SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

NO: SDRCC 22-0609

FRANK FOWLIE
(Claimant)

AND

WESTLING CANADA LUTTE
(Respondent)

AND

DAVID SPINNEY
AHMED SHAMIYA
MARA SCHIAVULLI
(Affected Parties)

Before:

Harveen Thauli (Arbitrator)

Appearances and Attendances:

On behalf of the Claimant:	Dr. Frank Fowlie André Marin, Cousel Mark Bourrie, Counsel
On behalf of the Respondent:	Tamara Medwidsky, Representative Jordan Goldblatt, Counsel Morgan McKenna, Counsel
On behalf of the Affected Party:	David Spinney Michael Smith, Counsel Ahmed Shamiya, Self-represented

DECISION

3 April 2023

A. INTRODUCTION

1. On January 26, 2023, the Affected Party, Ahmed Shamiya sent a petition by email to the Sport Dispute Resolution Centre of Canada (the **SDRCC**) seeking the removal of the arbitrator appointed to hear the merits of this matter (the **Appointed Arbitrator**) on the grounds of an apprehension of bias (as stated in his email).

2. On February 7, 2023, I was appointed pursuant to Articles 5.4 and 5.5 under the Canadian Sport Dispute Resolution Code (the **Code**) to act as Jurisdictional Arbitrator to render a decision on Mr. Shamiya's challenge to the Appointed Arbitrator's jurisdiction (the **Shamiya Challenge**).

3. This was a documents-only arbitration.

4. In his submissions to the Shamiya Challenge, the Affected Party, David Spinney discussed the petition that he had brought on January 6, 2023, which also challenged the Appointed Arbitrator's jurisdiction to hear the merits of this matter on the grounds of a reasonable apprehension of bias (the **Spinney Challenge**). For the reasons explained in this decision, I determined it was necessary that I render a decision on the Spinney Challenge.

5. Wrestling Canada Lutte (**WCL**) took no position on either the Shamiya Challenge or the Spinney Challenge (together, the **Challenges**). The WCL wrote very brief submissions on the Spinney Challenge.

6. Although I have fully reviewed the submissions and carefully considered the arguments made, I refer to only the facts, evidence and arguments that I considered necessary to explain my reasoning in this decision. I dismiss the Challenges and remit the matter back to the Appointed Arbitrator to schedule a hearing on the merits.

B. BACKGROUND

7. To put the Challenges into context requires briefly discussing facts from SDRCC 21-0534, a previous matter involving the same parties. Although I did not have access to this case file, I referred to the Appointed Arbitrator's Interim Order dated March 1, 2022 (the **Interim Order**) to set out background details. However, on March 24, 28 and 30, 2023, I requested specific documents from SDRCC 21-0534 by way of "Production Orders" to assist me (discussed below).

Previous Matter, SDRCC 21-0534

8. The Claimant, Dr. Frank Fowlie submitted a complaint to WCL alleging he had been harassed by the WCL and the Affected Parties.

9. On receipt of Dr. Fowlie's complaint, WCL referred the matter to a Safe Sport Officer pursuant to WCL's Discipline and Complaints Policy (the **WCL Policy**). One of the duties of this Safe Sport Officer was to choose between Process #1 and Process #2 under the WCL Policy.

10. Process #1 deals essentially with minor infractions whereas Process #2 deals with repeated disrespectful or abusive conduct, repeated minor incidents and behaviour that constitutes harassment.

11. The Safe Sport Officer decided that Dr. Fowlie's complaint did not rise to the level of harassment and invoked Process #1. The matter was then to be referred to an arbitrator to review the evidence and render a decision on the appropriate sanctions.

12. Before an arbitrator was appointed, Dr. Fowlie appealed against the Safe Sport Officer's decision to invoke Process #1 to the SDRCC. Dr. Fowlie requested the Appointed Arbitrator hear this appeal.

13. On January 18, 2022, the SDRCC sent an email to the Affected Parties informing them of a Request filed with the SDRCC, which may affect them (the **2022 Notification**). They were required to sign the attached declaration of confidentiality (the **Confidentiality Agreement**) and return it by January 20, 2022. The 2022 Notification also stated that if the Affected Parties did not return a signed Confidentiality Agreement, the SDRCC would proceed in their absence. More particularly, the 2022 Notification stated:

> *The SDRCC hereby informs you of a Request filed before the SDRCC which may affect you.* ***The content of the case is confidential.*** *If you would like to view the information in order to determine whether or not you would like to participate in the case as an Affected Party, kindly complete the attached declaration of confidentiality and return it to the SDRCC before Thursday, January 20, 2022 at 4:00 p.m. (EST) by email at tribunal@crdsc-sdrcc.ca or by fax at one of the below numbers.*
>
> *Further information shall be provided to you upon reception of your signed declaration.* ***Please note that should you not provide your signed declaration, the SDRCC will proceed in your absence. Consequently, if you would like to participate in the case as an Affected Party, you should return the attached declaration promptly.*** *[…]*
>
> [Emphasis is mine.]

14. On January 18, 2022, according to the SDRCC's mail delivery system, the 2022 Notification was successfully delivered to Mr. Shamiya at [redacted], Mr. Spinney at [redacted], and Mara Schiavulli at [redacted]. The SDRCC obtained the email addresses of the Affected Parties from the relevant WCL's records pursuant to Article 6.5(a) of the Code.

15. On January 20, 2022, Mr. Shamiya signed and returned his Confidentiality Agreement to the SDRCC by email.[1] After receiving it, the SDRCC sent him an email with his login credentials on the same day so that he could access this case

[1] Given statements he made about confidentiality in his submissions, I requested only Mr. Shamiya's Confidentiality Agreement.

file on the SDRCC's case management portal (the **Portal**). The Portal includes resources such as party filings, administrative correspondence sent by the SDRCC and decisions rendered by the arbitrator.

16. On January 20, 2022, the SDRCC sent an email to Ms. Schiavulli with a second notification advising that the SDRCC had not heard from her (the **MS Notification**). The SDRCC gave her another opportunity to sign and return a Confidentiality Agreement by January 21, 2023, and if she did not, she would not receive any further information about this matter. Ms. Schiavulli did not respond or sign a Confidentiality Agreement. The SM Notification further informed her of Article 6.5(d), which states:

    Failure of an Affected Party to participate in the Arbitration will be a factor considered and may be given significant weight by any future Panel should that Affected Party file a subsequent Request relating to that matter.

17. Neither the WCL nor the Affected Parties raised any objection to the SDRCC's jurisdiction or the selection of the Appointed Arbitrator. Therefore, the Appointed Arbitrator was appointed as the sole arbitrator. Before his appointment, he had filed a "Declaration of Independence" with the SDRCC.

18. On January 27, 2022, the Appointed Arbitrator filed an amended Declaration of Independence (the **Amended Declaration**), stating the following:

    I was asked a few months ago, along with 7 other international personalities, to answer questions in writing about sport and peace for the purpose of a publication. I only realized yesterday, when I received the attached correspondence, that the person who had solicited the written interview was the Claimant in the present case. I have no other dealings with Mr. Fowlie, before or after that interview request.

19. The attached correspondence that the Appointed Arbitrator referred to in his Amended Declaration was an email dated January 25, 2022 from IGI Global Book Submission System (**IGI**), which stated the following:

    We are pleased to inform you that Frank Fowlie ([redacted]) has included you as an author for "[redacted]," which was submitted for inclusion in the title [redacted]
    (the **Publication**).
    […]

20. On January 27, 2022, the SDRCC sent an email attaching the Amended Declaration to the Claimant, the WCL and the Affected Parties, Mr. Shamiya and Mr. Spinney (together, the **Parties**).

21. On January 31, 2022, Mr. Spinney sent an email to the SDRCC advising that he had no objection to the Appointed Arbitrator continuing as arbitrator.

22. On January 31, 2022, the SDRCC sent an email to the Parties, which stated:

The SDRCC having received confirmation from Mr. Spinney that he has no objection to [the Appointed Arbitrator] continuing as Arbitrator, and having received no objection or concern raised by any other party, the SDRCC confirms that [the Appointed Arbitrator] will continue to act as Arbitrator in this matter.

The SDRCC did not receive any further correspondence from the Parties about the Amended Declaration.

23. On March 2, 2022, the Appointed Arbitrator issued the Interim Order. He dismissed Dr. Fowlie's appeal because under section 3.1(b) of the Code, Dr. Fowlie was required to first exhaust all of WCL's internal dispute resolution procedures. Dr. Fowlie's complaint was then remitted back to the WCL for final determination.

24. As set out in the Interim Order, the Appointed Arbitrator remained seized of this matter should there be an appeal following the conclusion of the WCL's internal appeal process and a final decision rendered.

Current Matter, SDRCC 22-0609

25. On November 22, 2022, Dr. Fowlie submitted his request to appeal the Safe Sport Officer's decision to invoke Process #1 and the final decision dated September 1, 2022 of the WCL Discipline Panel, among other grounds.

26. On January 26, 2023, Mr. Shamiya sent the Shamiya Challenge to the SDRCC in which he requested that the Appointed Arbitrator be removed as the arbitrator to hear the merits of this matter on the grounds of an apprehension of bias (as stated in his email). He stated that the Appointed Arbitrator and Dr. Fowlie communicated about and co-authored the Publication, which he claimed was for sale when Dr. Fowlie selected the Appointed Arbitrator.

27. On February 7, 2023, I was appointed as Jurisdictional Arbitrator to hear the Shamiya Challenge.

28. On March 14, 2023, I chaired a preliminary meeting (the **Preliminary Meeting**) during which I heard from the following parties:
    - Mr. Shamiya;
    - the Appointed Arbitrator;
    - Mark Bourrie, counsel for Dr. Fowlie;
    - Michael Smith, counsel for Mr. Spinney; and
    - Morgan McKenna, counsel for WCL.

29. I advised at the Preliminary Meeting that my role was to decide on the Shamiya Challenge only and all other orders of the Appointed Arbitrator stood to date. I agreed with Mr. Smith that the issue was not bias, but a reasonable apprehension of bias. Therefore, I asked the parties to address the test for a reasonable apprehension of bias in their submissions. The parties agreed to a submission schedule and to limit their submissions to five pages. The Appointed Arbitrator had

case citations, which he forwarded to the SDRCC for uploading onto the Portal so that the Parties could refer to them.

30. On March 17, 2023, approximately one hour before his submissions were due, Mr. Shamiya sought an extension. At this time, I learned that Mr. Shamiya had recorded the Preliminary Meeting without my knowledge or consent. He wrote, in part: "*When I went back to listen to the audio recording […].*"

31. Mr. Shamiya's reason for an extension was based on the Appointed Arbitrator making statements at the Preliminary Meeting. Mr. Shamiya wrote that he had spoken to two *pro bono* lawyers about the Appointed Arbitrator's participation. He stated that they had advised him on the concept of judicial immunity. Mr. Shamiya wrote:

> *Both arbitrators expressed shock that an arbitrator in one hearing was allowed to present evidence at another hearing. I was told that this relates to a legal concept called 'Judicial Immunity'. I was told that a judge cannot waive this immunity and provide evidence on a voluntary basis. […]*

32. On March 17, 2023, I issued a Procedural Order in which I informed the parties that my decision to allow the Appointed Arbitrator to make submissions was my decision to make; I reminded the parties to consider the test for a reasonable apprehension of bias; I had no other choice but to revise the submission schedule, which I did, given the short notice of Mr. Shamiya's request; and I would not provide any further extensions. Regardless, the purpose of the Preliminary Meeting was to set a schedule for submissions and not a forum to address substantive matters.

33. On March 21, 2023 before 9:00am (EDT), and further to the revised schedule, Mr. Shamiya provided his submissions. At his request, I allowed him to submit an additional page, which he did on March 22, 2023. His submissions included transcribed statements from the Preliminary Meeting.

34. On March 24, 2023, I received submissions from the Appointed Arbitrator, Dr. Fowlie and Mr. Spinney. Mr. Spinney's submissions included a discussion of the Spinney Challenge. Given they referred to documents that I did not have, I issued a Production Order requesting the following documents from the previous case file, SDRCC 21-0534:[2]

    - the Amended Declaration;
    - the correspondence from the SDRCC to the parties about the Amended Declaration;
    - Mr. Spinney's confirmation dated January 31, 2022 where he stated he had no objection to [the Appointed Arbitrator] continuing as arbitrator;

[2] After retrieving these documents from the Portal, I summarized them in chronological order in this decision.

- the correspondence dated January 31, 2022 from the SDRCC to the parties that no concerns had been expressed and [the Appointed Arbitrator] would continue as arbitrator; and
- any other correspondence directly related to the Amended Declaration.

35. On March 27, 2023, Mr. Shamiya sent an email to the SDRCC asking whether I had any communication with the Appointed Arbitrator before the Preliminary Meeting because the Appointed Arbitrator had written in his submissions: "*I was invited by the Jurisdictional Arbitrator to comment on the background facts, which I did*." Mr. Shamiya wrote: "*I have listened to the audio recording of the hearing again and you never once invited [the Appointed Arbitrator] 'to comment on the background facts'*." He stated my answer would be relevant to his sur-reply.

36. On March 27, 2023, I wrote the following to all parties:

> *All communication between the parties and me have only taken place through the SDRCC pursuant to Article 5.6(a) of the Canadian Sport Dispute Resolution Code. In specific response to Mr. Shamiya's question, I did not have any communication with [the Appointed Arbitrator] before the preliminary meeting of March 14, 2023 (the "Meeting"). This would have been improper.*
>
> ***The Meeting was not a hearing. I gave the parties an opportunity to provide written submissions because this is a documents-only arbitration and the entire weight of my decision will be based on the written submissions only****.* [Emphasis is mine.]

37. On March 28, 2023, Mr. Shamiya submitted his sur-reply submissions with an attachment. The attachment was an email from a representative of the Affected Party, Ms. Schiavulli and included submissions seeking the removal of the Appointed Arbitrator on the grounds of a reasonable apprehension of bias.

38. Mr. Shamiya inserted Ms. Schiavulli's submissions, made on her behalf, about the Appointed Arbitrator and Dr. Fowlie into his sur-reply. The submissions mirrored Mr. Shamiya's. In essence, she stated that the Appointed Arbitrator and Dr. Fowlie share a professional interest in the Publication, which rises to the level of a conflict of interest and therefore creates a reasonable apprehension of bias. Mr. Shamiya also stated that Ms. Schiavulli did not receive the Amended Declaration.

39. On March 28, 2023, I issued a Production Order requesting the following documents from the previous case file, SDRCC 21-0534:[3]
    - the SDRCC notification sent to the Affected Parties, informing them of this case;
    - the delivery receipts for all three Affected Parties of the SDRCC notification; and

[3] After retrieving these documents from the Portal, I summarized them in chronological order in this decision.

- Mr. Shamiya's signed confidentiality agreement or proof thereof.

40. On March 29, 2023, I reminded the parties that submissions closed on March 28, 2023 at 9:00am (EDT) and I would not be accepting any further submissions or documents from the parties.

41. On March 30, 2023, I issued a Production Order requesting the email of January 20, 2022 from the SDRCC to Mr. Shamiya in which the SDRCC provided him with his login credentials to the Portal for the previous case file, SDRCC 21-0534.[4]

C. PRELIMINARY MEETING

42. Mr. Shamiya and Mr. Spinney each referred to the Preliminary Meeting as a hearing in their submissions. This is a mischaracterization. The Preliminary Meeting was a scheduling effort and cannot be characterized as a hearing. There was no sworn evidence, no cross-examination, no exhibits, no opening or closing statements, no argument on the test for a reasonable apprehension of bias and no citations of authorities. There was no formal motion for the purpose of seeking a remedy. Nothing was adjudicated. The Preliminary Meeting was a case management conference to discuss next steps. I reminded the parties that all orders of the Appointed Arbitrator stood to date and set a submission schedule.

43. Mr. Shamiya's preoccupation in his submissions about the Appointed Arbitrator making statements at the Preliminary Meeting is unfounded and misplaced. They were neither matters of evidence that swayed me in making this decision nor did they resolve this matter. I placed no weight on what he said or what any of the other Parties said. There is also no prohibition in the Code that prevented me from hearing from him or any other Party.

44. This is a documents-only arbitration whereby I am basing the entire weight of this decision on the written submissions. Any statements that the Appointed Arbitrator, or any other Party, made at the Preliminary Meeting were immaterial to this decision and not dispositive of whether there is a reasonable apprehension of bias. Moreover, any additional concerns that Mr. Shamiya may have had were further neutralized by his right of sur-reply. He was given the "last word" to respond to all submissions, including the Appointed Arbitrator's.

D. RECORDING

45. Mr. Shamiya recorded the Preliminary Meeting without my knowledge or consent. Recording for his own personal note-taking use is very different from using that recording to refer to statements made during the Preliminary Meeting and critiquing them in his written submissions.

46. Article 5.1 of the Code states that the applicable law is the law of the Province of Ontario. Therefore, I refer to the Ontario directive, *Protocol Regarding the Use of*

[4] After retrieving this email from the Portal, I summarized it in chronological order in this decision.

Electronic Communication in Court Proceedings (the **Protocol**)[5] where subsection 3(iv) states:

> *Audio recording of proceedings is permitted by counsel, paralegals licensed by the Law Society of Ontario, court staff, members of the media, and litigants for note-taking purposes only but the presiding judicial officer must be advised before the recording is commenced.* ***Members of the public*** *are also permitted to make audio recordings for note-taking purposes only if the express permission of the presiding judicial officer is first obtained. These audio recordings cannot be transmitted. [Emphasis is in the original text of this subsection.]*

47. It is true, as Mr. Shamiya states, that the Protocol refers to court proceedings. Nonetheless, the Protocol's guidelines are informative of how parties should conduct themselves when they appear together, whether in court or a hearing or at a preliminary meeting.

48. I further refer to the Code of Professional Conduct of the Law Society of Ontario (the **CPC**) for guidance. I acknowledge that Mr. Shamiya is not a lawyer but the CPC also informs the conduct of parties when they interact with each other. Subsection 7.2-3 states:

> *A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.*

49. It was discourteous and frankly shocking that Mr. Shamiya recorded the Preliminary Meeting without first advising me and soliciting my consent as well as the consent of the other attendees. It is not unreasonable to expect this level of civility. Mr. Shamiya's conduct is of great concern because he then transcribed certain statements out of context and referred to them in his submissions as evidence. This goes beyond recording for his own personal note-taking use. Although I am not constrained by the same rules of evidence applicable to civil courts, I examined any transcribed statements and Mr. Shamiya's comments about them with caution and I was acute to the need for other indicators of their reliability. I noted, however, that most statements had nothing to do with examining how the Appointed Arbitrator's contribution to the Publication satisfied the test for a reasonable apprehension of bias.

50. Mr. Shamiya is reminded that there is a process under section 5.10 of the Code for arranging recordings.

E. THE ISSUES

51. This decision will address the following issues:
    i. Does the Appointed Arbitrator have standing, or should he be given an opportunity, to make written submissions in the Shamiya Challenge?
    ii. Did the Appointed Arbitrator's conduct, as described in the Shamiya Challenge, create a reasonable apprehension of bias?

[5] https://www.ontariocourts.ca/ocj/legal-professionals/practice-directions/electronic-devices/

iii. Did the Appointed Arbitrator's conduct, as described in the Spinney Challenge, create a reasonable apprehension of bias?

F. ARBITRATOR STANDING IN CHALLENGE PROCEEDINGS

52. I had to decide whether the Appointed Arbitrator had standing to make written submissions in the Shamiya Challenge. What I discovered during my research was that challenges are rare and whether an arbitrator is permitted to make submissions is fact specific and dependant on the circumstances of each case. It is interesting to note, however, that in the UK, caselaw indicates that the arbitrator should have such a right.[6]

53. The *Arbitration Act* (Ontario)[7] (the **Arbitration Act**) does not prohibit an arbitrator, whose jurisdiction is being challenged, from making submissions in certain situations. Subsection 15(2) states:

> ***Right of arbitrator***
> *15 (2) The arbitrator is entitled to be heard by the court if the application is based on an allegation that he or she committed a corrupt or fraudulent act or delayed unduly in conducting the arbitration.*

54. The Code is silent on whether an arbitrator has standing to make submissions and there are only two SDRCC decisions that have treated this question. One is the *SDRCC 21-0516 Valois v. Judo Canada* (the **Valois decision**) and the other, *SDRCC 19-0434C Alberta Cricket Council v. Cricket Canada* (the **Alberta Cricket decision**). For the purposes of addressing this issue, I focus on the approach adopted by the jurisdictional panels and not the outcomes of the decisions themselves. I rely on only those facts necessary to explain the approaches on the challenges.

55. In the Valois decision, the arbitrator had already begun presiding over the hearing on the merits when the claimant brought his challenge to have him removed. The hearing was suspended pending the decision on the hearing of this challenge. The jurisdictional arbitrator decided that the arbitrator had immunity from being called to testify as a witness at the challenge hearing because he was protected by judicial immunity.

56. Judicial immunity typically means that a judge cannot be compelled to testify about "*events experienced in the course of their judicial duties*" or "*matters encountered in the course of exercising a judicial function*."[8] Whether an arbitrator benefits from judicial immunity has been the subject of debate. In Ontario, for example, the court has held that joining an arbitrator may be appropriate in certain cases (discussed further in paragraph 59 below) and as stated above, the Arbitration Act allows participation in certain circumstances.

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[6] James Moore Earthmoving v. Miller Construction Ltd., [2001] EWCA Civ 654.
[7] *Arbitration Act*, 1991, 1991, S.O. 1991, c. 17.
[8] *R v Parente*, 2009 CanLII 18685 (ON SC), at para. 6.

57. Mr. Shamiya relied on the Valois decision to state that the Appointed Arbitrator was not allowed to waive this immunity and participate in the Preliminary Meeting. The circumstances of the Valois decision, however, are markedly different from the present matter. In that case, the challenge related directly to the arbitrator's conduct in the hearing. This required a deep dive into what he said and how he said it. Therefore, it makes sense that the jurisdictional arbitrator decided that the arbitrator had immunity from being called to testify as a witness. In this case, the Preliminary Meeting was not a hearing but a case management conference to determine next steps. Although the statements of the Appointed Arbitrator and the Parties were interesting, they were neither evidence nor did they resolve the Shamiya Challenge. This decision is based solely on the written submissions because I required an analysis of how the evidence satisfies, or does not satisfy, the test of a reasonable apprehension of bias.

58. In the Alberta Cricket decision, the arbitrator had directed the respondent to retain an independent investigator to investigate the matters raised in the complaint, before any hearing on the merits. After the arbitrator received and reviewed the investigation report, she wrote an email to the parties in which she stated: "*In my opinion, the Investigator has conducted a thorough investigation and has written a thorough and articulate report.*" The affected party in this matter raised a challenge, alleging the arbitrator's statement improperly prejudged and validated the investigation report in a manner that favoured the claimant, the Alberta Cricket Council. The three member jurisdictional panel directed that they would review the affected party's challenge and the arbitrator's response only.[9] The jurisdictional panel was silent on its approach in this documents-only arbitration, but in my view, it was logical to hear from the arbitrator given she made the statement and only she could explain her intent at the time of making it.

59. Turning now to Ontario caselaw, the decision of *Kitchener (City) v. G.M. Gest Group Ltd*. (the **Kitchener decision**),[10] involved an arbitration between the City of Kitchener and a contractor. A precondition to the commencement of the arbitration was that the contractor had to remove a third party lien claim so that the lien would no longer be registered against the City's property. The parties agreed to appointing an arbitrator. The arbitrator received information and letters from the contractor, which he did not share with the City, and he attended at least three meetings with the contractor, before the start of the arbitration. When the contractor failed to remove the third party lien, the City sent a letter to the arbitrator challenging his jurisdiction. The City asked the arbitrator to acknowledge the existence of the pre-condition and that the arbitration was never constituted. The arbitrator did not respond to this letter and instead issued his decision based on the documents only. The City joined the arbitrator in an application to have his decision set aside, among other things. The court determined that joining the arbitrator in these proceedings was ill-advised because his evidence or

[9] The Alberta Cricket decision was subject to the 2015 Canadian Sport Dispute Resolution Code, which required a three person jurisdictional panel at that time.
[10] *Kitchener (City) v. G.M. Gest Group Ltd.,* 2003 CarswellOnt 3946, 31 C.L.R. (3d) 168, [2003] O.T.C. 914, [2003] O.J. No. 4038 (Ont. S.C.J.)

participation added nothing to the proceedings. The court, however, acknowledged that joining an arbitrator may be appropriate in certain cases. The court suggested that had the arbitrator responded to the City's letter stating he had no intention of permitting the City to make submissions on jurisdiction and intended to proceed with the arbitration with no further notice to the City, it may well have been appropriate in these circumstances to join the arbitrator as a responding party. Although the Kitchener decision was a civil, not administrative matter, the court presented a hypothetical situation when an arbitrator's testimony may be required. If so, he most likely would have been questioned on his intention for not allowing the City to make submissions and proceeding with no further notice to the City.

60. In my view, the importance of these cases illustrates that where the matter in issue involves factors or considerations peculiarly within the arbitrator's knowledge or expertise, or where explanations are not going to be put forth by any of the parties, there should clearly be room for the arbitrator to make submissions on a challenge to his jurisdiction.

61. The Shamiya Challenge is peripheral to the merits of the case and strikes directly at the Appointed Arbitrator. Only he can fully respond to questions about his contribution to the Publication, his level of involvement and the frequency of any communication with Dr. Fowlie as well as why he chose not to resign. Therefore, I decided that the circumstances warranted receiving written submissions from the Appointed Arbitrator as his submissions would provide context to his contribution to the Publication and assist in determining whether there is a reasonable apprehension of bias.

62. I would add, however, that in the alternative, if I had decided not to give the Appointed Arbitrator standing to make submissions, I would have arrived at the same conclusion and dismissed the Shamiya Challenge. The reasons are the submissions of Mr. Shamiya and Mr. Spinney were weak and not based in any evidentiary foundation and there is information available online about the Publication, including a table of contents listing the names of the contributors.

G. LEGAL TEST

63. Article 5.5(a) of the Code establishes when a party may challenge an arbitrator's jurisdiction, as follows:

> *An Arbitrator may be challenged solely on the grounds of conflict of interest or a reasonable apprehension of bias. The challenge shall be brought without undue delay after the grounds for the challenge become known.*

64. The Challenges allege that the Appointed Arbitrator should be removed on the grounds of a reasonable apprehension of bias.

65. The test for a reasonable apprehension of bias is well-established and has been widely discussed in caselaw. I rely on the citations provided by the Parties to discuss this test.

66. In *Davidson v. Canada (Attorney General)*,[11] the Federal Court of Appeal set out the relevant question to ask:

> *[15] Further, the well-established test for a reasonable apprehension of bias is whether a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly (*Committee for Justice and Liberty et al. v. National Energy Board et al.*,1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at p. 394, 9 N.R. 115). The onus on demonstrating bias rests with the party alleging it (*R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 114, 218 N.R. 1).*

67. A reasonable apprehension of bias is sufficient to establish judicial impartiality. Actual bias need not be established. In *R. v. S. (R.D.)* (the **RD Decision**),[12] the Supreme Court of Canada stated:

> *109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. […] It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. […]*

68. The Supreme Court of Canada then went on to state in the RD Decision:[13]

> *134 To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.*

69. The test establishes a high threshold because decision-makers are presumed to be impartial.[14] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*,[15] the Supreme Court of Canada added:

> *[25] Because there is a strong presumption of judicial impartiality that is not easily displaced (Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30 (CanLII), [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation: see Arsenault-Cameron v. Prince Edward Island, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851, at para. 2; S. (R.D.), at para. 134, per Cory J.*
>
> *[26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and*

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[11] *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 15.
[12] *R. v. S. (R.D.) [1997] 3 SCR 484* at para. 109.
[13] *Ibid.* at para. 134.
[14] *McMurter v. McMurter*, 2020 ONCA 772 at para. 26.
[15] *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 25 and 26.

there is a correspondingly high burden of proving the claim on the party alleging bias: see Wewaykum, at para. 77; S. (R.D.), at para. 114, per Cory J. As Cory J. observed in S. (R.D.):

> *. . . allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]*

70. Therefore, the main question to ask is: Would a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly?

71. When asking the question, the following factors are relevant to consider:

- The onus on demonstrating a reasonable apprehension of bias rests with the party alleging it. Actual bias need not be established. However, the person making this allegation has a high burden to discharge because decision-makers are presumed to be impartial. Therefore, the test requires a real likelihood or probability of bias.
- The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias is inherently contextual and fact-specific. It is an objective test.

H. THE SHAMIYA CHALLENGE

72. The Shamiya Challenge is more particularly set out in his email of January 26, 2023 as follows:

- *In 2022 IGI Global sent [the Appointed Arbitrator] an email that stated. "We are pleased to inform you that Frank Fowlie ([redacted]) has included you as an **author** for "[redacted]," which was submitted for inclusion in the title [redacted]."*
- *[The Appointed Arbitrator] acknowledges (in writing) that he and Frank Fowlie had recent communication regarding Fowlie's publication.*
- *The publication, which is copyrighted in 2022, is for sale on the internet and I bought it for $29.95.*
- *The publication that I now hold in my hand, specifically lists Frank Fowlie and [the Appointed Arbitrator] as authors, literally right next to each other.*
- *Also in 2022, Frank Fowie specifically requested that [the Appointed Arbitrator] be the adjudicator in a complaint that he was advancing in a sport complaint against me.*

  […]

Mr. Shamiya's Submissions

73. I found that much of what Mr. Shamiya wrote in his submissions were inconsequential to the Shamiya Challenge. Before discussing his submissions that relate directly to the Publication, I will share my observations on other comments he made in his submissions.

74. Mr. Shamiya wrote at length about the Appointed Arbitrator's participation in the Preliminary Meeting and his belief that the Appointed Arbitrator breached the principle of judicial immunity. I told the parties in my email of March 27, 2023 that the Preliminary Meeting was not a hearing and I also addressed it and the principle of judicial immunity sufficiently under sections C and F above. There is no need to repeat it here.

75. The Appointed Arbitrator wrote the following statement about the Amended Declaration: "*The other two Affected Parties, despite having been fully advised regarding the Amended Declaration, did not respond*." Mr. Shamiya was one of the Affected Parties. In response, Mr. Shamiya stated he was "*never advised*" about the Amended Declaration and he was "*never part of those January 2022 proceedings in any way*."

76. On January 18, 2022, Mr. Shamiya received the 2022 Notification by email. The SDRCC mail delivery system confirmed its delivery. As requested, he signed and returned his Confidentiality Agreement by email on January 20, 2022. Soon after, on the same day, Mr. Shamiya received his login credentials by email from the SDRCC for the Portal, which gave him access to SDRCC correspondence. On January 27, 2022, the SDRCC sent the Amended Declaration by email to the Parties. On January 31, 2023, the SDRCC sent an email to the Parties confirming it had not received any objections or concerns about the Appointed Arbitrator continuing as arbitrator. The SDRCC sent all emails to Mr. Shamiya at the same email address as the 2022 Notification. Therefore, it is difficult to reconcile his statement that he never took part in the January 2022 proceedings given the email correspondence and his access to the Portal.

77. I believe Mr. Shamiya's concern relates partly to the Appointed Arbitrator's statement that: "*No further concerns were expressed by anyone regarding my status until almost a year later […].*" It is true that Article 5.5(a) of the Code requires that: "*The challenge shall be brought without undue delay after the grounds for the challenge become known*." This is inconsequential now since I have the Shamiya Challenge and must render a decision on it.

78. In his sur-reply, Mr. Shamiya added submissions that had been prepared by Ms. Schiavulli's representative. They mirror Mr. Shamiya's submissions. I will address them briefly.

79. The SDRCC sent Ms. Schiavulli the 2022 Notification, of which there is proof of delivery, and the SM Notification to the same email address. She was given two opportunities to sign a Confidentiality Agreement if she wished to participate in the

proceedings and receive further information about them from the SDRCC. She did not sign and return the Confidentiality Agreement. Therefore, Mr. Shamiya's statement that Ms. Schiavulli did not receive the Amended Declaration is true.

80. The SDRCC takes confidentiality very seriously. This is why parties are required to sign a Confidentiality Agreement agreeing to be bound by the confidentiality rules in the Code, before they receive documents from the SDRCC and gain access to the Portal. More specifically, Article 5.9 of the Code states:

> *(a) Arbitration proceedings under this Code are confidential and the hearings are not open to the public, except as provided in this Code.*
>
> *(b) The Panel, the Parties, their representatives and advisors, the SDRCC and any other Person present during the Arbitration* ***shall not disclose to any third party any confidential information*** *or confidential document related to the proceedings or any information or document acquired during the Arbitration, except as permitted under this Code, under the applicable rules of the Arbitration, under the rules and the by-laws of the SDRCC, or unless required by law to do so.*
>
> [Emphasis is mine.]

81. Given the wording of Article 5.9, it begs the question of how Ms. Schiavulli and her representative became aware of this jurisdictional challenge and the Publication in the first place.

82. Turning to Mr. Shamiya's submissions about the Publication and how the Appointed Arbitrator's contribution to it gives rise to a reasonable apprehension of bias, he wrote as follows:

> ***I accept that it is true that [the Appointed Arbitrator] and Frank Fowlie may have only had limited interaction with each other in their lifetimes.***
>
> *What is also true is that [the Appointed Arbitrator] and Frank Fowlie had communication/interaction with each [sic] in a project to the extent that it resulted in a book being sold on the internet. This is a book in which both men are listed as co-authors - a book that was copyrighted and sold during the exact same period of time that Frank Fowlie specifically requested that his co-author, [the Appointed Arbitrator], be the arbitrator to preside over his complaint which he seeks to permanently end my involvement in sport.*
>
> *These above facts are absolutely accurate and they alone give rise to a reasonable apprehension of bias.*
>
> [Emphasis is mine.]

The Appointed Arbitrator's Submissions

83. The Appointed Arbitrator is a regular contributor to various publications on topics involving national and international sports. He explained that during 2021, he was invited to contribute to the then proposed Publication by way of written answers to a series of questions about how sport has contributed to peace. He was not involved in selecting topics or other contributors to the Publication and he did not have any contact with anyone about his responses. He wrote: "*In that sense, I was not an academic 'colleague' of Dr. Fowlie in a joint undertaking*."

84. The Appointed Arbitrator further added the following about his contact with Dr. Fowlie:

> *I have no recollection of having met Dr. Fowlie and, to the best of my recollection, we spoke once in mid-2021 in connection with whether or not I would be willing to write a piece for inclusion in the [Publication].*
> *[…]*
>
> *Whatever communications we had once I agreed to respond to the written questions were routine and by email. These were principally with respect to providing my contribution in good time for publication. […] so I was otherwise engaged and, in the result, perhaps not as prompt as usual in delivering my contribution to the [Publication].*
> *[…]*
>
> *As soon as I became aware that Dr. Fowlie (the Claimant in these proceedings) was the same Dr. Fowlie who had been involved in the publication of the [Publication], I thought it was appropriate, out of an abundance of caution, to disclose that fact to the SDRCC and the parties to these proceedings and filed an amended Declaration of Independence, which was immediately forwarded to all Parties and Affected Parties to these proceedings. The SDRCC has a record of the various communications and their timing, which can be made available to the Jurisdictional Arbitrator.*
> *[…]*
>
> *I have, except as disclosed, had no "recent" or other conversations or communications with Dr. Fowlie.*

85. His contribution to the Publication was as follows:

> *A word on the [Publication] itself. My contribution to the [Publication] was contained in Chapter 17. Chapter 17 consisted of 17 pages in a [Publication] of almost 400 pages in total. There were 8 contributors to Chapter 17, so the average contribution was 2.125 pages. With respect, Mr. Shamiya has attempted to manufacture a mountain out of a mole hill.*
>
> *[…] My view was that the publisher was free to publish my contribution, but without any extended release from me, or to refuse to publish it. I heard nothing further from the publisher, so (until Mr. Shamiya's communication dated 26 January 2023) I did not know whether or not the publisher had decided to include my contribution. […]*

Dr. Fowlie's Submissions

86. Dr. Fowlie submitted that accusations of a reasonable apprehension of bias "*are serious ones that should not be casually flung at the decision-maker. These accusations should not be made lightly.*" He added that accusations without a sound evidentiary foundation prolong proceedings, add costs and ruin reputations.

87. Dr. Fowlie provided a screenshot of chapter 17 of the Publication. There are seven other contributors to this chapter in addition to Dr. Fowlie and the Appointed Arbitrator. Their names do not appear at all on the Publication's cover.

88. He then wrote: "*This is not evidence of prejudging an arbitration which did not exist a year ago when the book was published. Furthermore, [the Appointed Arbitrator] and Fowlie have been adamant since day one that they have not spoken since this voluntary engagement.*"

89. Dr. Fowlie added the following about the Preliminary Meeting: "*There is no connection between [the Appointed Arbitrator] appearing at the [Preliminary] Meeting and evidence of a reasonable apprehension of bias.*"

Mr. Spinney's Submissions

90. Mr. Spinney submitted that the Appointed Arbitrator and Dr. Fowlie "*co-authored*" the Publication and it was a "*joint venture*" that occurred before Dr. Fowlie selected the Appointed Arbitrator to preside over this matter.

91. He wrote that: "*A great deal of work goes into preparing a publication. It requires collaboration, cooperation, and correspondence, to say the least. [The Appointed Arbitrator] provided information to the Jurisdictional Panel that all three existed with [Dr. Fowlie], but were minimal*."

92. Mr. Spinney then stated that the Appointed Arbitrator's "*ongoing personal relationship*" and "*professional relationship*" with Dr. Fowlie establishes a reasonable apprehension of bias.

I. ANALYSIS – THE SHAMIYA CHALLENGE

93. It is helpful to seek guidance from the *IBA Guidelines on Conflicts of Interest in International Arbitration*[16] (the **IBA Guidelines**), which are published rules and guidelines relating to international arbitration and comprise "General Standards" on impartiality, independence and disclosure.

94. Part II of the IBA Guidelines, entitled Practical Application of General Standards, is divided into three coloured lists: the Red List, the Orange List and the Green List. Each list has specific, non-exhaustive, scenarios that are very likely to occur in an arbitration practice. Their purpose is to assist users of whether an arbitrator's appointment would violate the conflict of interest rules. The IBA Guidelines have been adopted by several jurisdictions. The same standards that apply in international arbitrations should apply in this situation. The criteria and examples are determinative of whether the Appointed Arbitrator's conduct created a reasonable apprehension of bias.

95. The Red List consists of two parts: a Non-Waivable Red List and a Waivable Red List. The Non-Waivable Red List "*includes situations deriving from the overriding*

[16] Adopted by resolution of the IBA Council on Thursday, October 23, 2014. Updated, August 10, 2015.

principle that no person can be his or her own judge" and "*acceptance of such a situation cannot cure the conflict*." The Waivable Red List includes "*situations that are serious but not as severe*" and "*these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest expressly state their willingness to have such a person act as arbitrator*."[17]

96. An example of the Non-Waivable Red List is where an "*arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom*."[18] An example of the Waivable Red List is where an "*arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom*."[19]

97. The Orange List includes situations that "*may, in the eyes of parties, give rise to doubts as to the arbitrator's impartiality or independence*" and "*with the consequence that the arbitrator has a duty to disclose such situations*."[20] This is, for example, when an "*arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have an ongoing relationship*."[21]

98. Finally, the Green List includes "*specific situations where no actual conflict of interest exists from an objective point of view*."[22] This includes, for example, where an "*arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)*."[23] This also includes where an "*arbitrator has had initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case*."[24] An arbitrator has no duty to disclose situations falling within the Green List.

99. Mr. Shamiya submitted that the Appointed Arbitrator and Dr. Fowlie co-authored the Publication. This is countered by facts easily available online. Chapter 17 is the last chapter of the Publication, which is about 400 pages and copyrighted in 2022. Chapter 17 has nine contributors, two of whom are the Appointed Arbitrator and

[17] *Ibid.*, Part II, para. 2.
[18] *Ibid.*, Part II, Non-Waivable Red List, para. 1.4.
[19] *Ibid.*, Part II, Waivable Red List, para. 2.3.7.
[20] *Ibid.*, Part II, para. 3.
[21] *Ibid*., Part II, Orange List, para. 3.1.1.
[22] *Ibid*., Part II, Green List, para. 7.
[23] *Ibid.*, Part II, Green List, para. 4.1.1.
[24] *Ibid*., Part II, Green List, para. 4.4.1.

Dr. Fowlie. Their names do not appear together on the Publication's book cover as co-authors. There are also different contributors to the other chapters.

100. The Appointed Arbitrator's contribution to chapter 17 was approximately two pages. He submitted that he received a list of questions to which he responded. He only became aware that his contribution was included in the Publication when he received notice of the Shamiya Challenge on January 26, 2023.

101. Mr. Shamiya further submitted that the Appointed Arbitrator acknowledged in writing that he had recent communication with Dr. Fowlie. The only evidence of any communication in the case file is the email of January 25, 2022 from IGI to the Appointed Arbitrator. The Appointed Arbitrator wrote in his submissions that to the best of his recollection, he spoke to Dr. Fowlie once in mid-2021 about the Publication and he has not had any "*recent*" communications with Dr. Fowlie. Dr. Fowlie also confirmed that "*they have not spoken since this voluntary engagement*." Despite their evidence, more importantly are Mr. Shamiya's own words when he wrote in his submissions: "*I accept that it is true that [the Appointed Arbitrator] and Dr. Fowlie may have only had limited interaction with each other in their lifetimes*."

102. As soon as the Appointed Arbitrator learned that Dr. Fowlie was the same Dr. Fowlie in these proceedings, he filed his Amended Declaration, which the SDRCC emailed to the Parties. On January 31, 2022, Mr. Spinney sent an email to the SDRCC confirming that he had no objection to the Appointed Arbitrator continuing as arbitrator. On the same day, the SDRCC sent an email to the Parties confirming that no objections or concerns were raised by any of the Parties and the Appointed Arbitrator would continue as arbitrator. It is a fact that Mr. Shamiya sought the removal of the Appointed Arbitrator a year after his Amended Declaration was filed and served on the Parties. His timing is indeed suspect given the chronology of events described in paragraph 76 above.

103. Mr. Spinney is supporting the Shamiya Challenge. It is unclear why his position changed between January 31, 2022 and now. His comments about an "*ongoing personal relationship*" and "*professional relationship*" between the Appointed Arbitrator and Dr. Fowlie are pure speculation and not based in evidence. I have already addressed the other points he made in his submissions as they mirror Mr. Shamiya's. It is unfortunate, however, that he did not independently verify facts about the Publication himself.

104. This situation does not even come close to meeting the semblance of a reasonable apprehension of bias, nor does it come remotely close to meeting any of the criteria in the Red List and the Orange List of the IBA Guidelines.

105. A reasonable and informed person, viewing the Shamiya Challenge realistically and practically, would conclude that the Shamiya Challenge falls within the Green List and Mr. Shamiya, who had the onus to prove there is a reasonable apprehension of bias, failed to discharge his burden of proof.

106. A reasonable and informed person would think that the Appointed Arbitrator, whether consciously or unconsciously, would decide this matter fairly.

107. The Appointed Arbitrator's conduct, as described in the Shamiya Challenge, does not create a reasonable apprehension of bias. Therefore, I dismiss the Shamiya Challenge.

J. THE SPINNEY CHALLENGE

108. On January 6, 2023, Mr. Spinney submitted the Spinney Challenge, alleging that the wording chosen by the Appointed Arbitrator to draft three sentences in the Interim Order demonstrated a "*positional alignment*" with Dr. Fowlie and are grounds of a reasonable apprehension of bias.

109. Mr. Spinney takes issue with a sentence that related to the Safe Sport Officer's decision to invoke Process #1. He wrote that "*an inference can be drawn*" that the Appointed Arbitrator has a "*predisposition towards*" Dr. Fowlie from the following sentence:

> *The Officer provided no reasons for his conclusion that the offending conduct did not rise to the level of harassment, nor any indication of what material in his possession he had reviewed (or did not review) and what factors in the respective allegations of the parties were weighed in the course of coming to his conclusion.*

110. In another sentence, Mr. Spinney took offence with the words, "*deserving of careful review*." He stated that Dr. Fowlie "*would have felt persuaded to appeal any unfavourable decision from the Panel based on [the Appointed Arbitrator's] comment that the matter was worthy of a carefully [sic] re-assessment*." The sentence read as follows:

> *Should there be an appeal from the eventual decision of the Arbitrator, the record of the process adopted by the Arbitrator and the conclusions reached will be matters deserving of careful review.*

111. In the final sentence that concerned Mr. Spinney, he submitted that the Appointed Arbitrator's comment showed "*alignment with*" Dr. Fowlie and demonstrated "*a reasonable apprehension of bias by opining on the seriousness, and 'far-reaching implications' of the issues raised*." The sentence read as follows:

> *The issues raised in these proceedings are important and have far-reaching implications, not only for the parties and the Affected Parties, but also for WCL as a national sport organization in the context of Canadian implication of Safe Sport. Without purporting to interfere in the internal process, I hope the Arbitrator will expedite that process in the interests of all concerned.*

112. On January 25, 2023, the Appointed Arbitrator and the Parties attended a motion hearing (not a preliminary meeting) to address three issues, one of which was the Spinney Challenge (the **Motion Hearing**).

113. On January 30, 2023, the SDRCC provided meeting notes of the Motion Hearing to the Appointed Arbitrator and Parties for their review. They initially read as follows for the Spinney Challenge:

> *As to the third issue to deal with, Mr. Smith, Mr. Goldblatt and Mr. Marin agree that there is no reasonable apprehension of bias from the [Appointed] Arbitrator and therefore no need for a Jurisdictional Arbitrator to be appointed. [The Appointed Arbitrator] states that there is no evidence of bias one way or another.*

114. There was some confusion over the wording of the initial draft, which the Parties brought to the Appointed Arbitrator's attention. They were amended as follows:

> *As to the third issue to deal with, Mr. Smith, Mr. Goldblatt and Mr. Marin agree that [the Appointed Arbitrator], not a jurisdictional arbitrator, must determine the motion. [The Appointed Arbitrator] dismisses the motion and states there is no evidence of bias one way or another.*
>
> (the **Revised Notes**)

115. The Appointed Arbitrator and the Parties reviewed the Revised Notes.

116. At the Preliminary Meeting, Mr. Smith, on behalf of his client, Mr. Spinney, raised the Spinney Challenge and stated it was his belief that the Challenges would be decided together. I then read the Revised Notes to the Appointed Arbitrator and Parties. There was a deafening silence. Nobody commented or objected.

117. Article 5.5(c) of the Code reads as follows:

> *If the Arbitrator does not resign, the other Parties will be given an opportunity to respond in writing to the challenge and a Jurisdictional Arbitrator will be appointed through the Rotating List to make a ruling on the basis of the written challenge and responses. The decision of the Jurisdictional Arbitrator is final and binding.*

118. On reviewing the Revised Notes with Article 5.5(c) after the Preliminary Meeting, it became apparent that the correct procedure was not followed. If an arbitrator does not resign, a jurisdictional arbitrator will then be appointed. It is evident that the Appointed Arbitrator would not have resigned. Therefore, to correct this procedural error, I will decide on the Spinney Challenge.

K. ANALYSIS – THE SPINNEY CHALLENGE

119. I had access to the submissions on the Portal, which included submissions for Mr. Spinney, Dr. Fowlie and WCL. Mr. Spinney's arguments about the sentences he finds offensive are summarized in the previous section.

120. I am reluctant to discuss Dr. Fowlie's submissions because most of what he wrote will be heard in the hearing on the merits. The one comment to share is his statement that "*bias/reasonable apprehension of bias are very serious and cannot be made without a solid basis in fact.*"

121. WCL wrote three paragraphs on the Spinney Challenge, the last of which read as follows:

> *As a matter of law, an adjudicator accepting submission from a party is not an indication of bias. Nor does an indication that a future proceeding (should it be brought) warrants 'careful review' engage partiality concerns.*

122. Mr. Spinney did not support his allegations with any concrete evidence. What he stated is pure speculation and baseless.

123. This situation does not even come close to meeting the semblance of a reasonable apprehension of bias, nor does it come remotely close to meeting any of the criteria in the Red List and the Orange List of the IBA Guidelines. It was difficult to ascertain which of the Challenges was worse for their lack of evidence.

124. A reasonable and informed person, viewing the Spinney Challenge realistically and practically, would conclude that it falls within the Green List and Mr. Spinney, who had the onus to prove there is a reasonable apprehension of bias, failed to discharge his burden of proof.

125. A reasonable and informed person would think that the Appointed Arbitrator, whether consciously or unconsciously, would decide this matter fairly.

126. The Appointed Arbitrator's conduct, as described in the Spinney Challenge, does not create a reasonable apprehension of bias. Therefore, I dismiss the Spinney Challenge.

L. CONCLUSION

127. This matter, which began in November 2022, has become less about sport and more about procedural wranglings. The Parties are reminded that if they wish to bring applications, their applications must be rooted in a strong evidentiary foundation.

128. Generally speaking, when parties are confident about their positions, they normally wish to proceed to having their views, evidence and arguments heard on the merits of the dispute. I hope the Parties take heed of this statement.

M. ORDER

129. I dismiss the Challenges and remit the matter back to the Appointed Arbitrator to schedule a hearing on the merits.

Dated April 3, 2023 at the City of Vancouver in the Province of British Columbia.

Harveen Thauli, Arbitrator

On April 4, 2023, I corrected paragraph 28 to reflect that Mark Bourrie, not André Marrin attended with Dr. Fowlie.