THE NEW "REAL DANGER" TEST FOR ARBITRATOR BIAS IN BRITISH COLUMBIA

By Murray L. Smith

On May 27, 2018, B.C.'s *International Commercial Arbitration Act*[1] was amended to raise the standard for challenging arbitrator independence or impartiality. The previous statutory threshold for disqualifying an arbitrator, set out in s. 12(3)(a), was that circumstances exist that give rise to "justifiable doubts as to the arbitrator's independence or impartiality". That wording remains, but s. 12(3.1) was added:

> (3.1) For the purposes of subsection (3)(a), there are justifiable doubts as to the arbitrator's independence or impartiality *only if there is a real danger of bias* on the part of the arbitrator in conducting the arbitration. [Emphasis added]

When introducing subsection (3.1), Attorney General David Eby noted an international trend toward a higher standard because of a concern that low-merit challenges were being employed as a strategic tool to disrupt arbitrations. He said: "This amendment, on its face, clearly does and is intended to raise the standard needed for a party to challenge an arbitrator's independence or impartiality."[2]

The House of Lords in *R. v. Gough* adopted a "real danger" test in a judicial context in 1993.[3] In 2004 the International Bar Association established a new test based on whether "there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case" in its Guidelines on Conflicts of Interest in International Arbitration.[4] The Australian *International Arbitration Act 1974* was amended in 2010 to add a "real danger" test; the amendment to the Australian statute has been termed the "*Gough* amendment", referring back to the House of Lords case.[5] In 2000, the *Gough* "real danger" test was applied in an arbitration context in the decision of the English Court of Appeal in *AT&T Corporation v. Saudi Cable Company*.[6]

However, in a dramatic turnaround, soon after *AT&T*, the House of Lords in *Porter v. Magill* ruled that the *Gough* "real danger" test should be replaced by a "real possibility" test (albeit to align with the test for bias adopted by the European Court of Human Rights).[7] The *Porter* test remains the law of England and would be applied as well in the context of a challenge to an arbitrator's independence or impartiality.

Against this backdrop, the questions that arise in interpreting and applying the B.C. amendment, and determining its significance, are as follows:

a) What was the pre-amendment test for challenging an arbitrator's independence or impartiality in the international commercial arbitration context in B.C.?

b) Has the amendment changed anything?

c) Is there a different test for a challenge to an arbitrator's independence or impartiality in a domestic case under B.C.'s *Arbitration Act*, which has not been similarly amended?

THE TEST FOR ARBITRATOR BIAS BEFORE THE AMENDMENT

The longstanding test for arbitrator bias in Canada was established by Rand J., writing for the Supreme Court of Canada, in *Szilard v. Szasz*,[9] in 1955: "Nor is it that we must be able 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."[10]

The *Szilard* "reasonable apprehension" test was affirmed in 1978 in *Committee for Justice and Liberty v. National Energy Board*,[11] where the Supreme Court adopted the comment by Rand J. that the "probability or *reasoned suspicion* of biased appraisal and judgment, unintended though it be", is ground for disqualification.[12] The concern for an apprehension of bias or a suspicion of bias is often linked to Lord Hewart's dictum in *R. v. Sussex Justice* that "justice should not only be done but should manifestly and undoubtedly be seen to be done".[13]

HAS THE AMENDMENT CHANGED ANYTHING?

Courts in Canada have not gone further than the statement from *Szilard* in elaborating the common law test for bias in the arbitration context. The applicable test is simply the "reasonable apprehension" test. On its face, the 2018 amendment to the B.C. *International Commercial Arbitration Act* dramatically alters the common law test for arbitrator bias. We have moved from a search for a suspicion of bias to a need for proof of a real danger of bias. This is essentially what the Attorney General said was the object and purpose of the "real danger" amendment.

To understand just how dramatic this shift is, we must examine the current test for bias in a domestic arbitration context. The domestic arbitration statute has not been similarly amended. By considering the test that the courts would apply in the domestic arbitration setting, the difference that the amendment has made in international arbitrations will be revealed.

IS THERE A DIFFERENT TEST FOR ARBITRATOR BIAS IN A DOMESTIC CASE UNDER B.C.'S *ARBITRATION ACT*?

To answer the question of what test will apply in a domestic arbitration context, it is necessary to first consider the current test for bias in a judicial context and then consider whether the common law test applicable in the judicial context would apply in the context of a consensual, domestic, commercial arbitration.

The Current Test for Bias in Judicial Proceedings

There have been significant developments in the test for judicial bias in recent years. The current statement of the test is found in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*,[14] where Abella J., writing for a unanimous seven-member panel of the Supreme Court of Canada, held that the test for a reasonable apprehension of bias is a real likelihood or probability of bias:

> Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2; *S. (R.D.)*, at para. 134, per Cory J.[15]

Yukon Francophone School Board presents a significant move beyond a "real possibility" or "reasonable suspicion" test to a "real likelihood or probability" test. The premise for such a high threshold, according to Abella J., is the presumption of impartiality.

Does the Presumption of Impartiality Apply to Arbitrators?

Earlier, in *R. v. Teskey*,[16] Abella J., writing in dissent, described the basis for the presumption of impartiality and integrity applicable to judges as follows:

> Of utmost importance to the resolution of this appeal, in my view, is the existence of a presumption of integrity, rebuttable only by cogent evidence. The high threshold for displacing the presumption that a judge is acting with integrity and in accordance with his or her oath of office, seeks to balance two significant public interests, both related to maintaining confidence in the administration of justice: the right of judges to be presumed to be acting with integrity and the right of litigants to challenge judges when their conduct gives rise to a reasonable apprehension of impropriety.[17]

The Supreme Court of Canada has applied the presumption of impartiality to lay jurors who must swear an oath. In *R. v. Burke*,[18] Major J. wrote: "Similar to judges, juries should be presumed to be impartial. There are

numerous procedural safeguards designed to ensure the impartiality of jurors".[19]

In an administrative law context, the presumption has been held to apply to members of statutory tribunals. In *Telus Communications Inc. v. Telecommunications Workers Union*,[20] Sexton J.A. wrote: "It is a well-known principle that each member of a tribunal is subject to a presumption of impartiality ... The fairness and impartiality attributed to judges, absent evidence to the contrary, has also been attributed to members of expert tribunals."[21]

Many sources suggest that the presumption applies to arbitrators as well, though the reasons for such an extension are not clear. The Federal Court has held that "[a]rbitrators are also presumed to be impartial",[22] though the judge in that case relied on a precedent involving a labour arbitration under the *Canada Labour Code*. Likewise, Rothstein J.A. (as he then was) wrote in one case: "The decision-maker in this case was the Vice-Chairman of the Public Service Staff Relations Board. There is a presumption of integrity and impartiality in such a decision-maker".[23] In these cases, the justification for the application of the presumption of impartiality to a consensual, commercial—as opposed to statutory—arbitrator was not made clear.

In his text on arbitration, J. Brian Casey writes: "There is a strong presumption of judicial impartiality, which is equally applicable to arbitrators whose function is in the nature of judicial determination."[24] He cites *Jacob Securities Inc. v. Typhoon Capital B.V.*[25] and *Terceira v. Labourers International Union of North America*.[26] The ruling in *Jacob Securities* involved an international commercial arbitration decided under the Ontario *International Commercial Arbitration Act*, but no reasons were given for why the presumption of impartiality should apply to a commercial arbitrator. *Jacob Securities* followed *Terceira*, which involved a challenge to the impartiality of the vice-chair of the Ontario Labour Relations Board, not a commercial arbitrator. None of the decisions that have applied the presumption to an arbitrator has included a rationale for applying the presumption to a private adjudicator who is not obliged to take an oath.

A judge in British Columbia might follow the Ontario precedents in applying the presumption of impartiality to arbitrators. The same or similar principles would be applicable in an arbitration setting as were applied in *Teskey* in judicial proceedings. While an arbitrator need not take an oath, there is a legal and ethical duty to disclose any circumstance that might give rise to justifiable doubts as to impartiality or independence. It follows that commercial arbitrators might be held to the same standard as judges because of the application of the high threshold presumption of impartiality.

Having said that, it could be argued that commercial arbitration is a consensual, private process that requires a sustained sense of confidence in the

impartiality and independence of the decision maker and that the presumption of impartiality applicable to a judge should thus not apply, certainly not with the same force. In *Commercial Arbitration in Canada*, J. Kenneth McEwan, Q.C., and Ludmila Herbst, Q.C., suggest that commercial arbitration is to be distinguished from situations where the parties have no choice in the decision maker.[27] McEwan and Herbst cite the opinion of one of the world's leading international commercial arbitrators, Albert Jan van den Berg, who comments that a more subjective approach is appropriate where the arbitration process depends upon the trust of the parties. No judicial ruling in Canada has explained why a party to a private dispute-resolution process should be required to overcome a presumption when questioning the impartiality or independence of an arbitrator. Why should a party to such a consensual process need to prove a likelihood of bias rather than raise a possibility of bias?

The administration of justice and the integrity of the arbitrator would not necessarily be called into question by a challenge in the same way as for a judge. The arbitral process is private. It is extremely rare for a judge to be disqualified for bias, but it is not uncommon for the authority of a commercial arbitrator to be revoked because of even remote connections to the cause or the parties to the cause. Membership in a large law firm is often a basis for challenging an arbitrator's impartiality because of potential connections to parties and witnesses. The presumption of impartiality is not a "one-size-fits-all" doctrine. It is much easier to disqualify a juror than it is to disqualify a judge. The "high threshold for displacing the presumption that a judge is acting with integrity" described in *Teskey* may not be appropriate in the arbitration context.

At least for international arbitrations in British Columbia, the statutory imposition of a "real danger" test renders moot the applicability of the presumption of impartiality. The threshold for a challenge for bias is very high. The same cannot be said for arbitrations under the domestic statute. While a court would be reluctant to take differing approaches in domestic and international cases, the domestic statute has not been amended to mandate a "real danger" test. It could be argued that if the legislature had wanted the "real danger" test to apply in domestic cases, the *Arbitration Act* would have been similarly amended.

The applicability of the presumption of impartiality is one factor to be taken into account in the analysis of what test would apply in the context of a domestic commercial arbitration in B.C. An equally significant factor is the differing treatment that Canadian courts give to the various formulations of the test for bias.

Is a "Real Danger" the Same as a "Real Possibility" or "Suspicion"?

The House of Lords in *Porter* took some pains to eschew the language of a "real danger" test, preferring a "real possibility" test. In Canada, confusion has resulted from different formulations of the "reasonable apprehension" test. Courts in Canada and England have referred to the "reasonable suspicion" test, the "real likelihood" test, the "real possibility" test and the "real danger" test. However, there is some suggestion in the Supreme Court of Canada that there is no meaningful difference between the various tests. In *R. v. S. (R.D.)*,[28] Major J., writing for Lamer C.J. and Sopinka J., in dissent, said:

> The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test.[29]

The view of Major J. regarding the interchangeability of the tests was accepted by Iacobucci, Binnie and LeBel JJ. in *Burke*.[30] Thus, six justices of the Supreme Court of Canada have accepted the dictum of Major J., and it is reasonable to conclude that the terms "real danger" of bias and "reasonable suspicion" of bias may be used interchangeably in Canada.

The decided cases do not confront the elephant in the room. How can a "real likelihood" of bias be the same as a "real possibility" of bias or a "reasonable suspicion" of bias? Canadian lawyers have been trained to treat a possibility (or suspicion) and a probability (or likelihood) as different. In most contexts a probability requires a preponderance of evidence, a *prima facie* case or a likelihood of over fifty per cent. A possibility or a suspicion, however, can be anything down to the most minimal probability. The Supreme Court of Canada, at least in the context of discussing the test for a reasonable apprehension of bias, seems prepared to equate a "real suspicion" with a "real probability" or a "real danger". It is a curious result that a judge deciding a challenge for bias may apply either a "reasonable suspicion" test or a "real likelihood" test and that both are essentially equivalent to a "real danger" test.

What has given rise to this evolution in the treatment of the test for bias by the Supreme Court? There is certainly a public policy trend toward maintaining the integrity of the judicial process by limiting challenges for bias. There is also a recent trend to promote alacrity and finality, especially in arbitration cases, as seen in *Sattva Capital Corp. v. Creston Moly Corp.*[31] In that case, rights of appeal in domestic arbitration were confined to pure questions of law, and a reasonableness standard rather than a correctness standard was applied to arbitrator rulings on most questions of law. What is

clear from recent developments in this area is that judges, in attempting to reconcile modern standards with the old language for an apprehension of bias, are looking for compelling evidence of an apprehension of bias while at the same time acknowledging the importance of justice being seen to be done.

What Does All This Say About the Amendment?

Does it follow from the ruling in *R. v. S. (R.D.)* that the new "real danger" test does not really alter the common law test for bias in Canada since the tests are interchangeable? The "real danger" test probably does raise the bar and gives voice to the social policy concern for speed and finality in international commercial arbitration proceedings. To borrow the language of the Attorney General in introducing the amendment, the amendment is meant "to raise the standard needed for a party to challenge an arbitrator's independence or impartiality". In the context of international commercial arbitrations, the courts must be particularly vigilant to find compelling reasons to doubt an arbitrator's independence or impartiality. The distinction between the tests in domestic and international commercial arbitration cases is essentially one of shades of grey. A challenge in a domestic arbitration case would involve a lesser threshold because the B.C. *Arbitration Act* does not mandate a "real danger" standard.

The Test for Bias in Domestic Arbitrations

In principle the test for bias in a domestic arbitration governed by the *Arbitration Act* should not be the same "real likelihood or probability" test applicable to judges as set out in *Yukon Francophone School Board*. An applicant has to move a mountain to get a judge disqualified. The same should not be said of a challenge to a commercial arbitrator. The test for commercial arbitration should be tempered by the element of greater subjectivity and need for trust in a consensual process as described by McEwan and Herbst above. Section 16 of the domestic *Arbitration Act* refers to "potential[]" bias and "apprehended" bias as a basis for revoking an arbitrator's authority. At a minimum, the presumption of impartiality should apply with less force in the context of domestic commercial arbitrations. There does not seem to be any reason why a party to a consensual arbitration should have to overcome an artificial presumption. More subjective considerations may be appropriate because the parties get to choose their decision makers. On a challenge for apparent bias under the domestic statute, a court should simply consider whether the challenging party has a legitimate basis for concern, especially in light of recent literature on the subject of heuristic thinking and unconscious bias.[32]

The difference between challenges for bias in international and domestic arbitration settings in British Columbia is subtle but real. It may just be a matter of optics, but a judge hearing a challenge in a domestic case should be less reticent in finding a basis for party concern about arbitrator independence and impartiality. An appropriate test for domestic cases would be the "real possibility" test from the House of Lords in *Porter*. The judge hearing a challenge in an international case must apply the "real danger" test, a standard that the Attorney General noted is meant to be a higher bar.

CONCLUSION

The test for bias in the international arbitration context has evolved over time. While the perception for many years was that a mere suspicion, a mere possibility or a mere appearance was sufficient, the reality now is that the courts will require a more substantive foundation for a challenge. Cogent evidence will be required before an arbitrator is disqualified. Judges hearing challenges in the context of judicial proceedings or international commercial arbitrations now require strong evidence that shows a likelihood of bias or a danger of bias.

The concern of Lord Hewart that justice must manifestly be seen to be done is giving way to a view that justice should in fact be done, a subtle shift that calls upon a party bringing a challenge to make a compelling case.[33] The amendment to add the "real danger" test to the B.C. *International Commercial Arbitration Act* cements the requirement that there be more than mere speculation or suspicion to challenge an arbitrator's impartiality or independence. The new articulation of the test will cause judges to be more circumspect. The new test revives the caution from Lord Denning M.R. in *Metropolitan Properties Co. v. Lannon*: "Surmise or conjecture is not enough".[34]

ENDNOTES

1. RSBC 1986, c 233.
2. British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 113 (12 April 2018) at 3819.
3. [1993] AC 646 [*Gough*].
4. International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(c).
5. See Sam Luttrell, "Australia Adopts the 'Real Danger' Test for Arbitrator Bias" (2010) 26:4 Arbitration International 625 at 628.
6. [2000] EWCA Civ 154 [*AT&T*]. This case happened to involve a challenge to the impartiality of a Canadian arbitrator in an international case.
7. [2001] UKHL 67 at para 103 [*Porter*].
8. RSBC 1996, c 55.
9. [1955] SCR 3 [*Szilard*].
10. *Ibid* at 7 [emphasis added].
11. [1978] 1 SCR 369.
12. *Ibid* at 391 [emphasis added].
13. [1924] 1 KB 256 at 259.
14. 2015 SCC 25 [*Yukon Francophone School Board*
15. *Ibid* at para 25.
16. 2007 SCC 25 [*Teskey*].
17. *Ibid* at para 28.
18. 2002 SCC 55 [*Burke*].
19. *Ibid* at para 65.
20. 2005 FCA 262.
21. *Ibid* at para 36.
22. *Canadian Union of Postal Workers v Canada P Corporation*, 2012 FC 975 at para 22.
23. *Gale v Canada (Solicitor General)*, 2004 FCA 13 para 18.
24. *Arbitration Law of Canada: Practice and Procedu* 3rd ed (New York: JurisNet, 2017) at 410.
25. 2016 ONSC 604.

26. 2014 ONCA 839 at para 27.
27. *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora, Ont: Canada Law Book) (loose-leaf) at § 4:50.40. A more subjective approach may be appropriate where one of the parties might say that the arbitrator would not have been selected if the undisclosed information raising an apprehension of bias were known at the outset. See *Idowu v York Condominium Corp No 128*, [2002] OJ No 2102 (SCJ).
28. [1997] 3 SCR 484.
29. *Ibid* at para 11.
30. *Supra* note 18 at para 61.
31. 2014 SCC 53.
32. See Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011). [*Ed. – See also Kimberly Jakeman & Mollie Clark, "The 'Neutral Person': A Paradox – Accepting and Addressing Unconscious Bias in Mediation" (2019) 77 Advocate 695.*]
33. See e.g. *R v Camborne Justices*, [1955] 1 QB 41 (in which Slade J cautions against overreliance on the dictum of Lord Hewart).
34. [1969] 1 QB 577 at 599 (CA).