A WAFTING *AROMA*: THE ONTARIO COURT OF APPEAL'S REASONS MAY NOT PASS THE SMELL TEST

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In *Aroma Franchise Company Inc et al v Aroma Espresso Bar Canada Inc et al* ("*Aroma ONCA*"),[1] the Court of Appeal for Ontario redefined the test for setting aside an arbitral award for reasonable apprehension of bias, by introducing a bright-line rule barring hindsight evidence, and by modifying the objective test to be limited by the arbitrator's perspective. Building on previous comments on the *Aroma* case published in this journal,[2] I add to the ink spilt on the *Aroma* saga and caution against overreliance on the ONCA's reasoning.

In *Aroma ONCA*, the Court of Appeal clarified the scope of arbitrators' duty to disclose facts that may give rise to a reasonable apprehension of bias, and elaborated on what can be inferred from a failure to disclose. In the first instance judgment ("*Aroma ONSC*"), the application judge held that the arbitrator had a duty to disclose a second, overlapping arbitral appointment by the same law firm (and at least one of the same counsel) in an unrelated matter.[3] The application judge held further that arbitrator's failure to disclose the second appointment gave rise to a reasonable apprehension of bias, on which basis the judge set aside the arbitrator's award. However,

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[1] 2024 ONCA 839 [*Aroma* ONCA], leave to appeal to SCC refused, 41640 (24 July 2025).

[2] Joshua Karton, "Mo' Appointments Mo' Problems? *Aroma Franchise v Aroma Canada*" (2024) 4:2 Can J Comm Arb 48 [Karton]; Bruce Reynolds, James Little & Nicholas Reynolds, "The Implications of Repeat Arbitral Appointments: *Aroma Franchise Company v Aroma Espresso*" (2023) 4:1 Can J Comm Arb 60 [Reynolds et al].

[3] 2023 ONSC 1827 [*Aroma* ONSC].

the Court of Appeal vacated the lower court's judgment, restoring the arbitral award. The Supreme Court of Canada refused leave to appeal, so *Aroma ONCA* represents good law in Ontario and persuasive authority across Canada.

In *Aroma*, the Court of Appeal appears to have made an inordinate effort to find a reviewable error in the application judge's decision. While the Court elucidated the objective standard governing reasonable apprehension of bias in arbitration, it unduly curtailed the admissibility of subjective evidence in applying that standard. The upshot is that it will be exceedingly difficult to set aside an award for reasonable apprehension of bias, unless courts read down or distinguish *Aroma ONCA*'s adherence to the arbitrator's actual knowledge of facts that might give rise to an apprehension of bias in the mind of a reasonable observer.

Since others have reviewed the case leading up to and following *Aroma ONCA*,[4] this commentary focuses on elements of the test set out in *Aroma ONCA*. If that test solidifies with the accumulation of precedent, the consequences will be much broader than the Court of Appeal seems to have anticipated.

I. TEST MODIFIED ONLY TO EVADE A MORE STRINGENT STANDARD OF REVIEW

As is well known, different questions attract different standards of review on appeal.[5] Appellate courts are loath to interfere with fact-based findings of lower courts.[6] Such reluctance is well founded in policy: to limit appeals, both in scope and number; to promote public confidence in lower courts; and to recognize the advantageous position of the adjudicator closest to the evidence in making findings of fact.

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[4] See e.g. Karton, *supra* note 2; Reynolds et al, *supra* note **Error! Bookmark not defined.**.

[5] See *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

[6] *Ibid* at paras 16-18, 32.

None of these policy considerations applies to questions of pure law, which is why such questions attract a more stringent standard of review on appeal.

This bears elaboration because *Aroma ONCA* makes conspicuous reference to Supreme Court of Canada jurisprudence on standards of appellate review.[7] If a lower court opines incorrectly on a question of legal principle—*e.g.*, what "recklessness" is—that is an error of law, which an appellate court may reverse simply because it is not correct.[8] If the court applies a legal standard to facts in arriving at a conclusion—*e.g.*, whether certain conduct was reckless—such analysis answers a question of mixed fact and law, which is reviewable only where palpable (obvious) and overriding (determinative) error is found.[9]

In practice, it suffices to simplify thus: if you cannot extricate an error of law from the first instance reasons, you generally do not have a viable appeal. The standard of palpable and overriding error is effectively insurmountable unless one can show that, *e.g.*, a judge summed two and two to equal five, where the judgment turned on the difference between four and five. Appeals are about teasing the purely legal questions apart from their milieu of reasons because, "[w]here the legal principle is not readily extricable, the matter is one of 'mixed law and fact' and is subject to a more stringent standard".[10]

An error of law in *Aroma ONSC* would not have been readily extricable—but for the Court of Appeal's a reformulation of the reasonable person test. The Court of Appeal's reasoning centred on its finding that the objective test for apprehension of bias

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[7] *Aroma* ONCA, *supra* note 1 at para 142, citing *Housen*, *supra* note 5 at para 27.

[8] *Ibid* at para 8.

[9] *Ibid* at para 37. See also *ibid* at para 10 (palpable and overriding error standard also applies to findings of fact).

[10] *Ibid* at para 36.

contained in the governing statute[11] must take precedence over the subjective test in the International Bar Association Guidelines on Conflicts of Interest. Nevertheless, *Aroma ONCA* acknowledges that "the application judge articulated the objective test".[12] To extricate an error of law, therefore, the Court of Appeal introduced a new formulation of the reasonable person standard, as one unable to even consider anything "never shared with the [a]rbitrator [or] correspondence that the [a]rbitrator was not reasonably aware of",[13] and should consider only "what the [a]rbitrator was told".[14] Since *Aroma ONCA*, any circumstance unshared with the arbitrator "falls into the category of subjective views" which "are not relevant" and "cannot be germane".[15] The Court restricts the reasonable person's knowledge to the arbitrator's actual knowledge.

Despite the Court's approval of and reliance on *Halliburton*, there, the UK Supreme Court was unanimous on the opposite view: "courts in applying the test of the fair-minded and informed observer would credit that objective observer with the knowledge both that some, maybe many, parties and some, maybe many, arbitrators in international arbitrations have [an] understanding" and "[t]o do so is not to measure apparent bias by reference to the subjective understanding of the parties to a particular arbitration and thereby to abandon the objective assessment" entailed by that reasonable person.[16] "But the weight which the fair-minded and informed observer should

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[11] The Ontario *International Commercial Arbitration Act, 2017*, SO 2017, c 2, s 5 at art 12, which adopts the *UNCITRAL Model Law on International Commrecial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006).

[12] *Aroma* ONCA, *supra* note 1 at para 142.

[13] *Ibid* at paras 88-89.

[14] *Ibid* at para 144.

[15] *Ibid* at paras 89, 139, 144.

[16] *Halliburton v Chubb* [2020] UKSC 48 at para 66 [*Halliburton*].

give to that consideration will depend upon the circumstances of the arbitration".[17]

Halliburton sets out a reasonable person aware of the totality of the circumstances, assessing subjective expectations as subject to weight, and not excluding those subjective expectations. The reasonable person under *Halliburton* is informed. The reasonable person under *Halliburton* is not a person of singular perspective. Reference to subjective knowledge does not abandon the objective assessment. *Aroma ONCA* is new law.

The Court of Appeal's only authority for the reformulation of perspective arises from jurisprudence about perceived bias in a judge, not an arbitrator.[18] For the purposes of this paper, I need not expound a lengthy exegesis on the fundamental distinctions between judge and arbitrator. Critically, however, the arbitrator's authority is rooted solely in the parties' contractual relationship, between each other, and as with the tribunal. The judge's is not.[19] "Arbitration involves the conferral of jurisdiction by contract, through the consensus of the parties to the reference", as Lord Hodge condensed in *Halliburton*.[20]

The Court of Appeal disliked the outcome of *Aroma ONSC*. A reweighing of all the circumstances would amount to a question of mixed fact and law. To sidestep the otherwise applicable standard of review, the Court needed to carve out a legal exemption in the objective analysis, by restricting the perspective of the reasonable person to the contemporaneous perspective of the arbitrator. Its approach was formalistic and

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[17] *Ibid* at para 67.

[18] *Aroma* ONCA, *supra* note 1 at para 89.

[19] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 96 (judges' appointment to superior courts); *Endean v British Columbia*, 2016 SCC 42 at para 23 (superior courts' inherent jurisdiction).

[20] *Halliburton*, *supra* note 16 at para 126.

arbitrary. Ironically, in effect, the Court of Appeal's redefines "objective" to mean the arbitrator's subjective perspective.

Aroma ONCA is not problem-free. The modified test answers a question "of law" but is now fraught with untested implications. As well, the underlying policy reasons for *prima facie* confidence in impartial arbitration are underdeveloped. Disappointingly, the contractual relationship, among and between the parties and arbitrator, remains unexamined. The law should not pretend judges and arbitrators are the same. Most concerningly, there now appears to be a perverse incentive to (attempt to) subpoena impugned arbitrators for impartiality determinations in the future.[21]

II. A KNOWLEDGE STANDARD MAKES THE RIGHT TO IMPARTIAL ARBITRATION ILLUSORY

Professor Karton describes the arbitration bar's collective relief upon "a return to normalcy" since the Court handed down *Aroma ONCA*.[22] Of course, *Aroma ONSC* set out an unexpected outcome, and *Aroma ONCA* may allay concerns prompting arbitrators' pre-emptive *Aroma* disclosure letters peppering the bar's e-mail inboxes. However, we should critically consider the precedential implications of *Aroma ONCA* on the courts' ability to set aside arbitral awards for reasonable apprehension of bias.

Per *Aroma ONCA*, because these circumstances were not made known to an arbitrator, they are categorically irrelevant to an impartiality analysis.[23] As made abundantly clear in Paciocco JA's oft-cited treatise on evidence,[24] that irrelevance

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[21] The consequences of treating a tribunal like a witness at an impartiality hearing deserve their own paper.

[22] Karton, *supra* note 2 at 48.

[23] *Ibid* at paras 88-89, 139, 144.

[24] On the "basic rule of admissibility", see generally David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law 2020) at Chapter 2.

makes hindsight evidence inadmissible.[25] The Court of Appeal reversed the application judge by ruling irrelevant this evidence:[26] "that if the [a]rbitrator had disclosed any other engagements with the [other side's] counsel, [the complainant] would not have supported his appointment [and] hindsight evidence that [the complainant] would have objected […] if he had been informed earlier".[27] Similar evidence is no longer admissible for any arbitral impartiality analysis going forward.

This prospect is problematic. It raises the question of how an arbitral award can *ever* be set aside for reasonable apprehension of bias. If a complainant's hindsight evidence is not admissible, then what evidence is?

Consider these circumstances: an arbitrator becoming romantically entangled with opposing counsel, during a years-long arbitral proceeding, remaining undisclosed until the award is issued. The complainant might seek the award's set-aside, which sounds arguable. All the evidence such complainants could adduce would be the hindsight that they would not have supported the arbitrator's appointment and would have objected if informed earlier, but that evidence is irrelevant and inadmissible under *Aroma ONCA*.

Consider also whether the test in *Aroma ONCA* is capable of setting aside the award in clearer circumstances of a partial arbitrator, such as one secretly accepting a valuable "gift" from opposing counsel, where the complainant does not learn of the gift until after the arbitral proceedings conclude. Under *Aroma ONCA*, the complainant can only bring the same kind of subjective hindsight evidence on application for set-aside, and the respondent can rely on the complainant's failure to specifically share to the arbitrator that large cash gifts are not

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[25] See, for example, *R v White*, 2011 SCC 13 at para 36 ("if an item of evidence is not relevant to a live issue, then that item of evidence should be removed from consideration").

[26] *Aroma* ONCA, *supra* note 1 at para 143.

[27] *Ibid* at para 55.

agreeable, even when the parties or counsel expressly discuss the objectionability of large cash gifts.

The plain counterargument here is that *Aroma ONCA* simply puts an onus on the parties to pre-specify their impartiality-related disclosure expectations, and that is a predictable principle guiding arbitral procedure and set-aside going forward. That is unsatisfactory for two reasons. First, while the parties in *Aroma* were sophisticated commercial entities, those are not the only persons engaging in arbitration. The most vulnerable, non-commercial persons should also be able to rely on impartial arbitration to resolve disputes, and they should not be forced to learn secret handshakes or arcane incantations before doing so. Second, the pre-specification of expectations would invariably become lengthy, exhaustive, rote, standard-form fine print, quickly emailed, quickly ignored, just as unhelpful as the parties' failure to share expectations to the arbitrator in *Aroma*. We should not expand the legal fiction that an abundance of unread words flying about online governs reasonable expectations.[28]

The test must be construed to give effect to the statutory right to challenge arbitral awards for reasonable apprehension of bias.[29] The *Aroma ONCA* test fails to accomplish this. Making the parties' impartiality expectations known to an arbitrator should not be a prerequisite for alleging reasonable apprehension of bias. The arbitrator's actual knowledge might be a factor, but some things should—*must*—go without saying. The actual knowledge standard, applied from the arbitrator's perspective, is a flawed standard permitting far too much mischief, and making illusory arbitral parties' rights under Article 12 of the Model Law.

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[28] See also *Douez v Facebook*, 2017 SCC 33 at para 99 (per Abella J, concurring ("legal acknowledgment should be given to the automatic nature of the commitments made" in online click-through contract construction).

[29] *International Commercial Arbitration Act*, *supra* note 11.

III. A CONSTRUCTIVE (NOT ACTUAL) KNOWLEDGE STANDARD SHOULD APPLY

I have outlined above my reservations about the reasons reversing *Aroma ONSC*. Simply to review the lower court's ruling, the Court of Appeal has myopically gerrymandered a jagged line through the law of reasonable apprehension of bias. While *Aroma ONCA* is now law, and while the Court sets out a reasonable person limited to the actual knowledge of its arbitrator, the test should be read to include both actual and constructive knowledge of the arbitrator.

As the Court of Appeal reasoned, actual knowledge can be inferred from the complete record of what was told to the arbitrator.[30] Constructive knowledge would ask the courts to assess what the arbitrator *ought to have* known; in the limitations context, for example, the courts ask what a plaintiff should have known upon reasonable diligence and suspicion using direct and circumstantial evidence.[31] Constructive knowledge is broader than actual, encompassing the courts' prescriptive standards, not relying simply on express notice to and from the parties.

The constructive standard could support the same outcome held in *Aroma ONCA*, while remaining permissive to set-aside for the example challenges raised above. Because the arbitrator was not told of the complainant party's disclosure expectation, the courts could still hold no reason the arbitrator *ought to have* known, thus grounding impartiality in the same analytical framework. At the same time, under the constructive standard of knowledge, the courts could hold arbitrators receiving a large

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[30] Or, more problematically, adduced directly from the arbitrator as a witness.

[31] *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 44. See also *R v Briscoe*, 2010 SCC 13 at para 21 (in the criminal context, constructive knowledge applies under the willful blindness doctrine where "suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries" [emphasis in original]).

cash gift or romancing counsel to be disqualified, irrespective of their actual knowledge of parties' expectations per *Aroma ONCA*.

If the test is the arbitrator's constructive knowledge, instead of actual, then Article 12 is saved from illusory effect. The courts would be able to assess arbitrator's knowledge from the circumstances, irrespective of any complainant's subjective hindsight evidence being (in)admissible, based on the courts' own normative standards of conduct, while guided by the arbitrator's perspective as *Aroma ONCA* prescribes. More generally, however, the courts in the future should question whether there was any principled basis to depart from *Halliburton*'s informed reasonable person.

While *Aroma ONCA* hints that arbitrators are "legislatively endorsed" and arbitrating parties deserve "confidence in the finality" of arbitration,[32] the Court declined to reason through the contractual terms of the arbitrator's appointment. In *Aroma*, presumably, the text of that contract provided no guidance on the arbitrator's duties of disclosure. Perhaps arbitrators and arbitral institutions should make express contractual promises regarding impartiality obligations. What is clear from *Aroma ONSC* and *Aroma ONCA* is that our courts are poorly equipped to interrogate arbitral impartiality.

[32] *Aroma* ONCA, *supra* note 1 at para 137.