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**Safeguarding the Institutional  
Impartiality of Arbitration in the  
Face of Double-Hatting**

**Joshua Tayar**

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# Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting

Joshua Tayar\*

*Double-hatting, whereby an individual serves as arbitrator in one case and as legal counsel in another, has become so prevalent that it is often considered benign. At present, the practice of double-hatting in arbitration does not comport with procedural justice and therefore the arbitration system lacks institutional impartiality. Although some expound a complete segregation of the roles of arbitrator and counsel, it is possible, with proper safeguards, for double-hatters to have the requisite arbitral impartiality. Further legislative restrictions and law society rules relating to arbitrations represent the optimal solution.*

...

*La pratique de la double casquette, en vertu de laquelle une personne agit à la fois à titre d'arbitre dans une affaire et de conseiller juridique dans une autre, est devenue si commune qu'elle est souvent considérée comme anodine. Pour l'instant, cette pratique ne s'accorde pas aux principes de justice procédurale et compromet donc l'impartialité institutionnelle du système d'arbitrage. Bien que certains défendent une séparation complète des rôles d'arbitre et de conseiller juridique, il est possible, avec les garanties appropriées, que la pratique de la double casquette puisse respecter l'impartialité requise en matière d'arbitrage. L'action conjuguée de nouvelles restrictions législatives et de règles des barreaux en matière d'arbitrage serait une solution optimale à ce problème.*

*It is undeniable that the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration. Whereas judges are segregated from the rest of the legal professional community, arbitrators are largely drawn from precisely the same pool of professionals.<sup>1</sup>*

## I. Introduction

Impartiality is “a fundamental characteristic of arbitration”,<sup>2</sup> with courts equating the role of an arbitrator to that of a judge,<sup>3</sup> and referring to arbitrators as “judge[s] freely chosen by the parties”.<sup>4</sup> In the United States, the Supreme Court has directed that courts and tribunals “be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review”.<sup>5</sup> This reference seems even more consequential in the context of double-hatting, whereby an individual serves as arbitrator in one case and as legal counsel in another.

Double-hatting has become so prevalent that it is often considered benign. For example, in a recent study<sup>6</sup> of treaty-based arbitrations, only 42% of the cases did not include any double-hatters; in 47% of the cases at least one arbitrator was simultaneously acting as legal counsel elsewhere, while in another 11% of the cases legal counsel were serving elsewhere as arbitrators. The test for bias in Canada is a reasonable *apprehension* of bias, not *actual* bias.<sup>7</sup> Presently, the safeguards in place do not preclude reasonable apprehension of bias in regards to double-hatters while they serve as arbitrators. This, in turn, threatens the legitimacy of the arbitration system as a whole. Although some have proposed a complete segregation of

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1 Sundaresh Menon, “International Arbitration: The Coming of a New Age for Asia (and Elsewhere)” (Keynote Address delivered at the ICCA Congress, Singapore, 2012) at para 40.

2 *Sport Maska Inc v Zittner*, [1988] 1 SCR 564 at 604, 38 DLR (4th) 221 [*Sport Maska Inc*].

3 *Szilard v Szasz*, [1955] SCR 3, [1955] 1 DLR 370 [*Szilard*]; (“[f]rom its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact” at 4); *Re Carus v. Wilson and Greene* (1886), 18 Q.B.D. 7 (C.A.) cited in *Campbellford, Lake Ontario and Western Railway Co v Massie* (1914), 50 SCR 409, 22 DLR 673 [*Massie*] (“the case is one of an arbitration [where] there shall be a judicial inquiry worked out in a judicial manner” at 419–420).

4 *Sport Maska Inc*, *supra* note 2 at 581.

5 *Commonwealth Coatings Corp v Continental Casualty Co et al*, 393 US 145 (1968) 337 at 339.

6 Malcolm Langford, Daniel Behn, & Runar Hilleren Lie, “The Ethics and Empirics of Double Hatting” (2017) 6:7 ESIL Reflections 1.

7 *Szilard*, *supra* note 3 at 6–7.

the roles of arbitrator and counsel,<sup>8</sup> it is possible, with proper safeguards, for double-hatters to have the requisite arbitral impartiality.

## II. The Roles of Adjudicator and Advocate – “per se Incompatible”

The Supreme Court of Canada (“SCC”) addressed the adjudicatory requirement of impartiality in the context of part-time municipal judges in Québec who also practice as lawyers. The SCC established the following test:

Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?

...

if the answer to that question is yes, this occupation is per se incompatible with the function of a judge.<sup>9</sup>

Ultimately, the SCC found that “the occupation of practising law is per se incompatible with the function of a judge”.<sup>10</sup> The International Court of Justice (“ICJ”) has similarly acknowledged that the simultaneous or sequential exercise of the two roles is per se incompatible,<sup>11</sup> More generally, this stance against double-hatting has not been confined to the participation of double-hatters in related cases or cases in which the facts, the law or the parties overlap.<sup>12</sup>

The SCC highlighted its concern with examples of conflicts of interest that illustrate this “general incompatibility”.<sup>13</sup> These examples, listed below, are equally applicable in the context of arbitration.

1. Part-time judges who are also practicing law could be pressured [by virtue of acting for others] to make a particular decision on an issue;<sup>14</sup>

8 Thomas Buerghental, “The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law” (2006) 22 *Arbitration International* 495 at 498.

9 *R v Lippé*, [1991] 2 SCR 114 at 144, 128 NR 1 [*Lippé*].

10 *Ibid* at 147.

11 International Court of Justice, *Practice Directions* at 7–8. The ICJ advises parties that “it is not in the interest of the sound administration of justice” to retain counsel or appoint an ad hoc judge, who is simultaneously acting, or has acted in the past three years, in the other capacity.

12 Maria Nicole Cleis, “The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions” (Leiden, NL: Brill Nijhoff, 2017) at 95.

13 *Lippé*, *supra* note 9 at 145–146.

14 In *British Columbia (Minister of Highways) v. Shaw* (1970), 18 DLR (3d) 636, aff’d (1971) 18 DLR (3d) 638n [*BC Minister of Highways v Shaw*], the court held that the arbitrator, who was simultaneously acting on behalf of the claimants, was disqualified because he was disposed to granting a high award of compensation in order to create a favourable precedent for his clients.

2. An appearance of a conflict of interest could arise if a lawyer of the judge's firm or a lawyer involved in a deal with the judge's firm appeared before the judge;<sup>15</sup>
3. If the judge's firm was pursuing a particular government contract, the judge may feel pressured to favour the government position in a decision;<sup>16</sup> and
4. Clients of the judge [or witnesses previously called by the judge on behalf of his or her clients] could be called to testify in a case before the judge.<sup>17</sup>

This “general incompatibility” of adjudication and advocacy may actually be more conspicuous in the context of arbitration. Arbitrators may be eager to assume jurisdiction by broadly interpreting the scope of arbitration agreements and investment treaty provisions, as the greater the number of disputes that arbitral tribunals hold themselves to have jurisdiction over, the greater the revenue for both counsel and arbitrators alike.<sup>18</sup> As arbitration is generally initiated by one of the parties, the more attractive arbitration is made to appear to initiating parties and/or repeat players,<sup>19</sup> the more arbitration claims will be filed—counsel and arbitrators will thus obtain more work. Awareness by an arbitrator that a legal representative in the proceeding will adjudicate another proceeding, in which the arbitrator serves as counsel, might influence the arbitrator's decision in favour of the legal representative's position, or, at least, appear to influence it. In cases where arbitrator challenges are decided by the unchallenged arbitrators, the unchallenged arbitrators have an incentive to reject the proposal for disqualification in order to maintain good relations with the challenged arbitrators in the hopes of being appointed in the future by the challenged arbitrators, acting as counsel.

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15 See also the International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, Council of the International Bar Association, 2004, at 2.3.3. The Guidelines list the following as a “Red List” or serious conflict of interest, situation: “The arbitrator is a lawyer in the same law firm as the counsel to one of the parties”; *Starr v Gordon*, 2010 ONSC 4167, [2010] OJ No 3223 [*Starr*].

16 *Vito G Gallo v The Government of Canada (Decision on the Challenge to Mr J Christopher Thomas, QC)* (2009), PCA at paras 32– 33 (UNCITRAL) (Nassib G Ziade). Thomas, a sole practitioner practicing as a lawyer and arbitrator, sought to provide legal advice to the Government of Mexico while serving as arbitrator in a case that could potentially affect Mexico's interests. Thomas was required to choose between continuing to advise Mexico or continuing to serve as an arbitrator in the case.

17 Likewise, a witness may be called to testify before an arbitrator, who, while acting as counsel in another proceeding had called that same witness. In *MDG Computers Canada Inc v MDG Kingston Inc*, 2013 ONSC 5436, 233 ACWS (3d) 285 [*MDG*], the respondent's expert witness had previously been retained by the arbitrator, acting as counsel, in another proceeding. The court disqualified the arbitrator as he could not impartially assess these witness factors anew.

18 See Owen Fiss, “Against Settlement” (1984) 93 Yale LJ 1073 at 1077; see also Fabien Gélinas, “The Independence of International Arbitrators and Judges: Tampered With or Well-Tempered?” (2011) 24 NY Intl L Rev 1 at 8 (“[i]International lawyers who act as arbitrators are now often “in the business” of getting cases, which may reasonably be assumed to be the primary economic incentive that governs their behavior”).

19 For example, arbitrators may broadly interpret investment treaty obligations in favour of investors – the initiating parties.

### III. Absence of Institutional Impartiality

“Institutional impartiality” has been found to be a constitutional guarantee.<sup>20</sup> “If the [legal] system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met . . . the appearance of impartiality is important for public confidence in the system”.<sup>21</sup>

Given the “general incompatibility” of legal practice with adjudication, coupled with a lack of safeguards<sup>22</sup> to “alleviate the risks of bias”, the present arbitration system “is structured in such a way as to create a reasonable apprehension of bias”.<sup>23</sup> The successful challenges of double-hatters for lack of arbitral impartiality in the case law underscore this absence of institutional impartiality. In *Ghirardosi v. British Columbia (Minister of Highways)*,<sup>24</sup> a party to an arbitration proceeding had previously retained the arbitrator as legal counsel in connection with another dispute. The SCC held “disqualification [of the arbitrator] arises from the circumstance that, unknown to the [other party], the confidential and mutually beneficial relationship of solicitor and client existed”.<sup>25</sup> Similarly, in *Bank of Montreal v. Brown*<sup>26</sup>, the court disqualified the arbitrator for simultaneously acting as counsel against one of the parties concerning an unrelated dispute in a different field of the law. The court noted:

It may well be that [the arbitrator] considered that he could dissociate the two files in his mind and that his state of mind was not such as to preclude him of being impartial. But this is irrelevant, as a reasonable apprehension of bias must not be confused with actual bias.<sup>27</sup>

Courts have also held that an arbitrator will be disqualified just by virtue of formerly acting as counsel to a party concerning matters unrelated to the arbitration proceeding.<sup>28</sup>

This absence of institutional impartiality in the arbitration system is problematic:

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<sup>20</sup> *Lippé*, *supra* note 9 at 140.

<sup>21</sup> *Ibid* at 140–141.

<sup>22</sup> More fully discussed below.

<sup>23</sup> Because of double-hatting. See the text accompanying note 21.

<sup>24</sup> *Ghirardosi v British Columbia (Minister of Highways)*, [1966] SCR 367, 56 DLR (2d) 469 [Ghirardosi].

<sup>25</sup> *Ibid* at 371.

<sup>26</sup> *Bank of Montreal v Brown*, 2006 FC 503, [2006] FCJ No 623 [*BMO v Brown*], *aff'd* 2007 FCA 23.

<sup>27</sup> *Ibid* at para 42.

<sup>28</sup> See *Sumner et al v Barnhill* (1879), 12 NSR 501 cited in *Szilard*, *supra* note 3 at 5, where an award was set aside on that basis.

If a judicial system loses the respect of the public, it has lost its efficacy... public confidence in the system of justice is crucial to its continued existence and proper functioning.<sup>29</sup>

It is therefore crucial that public perception of the legitimacy of the arbitration system as a whole be protected by resolving the partiality problems posed by double-hatting.<sup>30</sup>

#### IV. Safeguards for Impartiality – or Lack Thereof

Safeguards for the impartiality of arbitrators are scarce; it has been said that “barbers and taxidermists are subject to far greater regulation than [arbitrators]”.<sup>31</sup> In the context of Québec’s municipal judges, the SCC found that the existing safeguards for impartiality were effective; these include the oath of office, a binding code of ethics/legislative restrictions, and judicial immunity. Presently, equivalent safeguards are not found in the arbitration setting.

##### A. Oath of Office

Canadian judges are required to take an oath of office before they may perform judicial duties.

The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially . . . there is a presumption that judges will carry out their oath of office.<sup>32</sup>

There is nothing similarly compelling with respect to arbitrators. The common law, arbitration legislation in Canada, and the vast majority of arbitral institutions do not require arbitrators to swear an oath before commencing their tasks unless the arbitration agreement expressly so provides.<sup>33</sup>

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<sup>29</sup> *Lippé*, *supra* note 9 at 141.

<sup>30</sup> Philippe Sands, “Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel” in Chester Brown & Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 19 at 21–22.

<sup>31</sup> Richard C Reuben, “Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice” (2000) 47 *UCLA L Rev* 949 at 1013.

<sup>32</sup> *R v S (RD)* [1997] 3 SCR 484 at paras 116–117, 1997 CarswellNS 301 [*S(RD)*].

<sup>33</sup> George L Blum and Eric C Surette, “Oath of Arbitrators” in *American Jurisprudence*, 2d ed vol 4 (Thomson Reuters: 2004) at section 160.

### B. *Binding Code of Ethics/Legislative Restrictions*

In *R. v. Lippé*<sup>34</sup>, the SCC specifically noted that the *Code of ethics for municipal judges of Québec*<sup>35</sup> and section 608.1 of the *Cities and Towns Act*<sup>36</sup> provide strict rules binding on municipal judges, who practice law, relating to issues of bias. Arbitrators, on the other hand, are not legally bound by equivalent rules. The IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”), often consulted by Canadian courts and tribunals in international matters, are non-binding guidelines only. Arbitrators cannot be sanctioned for breaching the IBA Guidelines per se, because they do not create legal obligations.

To further safeguard judicial impartiality, it is an offence within the Criminal Code for a judge to accept, and for anyone to offer and/or provide a judge, anything of value in respect of something done in her judicial capacity.<sup>37</sup> In arbitration, it is quite to the contrary – the parties actually compensate the arbitrators. Additionally, judges will soon be prohibited from even engaging in discussions with a legal practitioner or law firm concerning a potential business or employment relationship.<sup>38</sup> There are no corresponding provisions or constraints to prevent a party or counsel from offering similar inducements to a double-hatter, who is serving as the arbitrator on the case, nor to prevent an arbitrator from accepting such inducements. Moreover, double-hatters may be enticed to offer and accept quid pro quo arrangements between one another in relation to their respective arbitral awards. Courts have had to intervene on a case-by-case basis to prevent such inducements from negatively impacting the administration of justice. In *Conmee et al v Canadian Pacific Railway Company*,<sup>39</sup> the court held that an arbitrator who had received and accepted an offer to become legal counsel of the defendants’ company was thereby disqualified from serving as arbitrator.

### C. *Judicial Immunity*

Although adjudicators may be faced with threats (in the most extreme of circumstances), arbitrators do not have the same legal protections and recourses that judges have. For example, a party may be more hesitant to

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34 *Supra* note 9 at 148–150.

35 *Courts of Justice Act*, CQLR c T-16, r 1, s 261, 262 (Supp).

36 *Cities and Towns Act*, CQLR, c C-19, s 608.1.

37 *Criminal Code*, RSC 1985, c C-46, s 119(1).

38 Federation of Law Societies of Canada, *Model Code of Professional Code Consultation Report*, 2017, at Proposed Rule 5.6-4.

39 *Conmee v Canadian Pacific Railway*, [1888] OJ 176, 16 OR 639.

threaten a judge, who has the power to hold that party in contempt of court.<sup>40</sup> As Martin Friedland has noted, “A lack of protection from intimidation will understandably influence — consciously or subconsciously — the impartiality of adjudication”.<sup>41</sup>

Further, legal proceedings can be instituted against arbitrators. Canadian courts have restricted the liability of arbitrators to very limited circumstances. Absent proof of bad faith or fraud, an arbitrator will not be held liable for any damages that may arise from the arbitrator’s acts or omissions; but lawsuits are time-consuming and expensive to defend. A threat during arbitration proceedings by a powerful party to bring suit against the arbitrator, even if unlikely to ultimately succeed in the courts, may nonetheless dissuade the arbitrator from ruling against that party.

## V. Potential Solutions

### A. Arbitrator Challenges

Parties are entitled to challenge arbitrators for bias in various circumstances. Double-hatting has come to the forefront as one of those circumstances.<sup>42</sup> This remedy of arbitrator challenges has been available for decades yet the partiality problem caused by double-hatting persists. Within Canada, if timely challenges are made, courts and tribunals should be able to disqualify biased double-hatters on a case-by-case basis. Some have suggested that if challenges were raised more regularly then nomination of these double-hatters would carry greater risks for all involved and therefore would be avoided.<sup>43</sup> However, the SCC held in *Lippé* that the Charter guarantees impartiality not only on a case-by-case basis (individual level), i.e., “whether [a] particular judge harbour[s] pre-conceived ideas or biases”, but also on an institutional level.<sup>44</sup> Individual arbitrator challenges will thus

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40 In *R v Glasner*, [1994] OJ 1892, 19 OR (3d) 739 [*Glasner*], Justice John Laskin stated: “Contempt of court . . . is a sanction that courts have imposed for centuries to uphold the public’s confidence in and respect for the administration of justice”.

41 Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Council*, (Canadian Judicial Council, 1995) at 27.

42 See *Telekom Malaysia Berhad v The Republic of Ghana*, HA/RK 2004 788, Decision of the District Court of the Hague, 5 November 2004, (where the claimant-appointed arbitrator was successfully challenged because he was concurrently acting as the claimant’s counsel in another proceeding); *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ARB/05/24, ICSID Tribunal Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, 6 May 2008 (where one of Slovenia’s lawyers was from the same barristers’ chambers as the chairman of the tribunal); *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA 2010-9, UNCITRAL Decision on Challenge to Arbitrator, 17 December 2009 (where the arbitrator was successfully challenged because he was concurrently acting as counsel in another proceeding against one of the parties).

43 Langford, Behn, & Lie, *supra* note 6 at 11–12.

44 *Supra* note 9 at 140.

not remedy defects in the arbitration system on an institutional level.

### B. *Self-Imposed Safeguards*

Institutional impartiality of the arbitration system is compromised by double-hatting, notwithstanding self-imposed undertakings from individual double-hatters. “Self-regulators . . . tend to be self-satisfied. The question, here as elsewhere, is whether they in fact succeed in the eyes of objective observers”.<sup>45</sup> It is unreasonable to expect that all double-hatters will put safeguards in place, and equally unreasonable to expect that self-imposition of safeguards in a given case will necessarily “alleviate the risks of bias”.

A case in point is *Telesat Canada v. Boeing Satellite Systems International, Inc.*<sup>46</sup> Here, the applicant confirmed Gabrielle Kaufmann-Kohler as chair of the arbitral tribunal after she made several undertakings regarding a related arbitration proceeding<sup>47</sup> that was being heard by Laurent Lévy, Kaufmann-Kohler’s partner in her boutique law firm. These undertakings included that she knew nothing about the other arbitration; she would erect an informational wall between herself and Lévy; she had not and would not discuss the subject matter of the arbitration heard by Lévy; arbitration privacy and confidentiality requirements made it “highly unlikely” that the tribunal would ever become aware of Lévy’s arbitral award; and, if the tribunal saw Lévy’s arbitral award, it would not be bound by it. After Lévy decided in the respondent’s favour, the respondent exercised its right to submit the arbitral award to Kaufmann-Kohler, as it gave rise to an issue estoppel defense against the applicant. The court observed that Kaufmann-Kohler “[would] be required to review and decid[e] whether the [award] of her partner [was] binding on the parties in this arbitration [on the grounds of issue estoppel]”.<sup>48</sup> The court removed her from the tribunal due to the reasonable apprehension of bias. The self-imposed safeguards, thought to be sufficient at one stage in the arbitration process, later turned out to be completely inadequate.

### C. *Government Legislation*

Amending the international conventions<sup>49</sup> to prohibit double-

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<sup>45</sup> Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 147.

<sup>46</sup> *Telesat Canada v Boeing Satellite Systems International Inc.*, [2010] ONSC 4023, [2010] CarswellOnt 34 [*Telesat Canada*].

<sup>47</sup> This proceeding involved the respondent, but not the applicant.

<sup>48</sup> *Telesat Canada*, *supra* note 46 at para 141.

<sup>49</sup> See, for example, the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, (18 March 1965) 575 UNTS 159 [ICSID Convention] and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (7 June 1959) 4739 UNTS 330 [New York Convention].

hatting or to impose safeguards within international arbitration is generally considered politically impossible in practice.<sup>50</sup> It therefore lies with each state to protect against perceptions of bias.

In Canada, this issue has been dealt with head-on in section 8.30 of the Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the European Union which provides that “upon appointment, [arbitrators] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement”.<sup>51</sup> In the House of Commons, Karen Ludwig noted that “Our government is convinced that such innovations address the concerns about a perceived lack of arbitrator independence and will give greater legitimacy to the dispute resolution process”.<sup>52</sup> This sentiment was reiterated by André Pratte in the Senate: “Unlike cases we have seen in the past, [arbitrators] will not be able to act as counsel, experts or witnesses in other investment disputes with the concomitant risk of perceived conflict of interest”.<sup>53</sup>

The inclusion of section 8.30 in CETA, and the parliamentary discussions surrounding it, reflect Canadian parliamentarians’ recognition of the serious risks of partiality caused by double-hatting. The restrictions set out in section 8.30 however are limited, both in time (while one serves on the CETA tribunal) and to a particular field of arbitration (investment arbitration); further, counsel appearing before the CETA tribunal can still arbitrate disputes under other trade agreements.

Presently, the double-hatting ban is limited to CETA, but the issues contemplated above could be resolved by government passing legislation more generally applicable to all arbitrations. Such legislation would reflect Canadian public policy on the issue of double-hatting. Where foreign arbitral awards, written by double-hatters (in foreign jurisdictions) lacking satisfactory safeguards for impartiality, are brought to Canada for

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50 See Nathalie Bernasconi-Osterwalder, Lise Johnson, & Fiona Marshall, “Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel” (International Institute for Sustainable Development delivered at the IV Annual Forum for Developing Country Investment Negotiators, 27-29 October 2010) at 43.

51 *Comprehensive Economic and Trade Agreement*, 30 October 2016, Can TS 2017 (entered into force 21 September 2017) [CETA] at art 8.30.

52 Canada, Parliament, *Hansard*, 42 Parl, 1st Sess, 148:112 (22 November 2016) at 7103.

53 Canada, Parliament, *Hansard*, 42 Parl, 1st Sess, 150:98 (16 February 2017) at 2364.

recognition and enforcement, Canadian judges would be emboldened to refuse recognition and enforcement on the grounds of procedural fairness/ due process and public policy.<sup>54</sup>

#### D. Professional Constraints on Lawyers

Tolerance for intermingling adjudication with the practice of law is clearly declining in Canada's legal community. In 2015, The Honourable Frank Marrocco<sup>55</sup> raised concerns about judges returning to the practice of law. In response, the Law Society of Ontario adopted stricter professional rules<sup>56</sup> and is currently considering additional measures.<sup>57</sup> The Federation of Law Societies of Canada ("FLSC") is also of the view that the administration of justice would be negatively impacted by the appearance of a former judge as counsel in a Canadian court or tribunal.<sup>58</sup>

The FLSC is currently considering<sup>59</sup> whether to include rules in the Model Code of Professional Conduct concerning lawyers serving as arbitrators; these could include a complete prohibition on double-hatting or satisfactory safeguards in relation to double-hatters. Professional constraints would allow law society tribunals to deter and discipline non-compliant double-hatters.<sup>60</sup>

#### E. Reform of Institutional Rules

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54 See New York Convention, *supra* note 49 at article (V)(2)(b); *Jacob Securities Inc v Typhoon Capital BV*, 2016 ONSC 604, at para 33, 262 ACWS (3d) 840 [*JSI*] ("[c]hallenges to an award based on reasonable apprehension of bias amount to claims of unequal treatment, which would be contrary to Article 18 [of the UNCITRAL Model Law] and, hence, would seem to be properly brought under Articles 34 [application for set aside] and 36 [grounds for refusing recognition and enforcement]").

55 At the time of writing, Honourable Frank Marrocco was the current Associate Chief Justice of the Ontario Superior Court of Justice. Standing Committee on the Model of Code of Professional Conduct, "Post-Judicial Return to Practice" (2016) Federation of Law Societies of Canada Discussion Paper at 2.

56 The Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2014. Section 7.7 of the Rules provides that "a lawyer who was formerly a judge . . . shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a panel of the Hearing Division of the Law Society Tribunal. This approval may only be granted in exceptional circumstances and may be restricted as the panel sees fit."

57 Consultation Report, *supra* note 38 at para 13.

58 *Ibid* at para 17. See proposed rule 7.7-1 and Commentary [1].

59 The author contacted the Federation of Law Societies of Canada, which has not yet proposed rules concerning arbitrators.

60 An argument can be made that the Model Code of Professional Conduct should be interpreted as already prohibiting double-hatting in various circumstances within the arbitral context. See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2017, section 2.1-1 (Integrity) – Commentary 2; section 3.4-1 (Conflicts) – Commentaries [1], [5], [10], [11]; section 5.1-1 (Advocacy) – Commentaries [1], [2]; section 5.1-2 (Advocacy) – Commentary [C].

Even in cases where a singular institution has implemented rules relating to double-hatting, there can still be reasonable perceptions of bias. For instance, in late 2009, the Court of Arbitration for Sport (“CAS”) amended section 18 of the Code of Sports-related Arbitration to provide that CAS arbitrators may not act as counsel for any party appearing before the CAS;<sup>61</sup> this approach, however, does not prevent a CAS arbitrator from acting as counsel in proceedings before another tribunal, nor does it prevent counsel appearing before the CAS from serving as an arbitrator elsewhere. Closing these loopholes would require every arbitration institution to disallow its arbitrators from acting as counsel in any forum. Alternatively, satisfactory safeguards would have to be implemented by institutions across the board. Given the large number of arbitration institutions around the world any such solution is likely unworkable. The problem with any reform proposal is that there is no overarching coordinating organization that could enforce conflict of interest rules globally.<sup>62</sup> Moreover, a reform of institutional rules will not remedy the partiality problems of double-hatting with regards to ad hoc arbitrations.

## VI. Going Forward

If lawyers can serve concurrently as judges, as held in *Lippé*, it follows that lawyers should be able to serve concurrently as arbitrators. The complication in this analogy is that the safeguards protecting the legitimacy of judicial proceedings decided by municipal judges are not found in arbitral proceedings decided by double-hatters. At present, the practice of double-hatting in arbitration does not comport with procedural justice and therefore the arbitration system lacks institutional impartiality. As arbitrations become more prevalent in Canada as a method of dispute resolution these defects must be cured.

Further legislative restrictions and law society rules relating to arbitrations represent the optimal solution. Canadian lawmakers and law society benchers can and should follow the blueprint in *Lippé* by creating an oath to be sworn by double-hatting arbitrators, developing a binding code of ethics to which they are subject, and outlining restrictions in legislation similar to those set out in section 608.1 of the *Cities and Towns Act*, which provides both specific and general causes for disqualification.

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61 Dennis H Hranitzky & Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration: Should Advocates and Arbitrators be in Separate Bars?” (2010) NY LJ.

62 Langford, Behn, & Lie, *supra* note 6 at 11.