COURT OF APPEAL FOR ONTARIO

CITATION: Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82
DATE: 20250204
DOCKET: COA-23-CV-1332

Huscroft, Trotter and Dawe JJ.A.

BETWEEN

Vento Motorcycles, Inc.

Applicant (Appellant)

and

The United Mexican States

Respondent (Respondent)

John Terry and Myriam Seers, for the appellant

Vincent DeRose, Jennifer Radford and Stephanie Desjardins, for the respondent

Heard: November 4, 2024

On appeal from the judgment of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated October 23, 2023, with reasons reported at 2023 ONSC 5964.

Huscroft J.A.:

OVERVIEW

[1] Vento Motorcycles Inc. (“Vento”) brought a claim against the United Mexican States (“Mexico”) under Chapter 11 of the North American Free Trade Agreement (“NAFTA”). The parties established a tribunal to hear the claim.

[2] Three arbitrators were appointed to the Tribunal, each of whom provided declarations of their independence and impartiality. The arbitration took place in November of 2019 and the Tribunal issued its award on July 6, 2020. The Tribunal held, unanimously, that Mexico did not breach its obligations under NAFTA and dismissed Vento’s claim.

[3] Subsequently, Vento learned that Mexican officials had been communicating with the Mexican nominee to the Tribunal, Mr. Hugo Perezcano, during the arbitration. Among these officials was Mr. Orlando Pérez Gárate, lead counsel for Mexico on the arbitration and a senior Mexican trade official. At first, he invited Perezcano to apply for Mexico to appoint him to future arbitration panels under different trade agreements. Eventually, Pérez confirmed Perezcano’s appointments.

[4] Vento brought an application to set aside the award. The application judge found that Perezcano’s conduct during the arbitration gave rise to a reasonable apprehension of bias but refused to set aside the Tribunal’s award. In her view, the apprehension of Perezcano’s bias did not undermine the reliability of the Tribunal’s

award, nor did it result in real unfairness or practical injustice. The application judge found, further, that the seriousness of the breach and the potential prejudice from rehearing the arbitration also supported the exercise of her discretion not to set aside the award.

[5] Vento appeals. In response, Mexico does not challenge the finding that there was a reasonable apprehension of bias, but argues that the application judge properly exercised her discretion to decline to set aside the Tribunal's award.

[6] I conclude that the application judge erred in failing to set aside the Tribunal's award. I would allow the appeal and set aside the award for the reasons that follow.

BACKGROUND

[7] Vento is a United States-based manufacturer of motorcycles. It alleged that Mexico attempted to drive it out of the Mexican motorcycle market by denying preferential import tariffs to motorcycles it assembled in the United States. This impaired and ultimately destroyed Vento's business for the sale and marketing of motorcycles in Mexico under a joint venture agreement it had with MotorBike, S.A.

[8] Vento brought a claim under Chapter 11 of NAFTA in 2017 – a claim it valued between $658 million and $2.748 billion USD – and the parties initiated the arbitration process set out in the agreement. Each party appointed one member to the arbitration tribunal. Vento appointed Professor David Gantz and Mexico

appointed Perezcano. The president of the Tribunal, Dr. Andrés Rigo Sureda, was appointed by the International Centre for Settlement of Investment Disputes ("ICSID").

[9] In its Procedural Order No. 1, the Tribunal established Toronto as the place of arbitration and set out the parties' agreement as to matters including the examination of witnesses and the submission of written materials. The arbitration hearing proceeded over five days in November of 2019. The Tribunal issued its award on July 6, 2020, holding unanimously that Mexico did not breach its NAFTA obligations and dismissing Vento's claim.

The communications giving rise to the bias allegation

[10] After the release of the Tribunal's award, Vento learned that Perezcano had, on several occasions, communicated with Mexican officials during the arbitration process – specifically, with Pérez, who was both lead counsel for Mexico in the arbitration and Director General of the Legal Office of International Trade at the Subsecretaría de Comercio Exterior.

[11] Perezcano initiated the communications shortly after Mexico filed its Counter-Memorial, several months before the hearing took place. The communications are summarized below:

> **January 2019** – Perezcano calls Pérez, congratulates him on his new position in Mexico's government, and wishes him luck.

May 13, 2019 – After Vento filed its Reply and before Mexico filed its Rejoinder, Pérez emails Perezcano. He invites Perezcano to provide his CV to be presented as one of Mexico's candidates for a roster of 15 arbitrators eligible to serve as Chairpersons of arbitral panels under the Comprehensive and Progressive Agreement on Trans-Pacific Partnership ("CPTPP"). Pérez includes his personal email address "[t]o avoid spam problems", and invites Perezcano to ask questions or seek clarification.

May 16, 2019 – Perezcano writes to thank Pérez for his email and confirm his willingness to serve on the list of arbitrators, enclosing his CV and expressing that he is "honored and grateful".

Nov 18-22, 2019 – The panel hears the arbitration.

March 17, 2020 – Mr. Antonio Nava Gómez, Area Director of the Legal Office of International Trade, sends an email to Perezcano, copying Pérez. At Pérez's instruction, the email invites Perezcano to submit his CV as a candidate for appointment by Mexico to the list of panelists eligible to hear disputes under CUSMA's[1] dispute settlement mechanism. The email also confirms Perezcano's appointment to the roster of arbitrators under the CPTPP.

[1] CUSMA is the name by which NAFTA's successor agreement is known in Canada.

March 23, 2020 – Perezcano replies to Nava, copying Pérez, enclosing his CV and thanking Mr. Nava for considering him.

July 2, 2020 – Nava sends an email to Perezcano, copying Pérez, informing him that he has been appointed to the roster of arbitrators under CUSMA.

Perezcano replies to Nava, copying Pérez, thanking him for the email and expressing his honour to be on the list.

Perezcano and the other two arbitrators sign the Tribunal's award that same day.

July 6, 2020 – The Tribunal issues its award.

The governing legislation

[12] The *UNCITRAL Model Law on International Arbitration* (the "Model Law"), adopted into Ontario law by the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sched. 5, establishes and delimits judicial authority to set aside an arbitration award. The court may set aside an award only if one of the enumerated errors is established. Article 34(2) of the Model Law is the governing provision, and in particular subsection (2)(a)(iv):

> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid

> under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law. [emphasis added]

The application judge's decision

[13] The application judge found that Perezcano's conduct gave rise to a reasonable apprehension of bias. Although appointment to the rosters of panelists eligible to hear disputes did not involve any direct financial compensation or amount to an actual appointment to a tribunal, it was still a "valuable professional opportunit[y]" that enhanced Perezcano's professional reputation:

> From the perspective of an informed person, Mr. Perezcano had an incentive to please Mexico after he was informed that he was being considered for these appointments, pending the confirmation that he had been appointed. …

> As a result of Mexico holding out the possibility of the appointments to the rosters during the arbitration, I find that an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that Mr. Perezcano, whether consciously or unconsciously, would have a "leaning, inclination bent or predisposition towards" Mexico, or that he could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 58 … and General Standard 2 of the *IBA Guidelines*.

As a result, Perezcano had a duty to disclose what the application judge described as Mexico's "offers" during the arbitration. She found that these offers were "sufficient in themselves" to give rise to a reasonable apprehension of bias, and that the apprehension of bias was compounded by the failure of both Perezcano and Mexico to disclose the offers and the related communications during the arbitration.

[14] Having found a reasonable apprehension of bias, the application judge considered whether the Tribunal's award should be set aside. She described the apprehension of bias as a "procedural error" and, citing this court's decision in *Popack v. Lipszyc*, 2016 ONCA 135, 129 O.R. (3d) 321, stated that the essential question was whether this error produced real unfairness or real practical injustice. She adverted to a non-exhaustive list of factors relevant to that question, including the seriousness of the breach, its potential impact on the result, and the potential

prejudice arising from the need to conduct the arbitration again if the award were set aside.

[15] The application judge explained that potential impact of the breach was the most important consideration because Perezcano was part of a three-member panel. Relying on the Supreme Court's decision in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, she held that the reasonable apprehension of bias concerning Perezcano did not taint the Tribunal. The application judge noted the strong presumption of the impartiality and independence of those other members of the Tribunal and found that no reasonable person would conclude that they were biased or tainted by Perezcano's participation on the Tribunal. Thus, she concluded that the reasonable apprehension of bias concerning Perezcano did not undermine the reliability of the Tribunal's award or produce real unfairness or real practical injustice.

[16] The application judge added that, although these factors were less important considerations, the seriousness of the breach and the potential prejudice from the need to redo the arbitration also supported the exercise of her discretion not to set aside the award. She noted that nothing in Perezcano's conduct during the arbitration hearing itself gave rise to a reasonable apprehension of bias. Further, there was no evidence he had any *ex parte* communications with Mexico about the arbitration, and the email communications between Perezcano and Pérez were

"generic" in nature. As well, roster appointments are announced publicly according to a process mandated by the applicable trade agreements, and no financial compensation attaches to them. Finally, the application judge noted that significant prejudice could flow from ordering the parties to redo the arbitration. The arbitration took five years to complete and cost $625,000 USD, plus legal fees. The events in dispute occurred 20 years prior. Requiring the parties to redo the arbitration would result in significant wasted time, resources, and fees, and raised concerns about the impact of the considerable passage of time on witnesses' memories.

[17] In the result, the application judge declined to set aside the Tribunal's award and dismissed the application.

ISSUES ON APPEAL

[18] Vento raises two issues on appeal:

1. Did the application judge err in finding that Vento was able to fully present its case? This issue concerns a procedural ruling denying Vento's request to call a reply witness at the hearing.
2. Did the finding of a reasonable apprehension of bias require the application judge to set aside the award? On this issue, Vento seeks to admit fresh evidence that since the application judge's decision, Perezcano has been appointed to serve as a panelist in a dispute under CUSMA.

[19] The second issue was the focus of oral argument and is determinative of the appeal, regardless of the fresh evidence.

[20] At the outset, it is important to note that Mexico does not challenge the finding that Perezcano was subject to a reasonable apprehension of bias. It argued this ground of appeal solely on the basis that the application judge properly exercised her discretion in declining to set aside the Tribunal's award despite her finding on the bias issue.

[21] As I will explain, the application judge erred in failing to set aside the Tribunal's award. Given that the award must be set aside, I will not address the first issue.

DISCUSSION

[22] I will review the requirements of natural justice briefly before discussing procedural fairness in the context of commercial arbitration.

The two pillars of natural justice

[23] The requirements of procedural fairness flow from the pillars of natural justice. The first pillar, *audi alteram partem*, requires decisionmakers to hear both sides before deciding a dispute. In essence, it requires that a fair hearing be provided before a decision is made. At its most basic level, a fair hearing requires notice of the decision that is to be made and an opportunity to make submissions to the decisionmaker. The second pillar, *nemo iudex in sua causa,* precludes a

person from being judge in their own cause. In essence, it requires that a decisionmaker be impartial or unbiased – someone without an interest in or connection to the dispute, who will fairly consider the parties' positions before deciding.

[24] The two pillars of natural justice – compendiously described as "procedural fairness" in a wide range of judicial and administrative applications – are basic features of the common law, so important that their existence goes without saying.

[25] Depending on the nature of the proceedings and the decision to be made, and taking into account the procedural choices of the decisionmaker, a fair hearing may require relatively minimal procedural protection. But it may also require something much more substantial, approximating the protections accorded in a judicial proceeding including disclosure, a right to counsel, an oral hearing and, ultimately, a decision with reasons. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The requirements of a fair hearing are tailored not only to protect litigants' interests but also to ensure that those subject to state authority are treated with respect. Thus, a failure to provide a fair hearing may be caused by procedural defects that are relatively minor in nature, or by more significant defects that affect the substantive decision reached.

[26] There is considerable room for disagreement as to what constitutes bias in particular circumstances, not least because actual bias is difficult to establish. It is

usually impossible to know what an adjudicator thinks and, as a result, whether or not they can (or did) act impartially in deciding a particular dispute. Thus, Canadian law takes an objective approach to establishing bias: the question is not whether a decisionmaker is in fact biased but, instead, whether there is a reasonable apprehension that the decisionmaker is biased.

[27] This approach asks whether "an informed person viewing the matter realistically and practically … [w]ould think that it is more likely than not that [the decisionmaker], whether consciously or unconsciously, would not decide fairly": *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J. (dissenting in the result). This test applies to a wide range of decisionmakers in public and private law, including both statutory and private consensual adjudicators. See *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc*., 2024 ONCA 839, at paras. 127-32. It gives effect to the purpose that underlies the reasonable apprehension of bias concept, captured eloquently by Lord Hewart C.J.'s famous aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256 (E.W.H.C.), at p. 259.

[28] Regardless of what constitutes a reasonable apprehension of bias in particular circumstances, it is no minor procedural defect. A reasonable apprehension of bias means that it is objectively reasonable to think an adjudicator

would not decide a dispute fairly. It is a finding that undermines the integrity and legitimacy of the adjudicative process. A reasonable apprehension of bias is necessarily a major violation of procedural fairness.

Remedying a breach of procedural fairness

[29] The common law has historically been strict in response to a breach of procedural rights. A failure to provide a fair hearing has resulted in the quashing of the substantive decision, regardless of the result that might otherwise have obtained. It has never been necessary for an applicant seeking relief to establish that the outcome of the relevant decision would – or even might – have been different but for the unfair hearing procedure. Procedural fairness is "an independent, unqualified right" rooted "in the sense of procedural justice which any person affected by an administrative decision is entitled to have"; courts may not "deny that right and sense of justice on the basis of speculation as to what the result might have been": *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661.

[30] Exceptions are rare and demonstrate the strength of the rule. Courts will sustain decisions marred by procedural errors only in highly unusual circumstances. For example, in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, the Supreme Court held that Mobil Oil had established a breach of procedural fairness but declined to quash the

decision at issue because its disposition of the legal question before it *guaranteed* that Mobil Oil would be unsuccessful on a rehearing. The court emphasized that "the *apparent* futility of a remedy will not bar its recognition" but explained that circumstances are different when the answer to a legal question is inevitable: *Mobil Oil*, at p. 228 (emphasis added).

[31] The rule against bias is stricter still. No matter what gives rise to a reasonable apprehension of bias, once the finding is made the adjudicator is disqualified. If a decision has already been reached, the decision is void. As Cory J. explained on behalf of a unanimous Supreme Court of Canada, "it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established". Moreover, "[t]he damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void": *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623, at p. 645. This principle has been reaffirmed by this court. See, e.g., *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856, 272 O.A.C. 177, at para. 64.

[32] This approach reinforces the seriousness of an apparent failure of impartiality. No one whose rights, interests, or privileges are at stake can be required to accept a decision made by an adjudicator whose ability to decide fairly is – for whatever reason – reasonably in doubt. The importance of the rule against

bias transcends the interests of the parties to a particular dispute: bias is intolerable in any system that aspires to the rule of law. The finding of a reasonable apprehension of bias requires the disqualification of an adjudicator and the nullification of any decision they have made. Nothing less will do.

[33] Of course, courts have the inherent authority to control their own processes and to protect them from abuse. They may refuse to entertain an allegation of bias if, for example, the applicant for relief has not acted conscientiously by raising the bias allegation at the earliest opportunity. In these circumstances the court may find that the applicant has waived the protection of the rule against bias by raising it for tactical purposes. But the common law does not establish a discretion to refuse to remedy a reasonable apprehension of bias because the finding is for some reason not considered sufficiently serious, or because it would be somehow inconvenient to provide the required remedy. A finding of a reasonable apprehension of bias is necessarily serious and must be made in the knowledge of the result that follows: the adjudicator is disqualified and the substantive decision is void.

Procedural protection in commercial arbitration

[34] Commercial arbitration is designed to operate outside the judicial system. It involves sophisticated parties, represented by counsel, who choose the arbitrators that will decide their dispute and the procedures pursuant to which it will be

decided. See, generally, the helpful discussion in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48, [2021] 2 All E.R. 1175, at paras. 56-62.

[35] Although the courts have a role in overseeing commercial arbitration, that role is strictly limited by art. 34(2) of the Model Law to matters that are, in general, not concerned with the substance of the arbitration award. For example, an award may be set aside because of a party's incapacity or the invalidity of the arbitration agreement itself (art. 34(2)(a)(i)), or because of a failure of notice or breach of procedural fairness (art. 34(2)(a)(ii)). In exceptional circumstances the court may consider the substance of an award, but only for the limited purpose of ensuring that the tribunal did not go beyond the issues the parties agreed to submit to arbitration (art. 34(2)(a)(iii)). As this court has emphasized repeatedly, courts have no authority to scrutinize an award for an error of law that is otherwise immune from appeal or review and use any such error as a pretext to set aside an award on the basis of "jurisdictional error". See *Clayton v. Canada (Attorney General)*, 2024 ONCA 581, leave to appeal to S.C.C. requested, 41473; *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, leave to appeal to S.C.C. refused, 40546; and *Alectra Utilities Corporation v. Solar Power Network Inc*., 2019 ONCA 254, 145 O.R. (3d) 481, leave to appeal to S.C.C. refused, 38665.

[36] Although art. 34(2)(a) does not refer specifically to bias, Mexico accepts that the court can set aside an award on the basis of a reasonable apprehension of bias. This flows from art. 34(2)(a)(iv), which states that an award may be set aside

if “the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties”. This provision gives effect to the requirement in art. 18 of “equal treatment” of the parties in the arbitration process: an arbitral procedure tainted by bias fails to treat the parties equally, and so is not in accordance with their agreement. See also *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604, at para. 33; and *Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827, at para. 29, rev’d on other grounds, 2024 ONCA 839.

The effect of fair hearing errors in commercial arbitration

[37] Not only is the court’s authority to set aside an arbitration award strictly limited by art. 34(2); that authority must be exercised having regard to the unique circumstances of commercial arbitration. Procedural infirmities or irregularities in commercial arbitration – fair hearing errors – do not necessarily raise the same concerns as they do in the exercise of public authority. Countervailing concerns in the context of commercial arbitration limit the circumstances in which it is appropriate to set aside an award.

[38] This court summarized the Canadian approach to setting aside arbitration awards on the basis of fair hearing breaches in commercial arbitration in *Popack*. Courts are to engage in what is essentially a balancing exercise, considering both “the extent that the breach undermines the fairness or the appearance of fairness

of the arbitration and the effect of the breach on the award itself": *Popack*, at para. 31.

[39] The need for finality supplies the rationale for taking this approach. If, as at common law, every fair hearing breach – no matter how minor or inconsequential – were treated as a sufficient basis for voiding an arbitral award, the finality of arbitration awards would be compromised severely. Thus, courts will interfere only where a fair hearing breach can be shown to have affected the substantive fairness of the hearing: *Rhéaume v. Société d'investissements l'Excellence inc.*, 2010 QCCA 2269, [2011] R.J.Q. 1, at para. 61. The same kind of balancing is reflected in New Zealand and Australian law, and the same rationale underpins its deployment: *Kyburn Investments Ltd. v. Beca Corporate Holdings Ltd.*, [2015] NZCA 290, [2015] 3 N.Z.L.R. 644, at para. 42; *TCL Air Conditioner (Zhongshan) Co. v. Castel Electronics Pty. Ltd*., [2014] FCAFC 83, 232 F.C.R. 361, at para. 109.

[40] The balancing exercise contemplated in *Popack* emphasizes the instrumental purpose of the protection afforded by art. 34(2): fair hearing procedure is a means to an end – a fair hearing and a fair decision – rather than an end in itself. The dignitarian concern that underlies fair hearing procedural requirements in public law proceedings is not present in commercial arbitration. As Doherty J.A. put it, "[w]hatever label is placed on the procedural error, and whichever subsection of art. 34(2) is invoked, the essential question remains the same – what did the

procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness of the process?”: *Popack*, at para. 45.

[41] Although this language is ostensibly broad, it does not mean that *every* type of breach falling within art. 34(2) can be balanced away. *Popack* was concerned with a relatively minor fair hearing breach – an *ex parte* meeting between the tribunal and a prior arbitrator without notice to the parties – that clearly did not affect the outcome of the arbitration. The appellants sought to classify this fair hearing error as a breach of public policy under art. 34(2)(b)(ii), and this was the context in which Doherty J.A. stated that the label placed on the mistake did not matter. He recognized that some procedural breaches are more important than others. “It is clear from the case law”, he explained, “that the scope of the discretion under art. 34(2) is significantly affected by the ground upon which the award could be set aside”: para. 30. Thus, although courts may exercise their discretion to uphold an arbitral award despite breaches of the fair hearing requirement, it does not follow that they enjoy the same discretion in respect of more significant breaches, and in particular in respect of a reasonable apprehension of bias.

The effect of bias in commercial arbitration

[42] It is important to reiterate that a reasonable apprehension of bias is no minor procedural breach. It is a finding that the integrity and legitimacy of an adjudicative process have been compromised irreparably. It cannot be balanced away on the

basis that it is not serious; that it is thought to have had little impact on the result; or that it would be inconvenient and costly to rehear the arbitration if the award were set aside. A finding of a reasonable apprehension of bias means that it is objectively reasonable to conclude it is more likely than not that a dispute would not be decided fairly. It disqualifies an adjudicator in public law proceedings, and I see no reason why a different result should follow in the context of commercial arbitration.

[43] Nothing in art. 34(2) nor in the nature of commercial arbitration requires a different result. Nor does the well-established principle of judicial restraint in arbitration proceedings. That principle limits judicial intervention to matters that are, in general, not concerned with the substance of the arbitration award. It does so out of respect for the parties' choice to submit their disputes to arbitration. But respect for that choice neither requires nor justifies a decision compelling the parties to accept a decision made by an adjudicator subject to a reasonable apprehension of bias.

The bias of one panel member taints the decision of the entire panel

[44] There is no doubt that a commercial arbitration award would properly be set aside if it were rendered by a single arbitrator whose conduct was found to give rise to a reasonable apprehension of bias. Does it make a difference that Perezcano was one of three arbitrators on the Tribunal?

[45] The application judge concluded that it did, as it affected the potential impact of what she described as a “procedural error”. She noted that the parties did not refer to any cases dealing with the question but concluded, based on *Wewaykum*, that the reasonable apprehension that one member of a panel is biased does not necessarily “taint” the award and the entire panel. It is unfortunate that the application judge did not have the benefit of fuller argument on the matter.

[46] The decision to set aside an award does not depend on a demonstration that the participation of the disqualified member affected the outcome – that the disqualified member cast the deciding vote in a split decision. On the contrary, the bias of one member taints the tribunal. The rationale is plain: it is impossible to know whether – or to what extent – the participation of a biased member affected a panel’s decision. It cannot be left to conjecture, nor can it be ignored by assuming that the presumed impartiality and independence of the other two members of the panel rendered it harmless. The parties to an arbitration are entitled to an independent and impartial tribunal, not simply the decision of a quorum of panel members who are unbiased.

[47] This approach can be traced at least to the 1963 decision of McRuer C.J.H.C. in *R. v. Ontario Labour Relations Board; Ex parte Hall* (1963), 39 D.L.R. (2d) 113 (Ont. H.C.), at pp. 117-18, citing *Frome United Breweries Co. v. Keepers of the Peace & Justices for County Borough of Bath*, [1926] A.C. 586 (H.L.), at p. 591. The British Columbia Court of Appeal endorsed McRuer C.J.H.C.’s approach

in *R. v. B.C. Labour Relations Board, Ex. p. International Union of Mine, Mill & Smelter Workers* (1964), 45 D.L.R. (2d) 27 (B.C. C.A.), at p. 29, stating that it is "clear that the decisions of a tribunal or board consisting of more than one member will be vitiated if the circumstances establish a real likelihood that any member participating in the decision would be biased in favour of one of the parties".

[48] This principle, sometimes described as "poisoning the well", was endorsed by Esson J.A. in *Haight-Smith v. Kamloops School District No. 34* (1988), 51 D.L.R. (4th) 608 (B.C. C.A.), at p. 614, and by Rothstein J. (as he then was) in *Sparvier v. Cowesses Indian Band (T.D.)*, [1993] 3 F.C. 142, at p. 166. Writing in 2001, David J. Mullan summarized the law as follows: "[a] reasonable apprehension of bias in one member of a tribunal is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations. Mere presence is generally enough": *Administrative Law* (Toronto: Irwin Law, 2001), at p. 131.

[49] This principle is also well established in English law, even where the finding of bias concerns a member of a judicial, as opposed to an arbitral, panel. See *In re Medicaments and Related Classes of Goods (No 2)*, [2001] EWCA Civ 1217, [2001] 1 W.L.R. 700, at para. 99, endorsed by the Judicial Committee of the Privy Council in *Stubbs v. The Queen*, [2018] UKPC 30, [2019] A.C. 868, at para. 33. As that court explained, the bias of a single member necessarily vitiated a panel's decision: "the whole point of the appeal was that three judges should consider the

issues", and "[t]he mutual influence of each member of the court over the others necessarily means that if any of them was affected by apparent bias the whole decision would have to be set aside".

[50] Vento cites several annulment decisions under the ICSID Convention in support of this position. I appreciate that such decisions may be relevant, but the citation of foreign authority from non-common law jurisdictions is fraught with difficulty. The court has no way of knowing whether these decisions are representative of the law of foreign jurisdictions or anomalous. Moreover, the decisions are not easily accessible in any event: Some of them are not available in English while others are cited in translated, excerpted form.

[51] There is no need to rely on these cases and I will not review them here. The principle they are said to stand for is well established in Canadian law: The participation of a biased member requires the decision to be set aside regardless of the unanimity of the panel.

[52] This conclusion is not in tension with Ontario's responsibility as a venue for international arbitration. On the contrary, it reinforces the integrity of the Canadian legal system and, relatedly, the integrity of the arbitration process. Finality and efficiency are important goals, but they are not to be achieved at the cost of an impartial hearing.

Wewaykum does not change the law

[53] Mexico relies on the Supreme Court's decision in *Wewaykum* to support its argument that the unanimity of the panel precluded a finding that it was tainted. In my view, *Wewaykum* is not relevant to the decision in this case.

[54] *Wewaykum* involved a challenge to a decision of the Supreme Court in which Justice Binnie participated. The appellants argued that a remote connection he had to the appeal over 15 years earlier in his capacity as Associate Deputy Minister of Justice gave rise to a reasonable apprehension of bias and required the Court's decision to be set aside. The court concluded that Justice Binnie was not subject to a reasonable apprehension of bias and so was not disqualified from sitting on the appeal. In short, *Wewaykum* is not a bias case.

[55] The confusion comes from a "few comments" the court offered on whether its decision would have been undermined had it ruled that Justice Binnie was disqualified. This was the context in which the court stated: "[E]ven if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge": para. 93.

[56] Some courts have taken these *obiter* remarks to apply more broadly. For example, in *Fletcher v. Manitoba Public Insurance Corp.*, 2004 MBCA 192, [2006] 3 W.W.R. 54, the Manitoba Court of Appeal found that a commissioner was not biased, but in *obiter* went on to state that his participation on a three-member panel would not have nullified the panel's unanimous decision in any event, because each member of the panel made their decision independently. This position was said to be supported by *Wewaykum*, albeit that the independent judgment of the other members of the panel was asserted by the court rather than established.

[57] The Alberta Court of Appeal has applied the *Wewaykum* dicta to its own processes in *obiter* remarks in two cases, neither of which concerned a reasonable apprehension of bias. In *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, [2008] 8 W.W.R. 251, at paras. 77-83, the court asserted that its decisions, like those of the Supreme Court, were the product of the panel members' independent deliberation, so the *Wewaykum* approach would have applied in the event that a reasonable apprehension of bias had been found. In *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2021 ABCA 366, the court rejected the argument that two members of a judicial panel were required to recuse themselves following the recusal of the third member for "inattention" during the hearing. The majority stated that they were unaware of their colleague's inattention and so could not have been affected by it. This case does not support the view that a panel is not tainted by the participation of a biased member.

[58] In *101115379 Saskatchewan Ltd. v. Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31, [2019] 8 W.W.R. 67, the Saskatchewan Court of Appeal found that the chair of a tribunal was not biased but added that even if he were, that finding would not have extended to the other members of the panel. Citing *Wewaykum*, the court stated that whether a panel is tainted by one member's bias "will depend on the decision-making process and the role played by the tainted decision-maker in arriving at the decision": para. 213.

[59] With respect, I do not endorse the *obiter* treatment of *Wewaykum* in these cases. *Wewaykum* does not address any of the relevant authorities and cannot be taken to have changed the law of bias. The court found no reasonable apprehension of bias, and its *obiter* comments about the consequences that would have flowed from such a finding applied only to the Supreme Court's distinct decision-making process.

[60] *Wewaykum* must be understood in its unique context: a claim of a reasonable apprehension of bias involving the participation of a Supreme Court justice in a decision that had already been rendered. The court's comments were based on its unique decision-making processes and the unique role played by its members. These comments may have purchase in the context of appellate courts, but it is difficult to see how they are relevant in non-judicial adjudicative contexts, regardless of the presumption of impartiality.

[61] Certainly, no inferior tribunal could be heard to defend an allegation of bias on the basis of assurances about the nature of its decision-making process. It is not for the tribunal to say, and the court cannot speculate about the role played by individual members in tribunal deliberations. The reasonable apprehension of bias test is designed to dispense with such considerations in favour of an objective appraisal of the relevant circumstances.

The application judge's error

[62] I reiterate that Mexico did not challenge the application judge's decision that there was a reasonable apprehension that Perezcano was biased. It accepted that finding and sought to defend the application judge's decision not to set aside the Tribunal's award.

[63] Perezcano participated in the hearing, deliberation, and decision-making process. There is no basis to conclude that his participation was somehow harmless, nor could there be, given the private nature of commercial arbitration proceedings. His participation tainted the Tribunal and requires that its award be set aside.

[64] The application judge erred in assuming that the impartiality of the other two members of the Tribunal justified the refusal to set aside the Tribunal's award. The impartiality of the other two members of the Tribunal was irrelevant to the question before the application judge. It was not incumbent on Vento to establish that a

majority of the Tribunal was subject to a reasonable apprehension of bias in order to obtain a remedy. The reasonable apprehension that Perezcano was biased sufficed to require that the Tribunal's award be set aside.

[65] Finally, I note that the application judge appears to have assumed that the "seriousness of the breach" by Perezcano was "soften[ed]" by several considerations, including the absence of financial compensation following appointment to a roster of arbitrators and the public nature of panel appointments. With respect, these considerations were not relevant at the remedial stage.

[66] Either there was a reasonable apprehension of bias or there was not. The application judge found that there was – that it was more likely than not that Perezcano would not decide the dispute fairly. He did not owe a lesser obligation of impartiality because he was appointed to the Tribunal by Mexico. Arbitrators are neither representatives of the party who appointed them nor required to protect and promote that party's interests. Whether appointed independently or by a party to the arbitration, arbitrators are expected to comply with the same high standards of impartiality: *Halliburton*, at paras. 63-64.

[67] Perezcano did not do so, and the consequence is that Vento's claim was not decided by the impartial tribunal to which they were entitled. The Tribunal's award must be set aside.

[68] This result is unfortunate, to be sure, given the importance of finality and economic efficiency in commercial arbitration. But it is the only result that is appropriate in the circumstances. It is the only result that guarantees the integrity of the commercial arbitration process.

Summary

[69] The application judge erred in failing to remedy the reasonable apprehension of bias she found concerning Perezcano. This was no minor procedural error. There was no basis to discount the significance of her finding at the remedial stage, or to refuse to remedy it on the basis of cost or inconvenience. The impartiality of the Tribunal was compromised, and its award must be set aside.

DISPOSITION

[70] Accordingly, I would allow the appeal and set aside the Tribunal's award.

[71] In accordance with the agreement of the parties, Vento is entitled to its costs on the appeal of $60,000 and its costs on the application of $100,000, both figures all inclusive.

Released: February 4, 2025 "G.H."

"Grant Huscroft J.A."
"I agree. Gary Trotter J.A."
"I agree. J. Dawe J.A."