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Removal of an Arbitrator for Reasonable Apprehension of Bias

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In non-international arbitration across Canada, the test for removal of an arbitrator for reasonable apprehension of bias is clear and consistent as set by the Supreme Court of Canada in *Szilard v. Szasz* [1955] S.C.R. 3, [1955] 1 D.L.R. 370. This article reviews several subsequent illustrative cases in which bias has and has not been found. The takeaway is that the actions of an arbitrator will have to be fairly egregious to justify removal for a reasonable apprehension of bias.

Many of the non-international arbitral statutes across Canada allow a party to challenge an arbitrator on the grounds of an apprehension of bias. The test for determining whether a reasonable apprehension of bias exists in an arbitrator, as set by the Supreme Court of Canada in ***Szilard v. Szasz*** [1955] S.C.R. 3, [1955] 1 D.L.R. 370, 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.

A recent case from Ontario discusses the test and shows how it applies. In ***MDG Computers Canada Inc. v. MDG Kingston Inc.***, 2013 ONSC 5436, 2013 CarswellOnt 13907, the arbitrator, Mr. Goldman, was a lawyer who was involved as counsel in another proceeding where he had hired an accounting expert to discuss damages. The allegation of bias arose because the expert he had hired for the other proceeding was the same expert that would be appearing in the arbitration. The Court found that a reasonable apprehension of bias existed based on the fact that Mr. Goldman had hired the expert to advance his client's case.

Starr v. Gordon, 2010 ONSC 4167, 88 R.F.L. (6th) 54, is also illustrative. In that case, the parties engaged in an arbitration in connection with a child support matter. Starr sought to set aside the award arising out of that arbitration on the ground that the arbitrator's past association with lawyers led to an apprehension of bias. Starr's evidence was that there was a familiarity between the arbitrator and Gordon's counsel, such as the arbitrator asking counsel if she would join him on a patio for lunch, and mentioning "you know where the fridge is". Starr also noted that Gordon's lawyer and the arbitrator met for an hour alone on the first day of arbitration, without her present. Starr later found out that the arbitrator had a previous professional connection with Gordon's lawyer. The arbitrator was a partner at two firms where Gordon's lawyer worked as an associate. The Court was blunt in noting that it had never before seen such a series of interconnections between the arbitrator and his former colleagues.

In addition, ***Kitchener (City) v. G.M. Gest Group Ltd.*** (2003), 31 C.L.R. (3d) 168, 2003 CarswellOnt 3946 involved an arbitration between the City of Kitchener and a contractor. 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, an arbitrator was agreed to be appointed, but the City subsequently disputed his jurisdiction on the basis that a pre-condition had not been met. The arbitrator received information and letters from the contractor which the arbitrator 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. In the result, the arbitrator was removed and the arbitration terminated. The court found that it was ill-advised

for the City to have joined the arbitrator as a party to the court application, and the court denied the City's claim against the arbitrator for the fees and expenses paid to the arbitrator due to the flawed arbitration process. However, the court indicated that the City could have the arbitrator's accounts assessed in the ordinary course under the *Arbitration Act*.

In ***Waterloo (Regional Municipality) v. Elgin Construction*** (2001), 13 C.L.R. (3d) 24, 2001 CarswellOnt 3965 Elgin Construction appointed Mr. Fine as its nominee to the arbitration panel. 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 provided Mr. Fine with a binder including Elgin's view of the facts and a chronology they created, which was not provided to the City of Waterloo. The binder also had letters the City had sent on a "without prejudice" basis. The arbitral panel ruled 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.

Ritchie v. Ritchie, 2014 ABQB 219, 2014 CarswellAlta 586, is a case in which a reasonable apprehension of bias was not made out. Ms. Ritchie made a number of complaints against the arbitrator Mr. Moe in relation to his arbitration of her family law matter. Ms. Ritchie argued that Mr. Moe made comments during the process that showed that he was biased against her. These included comments that his uneducated daughter could get a job earning $40,000 a year without experience or training, which were directed at 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 parties' presence about a woman who was out to get every penny from her ex-husband. The Court found that the remarks and conduct did not meet the test for bias. Ms. Ritchie was very sensitive to discussions and language used by the arbitrator, but not liking his language and reactions was insufficient to show bias.

These illustrative cases suggest that the actions of the arbitrator will have to be fairly egregious to justify removal for an apprehension of bias.

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