Dufferin v. Morrison Hershfield
2022 ONSC 3485

LU #159 [2021]

Primary Topic:
XIV. Arbitration and Mediation
Jurisdiction:
Ontario
Authors:
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ONTARIO

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The Skeptical Arbitrator, Claims of Bias, and the Search for Truth: *Dufferin v. Morrison Hershfield*

In their article, "Arbitrator Questioning: Sphinx or Skeptic?", Duncan Glaholt and Markus Rotterdam consider what constitutes appropriate arbitrator intervention with specific regard to witness questioning.[1] They conclude that arbitrators questioning witnesses on material points and other streamlining measures are warranted where such measures provide clarity and efficiency.

This conclusion was put to the test in *Dufferin v. Morrison Hershfield*[2] ("Dufferin"). In this court application, Justice Woodley considered whether the arbitrator, Stephen Morrison, demonstrated a reasonable apprehension of bias when questioning witnesses. Justice Woodley found that Morrison had not done so. More than that, Her Honour found that Morrison was an engaged arbitrator who "worked tirelessly… to determine the truth of the issues before him."[3]

Background

The application was brought by two joint venture partners: Dufferin, one of Canada's largest heavy civil construction companies, and Aecon Construction and Materials Limited, Canada's largest public infrastructure contractor. Their joint venture, RapidLINK, was the design-builder selected by The Regional Municipality of York ("**the Owner**") for the VivaNEXT Yonge Street Bus Rapidway Design-Build Project (the "**Project**"). RapidLINK subcontracted with Morrison Hershfield ("**MH**") for the Project's design.

RapidLINK came to claim against the Owner some $149 million for extras and delay. This claim included those of MH as against RapidLINK. RapidLINK and the Owner mediated and ultimately settled their dispute for the Owner's payment to RaidLINK of $63 million. As part of the settlement, RapidLINK assumed all liability for MH's claims.

Following its settlement with the Owner, RapidLINK denied MH's claims. MH accordingly commenced the arbitration against RapidLINK for $33 million. At RapidLINK's suggestion, the parties selected Morrison as arbitrator.

The arbitration was a complex proceeding. The parties delivered over 20 total affirmative, reply and surrebuttal witness statements, 16 total expert reports, and over 2,600 pages of evidence. After 14 hearing days, and RapidLINK having consumed its allotted chess clock time, RapidLINK brought an application to remove Morrison for bias. The initial application alleging bias was before Morrison, who dismissed it. In response, RapidLINK brought the court application.

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[1] Canadian College of Construction Lawyers Journal 2016, pp 81-104.
[2] *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485 (CanLII).
[3] *Dufferin*, para 167.

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The Application

RapidLINK sought Morrison's removal on the grounds that he,

- made repeated statements of position (rather than asking questions) and examined RapidLINK's witnesses in a manner suggesting that he had pre-judged their evidence;
- advocated positions favourable to MH, sought admissions from RapidLINK's witnesses, and engaged in cross-examination; and
- failed to demonstrate a balance and proportionate approach to witnesses of both sides.

MH countered that Morrison's interventions were fair, reasonable, and specifically targeted to permit witnesses to fully explain their positions.

The Law – Reasonable Apprehension of Bias

The bar for proving reasonable apprehension of bias is a high one. The applicant must show that the reasonable, informed, right-minded person would, viewing the matter realistically and practically – and having thought the matter through – would conclude that it is more likely than not that the decision-maker would not decide fairly.[4]

In addition to this primary test, Justice Woodley added the following observations about reasonable apprehension of bias from the jurisprudence:

- the threshold for finding real or perceived bias is high;
- the presumption of impartiality is high;
- the inquiry is objective, requiring a realistic and practical view of all the circumstances from the perspective of the reasonable person;
- evidence of bias, beyond mere suspicion, is required; and
- when considering bias, whether actual or perceived, context matters.[5]

[4] *Dufferin*, paras 109-110.
[5] *Dufferin*, para 112.

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Justice Woodley observed that when evaluating context, there is a difference between alleged bias in private arbitration and in civil litigation. In private arbitration, the decision-maker is chosen by the parties, the proceedings are typically confidential, and the parties are free to establish which rules and procedures will govern their arbitration, including whether the arbitrator can question witnesses directly. In the arbitration between RapidLINK and MH, the parties specifically agreed that the arbitrator could question witnesses.

The Court's Decision

Justice Woodley denied RapidLINK's application, finding no reasonable apprehension of bias. In doing so, Her Honour brought great focus to Morrison's conduct in the context of his appointment and the arbitration process.

Justice Woodley found that Morrison was selected for his expertise, education and experience.[6] Her Honour noted that, prior to the oral opening statements, Morrison had,

- already heard and determined two motions;
- received all evidence-in-chief, rebuttal, reply witness statements, and opening arguments; and
- "read ahead".[7]

Justice Woodley found that there was no question that Morrison had informed himself of the case on the full record available and conducted his questioning accordingly.

Her Honour focused heavily on the arbitration's transcripts, finding as follows:

> The transcripts do not read like an ordinary court proceeding. The Arbitrator purposefully and intentionally prepared questions for every witness. The Arbitrator intervened whenever evidence or testimony caused him to question the nature, effect, or reliability of that evidence or testimony regardless of whether the witness was called for the Applicants or the Respondent. **Contrary to the position of the Applicants, it is my view on reading the transcripts, that the Arbitrator's interventions were intended to ensure "a fair and independent process" and to enable the parties to provide their "full answer and defence" and not otherwise.**

[6] *Dufferin*, para 115.
[7] *Dufferin*, para 116.

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> ... contrary to the Applicants' submissions that the Arbitrator's impugned conduct was focused on the Applicants' witnesses, I found it necessary to re-trace and re-read the portions involving the questioning by the Arbitrator to determine which party had called a specific witness being questioned or queried by the Arbitrator. Having completed this task, **I found no significant difference in the Arbitrator's approach to any of the witnesses**.
>
> The Arbitrator was engaged and asked incisive questions of most, if not all, witnesses called to testify. The length of his questions often depended on the answers provided and were not (in my view) dependent on whether the witness was called by the Applicants or the Respondent.[8]

Justice Woodley's careful examination of the arbitration record, grounded her conclusion that, quite apart from having no reasonable apprehension of bias, Morrison properly sought truth as a well-prepared, expert, and skeptical arbitrator:

> Having reviewed and considered the interactions between the Arbitrator and counsel and the witnesses at trial, I am struck by the Arbitrator's preparedness for each witness and each day of hearing. The Arbitrator's questions and comments evidence that he is a truly a subject matter expert who seeks to find the truth. In his pursuit of the truth, the Arbitrator asked many questions of many witnesses but in my view did not become an advocate for either party. Instead, he positioned himself between the parties and poked and prodded each witness to ensure that both parties had a fulsome hearing, were granted an opportunity to explain their evidence, and had provided the Arbitrator with all information within their knowledge relevant to the proceeding.[9]

Takeaways

Putting aside the obvious challenge of establishing a reasonable apprehension of bias on the part of arbitrators, *Dufferin* confirms that arbitrators can and should in the normal course take an active role in the arbitration process. Parties involved in arbitration should be prepared for active, precise and even pointed questioning from their arbitrators. Mere discomfort resulting from an arbitrator's questioning does not mean an arbitrator is biased. Such discomfort may mean the arbitrator is actually doing their job.

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[8] *Dufferin*, paras 123-125 (emphasis added).
[5] *Dufferin*, para 165.