IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pomerleau Inc. v. 4HD Construction Ltd.,* 2024 BCSC 1973

Date: 20241018
Docket: S242589
Registry: Vancouver

Between:

Pomerleau Inc.

Petitioner

And

4HD Construction Ltd.

Respondent

- and -

Docket: S242794
Registry: Vancouver

Between:

4HD Construction Ltd.

Petitioner

And

Pomerleau Inc.

Respondent

Before: The Honourable Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for Pomerleau Inc.: G.H. Mayovsky, K.N. McCrystal, C. Conly

Counsel for 4HD Construction Ltd.: D.S. Klein

Place and Dates of Hearing:	Vancouver, B.C. October 11 and 18, 2024
Place and Date of Judgment:	Vancouver, B.C. October 18, 2024

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[1] **THE COURT:** In October 2019, Pomerleau Inc. ("Pomerleau") hired 4HD Construction Ltd. (“4HD”) as a subcontractor for construction of the South Burnaby Ice Arena to perform concrete formwork, placing and finishing. The parties entered into a fixed-price subcontract (the “Subcontract”) using a CCA 1-2008 form of stipulated price subcontract. There was a dispute-resolution clause that permitted either party to give notice of arbitration. Disputes arose. Notice was given to arbitrate. Then disputes arose with respect to the arbitration.

[2] All of that has led to two petitions that were heard together before me as well as an application for leave in the Court of Appeal.

[3] In proceeding S242589, commenced on April 19, 2024, Pomerleau seeks an order enforcing what is said to be an arbitral award issued on April 4, 2024, by John Singleton, K.C., as arbitrator, dismissing 4HD's claims for failure to prosecute the arbitration, and ordering 4HD to pay costs of $58,174.96 to Pomerleau plus interest (the “Award”). Alternatively, Pomerleau seeks an order that 4HD post security of $58,174.96 in respect of any application for leave to appeal from or application to set aside the order. Pomerleau relies on s. 61 of the *Arbitration Act*, S.B.C. 2020, c 2.

[4] In proceeding S242794, commenced on May 1, 2024, 4HD seeks orders as follows:

a) A ruling that Mr. Singleton was not appointed as arbitrator and declaring the Award to be void; or

b) Alternatively, an order that Mr. Singleton be removed as arbitrator and the Award set aside on the basis of a reasonable apprehension of bias.

Jurisdiction to make these orders is said to be found in ss. 14, 17 and 58 of the *Arbitration Act*.

[5] A third proceeding is not before me. On May 2, 2024, 4HD filed a notice of appeal in the Court of Appeal, by which it seeks leave to appeal the Award pursuant to s. 58 of the *Arbitration Act* on the basis of alleged errors of law. 4HD says that its

proposed appeal focuses primarily on the dismissal of its claim for failure to prosecute the arbitration.

[6] The application for leave to appeal was set down in Court of Appeal chambers on July 19, 2024, and heard by Justice Saunders. Justice Saunders concluded, over the objections of Pomerleau, that the application should await the decision in the Supreme Court of British Columbia in proceeding S242794. The leave application was adjourned generally.

Factual Background

[7] As an opening comment, I note that Pomerleau has argued that my jurisdiction to review whether Mr. Singleton was appointed is limited by the *Arbitration Act*. However, the facts were canvassed by the parties in depth, and given that I will need to consider the correspondence and the actions of Mr. Singleton, at the very least in the context of a reasonable apprehension of bias issue, I will proceed to provide a chronological summary of the relevant events, then deal with the various issues as to jurisdiction when I consider the relief sought.

[8] As noted above, Pomerleau and 4HD are parties to a CCA 1-2008 stipulated price subcontract. As is common with Canadian Construction Association forms, this agreement contains a series of subcontract conditions ("SCCs"), including SCC 8.2, which deals with dispute resolution by negotiation, mediation and arbitration. SCC 8.2.5 provides that:

> By giving a Notice in Writing to the other party, not later than 10 Working Days after the date of termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes as provided in CCDC 40 in effect of the time of bid closing with the following amendment:
>
> .1 the word "Contract" appearing in the rules shall read "Subcontract"; and
>
> .2 delete clause 7.1(b) and replace it with the following:
>
> "7.1(b) the date the Work has been completed or the Subcontract has been terminated."
>
> The arbitration shall be conducted in the jurisdiction of the Place of the Work.

[9] It was common ground that given the Subcontract was made in October 2019, the applicable version of the CCDC 40 rules is the 2018 edition. Those rules provide for the claimant to submit names of proposed arbitrators at the time the arbitration is initiated, then state at s. 9.2 that:

> The Parties shall make every reasonable effort to reach agreement on a single Arbitrator. Within 10 Working Days after receipt of the name or names prescribed by clause 7.1(e), the Respondent shall either accept from among those names or provide the name or names of proposed alternative Arbitrators. The Claimant shall have 10 Working Days to accept an Arbitrator from among the names proposed by the Respondent.

[10] Section 9.5 requires that arbitrators be "impartial, independent of the Parties, and have appropriate arbitration experience and knowledge of relevant construction industry issues." Section 9.7 provides for the parties to apply to court to appoint an arbitrator if agreement is not possible.

[11] Disputes between Pomerleau and 4HD arose at some point in 2020. On July 17, 2020, 4HD registered a claim of builders lien against the project site, claiming $1,476,377.89 for work and materials. Pomerleau subsequently obtained an order cancelling this lien pursuant to s. 24 of the *Builders Lien Act*, S.B.C. 1997, c. 45, through the deposit of lien bond security. That lien bond security has now been in place for over four years.

Initiation of the Arbitration

[12] On October 19, 2020, 4HD gave notice of arbitration by way of an email from its then lawyer, a Mr. Lin of Evolink Law Group in Burnaby. The notice references SCC 8.2.5 and asserts that a mediation had recently been terminated. The notice sets out various claims, including breach of contract, breach of duty of good faith, wrongful termination, damages, including loss of profits, and other claims. The amount sought was $1,476,377.89 plus unspecified additional damages. The notice proposed four potential arbitrators.

[13] Pomerleau was initially represented by in-house counsel, a Mr. Wilson from Ontario. On October 30, 2020, Mr. Wilson emailed Mr. Lin advising that Pomerleau

did not accept the arbitrators initially proposed by 4HD but proposing two alternative names. On November 16, 2020, Mr. Lin replied that 4HD did not accept the arbitrators proposed by Pomerleau.

[14] Later on November 16, 2020, Pomerleau gave notice that it would be advancing counterclaims in the arbitration, asserting that 4HD had not performed the work properly and that Pomerleau had incurred damages that at that time amounted to $2.7 million.

[15] As can be seen, the amount in dispute in the arbitration, given the range between the amount of the claim and the amount of the counterclaim, is in the range of $4.5 million to $5 million.

[16] On January 8, 2021, Pomerleau advised that it would have an expert observing destructive testing of some of 4HD's work and invited 4HD to have its expert attend. 4HD did not take this up.

[17] On July 12, 2021, new counsel retained by 4HD, a Mr. Boulter from Alberta, contacted Pomerleau to advise of his retainer. He also advised that 4HD would be commencing a court action in order to preserve its *Builders Lien Act* rights, but that it still intended to arbitrate.

[18] On July 15, 2021, 4HD commenced action S239161 in the British Columbia Supreme Court. That action referenced the very same claim advanced by 4HD in the arbitration. The action remains outstanding.

[19] Also in July 2021, Pomerleau retained external counsel, a Mr. Plunkett, to assume primary carriage of its dispute with 4HD. Mr. Plunkett had various discussions with the lawyers representing 4HD. At some point, Mr. Boulter was replaced as counsel by a Ms. Nazarali, also from Alberta. There appears to have been at least tentative agreement to appoint Mr. Knutson, K.C., as arbitrator. However, after a preliminary call with Mr. Knutson in May 2022, it was discovered that there were conflicts that prevented him from acting as arbitrator in the dispute.

[20] Pomerleau decided to reassign the matter to one of its in-house counsel, a Mr. Macaulay, also based in Ontario. Mr. Macaulay emailed Ms. Nazarali on May 20, 2022, advising that he was assuming conduct of the matter and suggesting that they speak by phone to discuss potential arbitrators. On June 3, 2022, Mr. Macaulay sent a further email, noting that they had not yet connected by telephone and presenting the names of two alternative arbitrators. Ms. Nazarali responded on June 9, 2022, noting that her client was still considering the names Mr. Macaulay had presented but also putting forward three additional names, one of them being Mr. Singleton.

[21] It appears from the emails in evidence that there were extended efforts to schedule a conference call between the two lawyers to discuss the dispute. In the course of one of them, Mr. Macaulay commented in an email on June 20, 2022, that:

> On a separate note, I can confirm that Pomerleau is agreeable to using John Singleton as arbitrator, so we can discuss next steps to retain him in our call.

[22] On June 27, 2022, Mr. Macaulay emailed Ms. Nazarali, stating:

> Thanks for the call earlier today. I confirm that you will be writing to John Singleton to canvass his availability, and I ask that you please copy me on that correspondence.
>
> As discussed, we will be compiling Pomerleau's documents shortly with a view towards a quick exchange of productions after a preliminary call with the arbitrator. Please ensure that 4HD also has its documents ready in due course so that we may move this matter forward efficiently.

[23] Ms. Nazarali responded on August 16, 2022:

> Further to below, I had this matter diarized for follow up within two weeks of my return from holidays. After having reviewed the file again, I am prepared to set up the next step as per our discussion on June 27th and as per your email below.
>
> I will be emailing Mr. Singleton shortly and will cc you re: setting up a conference call so as to discuss potential conflict, timelines etc.

Dealings With Mr. Singleton

[24] On August 18, 2022, Ms. Nazarali emailed Mr. Singleton as follows:

> Further to the above noted matter, I am reaching out to you on behalf of the parties for the purposes of securing an arbiter. This is a dispute involving

> commercial construction and I act for the Plaintiff 4HD Contracting Ltd. My friend Mr. Macaulay acts for the Defendant, Pomerleau Inc.
>
> The parties entered into a contract for the purposes of performing subcontract work and there is a contractual clause therein which stipulates that any dispute will go via the arbitration route.
>
> Both parties have agreed to select you to arbitrate the matter. Should you be willing to consider acting as an arbiter in this matter and if there are no conflicts, then perhaps we can schedule a conference call in the next week or so, subject to everyone's availability of course.
>
> If there is any additional information that you may need in order to consider taking this on, please let me know.
>
> [Emphasis added.]

[25] Mr. Singleton is a name partner of a law firm ("SR") that does a significant amount of construction law work. He replied to Ms. Nazarali on August 19, 2022, advising that he had performed a conflict check. He confirmed that he had not personally acted either for or against either Pomerleau or 4HD. He advised of three unrelated matters in which others in his firm were involved but that he had no personal knowledge of any of those matters. After that disclosure, he noted:

> If I was to act as arbitrator in this matter the appropriate walls would have to be put in place with respect to these three matters and the counsel involved in them. Additionally the arbitration will need to agree that SR can continue to act in all those three matters and confirm their agreement to an advance waiver or at least consent not to be unreasonably withhold their consent to SR acting through other lawyers for or against the parties in unrelated matters.
>
> Subject to the foregoing, I would be pleased to act as arbitrator in this matter.
>
> I will await further word from you.
>
> [Emphasis added.]

[26] Ms. Nazarali responded on August 30, 2022, that she was seeking instructions on the matters identified by Mr. Singleton. Later that day, Mr. Wilson responded:

> Mr. Macaulay is on vacation this week, but I confirm on his behalf, and on behalf of Pomerleau, that Pomerleau agrees that SR can continue to act in the three matters listed by Singleton, and also confirm that Pomerleau agrees to not unreasonably withhold consent to SR acting through other lawyers for or against Pomerleau in unrelated matters.

[27] Ms. Nazarali provided a further email response on September 12, 2022:

> Further to below, I confirm that 4HD and Farinha agree that SR can continue to act in the three matters as described below. Additionally, we also agree not to unreasonably withhold consent to SR acting through other lawyers for or against 4HD and Farinha in unrelated matters.
>
> Given the parties' agreements to the parameters set forth by Mr. Singleton re: conflict check, I suggest that the next step is for counsel and Mr. Singleton to set up a conference call.
>
> [Emphasis added.]

The email went on to discuss availability for a call.

[28] Pomerleau takes the position that through this series of exchanges, beginning on June 9 and ending on September 12, 2022, the parties had agreed to Mr. Singleton as arbitrator, and that the only condition imposed by Mr. Singleton to his acting had been resolved through the agreement of the parties.

[29] The position of 4HD is different. Ms. Nazarali made an affidavit noting with regard to her August 18, 2022 email that:

> … I wrote an email to John Singleton for the purpose of potentially selecting him as an arbitrator. I did state that both parties "agreed to select" him as an arbitrator. However, my understanding was that this was just one stage in the process to select an arbitrator.

She went on to reference the similar communications the parties had with Mr. Knutson before learning of his conflict. 4HD says that the emails that were exchanged were all conditional in nature and that Mr. Singleton's appointment was never finalized.

[30] Mr. Farinha, the principal of 4HD, has also given an affidavit. With reference to the August 18, 2022 email, he says that:

> … this was just one stage in the process to select an arbitrator. We had intended to receive a schedule from Mr. Singleton and then receive a quote from him with prices. I did not instruct Ms. Nazarali to finalize the selection until those issues were resolved.

[31] He went on to say that:

> My understanding of the process was that we would agree on a potential arbitrator, vet them, and then determine if their fees and schedule worked for both parties, prior to finalizing any appointment of an arbitrator. We may have had to repeat this brief introductory process several times before finalizing any appointment.

[32] Mr. Farinha does not say where he developed this understanding. He does say in his affidavit that he wanted to arbitrate "so as to decrease the cost of this matter." He referenced an information page from a BC government website that says with respect to mediation and arbitration that:

> These alternative dispute resolution options provide confidentiality and can be faster and less expensive than going to court.

[33] There is nothing in the record showing that any of these reservations were communicated to Pomerleau in 2022.

[34] I would also note that the government website uses the words "can be." Arbitration will always have at least one significant cost not applicable in court proceedings: the parties to an arbitration will generally have to pay the fees of the arbitrator. However, arbitration provides flexibility with respect to the choice of a procedure to be followed. If the parties choose to follow a procedure that more or less matches the trial process, with such matters as examination for discovery and evidence-in-chief tendered through *viva voce* evidence of witnesses rather than by way of sworn witness statements, then the proceedings can be just as complex and costly as litigation, with the added cost of the arbitrator's fees.

[35] The CCDC 40 – 2018 arbitration rules provide at s. 10.1 that:

> Within 10 Working Days after being appointed, the single Arbitrator … shall convene a procedural meeting of the Parties to reach a consensus, if possible, and to make orders, if necessary, on:
>
> (a) the procedures to be followed in the Arbitration;
>
> …
>
> (b) the time periods for taking steps in the proceedings,
>
> (c) the scheduling of any hearings or meetings,
>
> (d) any preliminary applications or objections a Party may have, and

(e) any other matter which will assist the arbitration to proceed in an efficient, expeditious and cost-effective manner, taking into account the complexity and issues in dispute.

[36] As suggested in Ms. Nazarali's email of September 12, there was a conference call involving Mr. Singleton and the two lawyers on the morning of September 28, 2022. On September 29, 2022, Mr. Singleton emailed Ms. Nazarali and Mr. Macaulay, stating:

> Further to our telephone call yesterday, my understanding is that we have reached a tentative agreement concerning procedural matters applicable to this arbitration as follows:
>
> 1. 4HD will file a formal Statement of Claim and serve it on Pomerleau by the end of October 2022.
> 2. Pomerleau will file a Defence and Counterclaim in response to the Statement of Claim and serve it on counsel for 4HD on or before November 30, 2022.
> 3. Counsel for 4D and counsel for Pomerleau will endeavour to reach an agreement on the exchange of documents and the need and length of proposed examinations for discovery once the documents have been received.
> 4. Once discoveries have been completed there will be an exchange of sworn witness statements. The party receiving such statements shall have the option to advise of the need to cross-examine one or more witnesses and the parties will agree on a date for such examinations.
> 5. The parties expect to call expert evidence in support of their claims or counterclaims but no firm date has yet been set or decision made with respect to those reports.
> 6. The parties expect the need for a formal hearing, whether by Zoom or in person. A final decision in this regard will be made later on in the process.
> 7. Counsel for 4HD will forward to me a copy of the arbitration clause found in the contract between Pomerleau and 4HD.
> 8. I will prepare and forward a draft Arbitration Agreement for the parties' review and consideration and suggested edits, if that is thought to be necessary. I will likely not look at this until sometime closer to mid October.
>
> I trust this accurately records what we discussed but if either of you have anything to add please do not hesitate to respond.

[37] Mr. Macaulay responded, advising that he had sent Mr. Singleton the arbitration clause immediately following the call on September 28. There was no response from 4HD or its counsel with respect to anything in this email.

[38] Mr. Macaulay had also sent a draft timetable to Ms. Nazarali on September 28, 2022, immediately following the conference call with Mr. Singleton. This was not initially copied to Mr. Singleton, but appears to have been an effort to resolve these dates as between counsel. The email said:

> Please find below a draft timetable for this matter. I have proposed dates for each step that we discussed in our call with Arbitrator Singleton this morning, and ask that you review with your client and either confirm your agreement or propose alternative dates.
>
> 1. October 31, 2022: 4HD to deliver its claim.
> 2. November 30, 2022: Pomerleau to deliver its defence/counterclaim
> 3. December 31, 2022: 4HD to deliver its documents
> 4. January 31, 2023: Pomerleau to deliver its documents.
> 5. February 17, 2023: Deadline for both parties to (1) agree on length of examinations for discoveries; and (2) schedule examinations accordingly.
> 6. April 14, 2023: Deadline to complete all examinations for discovery
> 7. May 31, 2023: Deadline for 4HD to deliver expert report(s), if any
> 8. July 31, 2023: Deadline for Pomerleau to deliver expert report(s), if any
> 9. August 11, 2023: Deadline for both parties to exchange witness lists for arbitration, including witness statements (in affidavit form)
> 10. August 31, 2023: Deadline for both parties to agree on rough length of arbitration hearing and schedule hearing accordingly.
> 11. November 30, 2023: Deadline to complete in person or virtual arbitration hearing
>
> Of course, the above dates are subject to Arbitrator Singleton's availability and any agreement to this timetable would not preclude any interim steps (e.g. motions or documentary disputes) that may arise during the course of the arbitration.
>
> I look forward to your thoughts, and would be happy to discuss in more detail.

[39] On October 17, 2022, Mr. Singleton sent the parties a draft agreement for their review and comment. The attachment is titled "Arbitration Terms of Reference Agreement." There are certain portions to be added by the parties, e.g., each party

was asked to provide a brief “description of business”, a summary of their claim, and the total amount claimed. The document provides that Mr. Singleton is the arbitrator. Section 6 of the proposed agreement included the following:

> By execution of this Arbitration Agreement, the above named arbitrator confirms his acceptance of his appointment and designation as Arbitrator of this matter. Conditional on prompt payment of deposits as herein provided, and barring serious illness or injury or other reasonable grounds, the Arbitrator has agreed to serve until this matter is completed.

[40] Section 52 of the proposed agreement provided that by executing the agreement, 4HD and Pomerleau affirm their agreement to the arbitrator's commercial terms, including:

a) Interim bills to be paid by the parties in equal shares;

b) Fees of $7,500 per day for all in-person hearings, and $750 per hour for all other time expended by the arbitrator; and

c) Where the parties ask the arbitrator to reserve a certain number of consecutive days for the hearing, a deposit will be required for the amount of the associated anticipated fees.

[41] Neither party proposed any changes to this document or raised any specific concerns about it. However, the agreement was never signed.

[42] On October 31, 2022, Mr. Singleton issued his initial interim account. The fee was $2,250 plus taxes based on three hours of work to date. It noted that the parties' proportionate share was $1,185.87 each. Pomerleau paid its portion of the account as issued. 4HD did not.

[43] On November 21, 2022, Mr. Macaulay emailed Ms. Nazarali noting that 4HD had yet to produce its statement of claim and requesting an update. The two of them spoke that day, and on November 24, 2022, Ms. Nazarali emailed both Mr. Macaulay and Mr. Singleton, stating:

> Yes, as discussed in our call, the submission of our claim was delayed to our honest yet mistaken belief that we had done so already via Mr. Farinha's pervious counsel.
>
> I have copied Mr. Singleton and suggest the following adjustments to the timetable previously proposed by you. As you can see from my suggested amendments in red, I have adjusted what I propose to be a fair timetable for both parties to submit their claims and documents and have attempted to keep steps 7 through 11 the same.

[44] As noted above, Mr. Singleton had not been previously copied on this timetable. He emailed the parties later that day, stating:

> I will await other counsel's response to the proposed timetable before providing any directions but my current feeling is that leaving setting of the length of the arbitration and choosing the hearing dates to August 31, 2023 is far too late. I would have to know by the end of May 2023 when the proposed arbitration dates are. I am currently unavailable in November and December and from mid March to early May 2024.
>
> I would also remind counsel that I am awaiting your preliminary replies to the Arbitration Agreement previously sent to you, a further copy of which is attached to this email. This needs to be finalized in the immediate future.

[45] Mr. Macaulay responded on November 25, 2022, with a proposed revised schedule. It included a new deadline of December 16, 2022, for 4HD to deliver its statement of claim. Mr. Singleton responded shortly thereafter, commenting:

> These dates are fine with me but we need to add the proposed dates for the arbitration. I am going to hold the month of February 2024 for that purpose or, if this does not work, I am prepared to hold the four weeks commencing May 20th, 2024. Once I have counsel's approval for all of these dates and the required information for the Arbitration Agreement, I will complete the Agreement for circulation and signature.

[46] Ms. Nazarali responded later that day, saying:

> Thanks, John, for below. I agree with you and will be available for the month of February 2024.

[47] Following this exchange, there was a lengthy hiatus in the parties' communications. On December 31, 2022, Mr. Singleton issued a further account with fees of $1,350 plus tax with the parties each responsible to pay $711.43. Again, Pomerleau paid its portion, but 4HD did not.

[48] On March 15, 2023, Mr. Singleton emailed the parties, asking:

> Could I please hear from you with respect to the current status of this matter and when I might expect to receive your draft of the arbitration agreement. It seems that we are already behind schedule and it has been sometime since I first asked you for your draft of the Arbitration Agreement. I would not want to hold the February 2024 dates if the matter has now stalled.

[49] Mr. Macaulay responded that:

> We are behind schedule and I have not heard anything from 4HD or their counsel for months now. Pomerleau would prefer not to vacate Arbitration dates, as we have already provided 4HD with multiple extensions on various deadlines.
>
> Alya, may you please advise when we will have your client's portion of the arbitration agreement completed, as well as your client's claim? Once we have those dates, I suggest we work out a revised schedule to get this matter back on track.

[50] Ms. Nazarali responded advising that her client had had:

> ... some challenges in continuing to stay the course of our procedural agreement/timelines but I will follow up forthwith so as to get back on track or provide a further update.

She concluded:

> I admit ball is in our corner and I will be in touch next week.

[51] On March 22, 2023, Mr. Singleton wrote to the parties noting that besides the case being off schedule, a portion of his fee accounts had been outstanding for two months or more. He asked that as a condition of him holding the February 2024 hearing dates, each party provide a retainer of $25,000 to secure his fees for the time being, with a further deposit of $90,000 from each party to be paid six months before the hearing date.

[52] Ms. Nazarali in her affidavit said that, after receiving this letter, she called Mr. Macaulay and that:

> Part and parcel of our discussions led to me verbally communicating that 4HD Construction did not want to appoint Mr. Singleton as the arbitrator, as his fees were too high and that the demand for the hefty retainer deposit was never disclosed to anyone during the initial call … Had this been disclosed to

> us at the outset of our call, 4HD Construction would have instructed me not to solicit Mr. Singleton's services due to high costs.

[53] Mr. Macaulay's evidence was that he had:

> ... no record of this conversation and do not recall any conversations with Ms. Nazarali regarding the cost of Mr. Singleton's fees or retainer.

[54] On April 18, 2023, Mr. Singleton sent a further email advising that unless there was progress by April 30, he would no longer hold the February 2024 hearing dates. Mr. Macaulay emailed Ms. Nazarali noting that he had not heard from her since March 15 and asking "whether your client still intends to pursue this arbitration". Mr. Macaulay followed up again on April 26, 2023, asking for a response. On April 26, Ms. Nazarali asked for a chance to speak by telephone and commented that she was "likely not to continue on this file."

[55] Mr. Singleton delivered a third invoice on March 31, 2023, and a fourth on April 30, 2023. The amounts were $984.37 per party and $630 per party respectively. Pomerleau paid its portion. 4HD did not make any payment.

[56] On May 16, 2023, Mr. Singleton advised that he was no longer holding the hearing dates.

[57] After some efforts at settlement, Ms. Nazarali wrote to Mr. Macaulay on July 17, 2023, advising that she had instructions to transfer the file to Mr. Klein, a Vancouver lawyer, who is 4HD's current counsel. She wrote as well to Mr. Singleton on July 26, 2023, to advise that the file was being transferred to Mr. Klein.

[58] In August 2023, Mr. Macaulay left Pomerleau. Pomerleau then transferred the file to Mr. Mayovsky of Borden Ladner Gervais LLP, who is Pomerleau's current counsel.

[59] On September 1, 2023, Kiran Dhillon, the collections manager from Mr. Singleton's law firm, wrote to Mr. Klein, noting that there was an outstanding balance of $3,511.67 with respect to Mr. Singleton's accounts and stating:

> I am hoping you can help organize payment for the outstanding balance that has been incurred to date …

[60] A second email from Kiran Dhillon to Mr. Klein and Mr. Farinha on November 6, 2023, stated:

> I am following up on the attached outstanding invoices totalling $3,511.67, can you please let us know when we can expect payment. Please let me know if there are any issues or concerns with the invoice that may be preventing payment as these invoices are now over a year old and we hoping to get the resolved as soon as possible.
>
> Thank you for your urgent attention to this matter.

[61] Mr. Farinha responded to this last email saying "Will call you shortly." It appears from the email string, however, that he did not.

[62] There are two further emails in the string from Kiran Dhillon, one on November 14, 2023 saying "I am following up on the balance owing" and "can you please let me know when payment will processed?"; the other on November 22, 2023, saying:

> I am requesting an urgent response to my emails regarding the outstanding AR for $3,511.67. Can you please get back to us on when we can expect payment?

[63] On November 27, 2023, Mr. Klein wrote to Mr. Wilson, who continued to be counsel of record in the lien action S239161, that had been commenced on July 15, 2021, serving him with a court form of "notice of intention to proceed." This form is required where no steps have been taken in a court proceeding for one year and the party serving the form intends to move that litigation forward.

[64] This prompted a letter of December 21, 2023, from Mr. Mayovsky, who referenced article 8.2.5 of the construction contract and the notice of arbitration that 4HD had given on October 19, 2020. Mr. Mayovsky then asserted that:

> In accordance with the agreement to arbitrate, 4HD and Pomerleau then went on to appoint Mr. John Singleton, KC as arbitrator and scheduled deadlines for the exchange of materials, which 4HD repeatedly failed meet.
>
> Therefore, the arbitration was commenced and the proper forum for the parties' dispute is arbitration, not court.

[65] Mr. Mayovsky advised that if 4HD attempted to take any further steps in action S239161, Pomerleau would apply for a stay of proceedings pursuant to the *Arbitration Act*.

[66] Mr. Klein responded on January 5, 2024, stating:

> We will not be taking any steps in this action without notice. We filed the Notice of Intention to Proceed as a precautionary step to prevent dismissal of 4HD's case.

The Dismissal Application

[67] On February 27, 2024, Mr. Mayovsky wrote to Mr. Singleton and to Mr. Klein. The letter began by making reference to both s. 17 of the CCDC 40 – 2018 arbitration rules and s. 33 of the *Arbitration Act* and advised that Pomerleau was applying for an order that 4HD's claim may be dismissed and the arbitration terminated. After a detailed review of the factual background, the letter summarized "the current state of affairs" as follows:

> (a) this arbitration was commenced over three years ago;
>
> (b) you were appointed as arbitrator almost a year and a half ago;
>
> (c) the draft terms of reference you circulated have not been agreed to or executed;
>
> (d) your own retainer and 4HD's portion of your accounts remain unpaid (we understand that Pomerleau has paid its share of the Arbitrator's invoices);
>
> (e) the reserved hearing dates have been vacated;
>
> (f) the Claimant has twice failed to submit its Statement of Claim in accordance with the established procedural time limits; and
>
> (g) in the last year, the Claimant has made no effort to advance its claim in this arbitration.

[68] By email dated February 28, 2024, sent to both Mr. Mayovsky and Mr. Singleton, Mr. Klein stated:

> We disagree with the contents of the letter. The previous arbitrator was not chosen as their fees were far in excess of what is reasonable, given the scope of this matter. These fees were not disclosed to Mr. Farinha until after the process had already begun.
>
> We have also taken steps forward, including contracting alternate arbitration services.

[69] Mr. Klein suggested a different arbitrator, one with extensive labour law experience but who did not claim any experience with construction disputes and whose quoted fee was $600 per hour or $3,600 per hearing day.

[70] In response to this email, Mr. Singleton wrote to both Mr. Mayovsky and Mr. Klein on March 1, 2024, stating:

> I have attached a series of correspondence exchanged between me and then counsel for the parties in 2022 and 2023. It seems clear to me from the correspondence that the proceedings were well underway, comments having been received on the arbitration agreement sent by me to counsel and an agreement on the steps required to be taken moving forward. I might also note that the amendments proposed on behalf of 4HD did not include any suggestion that the proposed financial arrangements for the arbitration were not acceptable to 4HD.
>
> Whether or not the previous steps taken in this arbitration constitute a binding agreement to arbitrate the issues raised by 4HD and Pomerleau is a matter for counsel to argue on the application now launched by Pomerleau.
>
> I await your advice in light of the above.

[71] On March 5, 2024, Mr. Mayovsky provided written submissions on behalf of Pomerleau with respect to the validity of Mr. Singleton's appointment as arbitrator.

[72] On March 13, 2024, Mr. Klein responded on behalf of 4HD, asserting that Mr. Singleton was not appointed as arbitrator, and specifically that there was no agreement as to fees, which is an essential term in any contract. He also asserted that given that Mr. Singleton was being asked to make a decision on his own appointment, which impacts on his ability to recover his fee from 4HD, there was an issue of bias. Finally, with respect to delay, he argued that there was no inordinate delay and that any delay was excusable as there was "a major rift between the parties over the alleged appointment of an arbitrator."

[73] On March 15, 2024, counsel for Pomerleau responded committing to pay all outstanding invoices from Mr. Singleton, subject to its right to claim such outlays as costs of the arbitration.

The Award

[74] Mr. Singleton issued his Award on March 22, 2024.

[75] He dealt first with his appointment as arbitrator. He reviewed the chronology of those communications to which he was a party (as generally set out above) and noted that:

> … at no time until hearing from Mr. Klein in February of this year did 4HD ever question the commercial terms under which the arbitration was proposed to be held nor was it ever suggested that my hourly rate or the requested retainer was out of line. In fact, it is at the lower end of the scale of those of us who undertake to act as arbitrators in complex construction matters like this.

[76] He concluded that:

> … it seems clear to me that my appointment was confirmed in 2022 and that the arbitration had already proceeded to scheduling a hearing date with the agreement of both counsel involved in this matter. In the circumstances I consider the challenge to my appointment to be without merit and would dismiss Mr. Klein's arguments to the contrary.

[77] He then dealt with the application to dismiss the claims of 4HD, concluding:

> In light of 4HD's marching ahead to its own drum rather than complying with the terms previously agreed upon to see this arbitration move forward to a full hearing and in light of his unilaterally contacting an alternate arbitrator without notice to either Pomerleau or me, and 4HD failing to deliver its Statement of Claim some year and a half after they were ordered to do so, I am hereby dismissing 4HD's Claim in this matter.
>
> I would ask that Mr. Mayovsky prepare a formal Award for my review and signature.
>
> In light of 4HD's conduct or lack there of, in this matter, I am also awarding costs to Pomerleau on a solicitor and own client basis from the date of commencement of the arbitration to the present time. …

[78] Those costs were subsequently summarily assessed at $41,601.71. The arbitrator then issued his invoice for the preparation of the award, which totalled $16,573.25, leaving a total outstanding of $58,174.96.

Legal Context

Arbitration Act Provisions

[79] Several provisions of the *Arbitration Act* were referenced in submissions.

[80] Section 4 deals generally with the role of the courts in arbitrations:

Extent of judicial intervention

4 In matters governed by this Act,

(a) a court must not intervene unless so provided in this Act, and

(b) the following 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:

(i) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal;

(ii) a determination or direction by the designated appointing authority.

[81] Section 14 deals with the appointment of arbitrators:

Appointment of arbitrator

14 (1) Subject to this section, the parties may agree on a procedure for appointing the arbitral tribunal.

(2) Unless the parties otherwise agree, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the designated appointing authority must, on request of a party, appoint the arbitrator.

…

(5) If, under an appointment procedure agreed to by the parties, any of the following occurs:

(a) a party fails to act as required under that procedure;

(b) the parties, or 2 appointed arbitrators, fail to reach an agreement expected of them under that procedure;

(c) a third party fails to perform any function entrusted to the third party under that procedure,

a party may request the designated appointing authority to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

(6) If the designated appointing authority does not make the appointment requested under subsection (2) or (4) or take the necessary measure in accordance with subsection (5) within 7 days of the request, the Supreme Court must, on application, appoint an arbitrator.

(7) In appointing an arbitrator, the designated appointing authority or the Supreme Court must have due regard to

(a) any qualifications required of the arbitrator by the agreement of the parties, and

> (b) any other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
>
> (8) An appointment of an arbitrator made by the designated appointing authority or the Supreme Court may not be appealed.

[82] The designated appointing authority is the Vancouver International Arbitration Centre: *Arbitration Regulation*, B.C. Reg. 160/2020, s. 2.

[83] Sections 15 to 18 deal with the removal and replacement of an arbitrator, including grounds for challenge:

> **No revocation of appointment**
>
> 15 Subject to this Division, a party to arbitral proceedings may not revoke the appointment of an arbitrator unless all other parties to the arbitral proceedings consent.
>
> **Independence and impartiality of arbitrator**
>
> 16 (1) Unless otherwise agreed by the parties to arbitral proceedings, an arbitrator must be independent of the parties.
>
> (2) An arbitrator must be impartial and act impartially.
>
> (3) If a person is approached in connection with the person's possible appointment as an arbitrator, the person must, without delay, disclose any circumstances likely to give rise to justifiable doubts as to the person's independence or impartiality.
>
> (4) An arbitrator, from the time of the arbitrator's appointment and throughout the arbitral proceedings, must, without delay, disclose to the parties any circumstances referred to in subsection (3).
>
> **Grounds for challenge**
>
> 17 (1)An arbitrator may be challenged only if
>
> (a) subject to an agreement described in section 16 (1), circumstances exist that give rise to justifiable doubts as to the arbitrator's independence,
>
> (b) circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or
>
> (c) the arbitrator does not possess the qualifications agreed to by the parties.
>
> (2) For the purposes of subsection (1) (a) and (b), 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.
>
> (3) 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.

> **Challenge procedure**
>
> 18 (1) Subject to subsection (4), the parties to arbitral proceedings may 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 any circumstances referred to in section 17 (1), 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 to by the parties or under the procedure referred to in subsection (2) is not successful, the challenging party may, within 30 days after receiving notice of the decision rejecting the challenge, apply to the Supreme Court to decide on the challenge.
>
> (5) If an application is made under subsection (4), the Supreme Court may refuse to decide on the challenge if it is satisfied that, under the procedure agreed to by the parties, the party making the application had an opportunity to have the challenge decided on by a person or entity other than the arbitral tribunal.
>
> (6) A decision of the Supreme Court under subsection (4) may not be appealed.
>
> (7) While an application under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

[84] Section 23 provides for arbitrators to rule on their own jurisdiction, reflecting what is sometimes referred to as the "competence-competence" principle:

> **Competence of arbitral tribunal to rule on its jurisdiction**
>
> 23 (1) An arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
>
> > (a) an arbitration agreement which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
> >
> > (b) a decision by the arbitral tribunal that the contract is null and void must not entail, as a matter of law, the invalidity of the arbitration agreement.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the first response on the substance of the dispute.

(3) A party to arbitral proceedings is not precluded from raising a plea referred to in subsection (2) by the fact that the party appointed, or participated in the appointment of, an arbitrator.

(4) A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(5) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (4), admit a later plea if it considers the delay justified.

(6) The arbitral tribunal may rule on a plea referred to in subsection (2) or (4) either as a preliminary question or in an arbitral award on the merits.

(7) If the arbitral tribunal rules as a preliminary question on a plea referred to in subsection (2) or (4), any party may, within 30 days after receiving notice of that ruling, apply to the Supreme Court to decide the matter.

(8) A decision of the Supreme Court under subsection (7) may not be appealed.

(9) While an application under subsection (7) is pending, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

[85] Section 55 deals with the fees and expenses payable to an arbitrator:

Arbitral tribunal fees and expenses

55 (1) The fees and expenses payable to an arbitrator must be

(a) in accordance with the agreement of the parties and the arbitrator, or

(b) in the absence of an agreement of the parties and the arbitrator, set at the sum of

(i) the fair value of the services performed, and

(ii) the necessary and reasonable expenses actually paid or incurred by the arbitrator.

(2) Unless otherwise agreed by the parties and the arbitrator, a party or an arbitrator may apply to the designated appointing authority for a summary determination of the fees and expenses payable …

[86] The jurisdiction of the Supreme Court to set aside an arbitral award is set out in s. 58:

Applications for setting aside arbitral awards

58 (1) A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:

(a) a person entered into the arbitration agreement while under a legal incapacity;

> (b) the arbitration agreement is void, inoperative or incapable of being performed;
>
> (c) the arbitral award deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement;
>
> (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or this Act;
>
> (e) the subject matter of the dispute is not capable of resolution by arbitration under the law of British Columbia;
>
> (f) the applicant was not given proper notice of the arbitration or of the appointment of an arbitrator;
>
> (g) there are justifiable doubts as to the arbitrator's independence or impartiality;
>
> (h) the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it;
>
> (i) the arbitral award was the result of fraud or corruption by a member of the arbitral tribunal or was obtained by fraudulent behaviour by a party or its representative in connection with the conduct of the arbitral proceeding.
>
> (2) If the Supreme Court finds that the grounds described in subsection (1) (c) or (e) apply in respect of only part of the subject matter of the arbitral award, the court may set aside part of the arbitral award.
>
> (3) For the purposes of subsection (1) (g), there are justifiable doubts as to the arbitrator's independence or impartiality only if there was a real danger of bias on the part of the arbitrator in conducting the arbitration.
>
> (4) The Supreme Court must not set aside an arbitral award on grounds referred to in subsection (1) (g) if, before the award was made,
>
> (a) the applicant was aware of the circumstances it relies upon to set aside the arbitral award and failed to follow the applicable procedure required by the arbitration agreement or this Act for seeking the removal of the arbitrator, or
>
> (b) the court determined that substantially the same circumstances as are relied upon to set aside the arbitral award were not sufficient to justify the removal of the arbitrator.
>
> (5)The Supreme Court must not set aside an arbitral award if the applicant is deemed under section 3 [waiver of right to object] to have waived the right to object on the grounds on which the applicant relies.
>
> (6) A party may appeal a Supreme Court decision under this section to the Court of Appeal with leave of a justice of the Court of Appeal.

[87] The Act also provides certain rights of appeal from an arbitral award in s. 59:

> **Appeals on questions of law**
>
> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
>
> (a) all the parties to the arbitration consent, or
>
> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.

[88] Finally, I note that Pomerleau's petition, by which it seeks to enforce the Award, is governed by s. 61:

> **Recognition and enforcement of arbitral awards**
>
> 61 (1) A party may apply to the Supreme Court to recognize and enforce an arbitral award made in an arbitration with a place of arbitration in Canada.
>
> (2) Unless the Supreme Court otherwise orders, an application under subsection (1) must be made on notice to the person against whom enforcement is sought, in accordance with the *Rules of Court*.
>
> (3) An application under subsection (1) must be accompanied by an original or certified copy of the award and evidence as to whether
>
> (a) the time limit for commencing an application to set aside or appeal the award at the place of arbitration has elapsed,
>
> (b) there is a pending application to set aside or appeal the award,
>
> (c) a stay of enforcement of the award has been issued,
>
> (d) the award has been set aside, or
>
> (e) the award has been remitted to the arbitral tribunal.
>
> (4) The Supreme Court must recognize and enforce the arbitral award unless
>
> (a) the award has been set aside by a court of competent jurisdiction,
>
> (b) the subject matter of the dispute is not capable of resolution by arbitration under the law of British Columbia,
>
> (c) the court does not have the jurisdiction to grant the relief sought,
>
> (d) the time limit for commencing an application to set aside or appeal the award under the laws of the place of arbitration has not yet elapsed,

> (e) there is a pending application to set aside or appeal the award, or a stay of enforcement of the award has been issued, at the place of arbitration, or
>
> (f) the award has been remitted to the arbitral tribunal.
>
> (5) If subsection (4) (d) or (e) applies, the Supreme Court may order that recognition and enforcement of the arbitral award is stayed for a time and on conditions, including conditions as to the deposit of security.
>
> (6) A Supreme Court decision to recognize and enforce an arbitral award has the same effect as a court judgment granting the remedy described in the award.
>
> (7) A party may appeal a Supreme Court decision under this section to the Court of Appeal with leave of a justice of the Court of Appeal.

Reasonable Apprehension of Bias

[89] The parties were agreed on the applicable test for a reasonable apprehension of bias. The discussion of Justice Giaschi in *Johnston v. Octaform Inc.*, 2024 BCSC 537, at paras. 42-47 provides a helpful summary:

> [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 in *Johnston*.]

[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.

Positions of the Parties

4HD

[90] 4HD says that the matters properly in issue in this court (as opposed to the Court of Appeal) are (a) whether Mr. Singleton was actually appointed as arbitrator, and (b) whether he should be removed for reasonable apprehension of bias. 4HD says that the question of whether the claim should have been dismissed for failure to advance the arbitration is a matter that is properly dealt with in the Court of Appeal.

[91] In its petition, 4HD relied primarily upon ss. 14, 17 and 58 of the *Arbitration Act*. Both s. 17 and s. 58(1)(g) provide for challenges based on reasonable apprehension of bias. With respect to the challenge as to whether Mr. Singleton was ever actually appointed, 4HD relies on s. 14 as setting out the process for appointing an arbitrator and which allows the Supreme Court to appoint an arbitrator in certain circumstances.

[92] It was not until reply submissions that 4HD set forward its position on how s. 58 permits review of the question whether Mr. Singleton was actually appointed as arbitrator. 4HD relies on s. 58(1)(d), arguing that the composition of the tribunal (a sole arbitrator, being Mr. Singleton) was not in accordance with the parties' agreement, and on s. 58(1)(f), arguing that 4HD did not have proper notice of

Mr. Singleton's appointment. Both of these latter points relate to the submissions made on s. 9.9 of the CCDC 40 – 2018 arbitration rules, which I discuss below.

[93] In reply submissions, in response to questions from the Court, 4HD also accepted that the court may have jurisdiction under s. 23 of the *Arbitration Act*. As its primary position, 4HD does not accept that Mr. Singleton was ever an "arbitral tribunal" and thus says that he does not fall within the language of s. 23(1), allowing an arbitral tribunal to "rule on its own jurisdiction." In the alternative, 4HD submits that this Court has jurisdiction pursuant to s. 23(7) to review on the merits the question of whether Mr. Singleton was appointed.

[94] With respect to the substantive question of Mr. Singleton's appointment, 4HD asserts that the discussions with Mr. Singleton never moved past a preliminary stage and that his appointment was clearly subject to the parties finalizing and signing an agreement such as the one that Mr. Singleton had shared a draft of in October 2022. 4HD says that the emails exchanged between August 30 and September 12, 2022, use such language as "should you be willing" and "if I was to act," which indicates that discussions were still at a preliminary stage.

[95] 4HD relies in particular on the language of s. 6 of the draft document provided by Mr. Singleton on October 17, 2022, which as noted above reads:

> By execution of this Arbitration Agreement, the above named arbitrator confirms his acceptance of his appointment and designation as Arbitrator of this matter. Conditional on prompt payment of deposits as herein provided, and barring serious illness or injury or other reasonable grounds, the Arbitrator has agreed to serve until this matter is completed.
>
> [Emphasis added.]

[96] 4HD says that it is clear from this provision that it is execution of a finalized agreement that makes Mr. Singleton the arbitrator, and also that the agreement is "conditional on prompt payment of deposits." While this is subsequent to the emails that Pomerleau relies on, 4HD says that it reflects the actual understanding of the parties after the discussions they had in September 2022. 4HD notes that it never paid any deposits or any fees whatsoever to Mr. Singleton.

[97] As well, 4HD argues that there was never agreement on Mr. Singleton's fees, and that it is a fundamental principle of contract law that an agreement on price is a necessary term in any contract. Mr. Farinha deposed that he would never have agreed to Mr. Singleton as arbitrator had he known what the costs were going to be.

[98] In its reply submissions, 4HD also pointed to s. 9.9 of the CCDC 40 – 2018 arbitration rules, which states that:

> The agreement used to retain the Arbitrator shall be substantially consistent with the terms of the model Arbitrator Services Agreement appended to these Rules for Arbitration.

[99] 4HD notes that the model agreement found at Appendix B to those rules contains a variety of terms, including s. 4, which states:

> The parties do hereby appoint the Arbitrator, and the Arbitrator does hereby accept this appointment, to arbitrate the issues identified by the parties in their respective written statements to be delivered, together with any issues or disputes ancillary or related thereto.

The agreement also includes various provisions related to the compensation of the arbitrator and payment of deposits.

[100] 4HD submits that whatever the law may be under the *Arbitration Act*, it should be inferred from these rules that the appointment of an arbitrator in an arbitration governed by the CCDC 40 – 2018 rules is not complete until an agreement substantially in the form found at Appendix B to those rules has been signed by the parties.

[101] With respect to reasonable apprehension of bias, 4HD says that once Mr. Singleton had issued accounts and one party had failed to pay its proportionate share, Mr. Singleton was in a debtor-creditor relationship with the party who did not pay. 4HD says that this gave rise to a conflict of interest, which founded a reasonable apprehension of bias. 4HD says that the way for an arbitrator to avoid such a conflict of interest arising is to provide a fee quotation and secure deposits from every party before commencing any billable work, so that the arbitrator never

finds themself in a position of seeking to collect unpaid accounts from a party whose claim is being arbitrated.

[102] 4HD goes on to argue that the four communications in the fall of 2023 from the collections manager of Mr. Singleton's firm were "aggressive." Mr. Farinha says in his affidavit that, based on Mr. Singleton's tone, he believes that Mr. Singleton "has already reached various conclusions about this matter."

[103] 4HD also submits that, given the circumstances, Mr. Singleton had a pecuniary interest in making a finding that he had been appointed as arbitrator given that such a finding was necessary in order to get the outstanding fees paid. It submits that Pomerleau's actions in paying those fees in March 2024 did not change the nature of that pecuniary interest. It says that, in circumstances like this, an arbitrator is like a lawyer ruling on their own taxation of fees.

[104] Although not specifically addressed in submissions before me, 4HD in its petition also referenced Mr. Singleton's letter of March 1, 2024, which it says demonstrates a lack of impartiality and a prejudging of the issues of whether Mr. Singleton had, in fact, been appointed.

[105] 4HD says that it felt ambushed by the dismissal application, that nothing had happened in the arbitration proceedings from July 2023 to February 2024, and that it did not understand there to be any urgency in moving forward.

[106] 4HD thus seeks “a ruling that Mr. Singleton was not appointed arbitrator”, and an order that the matter be referred to the designated approving authority to appoint an arbitrator.

[107] Alternatively it seeks an order that Mr. Singleton be removed as arbitrator on the basis of a reasonable apprehension of bias and any award made by him be set aside.

Pomerleau

Appointment of Mr. Singleton

[108] Pomerleau submits that s. 4 of the *Arbitration Act* provides clear limits on the jurisdiction of the Supreme Court to question, review, or restrain an arbitration award. Unless jurisdiction is provided in the Act, the court must not intervene. This reflects a policy prohibiting court intervention unless expressly authorized by the Act: *Terrace Community Forest LLP v. Skeena Sawmills Ltd.*, 2022 BCCA 37. As explained in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, at paras. 49-50:

> [49] The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate. This gives effect to the concept of "party autonomy", according to which parties are free to "charter a private tribunal" to resolve their disputes. Party autonomy is closely related to freedom of contract. Modern arbitration legislation is premised on these principles, which inform the policy choices embodied in provincial arbitration statutes like the *Arbitration Act*.
>
> [50] Party autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings. This latter principle is "fundamental" to modern arbitration law and "finds expression throughout modern Canadian arbitration legislation. For instance, s. 4(a) of British Columbia's new *Arbitration Act* provides that "[i]n matters governed by this Act, a court must not intervene unless so provided in this Act". Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule.
>
> [Citations omitted.]

[109] Pomerleau says that only two sections of the Act give a court jurisdiction to review a final award of an arbitrator: s. 58, which authorizes the Supreme Court to deal with issues that can be roughly described as relating to procedural fairness, and s. 59, which permits appeals to the Court of Appeal on errors of law. If 4HD is unable to bring itself within one of these two provisions, then the parties' decision to resolve their disputes by arbitration must be respected.

[110] Pomerleau says that 4HD itself placed the question of whether Mr. Singleton had been appointed as arbitrator in issue as part of its response to Pomerleau's

application to dismiss the claim. Mr. Singleton reviewed the various submissions made on that issue and concluded that it was without merit, all as part of his final order.

[111] Pomerleau says that Mr. Singleton had jurisdiction to rule on his own appointment. It relies on the principle of competence-competence, as now reflected in s. 23(1) of the Act, which provides that “An arbitral tribunal may rule on its own jurisdiction”.

[112] Although Pomerleau relied on s. 23(1) in its initial submissions, in sur-reply submissions it objected to 4HD's late reliance in its reply submissions on s. 23(7) as a basis for the court to review Mr. Singleton's decision that he had been appointed. It says that 4HD's petition does not reference s. 23 and that it would have to bring a new petition in order to seek relief under s. 23, which petition would be out of time. It also disputed in these sur-reply submissions whether the question of whether Mr. Singleton had been appointed is actually a question of jurisdiction.

[113] Pomerleau raised concern in its initial submissions that 4HD had not relied on any of the specific provisions of s. 58 as grounding its assertion that Mr. Singleton had not been appointed. Rather, it has simply asserted the facts and asked this court to conduct a hearing *de novo* of the question.

[114] Dealing specifically with the grounds in s. 58(1), Pomerleau says that:

a) There is no allegation that 4HD was under a legal incapacity at any time.

b) There is no allegation that the arbitration is void, inoperative, or incapable of being performed. In fact, 4HD asserts that it wishes to continue with arbitration.

c) The Award deals directly with the dispute that was submitted to it.

d) The composition of the arbitral tribunal—a single arbitrator with experience in construction disputes—is in accordance with the arbitration agreement as well as s. 9.5 of the CCDC 40 – 2018 rules.

e) There is no doubt that the subject matter of the dispute is capable of resolution by arbitration.

f) It was 4HD that gave notice of the arbitration and participated in the appointment of the arbitrator, so there can be no question of 4HD having proper notice.

g) The arbitrator was both independent and impartial.

h) 4HD had every opportunity to present its case but failed to do so, then when the application was made to strike the claim, 4HD exercised its right to make submissions.

i) There is no allegation of fraud or corruption.

[115] Pomerleau says that, in essence, 4HD is attempting to unilaterally revoke the appointment of Mr. Singleton, but that s. 15 of the Act clearly provides that an appointment cannot be revoked without the consent of all parties. Pomerleau does not consent.

[116] Pomerleau submits as well that the factual question of whether Mr. Singleton was appointed would have had to be brought pursuant to the challenge procedures in ss. 17 and 18 of the Act. Such a challenge may only be brought on one of the grounds set out in s. 17(1), and any challenge must be brought within 15 days. Neither of these criteria can possibly be met with respect to 4HD's factual arguments.

[117] While maintaining its position that this Court has no jurisdiction to review Mr. Singleton's factual determination that he had been appointed, Pomerleau also argued that Mr. Singleton was, in fact, appointed as arbitrator, noting that:

a) 4HD proposed Mr. Singleton as arbitrator and upon contacting him, advised that "both parties have agreed to select you to arbitrate the matter."

b) Mr. Singleton confirmed that he would be "pleased to act as arbitrator" if conflicts were cleared, including an agreement with respect to others in his firm acting for or against the parties.

c) Each of the parties confirmed that they accepted those terms, thereby resolving the only condition to Mr. Singleton's acceptance of his appointment.

[118] Pomerleau also relies on the following post-appointment conduct, said to provide confirmation of Mr. Singleton's appointment:

a) 4HD attended procedural calls and engaged in extensive pre-arbitration exchanges with respect to such matters as hearing dates and procedural scheduling.

b) Upon failing to submit its statement of claim in November 2022 in accordance with the agreed deadline, 4HD claimed that this was due to an "honest mistake" and did not suggest that there was any issue with the arbitrator's appointment.

c) That continued in 2023 with Ms. Nazarali, until she ceased acting, sending emails indicating that her client was having difficulty meeting the schedule but not questioning the arbitrator's appointment.

[119] With respect to the submission that there was no agreement as to fees, Pomerleau references s. 55 of the Act, which provides that an arbitrator's fees are as agreed or, in the absence of agreement, at the fair market value of services provided with a mechanism provided to review and determine the reasonableness of any fees. Pomerleau says that in light of this provision and the objective mechanism it provides for determination of a fee, agreement to an arbitrator’s specific fee schedule is not a precondition to the appointment of an arbitrator.

[120] Pomerleau casts doubt on Mr. Farinha's alleged concern about the fees that Mr. Singleton proposed to charge. Mr. Wilson's evidence was that he viewed the usual range for an experienced commercial arbitrator with significant experience

arbitrating construction disputes as being in the range of $600 to $800 per hour. Pomerleau notes that many of the arbitrators proposed by 4HD were name partners of construction law firms with K.C. designations. Anyone with Mr. Farinha's experience in the construction industry would be aware of the sorts of fees an arbitrator of that experience and reputation would command.

[121] Pomerleau says that from October 2022 until February 2024, 4HD conducted itself as if Mr. Singleton had been appointed as arbitrator. To the extent it had concerns, 4HD failed to raise them for some 16 months and then did so only in response to Pomerleau's application to dismiss its claim.

[122] Pomerleau references what it says are two similar cases.

[123] In *Overberg v. Vector Aerospace*, 2018 ONSC 1720, the parties were party to a contract containing an arbitration clause. Notice of dispute was given in February 2017. In March 2017, counsel exchanged letters confirming that a Mr. Lax was acceptable as arbitrator. Conflict checks were obtained. Mr. Lax wrote to counsel with a draft arbitration agreement. There was an initial request by Vector to put the arbitration on hold, to which Overberg did not agree, and a pre-arbitration conference call was scheduled but adjourned. In about October 2017, Vector advised of concerns with respect to Mr. Lax as arbitrator and relied on the fact that no arbitration agreement had been finalized and signed, no timetable had been agreed to, nor had any procedural steps been taken. Overberg brought an application for a court order appointing Mr. Lax as sole arbitrator, which was granted, with Justice Dow noting at para. 20:

> [20] I conclude, as submitted by the applicants, the parties made an agreement to use Mr. Lax. Steps were taken to move forward not only by the applicants in delivering its claim but also by Mr. Lax in forwarding the draft Arbitration Agreement. In the face of the attempt by the respondent to resile from its agreement, the applicant has properly sought this court’s assistance under Section 6 of the *Arbitration Act, supra* and specifically to ensure the arbitration is conducted in accordance with the Commercial Agent Agreement between the parties.

[124] In *Foglia v. Coccimiglio*, 2013 ONSC 1114, the parties chose an arbitrator. Then, after a few months, the applicant raised concerns about the potential expense involved and suggested a different arbitrator. When the respondent would not agree to change arbitrators, the applicant applied for "directions" from the court with respect to the selection of the arbitrator. Justice Ellies concluded at paras. 51-54 and 56-57 that:

> [51] In my view, the arbitrator has been selected. It is now too late for the applicants to revoke their consent. Section 12 of the Act provides:
>
> > A party may not revoke the appointment of an arbitrator.
>
> [52] Nor is it open to the applicants to challenge the appointment of the arbitrator on the basis of his fees or the procedure to be followed at the arbitration. The Act provides very limited grounds upon which to challenge the appointment of an arbitrator. [Citing the Ontario equivalent to British Columbia s. 17]
>
> [53] The applicants have no concerns about bias on the part of the arbitrator or about his qualifications. Their concern is with fees and procedures. However, these are not grounds upon which a party may challenge the arbitrator. Even if they were, the Act further provides that such issues are to be resolved by the arbitrator himself. [Citing the Ontario equivalent to British Columbia s. 18]
>
> [54] Although the Act does not allow issues about fees or procedure to provide a basis for the removal of an arbitrator, once chosen, it does contain provisions to deal with the resolution of those issues. Section 20(1) of the Act requires that the procedure to be followed at the arbitration be determined by the arbitrator. It reads:
>
> > The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.
>
> …
>
> [56] Concerning the arbitrator's fees, s.55 provides that those fees shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred. It further provides that the arbitrator's account for fees and disbursements may be assessed in the same way that a solicitor's bill is assessed under the *Solicitors Act*.
>
> [57] For these reasons, no order should be made by this court dealing with the issues of the appointment of the arbitrator or the conduct of the arbitration, in my view.

[125] Pomerleau says that parties are not permitted to agree to an arbitrator, repeatedly make statements and take actions acknowledging that choice, and then seek to resile from that agreement. It says that 4HD had an obligation to raise any

objections in a timely manner. It accepted the pre-arbitration schedule and gave all indication that, although it was having difficulty meeting the deadlines, it intended to comply with it.

[126] In response to 4HD's reply submission with respect to s. 9.9 of the CCDC 40 – 2018 arbitration rules, Pomerleau notes that this position was not advanced before Mr. Singleton, nor at any time prior to 4HD's reply submission. In any event, Pomerleau says that s. 9.9 does not require the parties to sign a written retainer agreement before the arbitrator is appointed or that the appointment of an arbitrator is ineffective if not confirmed by way of a retainer agreement. As well, Pomerleau says that the written retainer contemplated by s. 9.9 is distinct from appointment. Pomerleau says that ss. 9.2, 9.4, 9.7, and 9.8 deal with the process of appointment and that s. 9.2 makes clear that appointment is effected by the parties' acceptance of a name proposed.

Reasonable Apprehension of Bias

[127] With respect to the question of a reasonable apprehension of bias, Pomerleau argues that the burden is on 4HD to establish the application of s. 58(1)(g) – that is, that "there are justifiable doubts as to the arbitrator's independence or impartiality." Section 58(3) clarifies that this means a real danger of bias on the part of the arbitrator conducting the arbitration. Pomerleau notes that, as discussed in *Octaform*, this is no different than the test for judicial bias as discussed in *Wewaykum*.

[128] Pomerleau notes that the total amount billed by Mr. Singleton to 4HD as its proportionate share of fees up to April 30, 2023, was $3,511.67. Pomerleau says that it is completely unreasonable to think that a small debt like this would displace the strong presumption of impartiality that an arbitrator is entitled to. More generally, Pomerleau submits that outstanding accounts receivable are not uncommon in the legal industry and are a part of doing business.

[129] As a matter of principle, Pomerleau submits that it cannot be that any party unhappy with an arbitrator could unilaterally bring about their removal simply by

refusing to pay their bills. Such an interpretation is contrary to the Act, which requires a "real danger of bias," s. 58(3), and expressly prevents a party from unilaterally revoking the appointment of an arbitrator, s. 15.

[130] Pomerleau submits that the emails sent by the collections manager of Mr. Singleton's law firm cannot possibly give rise to a reasonable apprehension of bias. Pomerleau says that the emails were sent by someone other than Mr. Singleton. They were polite and requested 4HD's attention to the matter, and there were only six communications.

[131] In any event, Pomerleau submits that even if there was a potential issue of bias, it was removed when Pomerleau agreed to pay the full amount of Mr. Singleton's invoices, reserving the right to seek recovery as part of its claim for costs.

[132] As well, Pomerleau submits that to the extent the emails from the collections manager could be said to give rise to a concern about bias, 4HD was aware of them in the fall of 2023 and failed to take any steps. 4HD was required by s. 58(4) of the Act to bring any challenge as to impartiality in accordance with the timelines set out in ss. 17 and 18 of the Act and failed to do so. Pomerleau relies on the comments of Justice Donald in *Eckervogt v. British Columbia*, 2004 BCCA 398, at para. 48 (applied in the arbitration context in *Octaform* at para. 52):

> [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.

[133] With respect to ss. 17 and 18, Pomerleau says that these provisions govern challenges to an arbitrator while an arbitration is ongoing, while s. 58 governs challenges brought after a final award. Pomerleau says that the test and the time limits for bringing such a challenge are the same, such that even if 4HD had filed a challenge prior to the final award, it would have led to the same result.

Enforcement of the Award

[134] Pomerleau submits that since there is no basis to set aside the arbitral award, this Court is required by s. 61(4) of the Act to recognize and enforce it. It submits that it has complied with all of the requirements set out in s. 61(3).

[135] To the extent that this Court wishes to exercise its discretion under s. 61(5) to stay recognition and enforcement of the Award, Pomerleau submits that any such stay order should be for a limited duration of 30 days and be conditional upon the deposit of $58,174.96 into court as security.

Analysis

Jurisdiction to Review the Arbitrator's Appointment and Award

[136] In my view, the portion of the award in which Mr. Singleton dealt with the question of whether he had been appointed is a ruling dealing with his jurisdiction. As such, it is a matter governed by the *Arbitration Act* and is thus caught by s. 4 of the Act – that is, this Court may only intervene where so provided in the Act.

[137] Section 14 deals with appointment of arbitrators. It gives the court jurisdiction to appoint an arbitrator under certain limited circumstances: s. 14(5). However, unless in the context of a s. 14 application, it does not provide jurisdiction for the court to either comment on whether a particular arbitrator has been duly appointed or review the jurisdictional ruling of an arbitrator.

[138] I agree with Pomerleau that none of the grounds set forth in s. 58 are applicable. With respect to s. 58(1)(d), it is my view that the question of whether "the composition of the tribunal was not in accordance with the Act" does not extend to questions of reviewing whether the parties had agreed to the appointment of an arbitrator. With respect to s. 58(1)(f), I agree that for the most part, it was 4HD giving notice both of the arbitration, and if I find it to be effective, the actual appointment of Mr. Singleton as arbitrator.

[139] Thus, it is my view that I do not have jurisdiction under either of the provisions relied on by 4HD to consider whether Mr. Singleton was, in fact, appointed as arbitrator.

[140] I am of the view that, subject to the comments below, s. 23(7) would give me jurisdiction to review Mr. Singleton's ruling that he had been appointed. I appreciate Pomerleau's objection that this ground had not actually been pleaded. Given the conclusion I reach on the factual issue, however, I do intend to proceed to consider this question after commenting briefly on s. 23.

[141] It is my view that the portion of Mr. Singleton's award in which he concluded that he was appointed is a ruling on his own jurisdiction as arbitrator. Such a ruling is within his jurisdiction pursuant to s. 23(1). 4HD's challenge to Mr. Singleton's appointment was, at least arguably, out of time. However, I will assume that Mr. Singleton chose, pursuant to s. 23(5), to allow the plea of lack of jurisdiction to be advanced despite the late notice.

[142] I am going to proceed on the basis that because Mr. Singleton chose to deal with the question of his jurisdiction first in the award, that it can be considered a "preliminary question." It does seem to me that there is an argument to be made under the Act that the reviewability of such a ruling pursuant to s. 23(7) could turn on whether it was part of a final award, as distinct from two separate documents issued in succession (even in quick succession). This question was not argued in any depth, however, and my decision to proceed to consider the merits should not be seen as a considered ruling on that question.

[143] In *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428, Justice Marchand, as he then was, considered the appropriate standard of review under a similarly worded provision of British Columbia's *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233. He confirmed at para. 34 that the standard of review is correctness. See, to similar effect, *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894, at paras. 122-125.

[144] I will thus consider the question of whether Mr. Singleton was appointed based on this tentative view that I have jurisdiction to do so on a correctness basis. I begin with the fundamental principle of contract law that the court will consider the actions of the parties from an objective point of view. In the words of Professor Waddams in *The Law of Contracts* (5th ed.) at p. 103 cited, with approval in *UBS Securities Canada Inc. v. Sands Brothers Canada, Ltd.*, 2007 ONCA 405, at para. 2:

> The principal function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee. This is not, however, to say that the will of the promisor is irrelevant. Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an inquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee.

[145] This is significant in the present case as 4HD says that it never actually intended to appoint Mr. Singleton as arbitrator. However, there is a real absence of evidence as to that subjective intention ever having been communicated.

[146] In this case, SCC 8.2.5 required the parties to resolve their disputes through arbitration if either party gave notice to do so. 4HD gave that notice. The applicable arbitration rules then required the parties to make efforts to reach agreement on a single arbitrator, with alternative processes if the parties did not agree. The question is whether, based on the statements and conduct of the parties, a reasonable observer would conclude that they did so agree.

[147] In my view, that agreement can be found in a series of exchanges from June 9 to September 12, 2022. Those include:

a) Pomerleau's email of June 20, 2022, saying that Pomerleau agreed to one of the arbitrators proposed by 4HD, Mr. Singleton.

b) 4HD's email of August 18, 2022, to Mr. Singleton advising that the parties "have agreed to select you to arbitrate this matter."

c) Mr. Singleton's email of August 19, 2022, raising conflict issues but advising that if those were resolved, he "would be pleased to act as arbitrator."

d) The emails from Pomerleau on August 30, 2022, and from 4HD on September 12, 2022, providing the requested consents in respect of the conflict issues that had been raised.

[148] In Ms. Nazarali's email on September 12, 2022, she noted the "parties' agreement to the parameters set forth" and proposed a conference call to discuss procedural matters. That, of course, is what the applicable rules prescribe as the next step after an arbitrator has been appointed. A conference call occurred and led to a series of directions from Mr. Singleton as to procedural matters.

[149] In my view, on an objective view, the conclusion is inescapable that the parties had agreed to Mr. Singleton as arbitrator.

[150] That makes it unnecessary to resolve the unfortunate differences between the recollections of the lawyers as to any discussions they may or may not have had in the spring of 2023.

[151] 4HD relies on the draft terms of reference agreement that Mr. Singleton circulated in October 2022 to argue that there had not actually been agreement on Mr. Singleton as arbitrator. In my view, that document, clearly marked "draft", did not reopen the question of whether Mr. Singleton had been appointed. He clearly had. Its purpose was to formalize what had already been done, not to return the parties to a state of uncertainty.

[152] As noted above, 4HD also made submissions based on s. 9.9 of the CCDC 40 – 2018 arbitration rules to argue that the appointment of an arbitrator is not complete until an agreement substantially in the form found in Appendix B to those rules is signed. I do not accept that argument. I note that several of the items that are required to be in the Appendix B form of agreement are matters that are required by s. 10.1 of the rules to be the subject matter of discussions at a meeting within a few days after the appointment of the arbitrator. In my view, to the extent that the

form of agreement at Appendix B provides confirmation of the arbitrator's appointment, it is, like the draft terms of reference agreement circulated by Mr. Singleton, intended to be confirmatory of what has already been agreed to by the parties. I agree with Pomerleau that on a proper interpretation of s. 9.9 in the context of the CCDC 40 – 2018 arbitration rules, a distinction is made between "retainer" and "appointment."

[153] I will deal briefly with the question of certainty. 4HD argued that there was never agreement on a fundamental term, i.e., the compensation to be paid to Mr. Singleton. In my view, s. 55 of the *Arbitration Act* provides a complete answer to that assertion. It provides that in the absence of agreement, an arbitrator is entitled to be paid at the fair market value of the services provided, and it provides a mechanism for that fair value to be determined through a review. This overcomes any issue as to the certainty of terms with respect to Mr. Singleton's appointment.

[154] While not a factor in my decision, it does seem to me that had 4HD truly been concerned about the amount of arbitration fees, it would have been open to it to make inquiries as to Mr. Singleton's hourly and daily rates prior to advising Mr. Singleton and Pomerleau that it had “agreed to select you”.

[155] In my view, to the extent that it is open to me to review Mr. Singleton's ruling as to jurisdiction on a correctness standard, and considering the additional evidence placed before me that was not before Mr. Singleton, I would come to the same conclusion – that is, that Mr. Singleton was appointed arbitrator in September 2022.

Reasonable Apprehension of Bias

[156] As noted above, the question to be addressed with respect to reasonable apprehension of bias is whether “an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that it was more likely than not that the arbitrator, consciously or unconsciously, did not decide fairly.”

[157] In my view, this test must be considered in light of the three-party relationship inherent in any commercial arbitration. The two parties to the dispute agree to submit their dispute to a third party, an independent decision-maker who will, in return for a fee, decide the dispute for them. It is a fundamental aspect of commercial arbitration that the arbitrator will fulfill that role in return for a fee, and that the parties to the arbitration will incur liabilities to the arbitrator.

[158] In my view, the submission that any arbitrator who is owed fees by a party to the arbitration loses the ability to decide the matter fairly is neither realistic nor practical. It does not reflect the reality that the parties have chosen someone they believe could act impartially, knowing that the person would be charging fees to them.

[159] Nor is it realistic to say that this issue could be overcome by a rule that commercial arbitrators must always seek deposits in advance of performing any work and should stop work immediately should either party not pay the deposit. While seeking deposits may be good practice, the impracticality of this proposed approach and the mischief that it could cause in the event one party to an arbitration had a change of heart is apparent.

[160] In this case, the parties approached a senior lawyer with years of experience in commercial arbitration, particularly with respect to construction disputes. They submitted to him a dispute in which the amount in issue was in the range of $4.5 million to $5 million. The likely overall costs of arbitration, were the full arbitration to proceed, would likely have been substantial.

[161] I do not accept that in circumstances like this, the fact that some $3,511.67 of fees were outstanding would constitute the sort of "serious grounds" referred to in *Wewaykum*.

[162] I have reviewed the emails sent by the collections manager at Mr. Singleton's firm. In my view, they are respectful and not at all out of line. They ceased after it became clear that 4HD was not going to respond. Apart from the fact that these

emails are not from Mr. Singleton himself, I see nothing in these emails to found any realistic concerns about bias.

[163] Finally, I have considered Mr. Singleton's letter to the parties of March 1, 2024. I note that Mr. Singleton, in the letter, was providing the documents that he considered to be the factual record (to the extent he was aware of it) underlying the understanding he had clearly been operating under for the previous 18 months – that he was the arbitrator. It was appropriate for him to send that, particularly given that 4HD's then counsel had not been its counsel in 2022. The fact that Mr. Singleton had a preliminary view is perhaps not surprising given that he had been acting as if he was the parties' arbitrator for 18 months. However, he also made it clear that the question of his appointment was "a matter for counsel to argue," and he invited submissions on it.

[164] In my view, this letter establishes that Mr. Singleton was maintaining an open mind and taking steps to ensure there could be a fair hearing on the merits of the issue of his appointment as arbitrator.

[165] I conclude that 4HD's challenge on grounds of a reasonable apprehension of bias does not meet the applicable standard, and the application to set aside the Award and remove Mr. Singleton as arbitrator must be dismissed.

Enforcement of the Award

[166] 4HD resisted enforcement of the Award, primarily on the basis of its challenges to Mr. Singleton's appointment and its challenges with respect to bias. Those arguments have been dismissed.

[167] Enforcement of awards is governed by s. 61 of the *Arbitration Act*. In my view, Pomerleau has met all the technical requirements of s. 61(3), and none of the factors set out in s. 61(4) that might prevent recognition have been established.

[168] There was some discussion in submissions as to whether there should be a stay of enforcement of the order pursuant to s. 61(5) on the basis that 4HD's

application for leave to appeal remains pending in the Court of Appeal, and if so, on what terms. 4HD, through its counsel, indicated that it would not be interested in a stay on terms that included posting of security, and that if unsuccessful on these petitions, it would prefer to move quickly in respect of proceedings in the Court of Appeal.

Conclusion

[169] For the reasons set out above:

a) The petition of 4HD is dismissed.

b) With respect to proceeding S242589, I would grant an order recognizing and enforcing the Award issued by Mr. Singleton.

[170] Ordinarily, the successful party would be entitled to costs on Scale B. Is there any reason to depart from that in the circumstances?

[SUBMISSIONS]

[171] Costs to Pomerleau on Scale B.

[SUBMISSIONS]

[172] I would add to my order a direction pursuant to s. 61(5) of the Act that enforcement of the award is stayed for 45 days, subject to, as a condition of that stay, 4HD within one week posting security the amount of $58,174.96, by paying that amount into court. If the parties agree to terms for the funds to be held in a lawyer's trust account instead of being paid into court, that is fine as well.

[SUBMISSIONS]

[173] With respect to the specific wording of a formal order, I think it would be important to look at precedents for past orders to enforce arbitration awards. I am concerned about specifying the wording without knowing the usual practice. If the

parties are unable to agree on the proper wording, they may arrange to return before me at 9:00 am one morning.

"Veenstra J."