IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Johnston v. Octaform Inc.,*
2024 BCSC 537

Date: 20240404
Docket: S227911
Registry: Vancouver

Between:

Bruce Johnston and Alba Lozano

Petitioners

And

Octaform Inc.

Respondent

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	J.D. Shields
Counsel for the Respondent:	K. Booth A.D. Butler C.M. McHardy
Place and Date of Hearing:	Vancouver, B.C. February 8-10, May 30-31, June 1-2 and October 4, 2023
Place and Date of Judgment:	Vancouver, B.C. April 4, 2024

Table of Contents

Introduction

[1] This petition arises out of an ongoing arbitration between the parties in relation to whether the petitioners breached employment agreements between them and the respondent. The arbitrator in that arbitration is Leslie Maerov. The petitioners allege that circumstances exists that give rise to a reasonable apprehension of bias on the part of arbitrator Maerov. In the petition, they request:

a) an order removing him as the arbitrator;

b) an order setting aside all of the decisions made by him to date;

c) an order appointing a substitute arbitrator; and

d) an interim or interlocutory order staying the ongoing arbitration pending the final resolution of this petition.

[2] In reasons dated February 14, 2023, indexed at 2023 BCSC 311, I addressed and denied the request for a stay of the arbitral proceedings on the basis that the court had no jurisdiction under the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*ICAA*], to stay those proceedings. These reasons relate to the balance of the relief claimed in the petition, namely, whether circumstances exist that give rise to a reasonable apprehension of bias on the part of arbitrator Maerov.

[3] For the reasons that follow, the petition is dismissed. The circumstances relied on by the petitioners do not give rise to a reasonable apprehension of bias on the part of arbitrator Maerov, individually or cumulatively.

Background Facts

[4] The respondent is a Nevada corporation. It is a wholly owned subsidiary of Octaform Systems Inc. (“OSI”), a Canadian company. The respondent sells PVC liner panels and formwork products in the United States. OSI sells the same type of products in Canada.

[5] The petitioners were both employees of the respondent. Bruce Johnston was the former General Manager of the respondent from mid-2012. Alba Lozano, the spouse of Bruce Johnston, was employed by the respondent from mid-2013 as a Warehouse and Logistics Coordinator.

[6] Both petitioners signed employment agreements with the respondent which contained arbitration clauses and non-competition and non-solicitation clauses. The validity of the employment agreements is in dispute.

[7] The arbitration clauses provided:

> The arbitration will be held in Vancouver, B.C., in accordance with the BCICAC's Shorter Rules for Domestic Commercial Arbitration …

[8] The petitioners allege that they left the employ of the respondent in July 2015 but continued to provide services to the respondent through ALJ Consulting LLC, a Nevada company. This is disputed by the respondent who says that Bruce Johnston was terminated for cause effective May 27, 2016, and that Alba Lozano resigned on the same date.

[9] Pursuant to the arbitration clauses in the employment agreements, arbitration proceedings against the petitioners were commenced by OSI on October 7, 2016 with the British Columbia Arbitration and Mediation Institute. The respondent was subsequently substituted for OSI as the party to the arbitration.

[10] On November 30, 2016, Leslie E. Maerov was appointed as the sole arbitrator, a fact which he confirmed by letter dated December 7, 2016.

[11] The petitioners immediately raised various jurisdictional issues including:

a) Whether mediation was a condition precedent to the arbitration and whether such mediation had been conducted;

b) Whether the issues were within the scope of the arbitration agreements; and

c) Whether the arbitration was an abuse of process, as civil proceedings had been commenced.

[12] The jurisdictional issues raised by the petitioners led to the first of many procedural orders by arbitrator Maerov. In Procedural Order No. 1 dated December 21, 2016, he directed, on consent, that the jurisdictional issues were to be addressed with written submissions only and he set a timetable for the delivery and exchange of such submissions.

[13] On March 27, 2017, arbitrator Maerov issued Interim Award No. 1 in which he addressed the various jurisdictional issues raised by the petitioners. He ultimately dismissed the petitioners' applications for a dismissal or stay of the arbitration.

[14] On May 8, 2017, the respondent filed its statement of claim in the arbitration. In that statement of claim, the respondent alleges that the petitioners breached their employment and fiduciary duties, breached their employment agreements, misused confidential information and misappropriated business opportunities. In particular, it is alleged in the statement of claim that the petitioners:

a) established a competing business under the name H-PAC Plastics LLC ("H-PAC") and disguised their interest in that business by registering it in the name of Carolina Diaz;

b) hired the respondent's employees, Carolina Diaz, Francis Leung, Steve Ehrenpreis and Leonard Warland, to work at H-PAC; and

c) used confidential information to solicit customers and suppliers of the respondent.

[15] The petitioners filed an amended statement of defence and counterclaim in the arbitration on November 12, 2018. In that pleading, the petitioners deny breaching any duties owed to the respondent or any agreements with the respondent. In particular, they deny the validity of their respective employment agreements and deny they operated, managed or had any financial interest in H-

PAC. In the counterclaim, they allege they are owed commission and bonus payments and further claim damages for loss of income, unjust enrichment and emotional distress.

[16] There were multiple pre-hearing conferences and applications in the arbitration, the results of which were recorded in interim awards and various procedural orders. The orders made up to the commencement of the hearing included:

a) Procedural Order No. 3 dated April 12, 2017, which sets out that, notwithstanding the arbitration clause, the parties agreed that the BCICAC's Shorter Rules for Domestic Commercial Arbitration were not suitable;

b) Procedural Order No. 4 dated September 8, 2017, which sets out that:

    i. The arbitration was to be conducted on an "ad hoc" basis "with discretion to the arbitral tribunal to apply such rules as are considered appropriate from time to time",

    ii. The substantive law applicable to the dispute was the law of Nevada,

    iii. Document discovery was to be through production of "reliance documents",

    iv. Examinations for discovery were to follow production of documents, and

    v. The evidence at the hearing was to be by witness statements with a brief examination in chief followed by cross-examination and re-examination;

c) Procedural Order No. 6 dated March 7, 2018, which directed that:

    i. All witness statements be delivered 21 days prior to the commencement of the hearing,

ii. Any rebuttal witness statements be delivered 14 days prior to the hearing,

iii. Pre-hearing briefs be delivered three days prior to the hearing, and

iv. Lists of documents to be relied on and copies of the documents be provided seven days prior to the hearing;

d) Procedural Order No. 10 dated January 25, 2019, which noted that each party had one expert witness and directed that the respondent's expert report be delivered 60 days before the hearing and the petitioners' report 30 days before the hearing;

e) Procedural Order No. 13 dated October 9, 2019, which addressed in greater detail how evidence was to be presented at the hearing including that:

i. The evidence of both parties was to be in the form of witness statements which were to be exchanged,

ii. A witness who had provided a statement must be made available for cross-examination, and

iii. Witnesses could be examined in chief for no more than 15 minutes;

f) Procedural Order No. 14 dated December 19, 2019, which directed, *inter alia*, that:

i. Foreign law had to be proved by expert opinion evidence in reports to be filed by January 24, 2020,

ii. Any responding reports were to be filed by February 21, 2020,

iii. Objections to an expert report were to be made in writing by March 27, 2020, and

iv. If a party demanded to cross-examine an expert, the expert must be made available for cross-examination;

g) Procedural Order No. 20 dated July 27, 2020, which clarified that the parties need not identify in advance the documents they intended to use in cross-examination of a witness but no such document could be put to a witness unless it had been produced prior to the hearing;

h) Procedural Order No. 21 dated September 22, 2020, which addressed issues that had arisen concerning various witnesses (Francis Leung, Lisa Clayworth, and the petitioners) and how their evidence was to be received. In relation to the evidence of the petitioners, who had given witness statements, the issue was whether their counsel could cross-examine them if they were called by the respondent as adverse witnesses during its case. Arbitrator Maerov held that if the respondent called the petitioners as witnesses during its case, each side would be entitled to cross-examine them; and

i) Procedural Order No. 22 dated October 23, 2020, which addressed reply witness statements and when they had to be delivered. Arbitrator Maerov directed that, if the petitioners elected to call evidence in the arbitration, reply witness statements had to be delivered within two days of the petitioners opening their case.

[17] The actual arbitration commenced on October 26, 2020. I am advised that there has been 57 days of hearings and that the respondent's case (the respondent being the claimant in the arbitration) is not yet concluded.

[18] Further procedural orders and interim awards were made during the course of the hearing. These included Interim Award No. 2 dated August 28, 2020, in which arbitrator Maerov addressed an application dated May 14, 2020 brought by the petitioners for a declaration that the tribunal had no jurisdiction to determine the dispute. An issue in that application was whether the arbitration was governed by the *Arbitration Act*, R.S.B.C. 1996, c. 55 or the *ICAA*. Arbitrator Maerov held that the

arbitration was governed by the *ICAA* and that he had jurisdiction. The petitioners subsequently brought a petition in this court to set aside Interim Award No. 2. That petition was dismissed by Justice Kent on March 26, 2021. In reasons indexed at 2021 BCSC 536, Justice Kent upheld Interim Award No. 2 and expressly held that the arbitration was governed by the *ICAA*.

[19] The events in the arbitration that are alleged to give rise to a reasonable apprehension of bias commence in early 2022. I summarize these events here but will address them in more detail later in these reasons. Additionally, to provide the required context, it is necessary to know that there was evidence in the arbitration that the business of H-PAC was transferred to EZ PVC LLC ("EZ PVC"), which was later sold to Amerilux International LLC ("Amerilux").

[20] Procedural Orders No. 35 and 36 were issued on January 24 and February 24, 2022. These orders addressed the admissibility of a reply expert report of Anthem Forensics.

[21] On April 21, 2022, upon application by the respondent, arbitrator Maerov issued a freezing order prohibiting the petitioners from disposing of or otherwise dealing with the proceeds from the sale of EZ PVC to Amerilux, including to not remove the proceeds from the jurisdiction of Canada or the U.S.A. Arbitrator Maerov further ordered that the petitioners could remove assets from the jurisdiction of Canada or the U.S.A. or otherwise dispose of or deal with assets if the net value of the petitioners' assets remaining in Canada or the U.S.A. exceeded $21.6 million.

[22] Also, on April 21, 2022, arbitrator Maerov issued Procedural Order No. 38 in which he ordered that the petitioners produce documents relating to the sale of EZ PVC to Amerilux. He also ordered that the petitioners submit to further examination for discovery and further cross-examination in relation to the sale.

[23] On April 25, 2022, the petitioners applied to arbitrator Maerov to set aside the freezing order and Procedural Order No. 38. On April 28, 2022, in Procedural Order No. 39, arbitrator Maerov dismissed the application to set aside.

[24] On May 11, 2022, the petitioners brought an application before arbitrator Maerov for him to recuse himself and to set aside the various orders and awards he had made to date.

[25] On August 2, 2022, the petitioners informally requested that arbitrator Maerov stay the arbitration pending the determination of their recusal application. Arbitrator Maerov refused to do so.

[26] On August 5, 2022, the petitioners requested that arbitrator Maerov defer his decision on the recusal application until after September 25, 2022. Arbitrator Maerov agreed to defer his decision only until September 16.

[27] On September 16, 2022, arbitrator Maerov issued his reasons in respect of the recusal application. He declined to recuse himself, declined to set aside his previous orders and declined to stay the arbitration proceedings.

[28] On October 3, 2022, the petitioners filed the petition in this matter for an order removing arbitrator Maerov.

Submissions

[29] The petitioners make two broad submissions. First, they submit that circumstances exist that give rise to a reasonable apprehension of bias or justifiable doubts as to arbitrator Maerov's independence or impartiality, if not actual bias. Second, they submit that arbitrator Maerov is unable to perform his functions as an arbitrator. The circumstances relied on by the petitioner as displaying reasonable apprehension of bias or inability to perform the functions of an arbitrator are as follows:

a) In Procedural Order No. 35 dated January 24, 2022, arbitrator Maerov admitted into evidence a reply expert report of Anthem Forensics that he redacted himself;

b) In the Reasons for Interim Award dated April 21, 2022, arbitrator Maerov made credibility findings against Bruce Johnston and Francis Leung;

c) In a ruling made on April 21, 2022, arbitrator Maerov issued a preservation or freezing order for the full amount of the damages claimed;

d) In the Reasons for Interim Award dated April 21, 2022, arbitrator Maerov pre-judged the issue of whether Bruce Johnston controlled and beneficially owned H-PAC;

e) In the Reasons for Interim Award dated April 21, 2022, arbitrator Maerov referred to and relied on a witness statement of Bruce Johnston, which was not then in evidence;

f) In Procedural Order No. 39 dated April 28, 2022, arbitrator Maerov refused to address concerns raised by the petitioners that he had improperly relied on the aforesaid witness statement;

g) On August 2, 2022, arbitrator Maerov refused to stay the arbitration proceeding pending the hearing of their recusal application;

h) Arbitrator Maerov refused to defer or delay his decision on the recusal application and thereby attempted to limit the petitioners' access to this court; and

i) Arbitrator Maerov refused to recuse himself or stay the proceedings.

[30] In summary, the respondent submits that this petition is a spurious attempt to derail the arbitration because the petitioner feels it may ultimately lose. The respondent says the interim rulings have been transparent, logical, and based on the evidence and that arbitrator Maerov has been respectful and fair to the parties throughout the proceedings. They say the petitioners have failed to meet the high threshold required to remove an arbitrator on the grounds of bias. Additionally, they submit that the first five circumstances alleged by the petitioners to give rise to a reasonable apprehension of bias (items a through e) were not challenged within 15 days and are therefore out of time.

Issues

[31] Although the petitioners' base their challenge on two allegedly independent grounds, reasonable apprehension of bias and inability to perform his functions, they rely on the same facts and circumstances in respect of both grounds. The real issue in dispute is whether arbitrator Maerov should be removed on the grounds of reasonable apprehension of, or real danger of, bias.

[32] A secondary issue is whether the challenges based on the first five circumstances are out of time.

Legal Principles

[33] This arbitration is governed by the *ICAA* as confirmed by Kent J. in his reasons indexed at 2021 BCSC 536 and as was conceded by the parties before me and recorded in my reasons indexed at 2023 BCSC 311.

The *ICAA*

[34] Sections 5 and 6 of the *ICAA* address the limited extent of this court's jurisdiction in relation to arbitral disputes governed by the *ICAA* and the general principles to be applied when interpreting the *ICAA*.

> **Extent of judicial intervention**
>
> **5** In matters governed by this Act,
>
> > (a) a court must not intervene unless so provided in this Act, and
> >
> > (b) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.
>
> **International origin and general principles**
>
> **6**(1) In interpreting this Act, a court or arbitral tribunal
>
> > (a) must have regard to the international origins of the Act, the need to promote uniformity in its application and the observance of good faith, and
> >
> > (b) may have regard to the following:
> >
> > > (i) the Reports of the United Nations Commission on International Trade Law on the work of its eighteenth (1985)

> and thirty-ninth (2006) sessions (UN Docs A/40/17 and A/61/17);
>
> (ii) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264);
>
> (iii) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (UN Sales No. E.08.V.4).
>
> (2) Questions concerning matters governed by this Act that are not expressly settled in this Act are to be settled in conformity with the general principles on which this Act is based.
>
> …

[35] Section 12 addresses the specific grounds upon which an arbitrator's appointment may be challenged.

> **Grounds for challenge**
>
> **12**(1) When a person is approached in connection with his or her possible appointment as an arbitrator, the person must disclose any circumstances likely to give rise to justifiable doubts as to the person's independence or impartiality.
>
> (2) An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, must, without delay, disclose to the parties any circumstances referred to in subsection (1) unless they have already been informed of them by the arbitrator.
>
> (3) An arbitrator may be challenged only if
>
> > (a) circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality, or
> >
> > (b) the arbitrator does not possess the qualifications agreed to by the parties.
>
> (3.1) For the purposes of subsection (3) (a), there are justifiable doubts as to the arbitrator's independence or impartiality only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration. [Emphasis added.]
>
> (4) A party may challenge an arbitrator appointed by that party, or in whose appointment the party has participated, only for reasons of which the party becomes aware after the appointment has been made.

[36] It is to be noted that the petitioners rely only on s. 12(3)(a) of the *ICAA* in support of their request for the removal of arbitrator Maerov. They do not allege he does not have the necessary qualifications.

[37] Further, it is to be noted that by the conjunction of ss.12(3) and 12(3.1), there must be “a real danger of bias” for there to be justifiable doubts as to an arbitrator’s independence or impartiality. As will be seen, there is no distinction as between “a real danger of bias” and “a reasonable apprehension of bias”.

[38] Section 13 prescribes the procedure to be followed where an arbitrator’s appointment is challenged.

> **Challenge procedure**
>
> **13**(1) Subject to subsection (4), the parties are free to agree on a procedure for challenging an arbitrator.
>
> (2) Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in section 12 (3), send a written statement of the reasons for the challenge to the arbitral tribunal.
>
> (3) Unless the arbitrator challenged under subsection (2) withdraws from office or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge.
>
> (4) If a challenge under any procedure agreed on by the parties or under the procedure under subsection (2) is not successful, the challenging party may request the Supreme Court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge.
>
> (5) If a request is made under subsection (4), the Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed on by the parties, the party making the request had an opportunity to have the challenge decided on by a party or entity other than the arbitral tribunal.
>
> (6) The decision of the Supreme Court under subsection (4) is final and is not subject to appeal.
>
> (7) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

[39] In summary, absent an agreement of the parties, the procedure to challenge an arbitrator set out in s. 13 is as follows: (1) a challenge must be made within 15 days of a party becoming aware of any circumstance giving rise to justifiable doubts as to the arbitrator's independence or impartiality; (2) the challenge must first be made to the arbitral tribunal; and, (3) if the challenge before the tribunal is not successful, the party challenging must apply to this court within 30 days of receiving notice of the decision of the tribunal rejecting the challenge.

[40] Section 14 of the *ICAA* sets out additional circumstances where the mandate of an arbitrator terminates, as follows:

> **Failure or impossibility to act**
>
> **14**(1) The mandate of an arbitrator terminates if
>
> (a) the arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, and
>
> (b) the arbitrator withdraws from office or the parties agree to the termination of the arbitrator's mandate.
>
> (2) If a controversy remains concerning any of the grounds referred to in subsection (1) (a), a party may request the Supreme Court to decide on the termination of the mandate.
>
> (3) A decision of the Supreme Court under subsection (2) is final and is not subject to appeal.
>
> (4) If, under this section or section 13 (3), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12 (3).

[41] Section 18 of the *ICAA* provides that the parties to an arbitration must be treated equally and given a reasonable opportunity to present their case.

> **18** The parties must be treated with equality and each party must be given a reasonable opportunity to present their case.

Caselaw on Removal of Arbitrators for Bias

[42] The parties are in agreement as to the test to be applied to remove an arbitrator, or other decision-maker, on the grounds of reasonable apprehension of bias. The test is set out in the leading case of *Wewaykum Indian Band v. Canada*, 2003 SCC 45 [*Wewaykum*], and is: whether an informed person, viewing the matter realistically and practically and having thought the matter through would conclude it was more likely than not the arbitrator, consciously or unconsciously, did not decide fairly?

> 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> …
>
> 74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

[43] At para. 76 of *Wewaykum,* it was noted that there must be serious or substantial grounds raising an apprehension of bias to displace the presumption of judicial impartiality.

> 76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:
>
> > The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". (*Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 395)
>
> [Emphasis added.]

[44] At para. 77 of *Wewaykum,* it was also recognized that the inquiry was very fact specific, with context and the particular circumstances of supreme importance.

> 77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

[45] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 (SCC), Justice Cory observed that a reasonable apprehension of bias taints the entire proceeding, cannot be cured and it is inconsequential that the presider was correct.

> 100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone*, *supra*, at p. 645; see also *Curragh*, *supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": *Blanchette v. C.I.S. Ltd.*, 1973 CanLII 3 (SCC), [1973] S.C.R. 833, at p. 843. However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

[46] Justice Cory further observed in *S. (R.D.),* at paras. 113-114, that the onus of demonstrating reasonable apprehension bias lies with the person alleging it and the threshold is high.

[47] As I indicated above, there is no distinction as between "a real danger of bias", the test set out in s. 12(3.1) of the *ICAA,* and "a reasonable apprehension of bias". The parties agree that this is merely a different label for the same test. This is clear from *R. v. Burke*, 2002 SCC 55, at para. 61:

> As stated in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 11, the precise phrasing of the test is not crucial, if the substance is plain. It is interchangeably expressed as a "reasonable apprehension", "real likelihood" or "real danger" of bias, a "reasonable suspicion" of prejudice or taint, and so forth. Whatever the exact formulation of the test, the essence of the inquiry is the same; namely, the test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude": *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J.

[48] The parties, in particular the petitioners, have referred me to multiple additional case authorities involving allegations of reasonable apprehension of bias where the above test has been applied. I did not find most of the cases helpful and

do not intend to refer to them. The inquiry is, as stated, “very fact specific” and depends on the “particular circumstances”. In *S. (R.D.)* at para. 136, it was specifically said that “other cases … with similar allegations are of very limited precedential value”.

[49] The test that I apply throughout these reasons is that set out above, namely, whether an informed person, viewing the matter realistically and practically and having thought the matter through would conclude it was more likely than not that the arbitrator, consciously or unconsciously, did not decide fairly? Throughout, I refer to this test by the commonly accepted shorthand “reasonable apprehension of bias”.

Analysis

[50] I will first address whether any of the circumstances alleged to give rise to a reasonable apprehension of bias are time-barred pursuant to s. 13(2) of the *ICAA*. I will then address each individual circumstance alleged to give rise to a reasonable apprehension of bias.

Section 13(2) Time Bar

[51] The respondent submits that, pursuant to s. 13(2) of the *ICAA*, the petitioners were required to bring their challenges to arbitrator Maerov within 15 days after becoming aware of the various circumstances said to give rise to justifiable doubts as to arbitrator Maerov's impartiality. It says the petitioners failed to do this in respect of at least the first five grounds, which relate to orders and rulings made on January 24 and April 21, 2022.

[52] The respondent relies on the literal wording of s.13(2) of *ICAA* and also refers me to *Eckervogt v. British Columbia*, 2004 BCCA 398, at para. 48, where Justice Donald wrote:

> [48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of

> waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.

[53] It is not disputed that the first five grounds pleaded by the petitioners relate to events that occurred more than 15 days before the petitioners brought their application for the recusal of arbitrator Maerov on May 11, 2022. It is further not disputed that the petitioners became aware of these rulings on the dates they were made. However, the petitioners submit that "becoming aware of … is an open and fluid concept, with 'aware' meaning time to read the respective decisions, consult counsel, review the law, and formalize [s]ubmissions". They further submit that the 15-day limit does not apply to specific events but to the cumulative effect of the various events.

[54] I completely reject the petitioners' submission that the 15-day limit in the *ICAA* should be so loosely and broadly interpreted as they suggest. They provide no authority for such an interpretation and it is completely contrary to the spirit and intent of the section which is to ensure that such important issues are addressed quickly. The interpretation urged upon the court by the petitioners would render the 15-day limit completely meaningless.

[55] However, in support of their second submission, that the time limit applies to the cumulative effect of individual events, the petitioners refer me to *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485 [*Dufferin*]. In *Dufferin*, the applicable arbitration rules required that challenges to an arbitrator be brought within seven days of becoming aware of the grounds for the challenge. The applicant argued that the challenge was not out of time as the various grounds had to be considered cumulatively. Justice Woodley accepted that, in the circumstances, the challenge was not brought out of time.

> 100. The Applicants argue that the grounds for the application are cumulative. The circumstances that gave rise to justifiable doubts about the arbitrator's independence or impartiality did not cumulatively rise to the level necessary to bring an application until the date the application was commenced.
>
> 101. In these circumstances, the Applicants argue that the application was brought within the period provided by Rule 3.6.2.

> 102. For the purposes of this application, I accept the Respondent's position that the stricter seven-day period provided by the ADRIC Rules is the applicable period. However, I also accept the Applicants' position that it is the cumulative effect of the Arbitrator's conduct and not necessarily specific acts that give rise to justifiable doubts about the arbitrator's independence or impartiality.
>
> 103. Given that the Applicants' counsel was actively involved in the ongoing Arbitration hearing, it is not unreasonable to accept that counsel's ability to determine or identify "circumstances" sufficient to give rise to "justifiable doubts" about the independence and impartiality of the Arbitrator was impacted by the ongoing arbitration.
>
> 104. In the circumstances of this case, and for the reasons for decision that follow regarding the issue of reasonable apprehension of bias, I find that the Applicants commenced the application in a timely manner within the applicable seven-day period as required by Rule 3.6.2
>
> [Emphasis added.]

[56] I accept that there may be circumstances where only an accumulation of events gives rise to justifiable doubts as to the impartiality of an arbitrator and, in those circumstances, it might properly be said that the 15-day limit does not apply to each and every specific event. However, this is not such a case.

[57] The petitioners have not pleaded that it is only the cumulative effect of the various circumstances raised that gives rise to a reasonable apprehension of bias. To the contrary, they plead that the various grounds advanced are "independent" or even "fully independent". Indeed, the rulings and orders complained of are independent.

[58] It is my view that the challenges relating to orders and rulings made on January 24 and April 21, 2022, were out of time. The challenge in relation to the January 24, 2022 ruling regarding the Anthem reply report should have been brought by February 8, 2022. The challenges in relation to the April 21, 2022 orders and rulings should have been brought by May 6, 2022.

[59] Notwithstanding that the grounds of challenge in relation to the rulings made on January 24 and April 21, 2022, were made out of time, I will nevertheless address whether they give rise to a reasonable apprehension of bias.

The Circumstances Alleged to Give Rise to Bias

[60] I wish to emphasize that, in evaluating the various circumstances put forward by the petitioners, I am not sitting in appeal of the various rulings made by arbitrator Maerov or conducting a judicial review of his various decisions. The test that I apply throughout is as set out in *Wewaykum*.

Reply Expert Report of Anthem Forensics

[61] The first circumstance alleged by the petitioners to give rise to a reasonable apprehension of bias is that arbitrator Maerov admitted a reply expert report of Anthem Forensics into evidence and that he unilaterally redacted portions of the report.

[62] The respondent initially introduced into evidence an expert report of Joseph Leauanae of Anthem Forensics dated June 1, 2020. This report addressed the damages allegedly suffered by the respondent. The report, however, did not distinguish between the damages suffered by the respondent and those suffered by its Canadian parent, OSI, which was not a party to the arbitration.

[63] The petitioners then delivered a report of their own expert, Mark Newton, dated July 3, 2020 (the “Newton report”). The Newton report addressed only the damages allegedly suffered by the respondent.

[64] The respondent then had Mr. Leauanae prepare a reply report dated September 12, 2020 (the “Anthem reply report”). This reply report addressed the Newton report and dealt with the alleged damages suffered only by the respondent.

[65] By email dated December 13, 2021, and at the hearing before the arbitrator on that day, counsel for the petitioners advised that the Newton report was formally withdrawn. The petitioners’ counsel also took the position that the Anthem reply report was no longer admissible because it was in reply to the Newton report. This turn of events was not entirely unexpected. By email dated December 1, 2021, counsel for the petitioners advised that “Unless I call my accounting expert, which I doubt, the Reply Report … is not to be placed before the Tribunal”.

[66] The parties made submissions before arbitrator Maerov on December 16, 2021 regarding the admissibility of the reply report. Arbitrator Maerov rendered his decision on January 24, 2022 in Procedural Order No. 35.

[67] Procedural Order No. 35 includes both the reasons and order of arbitrator Maerov. In his reasons, he outlined the various arguments made by the parties, the authorities to which he had been referred and conducted his analysis. He noted that the petitioners made essentially three arguments: (1) that the reply report was case splitting; (2) that once the Newton report was withdrawn the Anthem reply report must "fall away"; and (3) that admitting the Anthem reply report would unduly prejudice the petitioners. Arbitrator Maerov addressed each of the petitioners' arguments.

[68] First, he determined that the Anthem reply report was not "case splitting" as there was no categorical rule that a second or supplementary expert report could not be filed and the respondent's case had not yet been concluded. He noted that the report had been provided in compliance with his previous orders and held that the interests of justice dictated its admission unless there were principled reasons to not accept the report. He also noted that the petitioners could have applied to file a sur-reply report or could have objected to the reply report at an earlier date.

[69] Second, he reasoned that the authorities relied on by the petitioners, being *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2016 BCSC 2345 and *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2017 BCSC 581, did not stand for the proposition that a reply report must be struck when the report it responds to is withdrawn. Rather, he determined the *Cambie Surgeries* cases and *Kaigo v. Sawchuk Developments Co. Ltd*., 2014 BCSC 1857, established that only the parts of the report that referred to the withdrawn report or were not understandable without the withdrawn report, "fell away" when the initial report was withdrawn.

[70] Third, in relation to prejudice, he noted that the ability of the respondent to claim damages on behalf of OSI had long been an issue in the arbitration and

neither party could be said to be taken by surprise. He noted that the petitioners had had the Anthem reply report for 15 months and could have conducted cross-examination on the matters contained in the report or could have objected to it earlier. He also noted that late tactical objections or applications were to be discouraged.

[71] Accordingly, arbitrator Maerov ruled that the report was admissible but, consistent with his view of what was decided in *Cambie Surgeries*, he redacted those parts of the report that referred to the Newton report and left those parts that could be understood without reference to the Newton report.

[72] Following the release of Procedural Order No. 35, the petitioners applied to arbitrator Maerov to reconsider the order. They provided him with a new decision, *Cowichan Tribes v. Canada (Attorney General)*, 2022 BCSC 184 [*Cowichan Tribes*], which was released after submissions were made in the original application and which held that responding reports must fall away when the original report is withdrawn.

[73] In Procedural Order No. 36, arbitrator Maerov rejected the request to reconsider Procedural Order No. 35. In doing so he noted at para. 17:

> 17. The [*British Columbia Supreme Court Civil*] *Rules* do not apply to this proceeding, and the only restrictions on delivery of expert reports is contained in my Procedural Orders dealing with that issue. In this case the September 14 Anthem Report was delivered in accordance with the deadlines prescribed in Procedural Order No. 19, and there is no prohibition on that report containing additional information or opinions. Because that report was delivered 18 months prior to the Claimant seeking to introduce the report into evidence, the Respondents have had ample opportunity to apply for leave to file an expert report in relation to the additional information and opinions and so were not prejudiced by the report being more than a response to the Pollard Report.

[74] The petitioners submit before me that the entire Anthem reply report was inadmissible and that arbitrator Maerov impermissibly re-wrote the report, without receiving submissions on what should be redacted, and thereby created evidence. They say the redacted report greatly benefitted the respondent and was prejudicial to them.

[75] The petitioners rely on *Cowichan Tribes*, as well as the *Cambie Surgeries* cases, as supporting the proposition that a reply expert report "falls away" when the report that it responds to is withdrawn. I do not intend to analyze what these cases decided because they were decided under the British Columbia *Supreme Court Civil Rules* which contain extensive provisions regarding experts reports. As arbitrator Maerov rightly pointed out, those rules did not apply to this arbitration. This was an *ad hoc* arbitration, which was agreed to by the parties and was recorded in Procedural Order No. 4. The principles established in the *Cambie Surgeries* cases and *Cowichan Tribes* do not apply to an *ad hoc* arbitration with full force.

[76] I would add that this is not an appeal or judicial review of arbitrator Maerov's decision. The question is not whether he was right or wrong in the principles he applied to resolve the issue before him. The question is whether an informed person, viewing the matter realistically and practically and having thought the matter through would conclude it was more likely than not that arbitrator Maerov, consciously or unconsciously, did not decide the issue fairly. That test is not met in relation to the admission of the Anthem reply report.

[77] The second prong of the petitioners' argument is that by redacting portions of the Anthem reply report, arbitrator Maerov re-wrote the report or made up evidence. They say this was going beyond the role of an adjudicator or arbitrator.

[78] In support of this second prong of their argument, the petitioners have referred me to several case authorities. Those authorities include:

a) *R. v. Pompeo*, 2014 BCCA 317, where the Court held trial fairness was compromised when the trial judge requested evidence be tendered and engaged in lengthy questioning of witnesses;

b) *Majcenic v. Natale*, [1968] 1 O.R. 189, 1967 CanLII 267 (ON CA), where a new trial was ordered because the trial judge improperly expressed his opinion on the quantum of general damages, engaged in unrecorded

discussions with counsel in chambers, and excessively questioned witnesses to the extent that he projected himself into the arena;

c) *R. v. Bornyk*, 2015 BCCA 28, where a new trial was ordered because the judge conducted his own research into fingerprint identification;

d) *Goghari v. Saarela*, 2014 BCSC 1667, and *McFarlane v. Safadi*, 70 O.R. (3d) 599, 2004 CanLII 12644 (ON CA), which are cited for the proposition that excessive interventions by the trial judge compromise trial fairness;

e) *Hearn v. McLeod Estate,* 2019 ONCA 682, where it was held that the trial judge had erred by conducting his own research and thereby stepped out of his position of impartiality and descended into the arena; and

f) *Mackereth (Henderson) v. Henderson* 2012 ONSC 5054, where the judge embarked upon an area of questioning that was not previously canvassed by counsel and did not give counsel the opportunity to ask follow up questions. The Court held that procedural fairness required that counsel be given the opportunity to make enquiries of their own in the new area opened up by the trial judge.

[79] In my view, the above authorities do nothing to advance the case of the petitioners. Arbitrator Maerov did not do any of the things that are impugned in the above cases. He merely redacted those portions of the Anthem reply report that he considered should be redacted because the Newton report had been withdrawn. This is in no way similar to the conduct chastised in the above authorities.

[80] Moreover, the redactions should not have come as a surprise to the parties. During submissions before arbitrator Maerov on December 16, 2021, the possibility of such redactions was expressly acknowledged. In particular, counsel for the respondent made the following submissions:

> And so much like in the *Cambie Surgeries* situation, the claimant has tendered evidence, direct response to the respondents' position and that evidence is internally coherent and it stands alone. It doesn't need you to understand anything in the Newton report because the parts that we want you

> to admit are parts that address the respondents' overall position, not the parts that respond specifically to details in the Newton report.
>
> And again, if you accept our position, then, you know, the correct thing to do would be to redact the parts of the reply report that are specifically responsive to the Newton report which has been withdrawn. [Emphasis added.]
>
> [Transcript, Dec. 16, 2021, at pp. 26-7]

[81] Similarly, the petitioners' counsel made the following submission:

> Were fairness a consideration, and I say it's not, it would be wholly unfair to now visit upon the respondents this reply report or as even redacted, as my friend now suggests. [Emphasis added.]
>
> [Transcript, Dec. 16, 2021, at p. 74]

[82] At the conclusion of the hearing, the following exchange occurred.

> CNSL C. MCHARDY: Mr. Chair, I think I just want to say one thing. This is not in argument. I just want to point out that if there's any issue about the standalone or coherency of parts of the reply report, I haven't addressed that because I don't think it needs to be addressed unless you make a decision on that.
>
> CNSL J. SHIELDS: Mr. Maerov, that can't be the way it ever works.
>
> CNSL C. MCHARDY: Mr. Chair, if you want us to parse the report, I can provide you with a redacted copy --
>
> THE ARBITRATOR: No, no, I can read the report.
>
> CNSL J. SHIELDS: I object to that. We've had argument on this for hours.
>
> CNSL C. MCHARDY: I haven't addressed that because there's no need to address it, but I brought it up now out of a caution because I know my friend objects to everything. So I'm bringing it up now so we can deal with it if you please, but I don't think it needs to be dealt with, pending your decision. And if it's still an objection after you made your decision and it's relevant then we can address that on the merits.
>
> THE ARBITRATOR: I don't think anything more needs to be said on that. I can read the report. I have read the report a number of times. I'm certainly going to have to reserve my decision on this, but I think there's nothing more to accomplish this afternoon, is there?
>
> [Transcript, Dec. 16, 2021, at pp. 94-95]

[83] It is to be noted that counsel for the respondent offered to redact the report and counsel for the petitioners objected to any such course of action.

[84] I have reviewed the redactions made by arbitrator Maerov to the Anthem reply report. Those redactions were exactly as he said. He redacted those portions

of the report that referred to the Newton report and only those portions. He left in place those portions of the report that did not depend on the Newton report for understandability or context. It may have been preferable if arbitrator Maerov had sought more input from counsel on what should and should not be redacted, but, given the exchange at the end of the hearing, it appeared the petitioners did not want to delay the matter further. In any event, in my view, any additional input from counsel would not have made any difference to the result. The portions that required redaction, given arbitrator Maerov's ruling, were obvious.

[85] In addition, arbitrator Maerov did not refuse to revisit his redactions or to hear submissions from counsel on the redactions, as the petitioners suggest. First, other than the exchange between the arbitrator and counsel at the end of the hearing on December 16, 2021, the petitioners never asked arbitrator Maerov to revisit the redactions he made. Second, when issues with the redactions were brought to the attention of the arbitrator, he did make changes. Specifically, during the hearing on February 22, 2022, while being cross-examined by petitioners' counsel, Mr. Leauanae identified that redactions to some footnotes were in relation to portions of the report that were not redacted. The following exchange then occurred:

> THE ARBITRATOR: Let me make sure I understand that. You're saying that the text was redacted but not the footnote or the footnote was redacted --
>
> THE WITNESS: The latter.
>
> THE ARBITRATOR: -- shouldn't have been.
>
> THE WITNESS: The footnote supports the narrative and the narrative portions were not redacted and specifically footnotes 14 and 15.
>
> THE ARBITRATOR: Well, I'll take another look at that, obviously. I think ...give me a minute, please. Okay. I think, subject to what counsel may say, it would seem that those two footnotes should not have been redacted. I apologize for that. Mr. McHardy, do you have anything to say on
>
> that?
>
> CNSL C. MCHARDY: No, I simply agree with you, Mr. Chair.
>
> THE ARBITRATOR: Mr. Shields, do you agree or disagree?
>
> CNSL J. SHIELDS: I don't think that any opposition would be successful so I'm taking no position.
>
> THE ARBITRATOR: All right. Well, Mr. Shields, presume that I will make that correction. If you wish to examine on those two footnotes, feel free to do that.

> [Transcript, February 22, 2022, pp. 55-56]
> [Emphasis added.]

[86] The above excerpt shows that arbitrator Maerov did not have a closed mind in relation to his redactions. He was amenable to changes on a principled basis consistent with his ruling.

[87] In result, in respect of this challenge, I am not satisfied that the circumstances give rise to a reasonable apprehension of bias on the part of arbitrator Maerov. He merely adjudicated an issue that was put before him and did so fairly and impartially and in accordance with the procedure and rules that had been agreed upon by the parties.

April 21, 2022 Reasons and Interim Award

[88] The second, third, fourth and fifth circumstances alleged by the petitioners to give rise to a reasonable apprehension of bias all relate to an interim award dated April 21, 2022 and the reasons given for that award.

[89] The April 21, 2022 interim award was a freezing order prohibiting the petitioners from removing, disposing of or otherwise dealing with proceeds of the sale of EZ PVC. The operative part of the order was:

> 1. Except as permitted by this Order, the Respondents must not, and must not take or participate in any action to:
>
> > (a) remove from Canada or the United States or in any way dispose of or deal with or diminish the value of any of their assets that are proceeds of the sale of the business known as EZ PVC LLC (“EZ PVC”), or assets traceable thereto, whether in their own name or not and whether solely or jointly owned;
> >
> > (b) This prohibition applies to the following assets:
> >
> > > (i) stocks, shares or other units of EZ PVC, or the net proceeds from the sale of said property if it has already been sold;
> > >
> > > (ii) any money in the bank accounts of the Respondents or their agents from the sale of stocks, shares or other units of EZ PVC; and

> (iii) any money in the bank accounts of de facto trustees of the Respondents that are proceeds of the sale of the business of EZ PVC.

[90] The pleadings in the arbitration make no reference to EZ PVC. The pleadings only refer to H-PAC and, as indicated, it is alleged in the statement of claim that the petitioners established H-PAC as a competing business, something which the petitioners deny. Notwithstanding that EZ PVC is not referenced in the pleadings, it is apparent from the evidence led in the arbitration, some of which I address below, that the business and assets of H-PAC were transferred to EZ-PAC such that it arguably became the successor to H-PAC.

[91] The Articles of Incorporation of EZ PVC disclose that EZ PVC was incorporated in Nevada in June 2017 by the petitioner, Bruce Johnston, who is also the sole Manager of the company. The registered agent for the company is the other petitioner, Alba Lozano.

[92] The question of who has ownership and/or control of H-PAC and EZ PVC became an issue early in the arbitration in relation to a document production application brought by the respondent. In that application, the respondent sought production of documents in the possession or control of the petitioners relating to both H-PAC and EZ PVC. The respondent alleged that the petitioners were the directing minds of H-PAC and EZ PVC and deliberately structured the companies to hide their interests. In support of their application they relied, *inter alia*, on an affidavit of G. David Richardson, the CEO and sole shareholder of the respondent. He deposed, *inter alia*:

a) The incorporation documents for H-PAC show that Ms. Diaz incorporated the company and that the address given for the company was the petitioners' home address;

b) Ms. Diaz did not have the requisite knowledge, skills and experience to establish such a business;

c) Bruce Johnston does in fact direct H-PAC;

d) Bruce Johnston was deposed in Nevada litigation as H-PAC's representative; and

e) Bruce Johnston provided instructions to H-PAC's counsel in the Nevada litigation.

[93] Ms. Diaz also filed an affidavit in the application. She deposed she was the sole shareholder of H-PAC and that the petitioners were not officers, directors or shareholders and had no financial interest in the company.

[94] In Procedural Order No. 11, dated July 31, 2019, arbitrator Maerov ordered that the documents requested be produced. He was satisfied that the evidence presented to date indicated the petitioners exercised effective control over H-PAC and EZ PVC.

> 30. Filed together with the Response of H-PAC is an affidavit of Carolina Diaz sworn May 23, 2019. Ms. Diaz deposes in that brief affidavit that she is the sole shareholder of H-PAC and that neither Johnston nor Lozano are officers, directors or shareholders of H-PAC and have no financial interest in H-PAC. I have no reason to disbelieve Ms. Diaz except that the contents of her affidavit are set against a preponderance of evidence to the contrary that warrants thorough denial and detailed explanation for me to discount it in favour of Ms. Diaz's assertions. To ignore the case put by the Claimant forces me to accept one version or the other, and my choice is to accept the Claimant's version.
>
> 31. I am satisfied that based on the evidence to date, the Respondents together own ALJ and that at least Johnston beneficially owns or controls H-PAC and exercises effective control over EZ P[V]C as well as H-PAC. There is ample evidence that this is the case and it has not been denied

[95] Later in the arbitration, during his cross-examination on June 14, 2021, Bruce Johnston admitted that:

a) He was the owner of EZ PVC (p18 L 1-5);

b) EZ PVC took or hired H-PAC's employees, independent contractors and customers for no consideration (p20 L 1-25);

c) EZ PVC used the same offices, warehouse and equipment as H-PAC (p22 L 2-13); and

d) The whole of H-PAC's business moved to EZ PVC for no consideration (p22-23 L 14-7).

[96] The exact date the transfer of the assets and business of H-PAC to EZ PVC occurred is unclear to me. However, I am advised that it occurred in 2019.

[97] On March 16, 2022, counsel for the respondent wrote to counsel for the petitioners advising that it had come to their attention that EZ PVC had been acquired by Amerilux in or around February 2022. They expressed their concern over the sale having taken place without any notice and requested an undertaking that the sale proceeds would be preserved.

[98] On March 23, 2022, the petitioners' counsel responded that Bruce Johnston could do as he wished. There was no denial that the sale had taken place.

[99] On March 26, 2022, the respondent made the formal application for a preservation order as well as for additional discovery and cross-examination.

[100] On April 1, 2022, the petitioners filed their response. Their response was less than surgical but included that: the tribunal did not have the jurisdiction to make the order; H-PAC and EZ PVC were not parties to the arbitration and the tribunal had no jurisdiction over them; and the damages sought of $21.6 million were exaggerated and artificial.

[101] On April 21, 2022, arbitrator Maerov rendered his reasons on the respondent's application and issued the award as set out above. He also ordered that there be additional discovery of Mr. Johnston.

[102] At the examination for discovery of Bruce Johnston held on April 29, 2022, he admitted that there had been a sale to Amerilux in exchange for a deposit, 21 monthly payments of $100,000 each, an employment agreement with himself, and payments for formwork sales over 10 years subject to a maximum of $3 million.

[103] Arbitrator Maerov's reasons identify that a key issue in the arbitration was the petitioners' interest in H-PAC and EZ PVC. At para. 2 he wrote:

> 2. A key aspect of the claims is that it is alleged that Johnston incorporated H-PAC Plastics LLC ("H-PAC") under the name of a friend, Carolina Diaz, though he was the directing mind and beneficial owner of H-PAC, and that he used H-PAC as a front for his own unlawful competition with Octaform. It is then alleged that Johnston orchestrated the transfer of the business of H-PAC to EZ PVC LLC ("EZ PVC"), of which he is the sole visible and acknowledged owner and directing mind, for no valuable consideration, which is asserted to corroborate the claim that he was the beneficial owner of H-PAC. Much evidence has been led in respect of this issue.

[104] At para. 10 and 11, arbitrator Maerov described the response of the petitioners as raising many points that had been repeatedly raised in the arbitration.

> 10. In opposition to the Application the Respondents refer to several points that they have brought up at various times during the dispute, including: the employment agreements may ultimately be found to be unenforceable, the non-competition and non-solicitation provisions in the employment agreements may apply only to liner panel but not formwork and they may otherwise be overly broad geographically and temporally, that the Respondents became independent contractors during the term of their agreements through ALJ Consulting LLC ("ALJ"), a company owned by Alba Lozano, and were not therefore subject to the restrictions contained in the employment agreements with Johnston and Lozano as individuals, that the employment agreements were not modified after their employment status changed and so they are not bound by any agreements at all, that the claims are inflated and unsupported by evidence, that the Claimant has not mitigated its alleged damages, that the Claimant was insolvent and suffered no losses, and that Johnston has the right to work and to use his list of customers.

[105] At para. 11, arbitrator Maerov wrote:

> 11. <u>These Reasons and the attached Interim Award do not adjudicate in any way the disputes referred to the Tribunal, and do not make any findings except as they relate to the Application, nor do they consider the defences referred to in par. 10, which may be relevant to the final determination of the dispute.</u> The Claimant has not closed its case, the Respondents have not had an opportunity to adduce evidence and the parties have not made their final submissions. <u>These Reasons deal only with the Application</u> before the Tribunal and considers the provisions of the *International Commercial Arbitration Act ("ICAA")* that appertain to the jurisdiction of the Tribunal to make the orders requested in the Application, and the requirements necessary to make such an order.
>
> [Emphasis added.]

[106] Arbitrator Maerov then addressed his jurisdiction to make the order sought. He referenced s. 17 of the *ICAA*, which addresses the powers of an arbitral tribunal to order interim measures of protection. He noted his prior orders had determined

the *ICAA* applied to the dispute and also noted that in *Johnston v. Octaform Inc*., 2021 BCSC 536, this court agreed with that assessment. Accordingly, he proceeded on the basis that he had jurisdiction to make the orders requested pursuant to s.17 of the *ICAA*.

[107] Arbitrator Maerov next addressed the petitioner's argument that an order could not be made because H-PAC and EZ PVC were not parties. He determined, however, that no order was being sought against these companies. Rather, he observed that the orders were against the petitioners.

[108] Arbitrator Maerov then, at paras. 22-24, addressed the evidence relating to ownership and control of H-PAC and EZ PVC. He concluded there was no doubt that Johnston controlled and was the beneficial owner of H-PAC and the owner and controlling mind of EZ PVC.

> 22. There has been some evidence in this arbitration that Carolina Diaz was the owner and sole director of record of H-PAC. However the evidence also has been that she had no experience in the PVC or liner panel business, had no particular training or skill as a manager, and she performed only fairly basic accounting tasks. She appears to have no involvement in EZ PVC.
>
> 23. Johnston and Francis Leung, particularly, have given tortuous explanations that Diaz exercised authority at H-PAC, but I find those explanations to be imprecise, contrived and that they lack credibility. The Respondents have filed a lengthy witness statement from Bruce Johnston which states generically that Carolina Diaz and he were both "involved" in the formation of H-PAC and that Johnston does not have a financial interest in H-PAC. He does not otherwise state with any specificity the nature of their involvement, or who was the beneficial owner or directing mind of H-PAC. In a brief affidavit sworn May 23, 2019, Diaz deposes she is the sole shareholder of H-PAC and that neither Johnston nor Lozano are officers, directors or shareholders of H-PAC and have no financial interest in H-PAC. There has been no other evidence tendered from Diaz and she is not on the Respondents' witness list. Diaz has not been cross examined on that affidavit. Finally, after strenuous cross-examination, Johnston admitted that he exercised control of H-PAC, which was in any event obvious from the remainder of the evidence. Because EZ PVC is the successor to H-PAC, which is alleged to have initially competed with Octaform, there is a need for continuity purposes to discuss H-PAC, though the Application does not directly concern it.
>
> 24. At relevant times given the issue under consideration at those times I have expressed the view that H-PAC was the alter ego of Johnston, and after hearing all of the evidence to date I have no doubt whatsoever that whatever the corporate documents say, and whatever evidence to the contrary has

> been, that H-PAC was controlled by Johnston and that he was the beneficial owner of H-PAC at all relevant times. It has been admitted and verified by both Johnston and Lozano that Johnston is the owner and controlling mind of EZ PVC. As a result he has effective and unencumbered access to all relevant documents concerning the Sale, and if the Sale was an asset sale he would have effective control of the sale proceeds within EZ PVC, and if the Sale was a sale of shares of EZ PVC, he would have direct control over the sale proceeds.
>
> [Emphasis added.]

[109] Arbitrator Maerov then moved on to discuss the conditions in s. 17.01 of the *ICAA* that must be met before an interim measure of protection could be granted. He reviewed each requirement and found that each had been satisfied. One such condition is that "there is a reasonable possibility that the requesting party will succeed on the merits of the claim". In assessing this requirement, he wrote:

> 34. One of the features of arbitration, in contrast with litigation, is that the evidence is disclosed at an early stage and the Tribunal has the opportunity of becoming familiar with that evidence well in advance of a hearing. Witness statements and expert reports all go to educating a Tribunal about the evidence, and in this case there have been many applications about various aspects of the dispute that help to define the issues and evaluate the evidence. While the Respondents have not been called upon to call their case, I have the advantage of having seen Bruce Johnston's witness statement, his Response witness statement, and lengthy cross-examination and Lozano's witness statement.
>
> 35. I have already confirmed that the hearing has not completed, the parties have not made their final submissions, the Respondents have identified a number of legitimate defences that could affect the ultimate decision and that this Order is not intended to make any adjudication of the issues.
>
> 36. Having said that, because I have only heard the Claimant's case and not the Respondents' case or counsel's legal arguments, it must be said that there is a reasonable possibility that the Claimant will succeed. This is a determination based on the balance of probabilities that the particular facts alleged by the Claimant are more likely than not to have occurred, and that no legal impediments have been established for the Claimant ultimately to be successful, all of which is subject to the Respondents' case and legal position.
>
> [Emphasis added.]

[110] Arbitrator Maerov next considered whether any order could be enforced. Relying on *First Majestic Silver Corp. v. Davila*, 2014 BCCA 11, he determined that the order was enforceable.

[111] Finally, arbitrator Maerov addressed the amount of the freezing order. In this regard he wrote:

> 43. The limit set on the freezing order is not a calculation of the Claimant's damages since it is premature to rule that the Claimant has any entitlement, that there were any damages or what amount those damages might be. The limit is a mathematical calculation of the maximum damages claimed if the Claimant were to be entirely successful in this proceeding. There is no basis at this time to calculate any other particular amount and there is no information before me from the Respondents that would influence any decision in that regard. The freezing order is simply an upward limit on the amount of Sale proceeds that should be preserved, though the actual amount is yet to be determined. [Emphasis added.]

Credibility Findings and Pre-judging

[112] The second and fourth circumstances alleged to give rise to reasonable apprehension of bias relate to the credibility findings arbitrator Maerov made against Bruce Johnston and Francis Leung and his finding that Bruce Johnston controlled and beneficially owned H-PAC. The credibility findings impugned are those set out in para 23 where he wrote, *inter alia*, that Mr. Johnston and Francis Leung gave "tortuous explanations" which he found to be imprecise, contrived and lacked credibility. The finding that Bruce Johnston controlled and beneficially owned H-PAC is set out in para. 24 where he wrote he had "no doubt whatsoever" that this was the case.

[113] The petitioners submit that premature findings of credibility and pre-judging an issue give rise to a reasonable apprehension of bias. They unnecessarily referred me to a multitude of authorities in support of these propositions, which are not disputed and with which I agree.

[114] The petitioners also refer me to *Hazelton Lanes Inc. v. 1707590 Ontario Limited*, 2014 ONCA 793 [*Hazelton Lanes*], where, mid-trial, the trial judge granted a *Mareva injunction* based on findings that all of the defendants had engaged in a "fraudulent scheme" to hide assets. On appeal, the Ontario Court of Appeal set aside the orders made by the judge. In particular, at para. 74, Simmons J.A. wrote:

> [74] In his reasons for granting the *Mareva* injunction, excerpts of which are set out below, the trial judge found that Faraci had engaged in a

> fraudulent scheme to divest himself of assets. As the trial judge himself later noted in his reasons for denying the recusal/mistrial motion (which were delivered after the appellants filed their notice of appeal of the contempt motion), he should have done no more in his reasons on the Mareva injunction motion than state that the evidence gave rise to a *prima facie* case. By going further and making findings, the trial judge effectively prejudged at least some of the issues on the added claims and commented adversely on Faraci's honesty and credibility: [Emphasis added.]

[115] Importantly, in *Hazelton Lanes*, the comments and findings made by the judge were not the sole or exclusive basis upon which the Court of Appeal found a reasonable apprehension of bias. The Court in fact held that it was the cumulative effect of several things that raised a reasonable apprehension of bias. Those things were interjections and comments made by the judge during cross-examination, the trial judge suggesting to counsel that he should request a *Mareva injunction*, and the mid-trial findings of fraud and credibility.

[116] Notwithstanding the comments of Simmons J.A. in *Hazelton Lanes*, it is not always open to a trial judge or arbitrator to limit their reasons in the way suggested. It is trite that adjudicators must give sufficient reasons justifying the conclusions they reached. If they fail to do so, their decisions are subject to be overturned on appeal or judicial review, as the case may be. Throughout the arbitration, arbitrator Maerov has provided thoughtful and considered reasons for virtually every decision he has made. It was undoubtedly expected of him that he would similarly provide fulsome reasons for such an important application. In this matter, if he had merely said he was satisfied on the evidence that the freezing order should be issued, I have no doubt but that the petitioners would have complained his reasons were insufficient. Indeed, in their reply submissions, the petitioners complain that the arbitrator did not support his credibility findings with "full reasoning".

[117] Additionally, to resolve this application before him, arbitrator Maerov had to decide, on a preliminary basis, whether the petitioners exercised control over H-PAC and EZ PVC and, more specifically over the proceeds from the sale. Given the petitioner's repeated assertions that they did not exercise any such control, it was essential that he assess the evidence before him and make findings, including

findings of credibility. The petitioners cannot have been surprised by this as it had been an ongoing and recurring issue since the inception of the arbitration.

[118] I agree with the petitioners that arbitrator Maerov's choice of words, if considered alone, suggest that he made final determinations of credibility and final findings on who controlled H-PAC and EZ PVC. He said Bruce Johnston gave "tortuous explanations" and that his evidence was imprecise, contrived and lacked credibility. He said he had no doubt whatsoever that Bruce Johnston controlled H-PAC. However, these words must be viewed in context "no matter how troubling the impugned words … may be": *S. (R.D.*), at para. 100.

[119] When arbitrator Maerov's words are considered in the proper context, they do not give rise to a reasonable apprehension of bias. Importantly, he repeatedly expressed that he was not pre-judging anything, credibility or the ultimate issues. At para. 11 of his reasons, as cited above, he expressly stated that his reasons and findings were in respect only of the application before him and that he was not making any determinations on the defences raised by the petitioners. At para. 35, he noted the hearing was not complete and that submissions had not yet been made. He again expressly stated that his order was not intended to be an adjudication of the issues. Finally, at para. 36, he noted he had only heard the respondent's case and that his conclusions were "subject to the Respondents' case and legal position".

[120] In my view, when the entire context is considered, arbitrator Maerov's credibility assessments and his finding that Bruce Johnston controlled H-PAC do not give rise to a reasonable apprehension of bias. These were interim assessments or findings, as he explained at length and repeatedly. He did what he had to do and went to pains to express that he was not making final decisions on credibility or any of the ultimate issues.

Freezing Order

[121] The third circumstance alleged by the petitioners to give rise to reasonable apprehension of bias is that the freezing order issued by arbitrator Maerov was for the full amount of the damages claimed, including damages suffered by OSI. The

petitioners say that he prejudged the damages and the important issue of whether and to what extent the respondent can claim for damages suffered by OSI.

[122] The petitioners have referred me to *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1, 1998 CanLII 3715 (ON CA), *J.M.W. Recycling Inc. v. Attorney General of Canada* (1982), 35 O.R. (2d) 355, 1982 CanLII 1947 (ON CA), *Poulter v. Pipe & Piling Supplies (B.C.) Ltd.* [1987] B.C.J. No. 1026, 1987 CanLII 2575 (BCCA), *Shoppers Mortgage & Loan Corp. v. Health First Wellington Square Ltd.* (1995), 23 O.R. (3d) 362, 1995 CanLII 1069 (ON CA), and; *Ayerst, McKenna & Harrison, Inc. v. Apotex Inc.* (1983), 41 O.R. (2d) 366, 1983 CanLII 1807 (ON CA). I found none of these cases helpful except that they confirm adjudicators must not prejudge a matter, must not excessively intervene in a trial, and must not conduct themselves in a manner that gives rise to a reasonable apprehension of bias, all principles that are not disputed.

[123] Arbitrator Maerov expressly stated in his reasons that the amount of the freezing order was a mathematical calculation of the maximum damages claimed if the respondent was entirely successful in this proceeding. The petitioners have not pointed me to any authority suggesting that the amount of the freezing order was calculated incorrectly or on a wrong principle. Rather, they merely submit that if they are ultimately successful on the damages issues, the damages will be considerably less. That may well be so but it does not mean arbitrator Maerov arrived at the figure because of a bias or lack of impartiality.

[124] In my view, arbitrator Maerov has clearly not pre-judged the damages issues and his determination of the amount of the freezing order in no way gives rise to a reasonable apprehension of bias. He was merely doing what he had to do and followed the guiding legal principles in so doing.

Improper Reliance on Witness Statement

[125] The petitioners additionally submit that arbitrator Maerov referred to and relied on a witness statement of Bruce Johnston and that this also gives rise to a reasonable apprehension of bias.

[126] This submission relates to para. 34 of arbitrator Maerov's reasons where he referenced that he had the advantage of having seen Bruce Johnston's witness statement, his response witness statement, and Ms. Lozano's witness statement. The petitioner says that it was improper for him to refer to these statements since they were part of the petitioners' case which had not yet been presented and, therefore, the statements were not yet part of the evidence.

[127] There is no merit in this submission. Arbitrator Maerov merely stated that he had had the advantage of having seen these statements. He was referring to the fact that in arbitrations, as opposed to court proceedings, he had advance notice of the evidence. He was merely explaining that, because of this, he had some advance knowledge of what the petitioners' case might be. This was all done in the context of his evaluation of whether the respondent had established a reasonable possibility of success. That context also included that he was not adjudicating any of the ultimate issues and that he recognized the petitioners had not yet put in their case.

[128] No reasonable and informed person could conclude arbitrator Maerov's reference to these witness statements gives rise to a reasonable apprehension of bias.

Procedural Order No. 39 dated April 28, 2022

[129] Following the issuance of the freezing order and arbitrator Maerov's reasons, the petitioners brought an application to set aside the freezing order. This application was refused in Procedural Order no. 39. Arbitrator Maerov's refusal to set aside the freezing order is the sixth circumstance relied on by the petitioners as disclosing reasonable apprehension of bias. The petitioners say he refused to address their concerns about his use of the Johnston statements.

[130] By letter dated April 25, 2022, the petitioners' counsel wrote to arbitrator Maerov requesting that he set aside the award of April 21, 2022. He alleged that arbitrator Maerov had made a number of errors and proceeded to list 19 aspects of the reasons that he disagreed with. Two of the alleged errors related to arbitrator referring to Bruce Johnston's witness statements. Counsel said it was a serious error

for arbitrator Maerov to have referred to the statement when it was not properly in evidence. He also suggested arbitrator Maerov was being one-sided or unfair. In particular, he accused arbitrator Maerov of "improper predetermination", of repeatedly ruling in favour of the respondent, of making wholly one-sided decisions, and of making findings without argument.

[131] In Procedural Order No. 39, arbitrator Maerov rejected the application to set aside the freezing order without calling upon the respondent to respond. He reasoned that the application was substantially an attempt to re-argue the application leading to the freezing order. He also reiterated that he had not made any final determinations of any issue.

> 5. The Respondents claim that I have not considered that evidence is not closed or that final argument has not taken place. The nature of the application for a freezing order is that it is a temporary measure, often made before a hearing, but always by the terms of the *International Commercial Arbitration Act ("ICAA")*, made before the issuance of the final arbitral award, to prevent current or imminent harm or prejudice to the arbitral process itself, or to preserve assets out of which a subsequent arbitral award may be satisfied. I made it clear in the Reasons that I was not making a final determination of any issue, and only made any findings necessary to resolve the Claimant's application, and then only based on evidence heard to date. Accordingly such an application is always made before final argument, and not for the reason of determining the dispute, but to preserve assets.
>
> 6. Several times I qualified my statements by cautioning that evidence was not closed, that the Respondents had raised a number of defences that had not been considered, and that I had not heard final argument. The Claimant's application sought an interim order on the understanding that this case has not concluded and the Reasons reinforce that several times.
>
> [Emphasis added.]

[132] In respect particularly of the evidence of Bruce Johnston, arbitrator Maerov wrote:

> 7. The Respondent takes issue with my evaluation of certain evidence of Bruce Johnston and Francis Leung. I am entitled to evaluate the demeanour and credibility of witnesses and evidence as I hear it, and to reach conclusions about those matters. That is the function of an independent Arbitral Tribunal.

[133] I agree with the petitioners that arbitrator Maerov did not expressly refer to the particular points made in their letter about his referring to the statements of Bruce

Johnston. However, I do not agree that this in any way gives rise to a reasonable apprehension of bias. The petitioners brought a misguided application to set aside the freezing order which contained over 19 separate grounds for setting aside the order. As arbitrator Maerov correctly pointed out, the application was nothing more than an attempt to re-argue the freezing order. Indeed, in my view, it could also be viewed as an attempt to bully the arbitrator. No proper basis was put forward that could have justified him in setting aside the order that was made. His dismissal of the application did not give rise to a reasonable apprehension of bias.

Refusal to Stay the Arbitration

[134] The seventh circumstance alleged by the petitioners to give rise to reasonable apprehension of bias is that arbitrator Maerov refused to stay the arbitration when the petitioners indicated they were bringing an application for recusal.

[135] On May 11, 2022, the petitioners' counsel wrote to arbitrator Maerov and respondent's counsel enclosing an application to set aside his various orders and for the arbitrator's recusal. He also stated in the letter that:

a) the application would have to be addressed before proceeding further with the arbitration;

b) if arbitrator Maerov did not recuse himself, the petitioners would apply to the court for his removal;

c) he did not require an immediate response as he was off to Europe until the end of the month and then had a three-week trial; and

d) he could not prepare a reply to any response to the application until July.

[136] On June 13, 2022, the respondent filed its response to the application for recusal.

[137] On June 23, the petitioners filed their reply to the respondent's response.

[138] Prior to arbitrator Maerov ruling on the application for recusal, on July 28, 2022, the respondent filed an application for orders that requests made at the examination for discovery of Bruce Johnston be complied with and for an order removing “Attorneys Eyes Only” designations over certain documents.

[139] On August 2, 2022, the petitioners’ counsel wrote to arbitrator Maerov and respondent’s counsel stating that nothing should be done in respect of the new application until there was ruling on the recusal application or, if the arbitrator did not remove himself, until the court determined the issue. He further wrote:

> The [petitioners’] application for recusal and setting aside has been before the Arbitrator for over a month after Reply Submissions were delivered. While Arbitrator Maerov may have been out of the country or dealing with other matters, he has a strict obligation to rule on the Respondents' application:

[140] He concluded his letter as follows:

> If necessary, the Respondents will apply to Court for an order removing Arbitrator Maerov and a stay of the arbitration pending resolution of that proceeding. He has no further jurisdiction to deal with OI's new application.
>
> Once again, however, the Respondents ask that Arbitrator Maerov do the right thing and recuse himself and set aside the decisions to date.
>
> [Emphasis added.]

[141] Arbitrator Maerov wrote to both counsel at 1:25 p.m. and 3:35 p.m. on August 2, 2022. In the first email, which related to the application for recusal, he asked counsel for their positions on the applicability and effect of s. 12(3.1) of the *ICAA*. He further requested that the petitioners provide their response to the questions posed by August 12, 2022, and that the respondent provide their position within one week thereafter.

[142] In the second email at 3:35 pm, arbitrator Maerov acknowledged receipt of the respondent’s application and the letter of the petitioners’ counsel. He noted that the petitioners had not responded to the matters raised in the July 28 application but had instead suggested he should not entertain the application pending the determination of the recusal application. He noted s. 13(7) of the *ICAA* and stated he had a duty to proceed with the arbitration.

> S.13(7) of the *International Commercial Arbitration Act* provides that while any request regarding a recusal is pending, the tribunal may continue the arbitral proceedings. At the present time the application for recusal is just an unresolved application and I have a continuing duty to proceed with the arbitration until there may be a decision or order made in which the recusal application is allowed. [Emphasis added.]

[143] Arbitrator Maerov concluded his email by setting a deadline of August 12, 2022, for the petitioners to respond to the July 28 application.

[144] The petitioners' counsel responded on August 5, 2022 at 2:18 p.m. and 2:22 p.m. The 2:18 p.m. email appears to be in response to arbitrator Maerov's August 2 email sent at 1:25 p.m. In the 2:18 p.m. email he complained about the "unilaterally imposed deadline" saying it worked against him and his clients and he found it "most unfair". In that email he also requested that no decision be rendered in September as he was "out of Canada the first 25 days" and wanted "to preserve all rights in case I wish to apply to the Supreme Court of British Columbia".

[145] The email of the petitioners' counsel sent at 2:22 p.m. on August 5 appears to be in response to the August 2 3:35 p.m. email of arbitrator Maerov. In that email he wrote:

> I have just sent you a note about the unilateral imposition of dates by the Tribunal.
>
> No inquiries were made of my availability on this matter either.
>
> I will endeavor to respond before I leave for London, for about a week, on August 10th.
>
> However, the unilaterally imposed deadline works against me and my clients for I have less time than I would otherwise.
>
> I find that most unfair.
>
> I politely ask that:
>
> (a) Going forward, that inquiries be made about possible deadlines instead of unilaterally imposing such;
>
> (b) And that no decision be rendered on this matter in September for I am out of Canada the first 25 days and I want to preserve all rights in case I wish to apply to the Supreme Court of British Columbia.

[146] Arbitrator Maerov responded on the same day, August 5 at 4:02 p.m., advising that he probably should have consulted with counsel before setting dates.

He requested that the petitioners' counsel provide him with dates that he was "comfortable with".

> I probably should have canvassed counsel's views, but expected that if there was a problem that you would let me know. I have always attempted to accommodate the schedules of counsel, having regard to the objective of moving the case along.
>
> Please give me your suggested dates that you are comfortable that you can meet, with a view to having all the submissions in before you leave in September. Thanks.

[147] In Procedural Order No. 40 dated September 8, 2022, arbitrator Maerov addressed the request for a postponement of the arbitration in a somewhat more fulsome manner. In that order he noted that a proper application for a stay had not been made. He further stated that s. 13(7) of the *ICAA* is permissive in that it permits the tribunal to proceed in the face of a challenge. He further wrote:

> The Tribunal has a contractual as well as legal obligation to resolve the dispute. Both parties are obligated to engage with the arbitration and there is no basis for a position that the Tribunal is barred from proceeding with the arbitration.

[148] The petitioners submit that arbitrator Maerov's decision to proceed with the arbitration gives rise to a reasonable apprehension of bias because he was not "under a continuing duty to proceed" and he made the decision to proceed without asking for submissions from the parties.

[149] There are three difficulties with the petitioners' submissions.

[150] First, the petitioners never formally requested that arbitrator Maerov stay the proceedings. They did not bring a formal application. Rather, they merely wrote the May 6 and August 2, 2022 letters stating that the recusal application had to be addressed before proceeding with the arbitration and that the arbitrator had no jurisdiction to proceed with the arbitration until the recusal application was resolved by the arbitrator and by the court.

[151] Second, to the extent that the letters from petitioners' counsel can be considered an application for a stay of the arbitration, those letters, especially the

August 2 letter, are equally the petitioners' submissions as to why the arbitration should not continue while the recusal application was outstanding. The petitioners never suggested that they needed to make further submissions on the issue.

[152] Third, despite the bald assertions in the August 2 letter that arbitrator Maerov had a "strict obligation" to rule on the recusal application and "has no further jurisdiction" to continue the arbitration, the petitioners provided no authority to arbitrator Maerov, or to me, supporting the proposition that the arbitration must be stayed or postponed while a challenge to an arbitrator was pending.

[153] As indicated, arbitrator Maerov wrote that he had a "duty" to continue the arbitration. His determination in this regard was based on s. 13(7) of the *ICAA*, which specifically provides:

> (7) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

[154] I addressed the interpretation of s. 13(7) of the *ICAA* in my reasons reported at 2023 BCSC 311, wherein I dealt with the petitioners' application for a stay of the arbitration proceedings. In those reasons, I held that the section gave the arbitral tribunal the discretion to continue the arbitration while a s. 13(4) challenge was before this court.

[155] Section 13(7) of the *ICAA* applies when there is a challenge before this court. It does not directly address a stay of the arbitration while the challenge is pending before the arbitrator. However, if an arbitral tribunal has the discretion to continue the arbitration while the challenge is before this court, it must have the same power while the challenge is before the tribunal itself.

[156] I do not necessarily agree with arbitrator Maerov's description of having a "duty" to continue the arbitration. However, he clearly had the discretion to continue with the arbitration while the challenge was pending, a discretion which he recognized in Procedural Order No. 40.

[157] Other than the fact arbitrator Maerov declined to stay the arbitration, there is nothing in what transpired that would give rise to a reasonable apprehension of bias. In fact, when the petitioners complained of the deadline set by arbitrator Maerov, his response was indicative of the opposite.

[158] In my view, the decision to continue with the arbitration while the recusal application was outstanding does not give rise to reasonable apprehension of bias. Again, arbitrator Maerov was presented with an issue that he had to decide and he decided it. There is nothing in this decision indicating a reasonable apprehension of bias.

Refusal to Delay the Recusal Decision

[159] The next circumstance alleged by the petitioners to give rise to reasonable apprehension of bias is in relation to a request that arbitrator Maerov defer or delay his decision on the recusal application.

[160] As set out above, on August 5, 2022, the petitioners' counsel wrote two emails in which he advised that he would be out of Canada for the first 25 days of September. He requested that no decision be rendered before the end of September so that he would have sufficient time to prepare an application to this court, if necessary.

[161] On September 2, 2022, respondent's counsel wrote to arbitrator Maerov and petitioners' counsel advising that the request to delay the release of the reasons was unreasonable.

[162] The petitioners' counsel responded on September 5, 2022, advising that any application to this court would need to be made within 30 days of the release of arbitrator Maerov's decision and he could not prepare those materials from abroad. He accused the respondent's counsel of trying to "jam" him.

[163] On September 8, 2022, arbitrator Maerov released Procedural Order No. 40, which is discussed above, and also wrote to counsel in respect of the request that

he delay his recusal reasons until the end of September. He agreed to delay delivery of his reasons until September 16, which he considered would give sufficient time for a court application to be brought. His email provided:

> I acknowledge receipt of Mr. Shields' email of August 5 which for the first time gives notice that he would be away for "about a week" on August 10 and also the first 25 days of September, and requesting that the Application and the Recusal Application decisions not be delivered until after the end of September.
>
> It is not unreasonable for Mr. Shields to be away for extended periods, but it is unreasonable to give such short notice during reserve time on two applications, particularly when the September absence was apparently arranged a year ago. Giving such short notice unfairly puts me in the difficult position of inviting criticism for not respecting counsel's availability if I were to render a decision on the Recusal Application when Mr. Shields is away, when I must also consider the Claimant's interest in advancing the proceedings, and my independent obligation of conducting the proceedings in an efficient manner.
>
> In the result, I have ordered that production of documents ordered by Procedural Order No. 40 be made by September 30, 2022, when Mr. Shields will be back in the office to attend to this, and I will release my decision on the Recusal Application on September 16, 2022. If Mr. Shields wishes to commence a court proceeding in respect of that decision, then this will give him sufficient time to do so within the time limited.

[164] Arbitrator Maerov's decision on the recusal application was in fact rendered on September 16, 2022, as he advised it would be.

[165] The petitioners characterize arbitrator Maerov's refusal to delay his reasons until after September as a deliberate attempt to limit their access to this court. I completely disagree.

[166] Arbitrator Maerov was presented with a difficult balancing exercise. On the one hand, he had a responsibility to not unnecessarily delay the proceedings. On the other hand, he had to be fair to the parties and their counsel. He attempted to balance these two responsibilities by delaying the delivery of his reasons until September 16, 2022. He did so to ensure the petitioners' counsel would have sufficient time to bring his application before this court. Additionally, there was, in fact, more than sufficient time for the petitioners to prepare their petition. This petition was filed on October 3, 2022, well within the 30-day time limit.

[167] In my view, the circumstances disclose nothing that gives rise to a reasonable apprehension of bias.

Refusal to Recuse Himself

[168] The final circumstance said to give rise to a reasonable apprehension of bias is that arbitrator Maerov refused to recuse himself.

[169] I do not intend to review arbitrator Maerov's decision on the recusal application in any detail. His justifications and reasons are not particularly relevant as there is no deference owed by a reviewing court to the arbitrator on an application for recusal: *Tanzanian Goldfields Company Limited v. East Africa Metals Inc.*, 2018 BCSC 1511 at para. 15. It is for me to decide independently and *de novo* whether the circumstances alleged give rise to a reasonable apprehension of bias. Suffice it to say that, in his reasons, the arbitrator addressed each of the circumstances that I have addressed above and came to the conclusion that a reasonable apprehension of bias had not been shown.

[170] The petitioners' submissions in relation to the recusal decision amount to nothing more than a rehashing of their arguments in relation to the other circumstances alleged to give rise to a reasonable apprehension of bias. They submit that arbitrator Maerov should have recused himself. However, they do not point to any particular part of the recusal reasons as indicating bias nor do they point to any part of the process as disclosing bias other than what has been addressed above.

[171] In my view, arbitrator Maerov's refusal to recuse himself is not an independent circumstance giving rise to a reasonable apprehension of bias. Again, he was presented with an application which he was required to resolve and he did so by applying the same legal principles as I have applied throughout these reasons.

Cumulative Bias

[172] I have thus far addressed each of the individual circumstances alleged by the petitioners to give rise to a reasonable apprehension of bias and have determined

that none of them individually do so. I am equally satisfied that the cumulative effect of the specific circumstances does not give rise to a reasonable apprehension of bias.

[173] Arbitrator Maerov is dealing with a hard-fought arbitration where every issue appears to be hotly contested and no stone is left unturned. The arbitration has been ongoing for over three and one-half years and has involved over 57 days of hearings. My review of the various circumstances alleged and arbitral record overall indicates that he has been courteous in his dealings with the parties, has treated the parties equally, has given the parties a reasonable opportunity to make submissions and has based his rulings on proper legal principles.

Order

[174] Accordingly, the petition is dismissed.

[175] The parties have leave to speak to me regarding costs, if necessary.

"Giaschi J."