familiarity in the course of the arbitration, the conversation about an issue before the arbitration, the involvement of the arbitrator’s former clerk and the appearance of a continuing association of the clerk with the arbitrator’s firm raise enough of an apprehension of bias that the legal threshold has been passed.

Therefore, the application to dismiss Ms. Starr’s application to challenge the arbitrator and set aside the award was dismissed.

Another case which involved improper communications between one party and the arbitrator was *Kitchener (City) v. G.M. Gest Group Ltd.* (2003), 31 C.L.R. (3d) 168, 2003 CarswellOnt 3946 (ONSC). The City of Kitchener sought to set aside an arbitration award made by the arbitrator Mr. Hawkins. The arbitration related to a dispute between the City and the G.M. Gest Group, a roof repair contractor. The dispute related to the length of time it took to complete a project and the significant sums claimed by the contractor as a result, as well as issues relating to the use of subtrades.

The facts are lengthy, but the evidence showed that there was a long period in which the parties were discussing whether to arbitrate or not and the terms of the arbitration. During that time, the arbitrator received information and letters from the contractor which he did not share with the City. There were also at least three meetings between the contractor and the arbitrator, which were not attended by the City or its counsel. The Court characterized these meetings as “completely inappropriate”, at para. 47. It also characterized the private correspondence from the contractor to the arbitrator as completely inappropriate, both in the fact of the communication and because the contractor made disparaging comments about the City and its position in the communications. The arbitrator should have ensured the City was privy to such communications in a timely fashion and given an opportunity to respond, at para. 49:

There is no evidence of any further communication between any of the parties until Mr. Hawkins published his “award of arbitration” dated April 12, 2002. **The correspondence sent to Mr. Hawkins by Mr. Connors on behalf of Gest quoted above and particularly the correspondence in February of 2002 was completely inappropriate. It was inappropriate first and foremost because it constituted, at least in part, submissions by Gest to the arbitrator which were never communicated to the City. Further, in my view it was inappropriate because of the disparaging comments made by Gest with respect to the City and its position. It is regrettable that Mr. Hawkins permitted Gest to communicate with him in this fashion and, more particularly, it is regrettable he failed to ensure the City was privy to such communications in a timely fashion with an opportunity to respond. ...**
[Emphasis added]

The Court concluded that the arbitrator's actions in permitting the contractor to act in this way clearly constituted a reasonable apprehension of bias, at para. 49 and para. 54. There were also procedural safeguards which were not followed that would have helped to ensure fair treatment, such as having a meeting with the parties to outline the procedures to be followed for the arbitration and to have informed the parties of a key issue that developed in relation to the removal of a lien.

The conduct permitted by the arbitrator and his procedures clearly offended the *Arbitration Act* and procedural fairness such that the arbitration ruling had to be set aside, at para. 67. The Court found the City had not been treated equally or fairly and had not been provided with an opportunity to present a case or respond to the other side's case. As a result of this treatment, a clear apprehension of bias existed, at para. 70:

Pursuant to s. 46(1) of the Arbitration Act, this court may set aside the arbitrator's award on a limited number of grounds. Without reservation I come to the conclusion that the applicant is entitled to the principal relief it seeks based on grounds six, seven and eight. Specifically, the applicant was not treated equally and fairly, nor was the applicant given an opportunity to present a case or to respond to the other party's case. Further, the procedures followed by the arbitrator did not comply with the Act. Finally, and largely as a result of the first two stated grounds, there is clearly a reasonable apprehension of bias. ...

The arbitrator Mr. Hawkins was removed and the arbitration terminated. The City was also allowed to seek reimbursement for the fees and expenses paid to Mr. Hawkins due to the flawed arbitration process, at para. 80.

Another case that was decided on similar grounds is ***Waterloo (Regional Municipality) v. Elgin Construction*** (2001), 13 C.L.R. (3d) 24, 2001 CarswellOnt 3965 (ONSC). The City of Waterloo applied to remove Mr. Fine as a member of a three-man arbitral tribunal due to an alleged reasonable apprehension of bias. The City and Elgin Construction were parties to a contract of a landfill gas control system and the contract had a clause agreeing to submit disputes to arbitration. The agreement allowed each party to appoint one member to the panel and the

third member would be agreed on by the two appointees. Elgin Construction appointed Mr. Fine. The arbitration began and went on for four days. At that point it came to light that a principal witness for Elgin Construction had met with Mr. Fine at Mr. Fine's home prior to the arbitration. The purpose of the meeting was to retain Mr. Fine as Elgin's appointee on the arbitration panel. At the meeting, the witness explained certain facts in issue and provided Mr. Fine with a binder containing relevant documents. Included in the Binder was Elgin's view of the facts and a chronology they created, which was not provided to the City. The binder also had letters the City had sent on a "without prejudice" basis and other documents that were not produced to the City or other members of the tribunal. These matters had been raised by Mr. Fine himself during the arbitration, for which he was commended. However, after considering the issue, the arbitral panel, including Mr. Fine, ruled that there was no reasonable apprehension of bias and that Mr. Fine did not need to be removed.

The Court disagreed. It noted that the procedure in selecting an arbitrator will necessitate some contact between a party and an arbitrator before the process begins, along with the transmission of some information regarding the case. However, the contact and information exchanged should be limited. The Court noted that the witness and Mr. Fine spent some sociable time together at the home and that Mr. Fine had a "positive" impression of Mr. Kennedy, who would be Elgin's primary witness. Importantly, the binder with documentation arguably favourable to Elgin was very problematic.

The Court quoted from *Szilard v. Szasz* regarding the importance of impartiality and the fact that bias is often unintended and unrealized by the arbitrator itself. The key question is whether the party, acting reasonably, has a sustained confidence in the independence of the arbitrator deciding his case, at paras. 16-18:

In that case the court relied upon its earlier judgment in the case of *Szilard v. Szasz* (1954), [1955] S.C.R. 3 (S.C.C.) In that case Mr. Justice Rand stated at page 371:

From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. **The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but as free, independent and impartial minds as the circumstances permit.** In particular, they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.

His Lordship went on to cite jurisprudence, some of which is worthy of repetition. In *Muckleston v. Brown* (1801), 31 E.R. 934 (Eng. Ch. Div.), Lord Eldon C. put it this way:

But the arbitrator swears, it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A judge must not take it upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice; but upon general principles it cannot be supported.

After considering other authorities Mr. Justice Rand concluded at page 373:

These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal's setup. **It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who sit in judgment on him and his affairs.**
[Emphasis added]

The Court found a reasonable apprehension of bias existed based on the meeting and provision of one-sided information, and concluded as follows:

...The combination of circumstances in this case leads me to the conclusion without reservation that Mr. Fine cannot continue as an arbitrator. **The meeting between Mr. Kennedy, a key witness for one of the parties, and Mr. Fine, and more particularly, the giving to Mr. Fine prior to the arbitration of a significant number of documents, some of which were privileged, some of which were not introduced in evidence, some of which were not given to the**

opposing party in the litigation and some of which constitute an “argument” for Elgin Construction clearly justify a reasonable apprehension of bias on the part of the Regional Municipality of Waterloo and as well constitute a denial of natural justice as a result of procedural unfairness. [Emphasis added]

Mr. Fine was removed as an arbitrator and the proceeding was declared void to that point in time. The Court directed the arbitration to begin anew with a completely new arbitration panel.

In *Ritchie v. Ritchie*, 2014 ABQB 219, 2014 CarswellAlta 586, bias was not made out in relation to a family law arbitration. Ms. Ritchie made a number of complaints against the arbitrator Mr. Moe in relation to his arbitration of her family law matter and she attempted to set aside the award. One of the complaints was bias. Ms. Ritchie argued that Mr. Moe made comments during the process that showed that he was biased against her or viewed her inappropriately. These included comments that his uneducated daughter could get a job earning \$40,000 a year without experience or training, which were directed as Ms. Ritchie’s concern that she would have trouble getting a job and earning a decent income. She also objected to Mr. Moe telling a story in the party’s presence about a woman who was out to get every penny from her ex-husband, at para. 20. She was also unhappy that Mr. Moe had spoken to her daughter Rachel.

The Court found that the remarks and conduct did not meet the test for bias. The conversation with Rachel occurred when she was sent to Mr. Moe’s office by Ms. Ritchie to deliver documents. The Court found Ms. Ritchie was very sensitive to discussions and language used by the mediator, but that not liking his language and reactions was insufficient to show bias, at paras. 25-26:

Mrs. Ritchie was clearly very sensitive to discussions and language used by the mediator. It is possible to follow the flow of the discussions from the documentation and summaries provided by the mediator/arbitrator as the process was ongoing. It is relevant to this decision that those summaries were being generated and provided to the parties as matters carried along, they were not generated after the fact, or after the allegations of bias were made.

Mrs. Ritchie may not have liked the language of or some of the reactions of the Arbitrator. However, the evidence presented is not sufficient to establish that Mr. Moe was biased or that his appointment or decision can be attacked by reason of his language or conduct.

This case is a good reminder that the test for bias is an objective rather than subjective one.

END