

Doubts about Arbitrator Immunity

By [Jonnette Watson Hamilton](#)

Cases Considered:

[Flock v. Beattie](#), 2010 ABQB 193

Can arbitrators be sued if they perform their duties negligently? Can they be sued if they breach their contract with the disputing parties? These questions were recently asked and answered in *Flock v. Beattie*, heard by Justice Earl C. Wilson of the Alberta Court of Queen's Bench. It is usually assumed that the law granting arbitrators' immunity to actions in tort and contract is well settled; the case cited for that proposition is the old English case of *Pappa v. Rose* (1872) LR 7 C.P. 525 (Ex Ch.). Despite this complacency, Justice Wilson's decision appears to be a rarity in Canada with its express grant of immunity to an arbitrator. In this post, I contend that the precedent-based argument in favour of extending the doctrine of judicial immunity to arbitrators is a weak one, the statutory argument against extending such immunity needs to be addressed, and the policy arguments on the no-immunity side have yet to be examined.

Facts

Flock v. Flock, a matter on which I have [blogged before](#) and a matter on which there has already been two Alberta decisions — [Flock v. Flock, 2007 ABCA 287](#) and [Flock v. Flock, 2007 ABQB 307](#) — involves a matrimonial property dispute. Arlene and Doran Flock married in 1982, separated in 1994 and divorced in 1999. They had four parcels of land, among other assets. A six day arbitration hearing was held before Alan Beattie, Q.C., in Calgary in 2003 and he rendered an award 33 months later, in July 2006. Article IX of the arbitration agreement between the couple and Beattie required Beattie to communicate his award to the parties within 60 days of the end of the hearing. Arlene sued Beattie for breach of contract and negligence based on the allegation that Beattie's delay in rendering an award had breached article IX of their arbitration agreement. Beattie applied to have Arlene's Statement of Claim struck or her action dismissed, claiming arbitral immunity from her lawsuit. While I commented on the delay in *Flock v. Beattie* in a [recent post](#), the question of arbitral immunity is the focus of this one.

Case law

As I have already indicated, it has been said that the law granting arbitrators' immunity to actions in tort and contract is uncontroversially accepted. For example, Catherine Morris, in her report on the *Arbitration of Family Law Disputes in British Columbia* (Ministry of Attorney General of British Columbia, 2004, available under "Research and Reports" from the [Family Justice Reform Working Group](#) of the BC Justice Review Task Force), states (at 44) that "Arbitrators are not liable in tort or in contract. This law appears to be well settled." She cites *Chambers v. Goldthorpe*, [1901] 1 K.B. 624 (Q.B.) for the immunity in tort rule, *Pappa v. Rose*

(1872) LR 7 C.P. 525 (Ex Ch.) for the immunity in contract rule, and *Sport Maska Inc. v. Zittler* [1988] 1 S.C.R. 564 (SCC) for the idea that immunity is a well settled rule. J. Brian Casey, in *Arbitration Law of Canada: Practice and Procedure* (Juris Publ., 2005) at ¶ 4.11, also references *Pappa v. Rose* for the proposition that, historically, arbitrators have been immune from actions in negligence or breach of contract. He notes, however, that there has been recent discussion in Canada and England about the scope and extent of that immunity.

The leading case in Canada on arbitral immunity and its scope is said to be the 1988 Supreme Court of Canada decision in *Sport Maska Inc. v. Zittler*. However, that case has some weaknesses as a precedent on the immunity issue. First, it was an appeal from the Quebec Court of Appeal and decided under arts. 940 to 951 of the 1965 *Code of Civil Procedure*. Second, the Supreme Court did not consider the availability and extent of an arbitrator's immunity because it found the process in issue was not an arbitration. Sport Maska sued the respondent accountants for acting negligently in connection with a valuation of inventory for a sale of assets. The respondents defended by alleging that they were acting as arbitrators and they were therefore immune from the action. The Superior Court disagreed but the Quebec Court of Appeal held that the respondents were acting as arbitrators and therefore, in the absence of fraud or bad faith, they enjoyed immunity from civil liability.

The key question before the Supreme Court of Canada in *Sport Maska* was therefore whether the respondent accounting firm was acting as an arbitrator. Most of the Court's decision is directed toward the definition of arbitration under Quebec's *Code of Civil Procedure*. Justice L'Heureux-Dubé, writing for the majority, specifically noted (at para. 47) that the relevant law of arbitration came from "old French law". Nevertheless, in determining the criteria for distinguishing between arbitration and the related concept of the expert opinion, she undertook a 55 paragraph review of the law on this issue in other jurisdictions, both common law and civil law. Applying the French and Quebec law on the question to the facts of the case, Justice L'Heureux-Dubé concluded that the parties to the agreement for the sale of assets did not agree to submit a dispute to arbitration by a third party. As a result, the question of whether arbitrators enjoy immunity from prosecution did not arise.

The Quebec Court of Appeal had, however, concluded that the respondents were arbitrators and it had therefore dealt with the immunity question. In her decision (at para. 17), Justice L'Heureux-Dubé quoted from the decision of (then) Justice LeBel in the lower court ([1985] C.A. 386 at p. 393):

[TRANSLATION] As such an arbitrator, who is called on to settle or prevent a dispute, is given certain immunities. These are governed by the rules of public and not private law because of the similarity of arbitration to the judicial function, even when the conclusion of a submission to arbitration is contained in a private contract, when the law does not require recourse to this method of settling disputes. In the absence of fraud or bad faith, an arbitrator enjoys the immunity from civil liability suggested for him by counsel. A majority of the House of Lords again recently came to this conclusion in *Arenson [v. Casson Beckman Rutley & Co.]*, [1975] 3 All E.R. 901]. Lord Morris of Borth y Gest had stated the same opinion some years earlier in *Sutcliffe v. Thackrah*, [1974] A.C. 727, at p. 744:

I think it must now be accepted that an action will not lie against an arbitrator for want of skill or negligence in making his award.

Discussing the liability of a lower court, the Supreme Court [in *Harris v. Law Society (Alberta)*, 1936 CarswellAlta 73 (SCC)] made the same distinction between the jurisdiction and the immunity of the members of a disciplinary board. It held that the members of a disciplinary board could arrive at an unlawful decision which was incorrect in law, without it giving rise in itself to an action for damages against the Alberta Bar or its directors. (emphasis added)

Although she quoted this passage from Justice LeBel's decision on this question, Justice L'Heureux-Dubé does not comment on the passage or the opinion expressed in it. She merely notes, much later (at para. 148), that the question of immunity did not arise.

As a precedent in common law Canada, *Sport Maska* has been taken to stand for the rule that a valuation or appraisal at common law is not an arbitration and for the test to identify which process is which: see, e.g., *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.*, (1990) 71 D.L.R. (4th) 681, 85 Sask. R. 54 (Sask.C.A.); *McPeak v. Herald Insurance Co.*, (1991) 115 A.R. 83; *Concord Pacific Developments Ltd. v. British Columbia Pavilion Corp.*, (1991) 85 D.L.R. (4th) 402 (B.C.C.A.); and *Precision Drilling Corp. v. Matthews Equipment Ltd.*, 2000 ABQB 499. However, a quick note-up reveals that *Sport Maska* had not been relied upon on the question of arbitral immunity by any common law court in Canada before Justice Wilson's decision in *Flock v. Beattie*. Justice Wilson quoted (at para. 13) the same passage of Justice L'Heureux-Dubé's judgment that I quoted from above — no more and no less — and stated (at para. 17) that he was persuaded by Justice LeBel's legal analysis. The only justification offered by Justice LeBel in the passage quoted is a superficial assertion of the similarity of arbitration to the judicial function. That is indeed the traditional common law justification for granting immunity to arbitrators, although in the English cases more of the policy arguments, both pro and con, are usually weighed. Justice Wilson went on to say (at para. 17) that he agreed with Justice LeBel "that 'arbitral immunity' may be properly expressed as meaning – 'In the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability.'"

In extending immunity for negligent acts to breach of contract, Justice Wilson relies (at para. 18) on the fact that Justice LeBel's statements refer to "certain immunities" and "immunity from civil liability" and the respondents' counsel had argued for immunity for both negligence and non-performance of contractual obligations. More importantly, Justice Wilson notes (at para. 19) LeBel's point that the liability or non-liability of arbitrators was determined by public law and not by private law, such as the law of contract. It is ironic to see this argument being deployed because proponents of arbitration rely upon private law. For example, the staying of court actions in favour of arbitration under agreements to arbitrate is justified in the name of freedom of contract and individual autonomy: see, e.g., *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17 at paras. 22, 52, 66-69. Proponents of arbitration almost always argue that an arbitrator's power and jurisdiction derives directly from the agreement of the parties. The "public law" argument in this case therefore has a certain "having your cake and eating it too" quality to it.

Justice Wilson finds support for the analogy between arbitrations and the judicial function in the 1936 *Harris v. Law Society (Alberta)* case mentioned by Justice LeBel in *Sport Maska*. That case involved the validity of the disciplinary proceedings taken against Harris by the Law Society of Alberta. Disbarment was ordered following the report of a special committee of three Benchers, but the relevant statute required that sanctions be recommended by the Discipline Committee, which at that time was a committee composed of all the benchers. The main issue before the Supreme Court was whether the disciplinary proceedings were void or voidable. The majority decided they were void. The Supreme Court of Alberta, which had found the proceedings to be void, had awarded Harris \$1,500 in damages to be paid by the Law Society. The secondary issue therefore arose as to whether the Law Society was liable in damages. The majority held (at para. 69) that it was not, because in exercising their statutory power to order the striking of the name of a member from the rolls of the Law Society the Benchers "perform[ed] a function not merely ministerial, but discretionary and judicial." As long as the Benchers acted in good faith, they were not liable in damages. This rule, as applied to law societies, appears to have been followed consistently since; see, e.g., *Calvert v. Law Society of Upper Canada*, (1981) 32 O.R. (2d) 176. It is not, however, binding in an Alberta case dealing with an arbitrator, as Justice Wilson finds (at para. 37). Analogizing is required to even make the *Harris* case persuasive outside the context of Benchers acting under a statutory power to discipline their members.

A 1936 Supreme Court of Canada case concerning the Benchers of the Law Society of Alberta and a 1988 Supreme Court of Canada case containing a bare quote of a lower court judge's brief discussion of arbitral immunity are two slender threads on which to hang a rule that, in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability in both tort and contract. The more considered and on-point precedents are all English: the previously referenced *Pappa v. Rose*, *Arenson v. Casson Beckman Rutley & Co.* and *Sutcliffe v. Thackrah*.

The assertion or assumption of the similarity of arbitration to the judicial function is also not without problems. There are several non-trivial differences between the two. A judge's power derives directly from the Crown. Does an arbitrator's? Proponents like to say that an arbitrator's jurisdiction derives directly from the agreement of the parties. Judges are not appointed by the parties, but arbitrators are. Judges are not paid by the parties, while arbitrators are. Judges are accountable to the state and only to the state. Do arbitrators owe duties to anyone? Judges' decisions are appealable and can be corrected. Arbitrators' awards often are not appealable; indeed, arbitration is often sold on the basis of its finality. Judicial conduct is supervised by Judicial Councils. Arbitrators might be responsible to those arbitration associations that they choose to voluntarily join. It is true that both judges and arbitrators should be independent and impartial in exercising their decision-making powers, but is that similarity enough?

Statutes

No argument based on the relevant statute governing domestic arbitrations in Alberta is considered in *Flock v. Beattie*. There is no discussion in Justice Wilson's decision about whether the common law of arbitral immunity is still available or whether the [Arbitration Act](#), R.S.A. 2000, c. A-43 is an exhaustive code, ruling out resort to the common law to fill an alleged gap. Although the *Arbitration Act* does not say anything about arbitral immunity, it does speak to every other type of arbitrator entitlement including arbitrators' powers and liberties, duties and liabilities. Is the absence of any mention of arbitral immunity significant? If arbitrators were entitled to immunity, would it not be spelled out in the legislation?

Courts are usually reluctant to fill gaps in legislation because, of course, they may be deliberate: see *Sullivan and Driedger on the Construction of Statutes* (LexisNexis, 2002) at 136. The absence of an immunity provision in the *Arbitration Act* may embody the actual intentions of the legislature, which would mean it was up to the legislature, and not the courts, to make any desired change. Nevertheless, in appropriate cases courts may invoke the common law to fill a gap (*Sullivan and Driedger* at 139 and 348-360). Assuming for the moment that there is in common law Canada a legal rule granting immunity to arbitrators, did the *Arbitration Act* displace that rule or is it permissible to supplement the *Arbitration Act* by resorting to the common law?

As *Sullivan and Driedger* point out (at 348), the courts usually consider this question by asking if the legislation is an "exhaustive code." Codes are meant to be the sole source of law governing an area and so, if the *Arbitration Act* is a code, resort to the common law would not be allowed. However, as *Sullivan and Driedger* also point out (at 349), the real question for the courts is not whether a statute is an exhaustive code but whether resort to the common law in the particular case is permissible. In deciding whether such resort is permissible, the starting point is the presumption against changing the common law: "In the absence of . . . a reason to believe that the common law has been deliberately excluded, it continues to apply" (*Sullivan and Driedger* at 349-50).

Evidence that the legislature meant to set out exclusive regulation can be implied by reading the legislation in context. If an enactment duplicates the common law or if it offers comprehensive regulation of a matter, the courts are likely to infer that the enactment was meant to be an exhaustive code. The original arbitration legislation in this province did duplicate the common law of England c1880 but our current Act stems from very deliberate and world-wide efforts to modernize arbitration and give it legitimacy as a dispute resolution process. The current *Arbitration Act*, based on uniform legislation put forward by the [Uniform Law Conference of Canada](#) which was itself based on the [Model Law on International Commercial Arbitration](#) of the United Nations Commission on International Trade Law (UNCITRAL), changed the common law in numerous respects. Based on the Commissioners' goals and deliberations, it appears the uniform act was intended to be comprehensive. The *Arbitration Act's* coverage is broad and detailed. There is at least a reasonable argument that the common law is displaced by the *Arbitration Act*.

That argument is bolstered by the fact that the judicial immunity doctrine that common law Canada inherited from the English common law was only available to superior court judges. In England that immunity is expressly extended to arbitrators now in the [Arbitration Act 1996](#), chapter 23, section 29 of which provides "An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith."

In Canada, judicial immunity has been extended to provincial court judges by provincial legislation: in Alberta, see the [Provincial Court Act](#), R.S.A. 2000, c. P-31, section 9.51(1) which provides that "No action may be brought against a judge for any act done or omitted to be done in the execution of the judge's duty or for any act done in a matter in which the judge has exceeded the judge's jurisdiction unless it is proved that the judge acted maliciously and without reasonable and probable cause." Other quasi-judicial decision-makers in Alberta, such as members of Alberta's Energy Resources Conservation Board, are also expressly granted immunity from action in their legislation; see the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, section 43.

It is not uncommon for courts to consider other statutes in interpreting one statute; part of the context of a legislative provision includes other legislation. When two or more statutes are analogous to one another, they are presumed to reflect an intention to deal with the matters in question in an analogous fashion. See *Sullivan and Driedger* at 328, citing *Law Society of Upper Canada v. Ontario (Attorney General)* (1995), 21 O.R. (3d) 666. *Sullivan and Driedger* also note that, when considering two or more statutes, courts also rely on departures from patterns.

Some might say that this statutory argument is irrelevant because arbitrators are not creatures of statute. It is usual for proponents of the process to say that the source of an arbitrator's power is the parties' agreement, and it is true that an arbitrator would have no jurisdiction to decide any particular dispute without such an agreement. However, an arbitrator's power to decide disputes is a hollow one without the *Arbitration Act* to enforce his or her decisions. If a losing party refuses to pay the amount an arbitrator decided was owed, is the arbitrator going to collect that amount for the winning party? Arbitration awards are not self-enforcing. Arbitration needs the *Arbitration Act* for legitimacy.

Policy considerations

In my discussion of the Canadian case law on the issue of arbitral immunity, I pointed out that it is ironic to see the argument made that the liability or non-liability of arbitrators is determined by public law and not by private law. Proponents of arbitration in Anglo-American legal jurisdictions usually rely upon private law, and specifically upon contract law, for just about every other issue. This point can be made more broadly.

In the *Law and Practice of International Commercial Arbitration*, 4th edition (Sweet & Maxwell, 2004), Alan Redfern *et al.* state (at ¶5-16) that whether a breach of a duty by an arbitrator can be sanctioned depends on the nature of the relationship between the parties. Although discussing international commercial arbitration, which is governed by different statutes and norms, the authors' more theoretical points apply to the domestic arbitration arena. As they note, there are two schools of thought on the nature of the relationship:

The first school sees the relationship between the arbitrator and the parties as being established by contract. The contractual school considers the arbitrator appointed by or on behalf of the parties to perform the service of resolving their dispute for them. The second, identified as the "status" school, considers that the judicial nature of an arbitrator's functions means the arbitrator should be treated like a judge.

The contractual approach, found in most civil law jurisdictions, fixes arbitrators with liability for breach of contract. As an example, Redfern *et al.* refer (at ¶5-17) to the Austrian Code of Civil Procedure which provides that an arbitrator who does not fulfil the duties he assumed on accepting the appointment, or who does not fulfil them in due time, may be liable to the parties for losses caused by his wrongful behaviour.

The status school, on the other hand, emphasizes the judicial or quasi-judicial function performed by arbitrators, which grants them an element of "status" entitling them to treatment similar to that of a judge. In most common law jurisdictions this leads to immunity, qualified perhaps when the arbitrator has acted in bad faith. Some commentators from common law jurisdictions have questioned the appropriateness of almost absolute immunity for arbitrators: see Redfern *et al.* at ¶5-18, arguing that arbitrators have professional duties and should be liable for

the breach of those duties. See also Yat-Sen Li, "Arbitral Immunity: A Profession Comes of Age" (1998) 64 *Arbitration* 51; Maureen Weston, "Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration" (2004) 88 *Minnesota Law Review* 449; Susan D. Franck, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity" (2000) 20 *N.Y.L. Sch. J. Int'l & Comp. L.* 1; Cameron L. Sabin, "The Adjudicatory Boat without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators" (2001-2002) 87 *Iowa L. Rev.* 1337.

Redfern *et al.* argue (at ¶5-19) that the real issue is whether immunity or partial immunity for arbitrators is appropriate as a matter of policy. The public policy arguments in favour of immunity include arguments that arbitrators' independence and impartiality might be jeopardized if arbitrators could be sued by disappointed parties, that immunity ensures the finality of awards by preventing an unsuccessful party from suing and that immunity ensures there are people willing to act as arbitrators. However, there are also policy reasons in favour of holding arbitrators accountable. Immunity may encourage carelessness. Disciplinary remedies are rarely available against arbitrators (as opposed to judges). Professionals often accept liability for failure to fulfil their professional duties and arbitrators hold themselves out as professionals. Professional liability insurance is also available to arbitrators. None of these policy concerns were considered in *Flock v. Beattie*.

Conclusion

Arbitrators escape accountability to most forms of social control, even those to which judges must submit. Arbitrators are accountable to some extent because they are liable for their criminal activity and for their actions taken in bad faith. Sometimes their awards can be appealed or reviewed by the courts. In theory they are responsible to arbitration associations they voluntarily join and their codes of conduct. Their fees can be taxed and cannot exceed the fair and reasonable value of the services performed under section 55 of the *Arbitration Act*. But all of that is rather negligible oversight.

Even if the common law of arbitral immunity is as unsettled as I have suggested in this post, the legislature could clear the matter up quite easily. They could add a provision granting absolute or qualified immunity from liability in tort or contract to the *Arbitration Act*, as they have done in the *Provincial Court Act* for judges and in various statutes setting up administrative decision-makers.

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