Kluwer Arbitration Blog

Vento Creates a Rule: If a Reasonable Apprehension of Bias is Established, an Award Must be Set Aside

Ruben Pinchas · Thursday, April 24th, 2025

The Ontario Court of Appeal ("The Court") has overturned **the decision** of an application judge who refused to set aside an arbitral award despite a finding of a reasonable apprehension of bias concerning one of the arbitrators. In doing so, the Court stated that when the objective test for bias is met, regarding even one member of an arbitral tribunal, awards *must* be set aside, as it represents more than a mere procedural error, but rather a major violation of procedural fairness. This post further reflects on the case of ***Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82**, and its impact in establishing a clear precedent in Ontario, building on from an earlier discussion in the Kluwer Arbitration Blog **here.**

Background

Following a **Chapter 11** based North American Free Trade Agreement ("NAFTA") arbitration between Mexico and a U.S. based motorcycle company, Vento Motorcycles Inc. ("Vento"), Vento sought a set-aside in an Ontario court after finding evidence of *ex parte* communications, which Vento argued, created a reasonable apprehension of bias regarding one of the arbitrators. The issue arose from communications between Hugo Perezcano, the Mexico-appointed arbitrator, and Orlando Pérez Gárate, lead counsel for Mexico, during the arbitration proceedings, which ultimately led to Perezcano's appointment to two prestigious state arbitrator rosters. The **application judge** cited the discretion under Article 34(2) of the **Model Law** to conclude that, despite a reasonable apprehension of bias existing, the award should not be set aside. A robust discussion of the facts and the application judge's flawed analysis in the Ontario Superior Court can be found in a previous blog **here.**

The Court of Appeal Disagrees: There is No Discretion Once a Reasonable Apprehension of Bias is Established

The primary point of departure from the application judge's decision is the finding that in the

common law, there is no requirement to prove that the decision may have been different but for the arbitrator's bias. Once a reasonable apprehension of bias is established, the decision must be set aside.

After finding a reasonable apprehension of bias, the application judge undertook another line of analysis**,** asking: "what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness of the process?" The application judge derived this requirement from the discretionary nature of Article 34(2)(a) of the Model Law, which states that "an arbitral award *may* be set aside…" based on the enumerated grounds; and the 2016 Ontario Court of Appeal case ***Popack v. Lipszyc*, 2016 ONCA 135** ("*Popack*"). However, *Popack* involved one procedural error in the form of an improper *ex parte* meeting, not a finding of a reasonable apprehension of bias. The Court of Appeal did not critique or alter the ruling in *Popack*; for procedural errors, there remains a balancing exercise in determining a just remedy. However, they distinguished that case given the limited nature of the procedural error and by finding that a determination of a reasonable apprehension of bias is not a mere procedural error.

The Court cited the Supreme Court in ***Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84** to confirm that it is not possible to have a fair hearing once there is a finding of a reasonable apprehension of bias, and thus the only possible remedy is a set aside. Essentially, under Article 34(2)(a)(iv) of the UNCITRAL Model Law, if a court finds a reasonable apprehension of bias concerning an arbitrator, there is *no discretion*; the arbitrator must be removed or the decision set aside.

Wewaykum Did Not Affect the Law: The Bias of One Arbitrator in a Tribunal Taints the Panel

The Court determined that in a three-member tribunal, if one arbitrator is found to have a reasonable apprehension of bias, then the entire tribunal has been tainted. Their rationale was that it is not possible to assess the effect of one biased member on the other arbitrators or the impugned arbitrator's effect on the eventual decision. Additionally, all three members are appointed to take part in coming to an unbiased decision; the influence of one cannot and should not be ignored.

The application judge relied on ***Wewaykum Indian Band v Canada*, 2003 SCC 45** ("Wewaykum") to justify the finding that the reasonable apprehension of bias of one member of a tribunal does not necessarily taint the entire panel. This decision involved a challenge to a Supreme Court decision due to Justice Binnie's remote connection to the appeal fifteen years prior. In *obiter*, the Supreme Court in *Wewaykum* emphasized the independent processes and opinions of each Supreme Court judge, arguing that this meant that the bias of one member did not taint the entire panel's decision.

The Court of Appeal strongly disagreed that these *obiter* comments changed the law on bias, especially given the unique nature of the Supreme Court. They justifiably asserted that an arbitral tribunal cannot defend its decision-making process in the same manner as the nation's apex court. In addition, the Court lamented that the application judge's analysis of the effect of one arbitrator's bias on the other arbitrators in the tribunal was based on pure speculation and represented a loosening of the objective test for bias in Canadian law.

The Effect on International Arbitrations in Ontario

It is unlikely that this decision will have a negative effect on the finality of arbitrations in Ontario. The objective test for a reasonable apprehension of bias is stringent and has not been altered in any way by this decision. As **leading lawyers** in the province have noted in response to the recent ***Aroma Franchise Company, Inc. v Aroma Espresso Bar Canada Inc.*** (*"Aroma"*) decision in the Ontario Court of Appeal, there is a strong presumption of arbitrator impartiality in Canada. The *Aroma* appeal upheld the strength of the test by overturning a set aside based on a flawed finding of a reasonable apprehension of bias by the **Ontario Superior Court of Justice** that was commented on in a previous blog **here.** Thus, this recently confirmed test is rightfully difficult to meet; it is not the case that mere failures to disclose certain information or weak evidence of past interactions will lead to findings of a reasonable apprehension of bias, and subsequently a set aside. When applied properly by courts, the test and this confirmation in the common law generates predictability in the province.

Additionally, this decision brings certainty and portrays that procedural fairness is the foremost concern of Ontario courts when it comes to reviewing arbitral decisions. Counsel, parties, and arbitrators in the province will be certain that the remedy for a finding of a reasonable apprehension of bias is a set aside. As a party to an arbitration, **this should bring comfort,** given that it is an indication that Ontario, as the seat of an arbitration, will not tolerate an objective indication of bias. The Court has put the fairness of arbitrations and the rights of parties first, rather than attempting to uphold the finality of awards and avoid increased costs by jeopardizing the integrity of private adjudication.

Conclusion

The Court has developed a concrete rule in the common law regarding international arbitrations and the interpretation of the Model Law. If there is a finding of a reasonable apprehension of bias concerning an arbitrator, the decision must be set aside under Article 34(2)(a)(iv); there is no discretion. Moreover, the Court confirmed that even if only one member of a tribunal is found to have a reasonable apprehension of bias, there remains no discretion and no need to attempt to analyze the decision-making process; a set aside is the remedy. This is a strong stance which shows that upholding the procedural rights of the parties in arbitrations is the most important consideration in ordering a set aside.

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This entry was posted on Thursday, April 24th, 2025 at 8:23 am and is filed under Bias, Canada, Independence and Impartiality, NAFTA, Set aside an international arbitral award
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