CITATION: Dhaliwal v. Richter International Ltd., 2024 ONSC 5103
COURT FILE NO.: CV-23-00695555-0000
DATE: 2024-09-20

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: JAGTAR DHALIWAL and VOXX SPORTS INC., Applicants

AND:

RICHTER INTERNATIONAL LTD., PETER SELLITTO, ROBERT SMALL, PFA SOCKS INC., TIMOTHY DAMASO and 2248717 ONTARIO INC. O/A PHYSIOMED, ROYTECH ROAD A.K.A. PHYSIOMED VAUGHAN, Respondents

BEFORE: Parghi J.

COUNSEL: Timothy Danson and Peter Danson, for the Applicants

Allan Dick and Daniel Hamson, for the Respondents

HEARD: July 18, 2024

ENDORSEMENT

[1] The parties are involved in an ongoing commercial arbitration (the "Arbitration") in which the Applicants brought a challenge for bias against their arbitrator, David McCutcheon, under s. 13(1) of the *Arbitration Act*, 1991, S.O. c. 17 (the "*Act*"). The arbitrator ruled against them. They now bring this application seeking a declaration that the arbitrator's mandate is at an end and an order setting aside his denial of their challenge for bias, removing him as arbitrator, and requiring that the parties litigate their dispute in court.

[2] The Applicants allege two forms of bias on the part of the arbitrator. First, they claim that a reasonable apprehension of bias arises from the arbitrator's failure to disclose, at the time of his appointment in the Arbitration, that he and one of the lawyers representing the Respondents, Mr. Dick, were at the time also involved in another arbitration as arbitrator and counsel respectively (the "Other Arbitration"). The Applicants say the arbitrator should have disclosed this information because it points to a "financial/business relationship" between Mr. Dick and the arbitrator and thereby gives rise to concerns of possible bias in the Arbitration.

[3] Second, they allege that this apprehension of bias "crystallized into an actual bias" when the arbitrator found that the Applicant Mr. Dhaliwal gave false testimony in the challenge for bias. The Applicants say that this improper "finding of perjury" renders it impossible for the arbitrator to have an open mind toward Mr. Dhaliwal's evidence in the Arbitration.

[4] For the reasons below, I dismiss the application. The Applicants have not established that they brought their challenge for bias in a timely way. In any event, I find that the arbitrator's involvement in the Other Arbitration did not give rise to a reasonable apprehension of bias in the Arbitration and need not have been disclosed. I further find that no actual bias was manifested in the arbitrator's ruling on costs.

Background

The Litigation and the Arbitration

[5] The parties commenced litigation against one another in 2018. In broad strokes, their underlying dispute pertains to royalty payments, passing off, and the use of confidential information in relation to the manufacture of a specialized sock.

[6] In May and June 2020, faced with the delays of litigating during COVID, the parties explored submitting their disputes to arbitration. During a phone call on June 11, 2020, the parties discussed potential arbitrators, and Mr. Dick proposed to then-counsel for the Applicants three potential arbitrators, one of whom was Mr. McCutcheon. As discussed below, the Applicants state that they understood from this phone call that Mr. Dick had used Mr. McCutcheon as an arbitrator in the past. The Respondents state that they conveyed during the phone call that Mr. Dick was in fact using Mr. McCutcheon presently in an ongoing arbitration (the Other Arbitration).

[7] In September 2020, the parties confirmed that they would conduct the Arbitration before Mr. McCutcheon. The Terms of Appointment were formalized in October 2020 and provide in relevant part as follows:

> 5. The Parties acknowledge that the Arbitrator has disclosed that he:
>
> (a) has no conflict of interest in connection with this Arbitration;
>
> (b) is unaware of any circumstances that may give rise to any reasonable apprehension of bias; and,
>
> (c) has declared that he considers himself able to act independently and impartially in this matter.
>
> 6. Based upon the foregoing, the Parties each hereby waive any objection to the appointment of the arbitrator based upon matters within his knowledge as of the date of these terms of appointment.
>
> 7. The arbitrator confirms that he has agreed to act as an independent and impartial arbitrator and further acknowledges a continuing duty to act independently and impartially in this arbitration.

[8] The Arbitration is not yet being heard on the merits. In fall 2020, there were several motions on documentary production, resulting in production orders against the Applicants. The Applicants then commenced, and abandoned, a motion for security for costs. They then

requested an adjournment of the Arbitration, which was granted. They then attempted to cancel and withdraw from the Arbitration, without success. A new hearing date was eventually scheduled for January 2022. It was adjourned because the Applicants terminated their retainer of their counsel in December 2021.

The Other Arbitration

[9] In the meantime, in January 2022, Mr. McCutcheon issued an award in the Other Arbitration in favour of Mr. Dick's client.

[10] The losing party in the Other Arbitration subsequently learned, by accident, about the Arbitration and Mr. Dick's and Mr. McCutcheon's involvement in it, and, in April 2022, brought an application before this court seeking to have the award in the Other Arbitration set aside. They asserted that Mr. McCutcheon had failed to disclose circumstances likely to give rise to doubts about his impartiality or possible bias – namely, his involvement in the Arbitration – and that his conduct gave rise to a reasonable apprehension of bias.

[11] By decision dated March 2023 (*Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827), Justice Steele granted the application. She held that Mr. McCutcheon's failure to disclose the Arbitration reasonably gave rise to an apprehension of bias in the Other Arbitration (at paras. 3-4). She set aside the award in the Other Arbitration and directed a new arbitration conducted by a new arbitrator (at para. 98). Her ruling is currently under appeal.

The Challenge for Bias

[12] On January 9, 2023, the Applicants gave notice of their challenge for bias under s. 13(1) of the *Act*, which provides that a party to an arbitration agreement may challenge the arbitrator on the ground that circumstances exist that may give rise to a reasonable apprehension of bias. In their notice, the Applicants asserted that there was a reasonable apprehension of bias in light of the arbitrator's failure to disclose to them his role in the Other Arbitration.

[13] In February 2023, the arbitrator dismissed the challenge for bias, holding that the challenge was not brought in a timely way and that there was no reasonable apprehension of bias.

[14] In March 2023, the arbitrator awarded costs on the challenge for bias in favor of the Respondents, on a substantial indemnity scale. In his reasons on costs, he held as follows:

a. That the Respondents were "fully successful" on the challenge for bias;

b. That Mr. Dhaliwal made "false statements" that the Other Arbitration had not been disclosed, which false statements Mr. Dhaliwal never retracted, corrected, or explained, despite having had the opportunity to do so;

c. That there had been "persistent delay" in the Arbitration that "is the fault of" the Applicants;

d. That the Applicants had "failed to produce documents ordered to be produced"; and

e. That, taken together, this conduct was "deserving of sanction."

[15] The Applicants now bring this application pursuant to s. 13(6) of the *Act*, which provides that, if an arbitrator renders a decision on a challenge for bias, a party may make an application to the court to decide the issues and, where applicable, remove the arbitrator. Their application is based on allegations of both reasonable apprehension of bias, flowing from the arbitrator's failure to disclose the Other Arbitration, and actual bias, which they say is revealed in his costs decision on the challenge for bias. The hearing of the Arbitration on the merits has been adjourned pending disposition of this application.

[16] The Respondents assert that this application is strictly tactical. They describe the challenge for bias and this application as the latest in a series of efforts by the Applicants to deliberately delay and challenge the Arbitration and postpone its hearing on the merits.

Issues

[17] There are three issues in dispute on this application:

a. Whether the Applicants' challenge for bias in the Arbitration was brought in time;

b. Whether the arbitrator's involvement in the Other Arbitration gives rise to a reasonable apprehension of bias in the Arbitration and should have been disclosed to them; and

c. Whether there was an actual bias arising from the arbitrator's decision on costs in the challenge for bias in the Arbitration.

Analysis

Timing of the Challenge for Bias

[18] Under s. 13(3) of the *Act,* a challenge for bias must be made "within fifteen days of becoming aware of" the grounds for the challenge. The grounds for the Applicants' challenge are that Mr. McCutcheon was involved in the Other Arbitration with Mr. Dick, and that the Other Arbitration was still ongoing at the time the parties were considering engaging Mr. McCutcheon for the Arbitration. I must determine whether, when the Applicants brought their challenge on January 9, 2023, they did so within 15 days of becoming aware of these grounds.

[19] Based on the evidence before me, I am unable to find that they did.

[20] Mr. Dhaliwal's evidence is that he learned of the Other Arbitration and its ongoing nature only in "late 2022," after a decision on a motion in the Other Arbitration was released on November 1, 2022. He does not explain what "late 2022" means. He does not provide a specific date or even a date range. Some dates in "late 2022" would fall sufficiently late in the year to satisfy the 15-day deadline, while many other dates would not. The issue of the

timeliness of the challenge for bias is important, and certainly not new; it was addressed by Mr. McCutcheon in his decision on the challenge and is canvassed by the Respondents at some length on this application. It was incumbent on the Applicants to tender evidence that was specific enough to enable me to determine that they issued their January 9, 2024 challenge in a timely way. They have not done so. As such, I am unable to find that they advanced their challenge within the time limits established by the *Act.*

[21] I note that the parties, in considering the timeliness of the challenge for bias, have focused on the June 11, 2020 phone call among counsel. The Respondents offer affidavit evidence from Mr. Dick stating that during that call, he told the Applicants' then-counsel that Mr. McCutcheon was conducting the Other Arbitration and that the other arbitration was ongoing. As such, say the Respondents, the 15-day clock started running on the date of the phone call. The Applicants disagree: they provide contradictory evidence from Mr. Dhaliwal's former counsel to the effect that Mr. Dick only stated that he had used Mr. McCutcheon as an arbitrator in the past. They state that, as a consequence, they did not become aware of the grounds for their challenge during the phone call.

[22] Ultimately, I do not have to decide whose evidence I prefer on this point, because even if I accept the Applicants' claim that they did not became aware of the grounds for their challenge during the June 11, 2020 phone call, I must be satisfied that, once they did become aware of those grounds, they commenced their challenge within 15 days. On the record before me, as explained above, I am not satisfied on this point.

[23] I accordingly find that the challenge for bias was not brought before the arbitrator in accordance with the deadlines in the *Act*. In this regard, I accept the Respondents' position, and the arbitrator's finding, that the challenge for bias was not brought in time. However, while the arbitrator based his conclusion on a finding about what was discussed during the June 11, 2020 phone call, I base my conclusion on the absence of evidence demonstrating that, if indeed the Applicants learned of the grounds for their bias challenge in "late 2022," they commenced their bias challenge within 15 days afterward.

Reasonable Apprehension of Bias

[24] The Applicants assert that the arbitrator's involvement in the Other Arbitration gives rise to a reasonable apprehension of bias in the Arbitration and should have been disclosed to them. They observe that the terms of appointment contain the arbitrator's assurances that he "is unaware of any circumstances that may give rise to any reasonable apprehension of bias". By not disclosing the Other Arbitration, they say, he failed to comply with this requirement. The Applicants' factum refers in passing to a second ground for their bias complaint, namely that the arbitrator made a production order that applied to Mr. Dhaliwal personally. This ground was not addressed in oral argument and I see no merit in it.

The Law

[25] The obligation of an arbitrator to be free of bias is established in the *Act*, which provides that an arbitrator "shall be independent of the parties and shall act impartially" (s. 11(1)). An arbitrator must disclose to the parties, before accepting an arbitral appointment, "any

circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias" (s. 11(2)).

[26] The test for establishing a reasonable apprehension of bias is clear at law and is uncontested by the parties. As articulated by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 (at p. 394), the test is as follows:

> What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would [they] think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

[27] There is a high presumption of impartiality on the part of an adjudicator (*Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 59), including in the context of arbitrations (*Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 112). A claim of bias questions the personal integrity of the adjudicator and the integrity of the administration of justice. As a consequence, the threshold for a finding of real or perceived bias is high. The grounds for claiming bias must be substantial. The onus is on the party seeking to disqualify the adjudicator to bring forward evidence to satisfy the test (*A.T. Kearney Ltd. v. Harrison*, (2003) CanLII 32908 (ON SC), at para. 7, cited in *Feng v. Mak*, 2015 ONSC 5675, at para. 23). The evidence must support the allegation that the adjudicator would not bring an impartial mind to bear on the matter before them: mere suspicion is insufficient (*R. v. Archibald*, (1992) 15 B.C.A.C. 301, at para. 13, cited in *Dufferin*, at para. 112).

[28] The inquiry into bias is objective: the subjective views of the parties are not relevant. The court must conduct a realistic and practical review of all of the circumstances from the perspective of a reasonable person (*Committee for Justice*, at p. 394, cited in *Dufferin*, at para. 112).

[29] Finally, and of particular importance in this case, context is relevant to the consideration of actual and apprehended bias (*Telesat Canada v. Boeing Satellite Systems International, Inc*., 2010 ONSC 4023, cited in *Dufferin*, at para. 112; *Dufferin*, at para. 114).

[30] The Applicants rely on several cases in which the courts have found a reasonable apprehension of bias on the part of an arbitrator. They say that the facts in this case are similar and urge me to likewise find a reasonable apprehension of bias on the part of Mr. McCutcheon.

[31] For the reasons discussed below, I do not accept this submission.

[32] One of the cases relied on by the Applicants is the UK Supreme Court decision of *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, [2020] U.K.S.C. 48. In *Halliburton*, bias was alleged against an arbitrator presiding over an insurance coverage matter that arose from a drilling disaster. The arbitrator took on three separate mandates arising from the drilling disaster. The second mandate involved one of the same parties as the first mandate. The third mandate involved the other party to the second mandate. The court voiced concern that "the existence of potentially overlapping arbitrations with only

one common party was a circumstance which might reasonably give rise to the real possibility of bias" (at para. 145). The court worried about the common party to two overlapping arbitrations obtaining an unfair advantage by having access to information about the arbitrator's responses to particular evidence or arguments in whichever arbitration was heard first.

[33] In the case before me, there is no meaningful "overlap" between the Arbitrations and the Other Arbitration that would give rise to these concerns. It is true that both arbitrations involve similar legal issues such as breach of confidentiality. However, that is not sufficient to ground a concern of bias. There are no doubt many commercial law issues that get arbitrated frequently. It cannot be the case that an arbitrator may be biased simply because they have addressed the same issue in multiple arbitrations, even at the same time.

[34] What is more relevant is whether there are similarities or "overlaps" between the two arbitrations that might, depending on the context and surrounding circumstances, give rise to reasonable concern on the part of one party that the arbitrator will not approach their matter with an open mind. Such similarities might include, for example, shared parties or common underlying events, both of which existed in *Halliburton*.

[35] In this case, I find that there are no such similarities. The parties to the Arbitration and to the Other Arbitration are altogether different. The underlying events giving rise to the two arbitrations are different. The industries involved in the two arbitrations are different. The Other Arbitration involves a franchise dispute, which the Arbitration does not. The Other Arbitration is an international arbitration, governed by the *UNCITRAL Model Law on International Arbitration*, while the Arbitration is a domestic arbitration.

[36] The only "overlap" between the two is with respect to counsel. Mr. Dick was involved as counsel in both arbitrations. I find it difficult to understand how this, in itself, could give rise to a reasonable apprehension of bias. The Applicants submit that the fact that the Other Arbitration was ongoing at the time Mr. McCutcheon was engaged for the Arbitration means that Mr. McCutcheon might have a financial incentive to treat Mr. Dick and his clients preferentially in the Arbitration. But arbitrators get paid for their work. I am not prepared to find that simply paying an arbitrator is some form of inducement that, on its own, creates an apprehension of bias. Moreover, even if the Other Arbitration had concluded by the time Mr. McCutcheon was retained in the Arbitration, there still would have been some theoretical financial incentive for Mr. McCutcheon; it still would have been, in theory, in his interest to treat Mr. Dick preferentially because he is a potential source of repeat work. It is uncontested that the Applicants were aware that Mr. Dick had used Mr. McCutcheon as an arbitrator in the past. They do not articulate what, if any, additional and more material harm arises from the fact that he was also using Mr. McCutcheon in the present. I am not able to identify what that additional and more material harm is, especially in the face of the presumption of impartiality.

[37] I am also wary of the suggestion that a repeat arbitral retainer is inherently concerning. In theory, counsel might engage the same arbitrator more than once in an effort to exert some influence over them. But they might also engage the same arbitrator more than once because the arbitrator is an effective arbitrator.

[38] I am therefore not persuaded that the "overlap" in counsel gives rise to a reasonable apprehension of bias of the kind the court found in *Halliburton*. The fact that Mr. Dick is involved in both arbitrations is not, in itself, a substantial ground for claiming bias. It is not sufficient to dislodge the appropriately high presumption of impartiality on the part of the arbitrator. In the words of the Supreme Court, it would not lead an informed person, having thought the matter through and viewing it realistically and practically, to consider it more likely than not that the arbitrator will not decide the Arbitration fairly.

[39] Nor are the other cases relied on by the Applicants analogous to this one. In the other cases, the conduct of, and relationships between, the arbitrator and parties or their counsel went well beyond what is involved in this case. For example:

a. In the 1888 Ontario High Court of Justice decision of *Conmee v. Canadian Pacific Railway Co.*, [1888] 16 O.R. 639 (Ont. Q.B.), a reasonable apprehension of bias was found on the part of the arbitrator when one party to an ongoing arbitration, described as a "large and wealthy corporation," offered to employ the arbitrator as its solicitor and to pay him an income of "considerable" sum;

b. In the Supreme Court of Canada decision of *Szilard v. Szasz*, [1955] S.C.R. 3, a reasonable apprehension of bias was found because, months before the arbitration began, the arbitrator and one of the parties jointly purchased a nine-unit building that was secured by a mortgage they were both paying off equally;

c. In *MDG Computers Canada Inc. et al. v. MDG Kingston Inc. et al.*, 2013 ONSC 5436, a reasonable apprehension of bias was found in light of the relationship between the arbitrator and a prospective damages expert. The arbitrator and his firm had, in the past, frequently used the expert to provide evidence on behalf of their own clients, on the same issues for which the expert was sought to be used at the arbitration; and

d. In *SA Auto Guadeloupe Investissements v. Colombus Acquisitions Inc.*, RG 13/13459 (cour d'appel de Paris, 14 October 2014), a reasonable apprehension of bias was found because one of the parties was an important client of the former law firm of the arbitrator.

[40] None of these cases are analogous to the one before me. They all involve significant and perhaps even egregious financial, professional, and/or personal relationships between the parties or their counsel or their experts, on the one hand, and the arbitrator, on the other. Those relationships cannot be compared to the one between Mr. Dick and Mr. McCutcheon.

Justice Steele's Finding of Bias in the Other Arbitration

[41] In the Other Arbitration, the losing party brought an application before this court (the *Aroma* case discussed above) asserting that Mr. McCutcheon's role in the Arbitration gave rise to a reasonable apprehension of bias in the Other Arbitration and therefore should have been disclosed. Justice Steele granted their application. The Applicants urge me to make the same finding here.

[42] I do not do so. I find that Justice Steele's decision in *Aroma* does not support the Applicants' claim of bias in the Arbitration.

[43] Justice Steele's decision turned in large part on the expectations of the parties to the Other Arbitration in selecting the arbitrator. These expectations, she held, were articulated in part in the terms of the underlying franchise agreement between the parties, which expressly provided that, in any arbitration, the selected arbitrator could not have a "prior social, business or professional relationship with either party" (at para. 7). Justice Steele noted that the arbitrator was informed of this requirement when he was engaged to conduct the Other Arbitration (at para. 82).

[44] She held that the expectations of the parties to the Other Arbitration in selecting the arbitrator were also reflected in the "significant" correspondence between the parties about the choice of arbitrator (at para. 41). That correspondence made it "clear that the applicants were concerned that any appointed arbitrator did not have a prior relationship with counsel to the parties, and the respondents were aware of this concern" (at para. 47). She went on to hold (at para. 89):

> A significant factor in this matter is the emphasis that was placed, in the pre-appointment correspondence, on whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers, or law firms. … [I]t was very important to both parties, but perhaps even more important to the applicants [the losing parties], who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel. After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator. It is not as though it would be less important while the arbitration was extant.

[45] Justice Steele emphasized that "the determination of whether a reasonable apprehension of bias exists is extremely fact specific" and context-driven (at para. 79). In her view, the expectations of the parties to the Other Arbitration, as articulated in the underlying franchise agreement and extensive correspondence on the choice of arbitrator, were an essential part of that context and were circumstances that rebutted the presumption that disclosure was not required.

[46] Importantly, there is no evidence of any such expectations on the part of the parties to the Arbitration. The Terms of Appointment do not prohibit, or obligate disclosure of, relationships among the parties or their counsel and Mr. McCutcheon. Nor does any other contract between the parties do so. Nor is there any correspondence, or indeed any evidence at all, to suggest that either of the parties had any particular concern about such relationships. In this important way, the context informing Justice Steele's analysis of bias in the Other Arbitration was markedly different from the context that informs my analysis here.

The IBA Guidelines

[47] The Applicants further submit that, based on the requirements of the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "IBA Guidelines"), the arbitrator ought to have disclosed the Other Arbitration.

[48] For the reasons below, I do not accept this submission.

[49] The IBA Guidelines are established to assist arbitrators and parties in international arbitrations to identify potential conflicts of interest and when their disclosure is warranted, and to understand when and how an arbitrator may accept an appointment in the face of a potential conflict. The IBA Guidelines recognize the growing complexity of conflict of interest and disclosure issues, and the need to balance competing principles (at p. 1):

> Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

[50] Part I of the IBA Guidelines articulates general standards about impartiality, independence, and disclosure, and Part II addresses the practical application of those general standards. It does so by grouping a variety of potential conflict scenarios into four categories ranging from the most serious to ones that present no conflict. The list of scenarios in each category is non-exhaustive. The purpose underlying the creation of the categories is "to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals" (at p. 2).

[51] At one end of the spectrum is the non-waivable red list, which consists of scenarios in which the stated conflict gives rise to justifiable doubts as to the arbitrator's impartiality and independence. In these scenarios, even after an arbitrator discloses the conflict, they should refuse the appointment. As an example, a situation in which an arbitrator has a significant financial or personal interest in one of the parties to the proposed arbitration falls under the non-waivable red list.

[52] The waivable red list consists of scenarios in which the stated conflict gives rise to justifiable doubts as to the arbitrator's impartiality and independence, but the arbitrator may accept the appointment if, after disclosing the conflict, the parties waive their objections to the conflict. For instance, a situation in which an arbitrator's law firm currently has a significant commercial relationship with an affiliate of one of the parties falls under the waivable red list.

[53] The orange list consists of scenarios "that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence" (at p. 18). Such situations should be disclosed, but the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (By

contrast, in the waivable red list scenarios, the parties must affirmatively waive the conflict to proceed.) An example of an orange list situation is one in which an arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue or matter involving one of the parties.

[54] Situations that are not listed in the orange list do not presumptively require disclosure but should be assessed individually to see if they would create a reasonable apprehension of bias. Because it is "a non-exhaustive list of examples," there may be situations not mentioned on the orange list that, "depending on the circumstances, may need to be disclosed by an arbitrator" (at p. 19).

[55] Finally, the green list consists of scenarios that are understood not to create a conflict of interest or appearance thereof.

[56] Notably, the scenario at issue here, in which one counsel is appearing in two ongoing but unrelated arbitrations before the same arbitrator, does not appear on any of these lists. The factually closest scenario appears on the orange list. It is the scenario in which an arbitrator has, "within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm" (at p. 24). Because this scenario is on the orange list, it presumptively requires disclosure.

[57] The scenario here is more benign, however: Mr. McCutcheon had been appointed by Mr. Dick within the past three years on only one occasion, not more than three. As such, the facts of this case do not fall under the orange list, or any list, in the IBA Guidelines, and there is no presumptive obligation to disclose.

[58] This point warrants emphasis. The IBA Guidelines acknowledge that an arbitrator may be engaged more than once by the same counsel. They impose no prohibition against contemporaneous retainers by the same counsel. And, in considering whether and when repeat retainers may give rise to potential bias, they establish a threshold of three retainers by the same counsel in the past three years. Mr. Dick's single other retainer of Mr. McCutcheon falls conspicuously short of that threshold. As such, I find that, contrary to what the Applicants assert, there was no presumptive obligation to disclose the Other Arbitration.

[59] Because the situation in this case does not appear on any of the lists in the IBA Guidelines, it should be assessed individually to see whether, in the circumstances, disclosure is appropriate even though it is not presumptively required. In my view, there are no circumstances that necessitate disclosure. The only overlap between the two arbitrations involves Mr. Dick's role in them, and, at a high level, the legal issues involved in them. This is not enough to give rise to a reasonable apprehension of bias, for the reasons discussed above. Furthermore, as discussed above, there is no evidence, based on agreements or correspondence between the parties, that the parties had particular concerns about prior social, business, or professional relationships among the parties or their counsel and the arbitrator, unlike in the Other Arbitration.

Other Resources on Conflict of Interest Disclosure

[60] The Applicants rely on additional guidance materials on conflict disclosure that they say support their position that the arbitrator should have disclosed the Other Arbitration to them. For example, they cite a disclosure form promulgated by the Court of Arbitration for Sport Arbitration. However, the parties to the Arbitration did not adopt this guidance document. Nor is this a sports arbitration. I do not see how this material assists them.

Conclusion on Reasonable Apprehension of Bias

[61] I therefore find that the arbitrator's involvement in the Other Arbitration did not give rise to a reasonable apprehension of bias in the Arbitration and need not have been disclosed.

Actual Bias

[62] The Applicants also assert actual bias on the part of the arbitrator. They say that his reasons on costs on the challenge for bias found that Mr. Dhaliwal engaged in "perjury" and that the arbitrator will not have an open mind toward Mr. Dhaliwal's evidence as the Arbitration proceeds.

[63] I do not agree.

[64] In claims of actual bias, as with reasonable apprehension of bias, there is a high presumption of impartiality on the part of the adjudicator. The grounds for claiming bias must be substantial, and the party claiming bias has the onus to tender evidence to support the test. I find that the Applicants' grounds for claiming actual bias are not substantial and they have not tendered adequate evidence in support of their claim.

[65] The basis of the actual bias claim is the arbitrator's finding that Mr. Dhaliwal's evidence contained "false statements" that he had the opportunity to, but did not, retract, correct, or explain. The "false statements" were contained in Mr. Dhaliwal's hearsay affidavit evidence that, during the June 11, 2020 phone call, Mr. Dick did not disclose to the Applicants' then-counsel that he was involved in an ongoing arbitration with Mr. McCutcheon. When considering the challenge for bias, the arbitrator determined that he preferred Mr. Dick's evidence on this issue over that of Mr. Dhaliwal and accordingly found that the Other Arbitration was in fact discussed during the phone call.

[66] The Applicants claim that the arbitrator characterized Mr. Dhaliwal's evidence as "perjury," and, in so doing, reflected a "deep-seated" bias against Mr. Dhaliwal. They say that the arbitrator could have simply said that he preferred Mr. Dick's evidence, or that he did not accept Mr. Dhaliwal's hearsay evidence, and that by using the language that he did, he revealed an actual bias against Mr. Dhaliwal.

[67] The arbitrator did not in fact use the term "perjury": only the Applicants have used that word, in characterizing the arbitrator's finding. The arbitrator did use the phrase "false

statements," but I do not see how that reflects bias. The arbitrator was faced with the task of deciding which evidence he preferred and why. He found one witness' evidence to be false, and he said so. I see nothing improper, or biased, about that. It was open to him to find that a witness provided false statements. Arbitrators and indeed all adjudicators are, and should remain, free to make such findings. These determinations should not be considered automatic indicia of bias, as the Applicants appear to suggest.

[68] Nor do I accept the Applicants' argument that the fact that the arbitrator made this finding in a preliminary motion means that he will be unable to hear Mr. Dhaliwal's evidence with an open mind as the matter proceeds. Arbitrators, and all adjudicators, routinely make findings of credibility in preliminary motions. They then go on to hear their matters on the merits with appropriately open minds. There is no basis for suggesting that Mr. McCutcheon will not do that here. Indeed, on the Applicants' argument, no adjudicator could ever be permitted to address a preliminary motion that involves credibility assessments, for fear that they will remain forever biased against the witness whose evidence they did not prefer. Such an outcome would be absurd and at odds with the well-established presumption of impartiality.

[69] I therefore reject the claim of actual bias.

Conclusion

[70] I accordingly dismiss the application. The Respondents have not established that they brought their challenge for bias in a timely way. In any event, the arbitrator's involvement in the Other Arbitration did not give rise to a reasonable apprehension of bias in the Arbitration and need not have been disclosed to the Applicants. Nor was there actual bias on the part of the arbitrator.

Costs

[71] In exercising my discretion to fix costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I may consider the factors enumerated in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. Those factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.

[72] In the recent case of *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, the Court of Appeal for Ontario restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable" (at para. 60). The overarching objective is to fix an amount for costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.

[73] Applying these principles, I find that it is appropriate to award the Respondents their costs on a partial indemnity basis, in the amount of $18,986.59. They were entirely successful in the application. Their costs are reasonable and proportionate, having regard to the nature of the application. They are also less than the costs of the Applicants, which suggests that it is within the reasonable expectations of the Applicants to pay this amount.

Order Granted

[74] The application is dismissed. The Applicants are to pay the Respondents their costs in the amount of $18,986.59 within 30 days.

Parghi J.

Date: September 20, 2024