CITATION: Atkinsréalis Construction (Pacific) Inc. v. GIP Construction Ontario East Ltd., 2026 ONSC 5666
COURT FILE NO.: CL-26-00000307-0000
DATE: 20261007

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ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BETWEEN:	
ATKINSRÉALIS CONSTRUCTION (PACIFIC) INC.	
Applicant	John Adair, David Ionos, and Rachel Allen, for the Applicant
– and –	
GIP CONSTRUCTION ONTARIO EAST LTD.	
Respondent	John Margie, Leah Mangano, and Sophia Montoni for the Respondent
	HEARD: July 15, and September 22, 2026

FL MYERS J

REASONS FOR DECISION

This Application

[1] The Applicant Atkinsréalis Construction (Pacific) Inc. seeks an order removing Arbitrator Stephen Richard Morrison, LL.B., C. Med, C.Arb, FCIArb from an ongoing arbitration proceeding pursuant to s. 13 (6) of the *Arbitration Act, 1991*, SO 1991, c 17.

[2] Atkinsréalis submits that as a result of the conduct of the Arbitrator, "[c]ircumstances exist that may give rise to a reasonable apprehension of bias." This is one of two possible grounds available under s. 13 (1) of the statute for seeking removal of an arbitrator during a proceeding.

[3] For the reasons that follow, the application is granted. The parties are to deliver submissions on the costs of the motion for recusal before the Arbitrator and this application on the timetable set out below.

Background

[4] The parties agreed to arbitrate in one proceeding several claims asserted by each of them in connection with construction work performed by the Respondent GIP Construction Ontario East Ltd. for the Applicant Atkinsréalis (referred to as "ATRL").

[5] ATRL was the prime contractor on the Trillium Line Extension Stage 2 Project in the City of Ottawa. ATRL contracted with GIP as its roadworks subcontractor on the project.

[6] Each side has claims against the other arising from delays in the project that led to changes to the agreed scope and timing of work.

[7] The parties agreed to appoint Mr. Morrison as the Arbitrator in the joined claims.

[8] Mr. Morrison is a very experienced arbitrator. He has specialized knowledge in the construction industry. The parties knew this and agreed to retain him to benefit from his experience and expertise.

[9] The parties each delivered comprehensive witness affidavits and expert reports in advance of the hearing. The Arbitrator was armed with substantial evidence and information about the parties' positions prior to the commencement of the arbitration hearing.

[10] The arbitration hearing commenced on December 8, 2025.

[11] On the eighth day of the arbitration hearing, ATRL moved for the Arbitrator to remove himself under s. 13 of the statute. At that time, the examinations of all fact witnesses presented by the parties had been completed. Three days of expert witness testimony remained.

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[12] Under s. 13 (5) of the statute, if the parties do not agree to remove an arbitrator who is challenged under the section, and if the arbitrator does not resign voluntarily, the arbitrator "shall decide the issue."

[13] The Arbitrator adjourned the arbitration while he resolved the challenge to his ongoing participation. After the parties delivered lengthy written submissions, the Arbitrator dismissed the challenge with comprehensive reasons dated April 18, 2026.

[14] ATRL has brought the issue to the court for resolution. Under s. 13 (6) of the statute, within ten days of receiving the Arbitrator's decision under s. 13 (5), a challenger is entitled to, "make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator."

[15] This is not specifically an appeal from the Arbitrator's decision. The court is directed to "decide the issue." No one argued that there is a standard of review applicable to this task. The parties argued the issue before me *de novo*. My references to the Arbitrator's decision then should be taken as illustrative of the issues under consideration. I do have concerns about errors of law and characterization made by the Arbitrator in his decision. Whether those errors would be subject to correction on appeal was not argued before me. I refer to them to explain where I depart from the Arbitrator's view of his role and the propriety of his approach.

[16] I wish to make clear at the outset that no one raises any concern or issue with the *bona fide* intention of the Arbitrator to perform his role to the best of his ability. Mr. Adair took pains to state most clearly that he was not alleging that the Arbitrator was in fact biased or predisposed against his client. The issue is whether the Arbitrator's conduct created circumstances "that may give rise to a reasonable apprehension of bias" and resulted in the arbitration being carried out in breach of the required fair procedure.

[17] As will become apparent below, the Arbitrator has a very engaged and active manner of conducting this type of arbitration. No one doubts his good faith belief that, in doing so, he was engaging in a search for the truth. However, the Arbitrator's use of an inquisitional approach in this particular case led him to unfairly cross the line setting off the roles of a neutral decisionmaker from an advocate for a party.

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[18] This is a clear case of an arbitrator “descending into the arena” and thereby creating reasonable apprehension of bias to an objective observer.

[19] I am not finding that an arbitrator is bound by every single restriction imposed on a judge under the doctrine of natural justice and the *Rules of Civil Procedure*, RRO 1990 Reg 194, applicable to civil litigation in this court. I am not finding fault with the Arbitrator’s determination that given his expertise and experience he chooses to be an active participant in the hearing process by asking questions to clarify evidence and for other appropriate reasons.

[20] This case does not require a determination of the nuances differentiating the roles and applicable rules of conduct as between an arbitrator and a trial judge of this court. On any view of the basic principles of neutrality and fairness required by the statutory scheme and the case law, the Arbitrator’s approach was impermissible in the overall context and on the specific facts of this case.

The Applicable Law

(1) The Statutory Obligation of Fairness and Avoiding Circumstances that may give rise to a Reasonable Apprehension of Bias

[21] Section 19 of the *Arbitration Act, 1991* requires that “[i]n an arbitration, the parties shall be treated equally and fairly.” This is expressed as a mandatory requirement.

[22] To drive home the mandatory nature of the requirements of fairness and equal treatment, s. 3 of the statute provides that the parties may agree to vary or exclude any provision of the statute subject to six listed exceptions. The obligations of fair and equal treatment provided in s. 19 are among the provisions that cannot be excluded by the parties.

[23] At all times an arbitration must provide equal treatment and fair process. It follows that I do not agree with the Arbitrator or the authors on whom he relies to find that the parties are free to agree to arbitrate by any process they wish including a civil inquisitional process or even a flip of a coin.

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[24] That is not to say that there can never be a fair civil inquisition and perhaps even a fair coin toss. But the parties agree that the doctrine of procedural fairness has known content at common law. Case law in this context associates procedural fairness with the doctrine of natural justice. While this is not the case to discuss the differences between the two procedural standards, the parties agree and the case law provides that both include the requirement that the decisionmaker be neutral as between the parties.

[25] In my view, an arbitrator under the *Arbitration Act, 1991* is required to be a neutral, independent decision-maker. He or she cannot lawfully be biased or predisposed towards a party. This is not just a dictate of the obligation of fairness set out in s. 19, but is made clear in s. 13 (1) that provides that an arbitrator may be removed if "[c]ircumstances exist that may give rise to a reasonable apprehension of bias."

[26] It may well be that the parties could devise a process for an inquisitional style of proceeding that protects and maintains the arbitrator's neutrality as defined at law. Perhaps they could devise a fair coin toss process. I agree with Mr. Adair that to do so would likely require very express wording that carefully respects the mandatory language of the statute and avoids creating circumstances that may give rise to a reasonable apprehension of bias.

(2) Neutrality or a Lack of Bias is a Component of the Doctrine of Procedural Fairness.

[27] In *Ontario Provincial Police v. MacDonald*, 2009 CanLII 9751 (ON SCDC), the Divisional Court dealt with an allegation of a reasonable apprehension of bias made against a regulatory adjudicator. The court gave a comprehensive summary of the state of the applicable principles as follows:

> [18] Impartiality and the appearance of impartiality are essential to procedural fairness:
>
> > The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the

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> precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. […]
>
> *Newfoundland Telephone Co. v. Newfoundland Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at para. 22

[19] An adjudicator, who serves a purely adjudicative and quasi-judicial function, must be held to the highest standards of fairness and freedom from apprehension of bias. The adjudicator is expected to comply with the standard applicable to courts.

> *Newfoundland Telephone*, *supra* at para. 27

[20] Whether perceived bias exists must be determined on a carefully considered analysis of the facts of a particular case. The factors to consider in that analysis include prejudgment of issues, prejudgment of credibility, undue and one-sided interventions with counsel or in the examination of witnesses, as well as the reasons of the judge. It is essential that a court consider these factors cumulatively. The test that must then be applied is as follows: taken cumulatively, would all of the relevant factors lead a reasonably informed observer to have a reasonable apprehension of bias on the part of the adjudicator and to conclude that there had not been a fair and impartial proceeding?

> *Newfoundland Telephone*, *supra*, at para. 22
>
> *Sorger v. Bank of Nova Scotia* (1998), 1998 CanLII 3715 (ON CA), 39 O.R. (3d) 1 (C.A.) at para. 3

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[21] The removal of a judge is appropriate when there is shown to be a reasonable apprehension of bias. The test for apprehension of bias is set out in *R. v. R.D.S*:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude.
>
> *R. v. R.D.S*., 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at paras. 31 and 111

[22] The test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable. “The grounds for this apprehension must, however, be substantial…and the test [will not] be related to the very sensitive…conscience.” The reasonable person must have knowledge and understanding of the judicial process and the nature of judging.

> *R. v. R.D.S., supra*, at paras. 31 and 37

[23] It is not an apprehension of bias for a judge to make reasonable criticism of counsel or witnesses who appear before them.

> *R. v.* McCullough*,* 1998 CanLII 6208 (ON CA), [1998] O.J. No. 2914 (C.A.) at para. 17

[24] When a disqualifying apprehension of bias is alleged, the strong presumption of judicial impartiality is also a companion consideration. The onus rests on the applicant to demonstrate a reasonable apprehension of bias.

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R. v. Brown, 2003 CanLII 52142 (ON CA), [2003] O.J. No. 1251 (C.A.) at paras. 37, 39 and 105

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> [25] When determining whether or not there is a reasonable apprehension of bias, the court must take into the consideration the context regarding the impugned behaviour.
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> > *Wewaykum Indian Band v.* Canada, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259 at para. 77; *Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005), 2005 CanLII 24217 (ON CA), 76 O.R. (3d) 321, (C.A) at para. 96, citing *Wewaykum Indian Band v. Canada*
>
> [26] It is inappropriate for a party to bring a disqualification motion if the essential purpose of that step is a form of reverse "judge shopping" because of subjective dissatisfaction with the arbitrator. A reviewing Court should be vigilant in examining the motive for bringing a motion to ensure that it is not brought for a purely tactical advantage.
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> > *Authorson (Litigation guardian of) v. Canada (Attorney General),* [2002] O.J. No. 2050 (Div. Ct.) at para. 4; *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc. et al.* (2007), CanLII 16821 (as cited in *Tazco Holdings Inc. v. Advantage Products Inc*., [2007] F.C.J. No. 1143)

[28] Many of the same sentiments were adopted in the Court of Appeal in *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47 (CanLII). In that case an allegation of a reasonable apprehension of bias was made concerning the conduct of a trial judge of this court.

[29] In *Chippewas,* the Court of Appeal confirmed that the assessment of whether a reasonable apprehension of bias exists requires an assessment of the context in which the allegation arises.

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[30] The Court of Appeal was clear that judges are free to actively and civilly participate in the proceeding before the court. They are in fact duty-bound to manage the proceeding to ensure fairness and efficiency. But the Court cautioned that this does not give the judge free rein to participate in questioning witnesses.

[31] The Court wrote:

> [237] For the most part, trial judges can manage the trial process by asking questions of counsel, making comments or giving directions about the course of the trial. Trial judges should be careful about trying to control a trial by examining witnesses. In the normal course, "the trial Judge should confine himself [or herself] as much as possible to his [or her] own responsibilities and leave to counsel ... [his or her] ... function:" *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at pp. 230-31; see also *Valley*, at p. 231.
>
> [238] On occasion, trial judges may be required to play a more active role in asking witnesses questions. However, when they do, it is important that they use care and not create an impression through the questioning process of having adopted a position on the facts, issues or credibility. [Notes omitted.]

[32] However, focusing on the context of the judge's involvement, and recognizing the strong presumption of impartiality, at para. 243, the Court held that:

> In the end, an appellate court should only intervene if satisfied that the trial judge's interventions, considered in the context of the entire trial, created a reasonable apprehension that the trial judge was biased.

[33] In discussing the permissible scope of questioning of witnesses by a judge, in *McFarlane v. Safadi*, 2004 CanLII 12644 (ON CA), Armstrong JA, for the Court of Appeal, wrote:

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[30] In Majcenic v. Natale (1967), 1967 CanLII 267 (ON CA), [1968] 1 O.R. 189, 66 D.L.R. (2d) 50 (C.A.), Evans J.A. described improper judicial intervention at p. 204 O.R.:

> When a Judge intervenes in the examination or cross-examination of witnesses, to such an extent that he projects himself into the arena, he of necessity, adopts a position which is inimical to the interests of one or other of the litigants. His action, whether conscious or unconscious, no matter how well intentioned or motivated, creates an atmosphere which violates the principle that "justice not only be done, but appear to be done". Intervention amounting to interference in the conduct of a trial destroys the image of judicial impartiality and deprives the Court of jurisdiction. The right to intervene is one of degree and there cannot be a precise line of demarcation but if it can be fairly said that it amounted to the usurpation of the function of counsel it is not permissible.

[31] The hallmark of a fair trial is that the judge preside with impartiality and neutrality between the parties. The judge must not cross the line and become a participant in the litigation. When he or she does so, his or her impartiality and neutrality are lost. It is at that moment that the trial ceases to be fair.

[32] Sometimes a trial judge unwittingly crosses the line without intending to do so. This is a more common error and appears to be what happened in the present case. Unfortunately, unintentional conduct may also result in an unfair trial.

[33] In my view, the trial judge made two fundamental errors in his conduct of the trial.

[34] The first error of the trial judge is found in his questioning of the police officer. His questions went

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> beyond the permissible limit. A trial judge may ask questions of a witness for the purpose of clarifying issues or amplifying areas of the evidence that require further explanation. However, if a trial judge questions a witness in a manner that gives the impression that he or she is adopting a particular position in opposition to one of the parties, he or she has gone too far. See James v. Canada (Minister of National Revenue), [2000] F.C.J. No. 2135, 266 N.R. 104 (F.C.A.) at para. 52; Majcenic v. Natale, supra, at pp. 203-04 O.R.

[34] These cases also make clear that the motivation or intention of the judge is not relevant. Judges may have the best of intentions to find the truth on the facts before them and yet inadvertently cross the line into unfair conduct that causes a reasonable apprehension of bias in reasonable and right-minded persons applying themselves to the question after obtaining the required information and viewing the matter realistically and practically.

(3) The Principles in the Context of a Commercial Arbitration with an expert Arbitrator armed with Written Evidence in Chief and Expert Reports

[35] The Arbitrator focuses on several contextual factors in his decision dismissing ATRL's request to remove him.

[36] First, he relies on his background and expertise. The parties chose someone whom they knew would understand the complexities of the issues and who could apply his own experience to assess the evidence and submissions before him.

[37] Coupled with his expertise, the parties also knew that this Arbitrator in particular adopts an active, interventionalist style of hearing. Both counsel agreed to this and encouraged the Arbitrator to do so.

[38] In a prehearing conference, on Apri, 16, 2025, the Arbitrator explained to counsel his "preference for a somewhat more inquisitorial approach." Both counsel concurred with his approach.

[39] The Arbitrator also relies on the written terms of his appointment that include the following term:

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> 9) The Parties shall be entitled to cross-examine any witness called on behalf of any adverse Party and to re-examine witnesses that have been cross-examined on matters raised for the first time in cross-examination. Recognizing that the Arbitrator is a neutral adjudicator of the dispute between the Parties, the Arbitrator shall be entitled to question any witness. including Party-appointed experts, provided that the Parties shall be provided the opportunity to ask additional questions on any matters addressed or raised by the Arbitrator's questioning.

[40] At the commencement of the arbitration hearing, the Arbitrator reiterated his preferred approach and said:

> …So, my practice has been, in arbitrations, to be a little more inquisitorial than your typical judge might be in a courtroom, who is hearing the case unfold for the first time live.
>
> Because I have read all the material and can anticipate some of the evidence, I feel that I have the ability to, sometimes, ask questions based on what I've read. I try very hard not to jump on anyone's cross-examination and, to the best of my ability, reserve the questions until you have completed your examinations.
>
> I always give counsel an opportunity to ask follow-up questions to anything I have raised if I, in fact, do, and that's the way I prefer to do things. Most lawyers actually like that because they find out what issues are of interest to me rather than read about it in my final award and have no chance to address it, but it's something that I like to clear with counsel in advance and make sure everybody is comfortable with that approach.
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> …
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> Sometimes I do it when I feel the witnesses are not being straightforward and not answering questions they're asked on cross-examination or being evasive. Sometimes I feel

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they're more likely to be responsive if it's the arbitrator asking the questions.

If at any point you're uncomfortable with any of that, all you have to do is let me know and ...

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[41] Mr. Adair responded most positively to this advice as follows:

> MR. ADAIR: No issue here, Mr. Morrison. As long as we get the chance to follow up on anything that comes out of that questioning at the end, which you have said, I have no problem whatsoever and say I will fall into that group of people who appreciates it because it makes our lives easier to know what you are interested in and thinking about.

[42] The Arbitrator also relied on the fact that this was a commercial arbitration rather than an action in the courts. The parties chose him for his expertise and approach. Moreover, as a private proceeding, he viewed the hearing as one in which public confidence in the administration of justice was not as compelling a factor as a court case. See: *Dufferin v. Morrison Hershfield,* 2022 ONSC 3485 (CanLII)

[43] I will come to the Arbitrator's specific conclusions and to the submissions of GIP on the facts and context points in the analysis below. At this stage, I am setting out the law that guides my analysis.

[44] The first and most obvious point is that despite the wishes for autonomy expressed by some arbitrators in industry publications, the *Arbitration Act, 1991* is the law of the land. The Legislature determined that in the public interest it would recognize private arbitrations and give parties a very broad berth at designing their own processes. However, the Legislature requires that in all cases an arbitration must treat the parties equally and fairly. That brings with it the obligation of neutrality applicable to all arbitrators. The fact that one of the only two grounds to remove an arbitrator amid stream is for a reasonable apprehension of bias, leaves no doubt that the duty of neutrality applies in arbitrations as a matter of law and public policy no matter what the parties may prefer.

[45] The Supreme Court of Canada has ruled that arbitrators and judges are bound by the same rules of neutrality. Allegations of bias or a reasonable apprehension of bias are subject to the same rules whether in court or in an arbitration.

[46] In *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] SCR 3, the Supreme Court of Canada applied the same principles for assessing a reasonable

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apprehension of bias for arbitrators as apply to judges of the court. The Court confirmed that this is so despite the fact or especially because of the fact that the parties get to choose their arbitrator. (at p. 6 of the SCR) as follows:

> …It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
>
> Especially so is this the case where he has agreed to the person selected. The Court of Appeal took the view that "from that circumstance alone" (the joint ownership of the property) "it is not to be inferred that the arbitrator would not act in an entirely impartial manner, and there is no evidence before us that he did not in fact act in an impartial manner." But as the facts show, it is not merely a case of joint ownership. Nor is it that we must be able to infer that the arbitrator "would not act in an entirely impartial manner"; it is sufficient if there is the basis for a reasonable apprehension of so acting.

[47] In *Szilard*, an arbitrator failed to disclose that he had a potential economic interest in the subject matter of the arbitration. Nothing in the Court's decision differentiated the law or analysis applicable to an arbitrator with a potential interest in the case from one who descends into the arena and gives the appearance of adopting the position of a party. Both create circumstances that could create a reasonable apprehension of bias in the mind of a duly informed, duly cautious observer.

[48] In *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII) the Court of Appeal just last year discussed the question of a reasonable apprehension of bias in a private commercial arbitration under the *UNCITRAL Model Law on International Arbitration* as adopted by the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5.

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[49] Huscroft JA dealt first with the requirement of neutrality as applicable to arbitrators under the principles of procedural fairness:

> **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.
>
> …
>
> [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

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> 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*, 1976 CanLII 2 (SCC), [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.

[50] After considering the arbitration context in particular, Huscroft JA concluded:

> **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

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> 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.

[51] I pause to note that the basic presumption that a judge or arbitrator must not descend into the adversarial arena to cross-examine witnesses is a widely recognized. Questioning "in the form of cross-examination" was not seen as fatal in *Chippewas (see pasas. 245 and 246)*. On the other hand, in a criminal case the rule is almost absolute.

[52] Just a few weeks ago, in *R. v. M.M.*, 2026 ONCA 617 (CanLII), the Court of Appeal drew a clear line precluding cross-examination by a judge in a criminal trial. The court held:

> Although a trial judge may intervene to ask questions that should have been asked by counsel or to clarify a witness' evidence, they may never become the cross-examiner: *R. v. Stucky*, 2009 ONCA 151, 303 D.L.R. (4th) 1, at para. 65; *R. v. Walton*, 2025 ONCA 368, 177 O.R. (3d) 1, at paras. 25-30. Doing so usurps counsel's role and gives a reasonable person the impression that the judge is not neutral. The impression of unfairness is heightened here because the trial judge began questioning the appellant before he was re-examined by his own lawyer, she directly challenged his credibility, and she relied on the testimony

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> that she herself elicited to justify her rejection of the appellant's evidence.

[53] As support for his breadth and style of his questioning, the Arbitrator referred to an article by Glaholt and Rotterdam, *Arbitrator Questioning: Sphinx or Skeptic?* 2016 J. Can. C. Construction Law 81. The authors wrote:

> …Across systems of private law, it seems that provided the questioning does not give rise to the appearance of one-sidedness or unfairness, permissible areas of questioning for an arbitrator include the following:
>
> > 1. Ensuring that the arbitrator has understood what the witness is saying.
> >
> > 2. Clearing up points that have been left obscure.
> >
> > 3. Ensuring that the arbitrator has correctly understood technical detail.
> >
> > 4. Maintaining an orderly, professional approach by counsel.
> >
> > 5. Protecting witnesses from misleading or harassing questions.
> >
> > 6. Moving the arbitration along at an appropriate pace.
> >
> > 7. Excluding patent irrelevancies and discouraging repetition.
>
> The better point of view, it would seem, is to consider it both an arbitrator's right and an arbitrator's duty to ask questions in these seven areas, particularly when the arbitrator has been chosen for subject matter expertise.

[54] The Arbitrator relied in particular on points 1 and 2 above to support his entitlement to question to clarify evidence and to clean up points left obscure.

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[55] The authors do not mention specifically the notion of cross-examination by an arbitrator. Rather, the proviso in the opening paragraph warns arbitrators that even when questioning for acceptable purposes, care must be had so that, “the questioning does not give rise to the appearance of one-sidedness or unfairness.”

[56] With the applicable law not in doubt, what remains for review is whether, on the facts of this case, measured in the overall context of this particular arbitration and this particular arbitrator, the concern that the Arbitrator may appear to lack neutrality is made out sufficiently to justify removing him.

The Cross-Examinations by the Arbitrator

[57] In his April 18, 2026 decision, the Arbitrator mentions his high degree of preparation of notes and questions in advance for each witness. He also relies on a descriptive passage penned by Woodley J. in the *Dufferin* case cited above. The issues in that case were very similar to the issues before me. The same arbitrator was accused of the same misconduct in an earlier arbitration.

[58] In *Dufferin*, after a close review of the transcripts of the arbitration before her, Woodley J. held:

> 122. The transcripts evidence that the Arbitrator attended each day fully prepared for the hearing having read, considered, and made notations regarding the proposed testimony being proffered each day. The Arbitrator's questions and comments expose that he has a high level of knowledge and experience in the area being arbitrated. The transcripts further evidence that the Arbitrator possessed the sought after "subject matter expertise" which expertise is strikingly evident throughout the written record as was the Arbitrator's ability to shortcut the issues to obtain answers to queries that were otherwise not forthcoming.
>
> 123. The transcripts do not read like an ordinary court proceeding. The Arbitrator purposefully and intentionally prepared questions for every witness. The Arbitrator

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> intervened whenever evidence or testimony caused him to question the nature, effect, or reliability of that evidence or testimony regardless of whether the witness was called for the Applicants or the Respondent. Contrary to the position of the Applicants, it is my view on reading the transcripts that the Arbitrator's interventions were intended to ensure "a fair and independent process" and to enable the parties to provide their "full answer and defence" and not otherwise.

[59] Like my colleague, on reviewing the transcripts of the arbitration in this case, I too see a highly prepared arbitrator possessing substantial understanding of the issues and facts before him. He prepared in advance careful questioning for witnesses much like counsel does. After cross-examination by counsel, he commenced his own questioning like a second counsel. Sometimes he spoke up during cross-examination for clarification. But the focus of the concerns are with the Arbitrator's carefully prepared and executed cross-examinations of ATRL's witnesses in particular.

[60] The Arbitrator was not limited by a concern of whether he was cross-examining witnesses because he formed an erroneous view in law that, as arbitrator, his questions could not amount to cross-examination by definition. Therefore, as will be seen, he conducted skillful cross-examinations, using leading questions, controlling the witnesses, all aiming at establishing facts he put to the witnesses that he wanted the witnesses to accept, destroying evidence that he did not wish to accept, or undermining the credibility of the witnesses.

[61] At para. 129 of his April 18, 2026 reasons, the Arbitrator wrote:

> 129. In its submissions, ATRL repeatedly alleges that I "descended into the arena" by engaging in impermissible "cross-examination" of its witnesses. ***The key error in this submission is that questioning by a judge or arbitrator is not, by definition, cross-examination.*** The definition of cross-examination in Black's Law Dictionary reads as follows:

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> The examination of a witness upon a trial or hearing, ... by the party opposed to the one who produced him, upon his evidence given in chief, to test the truth, to further develop it, or for other purposes. [Emphasis added]

130. Similarly, Sopinka, Lederman, and Bryant identify the three purposes generally attributed to cross-examination as:

> a) to weaken, qualify or destroy the opponent's case;
>
> b) to support the party's own case through the testimony of the opponent's witnesses;
>
> c) to discredit the witness.

131. The difference between "cross-examination" and questioning by a judge or arbitrator, even when those questions are probing, incisive, or in the "form of cross-examination", is one of intent. The cross-examiner intends to secure admissions of fact contrary to the opposing party's case, supportive of their own case, or answers that undermine the credibility of the opposing witness' testimony. Given my expressly acknowledged neutrality and impartiality, I have neither an opponent nor any intention to accomplish any of the above-noted purposes.

132. By comparison, questions asked by a neutral adjudicator have the sole purpose of clarification, resolving inconsistencies, assessing testimonial reliability, and ensuring a complete evidentiary record. My questioning of both parties' witnesses was entirely consistent with my expressly permitted inquisitorial search for the truth and mandate to deliver a fair and reasoned decision based on reliable evidence and a reasonable interpretation of the terms of the subject subcontract.
[Notes omitted. Bolded italics emphasis added.]

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[62] While there is no doubt that cross-examination is supposed to be carried out by counsel for opposing parties, that does not mean that arbitrators and judges are definitionally incapable of descending into the arena and using the questioning technique reserved for counsel.

[63] The Arbitrator misses the point that this is not a matter of definition. Rather, it is a proscription dictated by the obligation of neutrality. The point isn't that arbitrators "cannot" possibly cross-examine because dictionary definitions show that only counsel can cross-examine. Rather, the point is that, subject to contextual factors, like judges, arbitrators ***must not*** cross-examine precisely because questioning in that way and for those purposes is the role of adversarial counsel and is not consistent with the required neutrality of an arbitrator or judge.

[64] The Arbitrator held that his questions were an "inquisitional search for the truth." They were not impermissible cross-examination because he only intended to carry out his perceived mandate of holding an inquisition. This ignores the case law that in assessing whether a decisionmaker has created a reasonable apprehension of bias the intention of the arbitrator or judge is not relevant.

[65] Cross-examination is a questioning technique by which the examiner controls the witness through use of leading questions to have the witness give evidence desired by the examiner; undermine evidence previously given by the witness or others in the same side; or to impair the witness's credibility.

[66] The cross-examiner seeks to put words in the witness's mouth. The cross-examiner's goal is not to ask open-ended questions to allow the witness to tell his or her story. That was what evidence in chief was for. The cross-examiner seeks to push the witness through controlled questioning to hurt his side's case or to help the cross-examiner's case.

[67] Cross-examination is not a simple search for the truth. It is not just clarifying evidence. It is a complex, highly constructed form of questioning designed to obtain evidence desired by the questioner. It is inherently not neutral because it is the examiner who is creating the evidence for one of the three purposes noted above. The examiner knows in advance what he wants the witness to say. It is not a search

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for the truth because the desired “truth” has been determined in advance by the cross-examiner.

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[68] That is not to say that any leading question or any effort to cross-examine necessarily leads to a conclusion that a judge or arbitrator has impermissibly descended into the arena and created a reasonable apprehension of bias. *Chippewas* seems to have allowed some questions in the form of cross-examination. In each case the impugned conduct must be measured in its full context with due regard for the strong presumption of neutrality and the constrained, high hurdle set by the Supreme Court of Canada in *Committee for Justice and Liberty.*

[69] The Arbitrator commenced his examination of ATRL's witness MacDonald as follows:

> THE ARBITRATOR: So, let me begin Mr. MacDonald ... I'm going to draw on your extensive experience in the construction world and I'm going to ask you to just, for the moment, move on off this project and we're going to talk in generalities for a moment. Is that okay?

[70] What followed then was some seemingly innocuous questioning about how changes in construction projects are dealt with between contractor and subcontractor generally.

> THE ARBITRATOR: And they get the prices and they don't like them, or they don't like the schedule impact. I'm suggesting one option is they withdraw their request for the change. You know, "Don't do it. We'll get someone to do it later when you're done" or, "We don't need it. It was discretionary".
>
> THE WITNESS: That could be an option, yes.
>
> THE ARBITRATOR: Right? Or if it impacts a part of the work where that's really not an option, they could descope that part of the work that is impacted by the change, right?
>
> THE WITNESS: They could, yes.
>
> THE ARBITRATOR: So, the options are change order, change directive, withdraw the request for the change where that's feasible or, perhaps, descope the work. There are also provisions in most of these contracts, including

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> this contract, that says, "You must not do any work without a change order or a change directive" ...
>
> THE WITNESS: Right.
>
> THE ARBITRATOR: ... correct?
>
> THE WITNESS: Yes.
>
> THE ARBITRATOR: And you have seen lots of situations, I presume, having been in this industry for a long time, where a party does a whole bunch of work without a change order or a change directive, perhaps on a soft commitment that they will get paid for it, and then when they go and submit the invoice, they're told, "Well, no, we're not paying you. We never gave you a change order or a change directive. Go fly a kite." You've seen that, right?
>
> THE WITNESS: That does happen, yes.
>
> THE ARBITRATOR: Yes. And the contract provision is strict: do not do any additional work that, you know, arises from a change unless you have one of those two documents. All right, so, I want to just quickly change slightly. ..

[71] One major issue in the case was whether ATRL was entitled to terminate the contract when GIP and ATRL could not agree on the pricing of proposed changes. What seemed like innocuous background questions was actually the Arbitrator using leading questions to pin the witness to a list of options in response to proposed changes that did not include termination of the contract. He will come back to this.

[72] The Arbitrator then moved to questions to undermine the witness's evidence that ATRL required specific senior people to approve changes to pricing.

[73] I am sorry to have to insert here a lengthy piece of transcript. But it is important and very telling.

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[74] At p. 126 of the transcript, the Arbitrator then came back to the issue of changes to the scope of the project. He sought to elicit an admission from the witness that ATRL did not take any of the steps that the witness previously agreed were open to it to take when changes were proposed. But the witness disagreed. What follows was the Arbitrator and the witness debating the theory of ATRL's case:

> THE ARBITRATOR: Okay. So, as we, I think, agreed earlier, if the party receiving the cost to do the changes is not happy with what they get, they're not going to issue a change order, right?
>
> THE WITNESS: Right.
>
> THE ARBITRATOR: They could descope, they could withdraw the requested changes from this contractor, or they can issue a directive to proceed and track your costs. Now, I think the evidence is that SNC didn't do any of those things. They didn't issue a change order even for the new pieces of work that weren't ... I think we heard the electrical work, for example, was expanded by about 400 percent.
>
> THE WITNESS: So, we ended up descoping the electrical work.
>
> THE ARBITRATOR: You did eventually, I understand that, but a minute ago, or when you were being cross-examined, you said, "We didn't descope anything. We never issued a descoping change order, we terminated". So, you did ... on
>
> THE WITNESS: That was related to the. . .
>
> THE ARBITRATOR: ... descope it, didn't you?
>
> THE WITNESS: That was related to the concrete part that we were talking about at that. ..
>
> THE ARBITRATOR: Well, that wasn't what you said earlier. You said clearly, "We didn't descope anything. We insisted they go ahead and complete all the work within their scope." So, I guess what I'm getting at is, you had the

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right to issue a variation directive, you didn't do it. GIP says, "We're not doing anything until we get one of those things because that's what the contract says".

They never got any of those things, and you terminated ... partial termination in August. I'm trying to understand the basis on which you say they were in default of proceeding with the work when there was an acknowledgment of an entitlement, a request to submit prices, and they did all that. And I get that SNC thought they were playing games with the pricing and were unhappy with it. I'm not debating any of that, on but is there an obligation on the part of a subcontractor to give prices that you like or want ?

THE WITNESS: No, but by giving a variation directive, it's going to expose us to productivity issues that would have been their responsibility under the unit rate. So ...

THE ARBITRATOR: You can argue about that. . .

THE WITNESS: ... the escalation, you can't separate, but the productivity issues, if we gave a variation directive and got actual costs, you would have escalation plus productivity problems baked in there. So, you couldn't really establish ...

THE ARBITRATOR: That might be a later fight, but at least they would have a variation directive to rely on to do the work that they were prohibited from doing without it.

THE WITNESS: But would it be able to be fought later on after giving the variation directive?

THE ARBITRATOR: Why not?

THE WITNESS: Why don't ...

THE ARBITRATOR: You're having a on dispute over the value of the work, but here's the point. When you ask a contractor to do additional work in the middle of a contract and it's no longer a competitive process like there is in the

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> original bids, they give you the price they want to do that work.
>
> THE WITNESS: Which I understand for the new items ...
>
> THE ARBITRATOR: Well, for any items.
>
> THE WITNESS: So, I don't think we should open the door to change the unit rate, though.
>
> THE ARBITRATOR: I don't know why not. If there is a change that's acknowledged, in this case, in the schedule, and an entitlement that is clearly indicated, they go out to their suppliers and their subcontractors and they get updated pricing, and it is what it is. And if you don't like it, you have some choices, but they're not obliged to give you prices that you like, are they?
>
> THE WITNESS: No.
>
> THE ARBITRATOR: No. So, you can compel them to do the work under a directive and they track their costs and they're entitled to on certain markups on those, but that didn't happen, is my point.
>
> THE WITNESS: Okay.
>
> THE ARBITRATOR: Do you agree that didn't happen?
>
> THE WITNESS: Yes.
>
> THE ARBITRATOR: Okay. Give me a moment .

[75] In this questioning, the Arbitrator tried to have the witness accept that the contractual options to which he was pinned were not provided by ATRL to GIP. The separation of the questions pinning the witness to the general processes of construction projects and then later coming back to push the witness to accept that the general processes applied in the specific case is classic cross-examination technique. You pin the witness to seemingly innocuous points at the outset of the examination, before the witness is too hostile. Then, when the witness tries to wiggle

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later, you confront him with the admission to which he was already pinned.

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[76] The witness fought back here and relied on a descoping of some work to show how ATRL was dealing with some of the changes in scope. The Arbitrator responded by cross-examining the witness on a prior inconsistent statement. But rather than asking the witness to explain the alleged inconsistency, the Arbitrator led the witness to discuss GIP's entitlement to set proposed prices for new work. Instead of asking, "why did ATRL terminate the contract", he created a tautology and asked, "I'm not debating any of that, but is there an obligation on the part of a subcontractor to give prices that you like or want?" The answer to that question has to be "no" as it was.

[77] The Arbitrator then interrupted the witness in his effort to explain. Had counsel done that in cross-examination, a judge or arbitrator would have intervened to allow the witness to answer.

[78] The Arbitrator then led the witness towards the answer he sought at the beginning of the line of questioning. When the witness twice raised issues of concern to ATRL, the Arbitrator dismissed them with, "You can argue about that" and "That might be a later fight." So with his answers dismissed, the witness had nothing left but to agree with the suggestion put to him by the Arbitrator.

[79] This was a skillful piece of cross-examination in which the Arbitrator sought to undermine a key plank in ATRL's case. There cannot be any doubt about the purpose of the questioning. At the very outset of the lengthy segment above the Arbitrator asked or stated, "Now, I think the evidence is that SNC didn't do any of those things [that are available when a change is proposed the witness was pinned to already]." Then having stripped away the witness's efforts to deflect or answer with ATRL's concerns, the Arbitrator led the witness to the admission sought at the outset, with his final, "Do you agree that didn't happen." When he secured the admission, the Arbitrator then moved on.

[80] In the final piece from this witness's cross-examination by the Arbitrator, the Arbitrator took issue with ATRL claiming that GIP was refusing to perform work and using the supposed refusal as a basis to terminate the agreement rather than issuing a mandatory change directive to GIP. The following questioning starts at p. 139 of the transcript:

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THE ARBITRATOR: And they were told, "Come back on the 16th. It will be ready then", but on the 15th, they get a termination. What is wrong with this picture? No variation directive, told to come back and do a limited, reduced scope of work in a schedule on July 27th, they show up, they can't do the work, they're told to come back nine days later, but, in between, they get partially terminated.

I can't ask Jeff Tam about this because he's not here. So, do you understand why I'm having difficulty? I would like to give you an opportunity to explain if you have something further to say.

THE WITNESS: So, it all revolves around their refusal to come and do the curb work. So, I understand the other factors with that, but it's still part of their contract ...

THE ARBITRATOR: But that is not what the Notice of Default says, is it? It says all...

THE WITNESS: Well, it says...yes, it says "all the work", but because they're still pigeon-holing that out and trying to get out of doing that work, that's why we had to terminate them, so that we could execute that work and carry on.

THE ARBITRATOR: So, they have acknowledged, although you weren't necessarily privy to this, they really didn't want to do the work. I have heard that, okay?

THE WITNESS: We got that impression from them.

THE ARBITRATOR: You got that impression.

THE WITNESS: Yes.

THE ARBITRATOR: But by the time they're terminated, there is at least an email from Will Black saying that even the curb scope has been descoped, "Just come back and do the Granular A and asphalt". Now, you may not...

MR. ADAIR: But it doesn't say that.

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> THE ARBITRATOR: ...think Will Black had the authority ...
>
> MR. ADAIR: Mr. Morrison, sorry to interrupt. That is not who sent the email, and that's also not what the email says, so I'm not sure what we're doing here.
>
> THE ARBITRATOR: I'm asking...
>
> MR. ADAIR: These are not clarifying questions, with all respect, and they're factually inaccurate. That's not who wrote the email, and that's not what it says, and this witness was taken to task by you for reading things into the emails.
>
> THE ARBITRATOR: Right, I'm going to leave it at that. Thank you very much, Mr. MacDonald for your time. Any re-exam?

[81] The Arbitrator starts by expressing a sarcastic view of ATRL's conduct ("What is wrong with this picture?"). He then purports to give the witness an open-ended, non-leading opportunity to explain further. But, just as the witness is just starting to explain, the Arbitrator interrupts with a statement that his evidence is contradicted by the default notice. He did not put the document to the witness. He let the witness complete an explanation of that concern but then the Arbitrator raised another email that he asserted was also inconsistent with the witness's testimony. He did not put that document to the witness either. Rather, Mr. Adair objected and stated that the Arbitrator had mis-stated the contents of the email. The Arbitrator then ended his questioning.

[82] While the Arbitrator said he was providing the witness with an open-ended chance to explain further, he did not do so. Rather, he sought to undermine the witness's explanation – interrupting to raise inconsistencies.

[83] The Arbitrator had a different set of questions prepared for ATRL's witness Mr. Black. Starting at p. 55 of the transcript:

> THE ARBITRATOR: Okay. I don't really want to ask you much about the substance, but I did want to ask you a few questions about your statement, your witness statement,

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primarily focusing on the first one. A number of the witnesses in this arbitration have indicated in their witness statement that they had assistance from legal counsel in preparing their witness statement. I didn't see that reference in yours, but is it fair to say that you also had assistance in preparing your witness statement that we have in this proceeding?

THE WITNESS: Yes.

THE ARBITRATOR: I ask that because when I focus on some of the language used...for example, I'm looking at paragraph 8. You don't have to look at it, I'll just read it. It says,

> "...This broad, context-sensitive definition of works is again stated in the subcontract, GCs, and so on..."

That doesn't sound like your language, the way you speak, "broad, context-sensitive definition". Would I be correct in saying that was language provided by counsel?

THE WITNESS: Yes.

THE ARBITRATOR: Okay. The first 123 paragraphs of your witness statement, roughly just over two-thirds of the 50 pages, there are a lot of references to contract provisions, what they say, what they mean. Did you write any of that?

THE WITNESS: With assistance, but...

THE ARBITRATOR: Did you write any of that?

THE WITNESS: Not directly, no.

THE ARBITRATOR: No, you read it and signed it, would that be fair?

THE WITNESS: For the most part, yes.

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THE ARBITRATOR: Okay. And when Ms. Mangano asked you about that, about your significant contract interpretation in your statement, you said a number of times, "I was just giving my opinion". Do you remember that?

THE WITNESS: Yes, sir.

THE ARBITRATOR: So, I word-searched it. The word "opinion" never appears in your whole statement. It appears to be categorical statements about what the contract means, including a lot of editorializing about GIP's behaviour at a time when you weren't involved in the project. I take it those are not your assessments, per se?

THE WITNESS: No, not personal assessments, no.

THE ARBITRATOR: Okay. I'll just flip to another paragraph, for example. In paragraph 28, your statement says,

> "...On January 13, 2022, GIP wrote to ATRL, first indicating its intention to ignore the schedule..."

I looked at that email. I don't see...I see this as an editorial comment on what that email said. Do you remember that email?

THE WITNESS: Yes, I believe it was the email after the contract had been signed because the dates had already been passed, right? Am I recalling that correctly? The dates had already passed...

THE ARBITRATOR: Sorry, it wasn't an email, it was a letter. Excuse me for that. I'm just going to share my screen, and tell me if you can see that. And is it big enough for you to read?

THE WITNESS: Yes, I can read it. That's fine. Thank you. Okay.

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THE ARBITRATOR: So, they're referring to addendum number one?

THE WITNESS: Addendum number...

THE ARBITRATOR: Oh, sorry. They're referring to the dates. I take that back.

THE WITNESS: Okay.

THE ARBITRATOR: Do you see an indication in there that they're going to ignore the schedule?

THE WITNESS: I mean, I would say it's almost...maybe "ignore" was a harsh word to say.

THE ARBITRATOR: But it wasn't your word, in fact, was it?

THE WITNESS: No.

THE ARBITRATOR: No? Okay. Because it's a spin that has been put on that letter, but it wasn't put on it by you. This is just an example of a lot of what I'm seeing in the first two-thirds of your statement. And if you think I'm being critical, you're not the only one, so...and this is to some extent on both parties, but I just found it didn't seem to reflect the way you speak in your testimony.

All right, that's all. Those are all my questions. Thank you. Anything arising out of that, either of you, either counsel?

MR. ADAIR: No.

[84] The Arbitrator made the point that he was critical of both sides to some degree for submitting affidavits that were not in the witnesses' voices and that strayed into argument and, apparently, lay opinion on the interpretation of agreements. But it was only this witness who was subjected to the Arbitrator's cross-examination to undermine his credibility.

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[85] The Arbitrator sought to differentiate this witness because his affidavit did not mention that it had been prepared with the assistance of counsel. But is it not expected that counsel will prepare affidavits? Lay people do not prepare affidavits.

[86] I completely accept that an affidavit that is not written in the witness's voice or, worse still, that does not reflect the witness's own observations, should lack weight. In his April 18, 2026 endorsement,

> the Arbitrator points to several difficulties that can arise in hearings in which evidence in chief is provided in writing and only cross-examination is conducted in front of the trier of fact.

[87] But once the Arbitrator had obtained the admissions that the affidavit did not reflect the witness's personal observations, what was the point of the rest. For example, the witness swore to the truth of the word "ignore." He says it was harsh but he was not questioned on why he believed GIP was ignoring the schedule. Instead, the Arbitrator simply dismissed his evidence as "spin."

[88] The goal of this piece of the cross-examination was not to determine if GIP ignored the schedule or if Mr. Black had a reasonable basis for believing that GIP was not following the schedule. Instead it was to denounce the witness's evidence as spin so as to undermine the witness's credibility because the evidence was drafted by counsel.

[89] During the cross-examination of the GIP's witness Faheem, GIP's counsel objected to a question that asked the witness to speculate. The Arbitrator again raised his concern that the affidavits contained information well beyond the personal knowledge of the witnesses. He rightly concluded that it goes to weight. But he did not cross-examine Mr. Faheem on his lack of personal knowledge of facts written by counsel. Neither did he denounce Mr. Faheem's evidence as counsels' "spin."

The Arbitrator's Contextual Points

[90] The facts that the Arbitrator has expertise and has the evidence in chief and expert reports in advance matter. They enable the Arbitrator to come into the hearing "hot" or highly prepared and knowledgeable. In

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Chippewas the Court of Appeal referred to the fact that the judge had evidence in advance as a contextual factor supporting the judge having a higher degree of involvement than might normally be expected.

[91] In *Chippewas*, the involvement by the judge approved by the court was largely procedural. That is, the judge was very active in determining how the case was presented – which issues were important and needed evidence and on matters of timing for example. In paras. 237

and 238, quoted above, the Court reminded judges to take care not to descend into the arena by questioning for fear of giving the impression that they have adopted a position on the facts, issues, or credibility.

[92] The Arbitrator relies on his terms of appointment and repeated oral admonitions that he takes an active role as amounting to express consent to his approach. But, as noted at the outset, the parties cannot contract out of the duty of fairness and the requirement of neutrality.

[93] In any event, the Arbitrator reads too much into very limited statements. Quoting him, he told the parties he prefers “a somewhat more inquisitorial approach.” That is a far cry from a decisionmaker freed from the duty of neutrality.

[94] Similarly, para. 9 of the terms of appointment specifically notes the Arbitrator’s duty of neutrality and then authorizes him to “to question any witness.” But the same term also authorizes the parties to “cross-examine any witness called on behalf of any adverse [p]arty and to re-examine witnesses that have been cross-examined on matters raised for the first time in cross-examination.” Nothing in para. 9 authorizes the Arbitrator to cross-examine or to shed his cloak of neutrality.

[95] It is also clear that the Arbitrator did not view himself as limited by the duty of neutrality in his questioning. He wrote:

> 150. Regardless of approach, it is essential to the preservation of fundamental fairness that the arbitrator does not become an advocate for either party, for that has the potential to create an apprehension of bias. ***But, in my view, avoidance of the appearance of advocacy should***

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> ***not prevent an arbitrator from asking difficult questions in appropriate circumstances, so long as they are proper questions posed for a proper purpose.*** In my view, asking difficult questions, for any of the above-noted reasons, is not an exercise in advocacy, if the goal is ultimately to enhance the arbitrator's understanding of the facts and issues and to provide the witness with an opportunity to explain or elaborate on their position when inconsistencies or incongruities appear.
> [Emphasis added.]

[96] Contrary to the view of the Arbitrator, avoiding the appearance of advocacy for a party is central to the duty of neutrality when asking questions – difficult or otherwise. All questioning by a decisionmaker will enhance his or her understanding of the facts and evidence. Providing a witness opportunities to elaborate does so too. The issue is how the questioning is carried out. If a judge or arbitrator wishes to question a witness, the duty of neutrality and the doctrine of fairness require that questioning must be done in a reserved way that, “does not give rise to the appearance of one-sidedness”(See Glaholt and Rotterdam, *supra*) or that he or she has “adopted a position on the facts, issues or credibility” (*Chippewas*, at para 238).

[97] Mr. Adair refers to many other pieces of transcript to bring home points about the nature of the Arbitrator’s interventions. He also asks me to make a more general assessment of whether the Arbitrator acted unequally as between the parties. I do not in any way ignore the transcripts as a whole. Ms. Mangano points to competing snippets to reduce the sting or to try to show that the Arbitrator asked her client’s witnesses similar questions.

[98] I do not see a benefit in debating inferences on a snippet-by-snippet basis. I have quoted lengthy, prepared pieces of cross-examination above that so plainly cross the line that there is nothing to be gained by drilling into other discrete points in disembodied snippets of the transcripts.

[99] The Arbitrator’s major interventions into the testimony of ATRL’s two main witnesses and his clear misunderstanding of the inappropriateness of undertaking cross-examination generally provide

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overwhelming context for the hearing as a whole. I cannot avoid finding that by conducting cross-examinations, designed to undermine ATRL's position and the credibility of its witnesses, the Arbitrator gave a reasonable person a reason to apprehend that the Arbitrator adopted the position of GIP or was against the position advanced by ATRL. In the words of the case law, he went too far and descended into the arena as counsel instead of maintaining his role as the neutral arbiter.

[100] To draft those cross-examinations in advance, the Arbitrator was not just clarifying witnesses' testimony. He determined to have Mr. MacDonald accept his view of the facts – which coincided with GIP's case - and he determined to undermine the credibility of Mr. Black's evidence. Whether intentional or not, a reasonable observer can reasonably see in both cross-examinations that the Arbitrator could be acting with a predetermined view of the outcome. He left the very impression that all the case law and authorities caution decisionmakers against leaving.

[101] In my view, on reading these interventions, a reasonably informed observer will properly form a reasonable apprehension of bias on the part of the Arbitrator and conclude that there had not been a fair and impartial proceeding.

[102] At para. 151 of his April 18, 2026 reasons, the Arbitrator held:

> 151. Moreover, having carefully reviewed the transcript with respect to my questions posed to various witnesses, I am satisfied that none of those questions exceeded the proper boundaries applicable to trial judges, even without the greater latitude extended to me by the parties' express agreement.

[103] There is no case in which a trial judge has been held to be entitled to carry out cross-examinations of the type performed by the Arbitrator. The boundaries applicable to trial judges in all the cases cited above are so narrow that cross-examination is all but prohibited. Context allows much leeway in the assessment of whether a decisionmaker has created a reasonable apprehension of bias for any number of reasons and different types of interventions in a proceeding. However, apart from a hint in *Chippewas* that not every question "in the form of

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cross-examination" is necessarily disqualifying, in all other cases, cross-examination is presumptively on the wrong side of the line.

[104] I agree with Mr. Adair that the significant concerns with cross-examination flow from the fact that cross-examination is perhaps the most powerful adversarial arrow in a litigator's quiver. None of the three recognized purposes of cross-examination is neutral. Cross-examination helps one side and hurts the other by design. The Arbitrator used the technique with powerful effect in this case.

[105] None of the contextual facts that the Arbitrator is experienced, knowledgeable, was provided with evidence in advance, that he allowed counsel to re-examine, or that the parties knew he would have a somewhat more inquisitional approach, altered the fundamental requirement that the Arbitrator be neutral. He was not entitled to favour one side or to be seen to be favouring one side. Yet he did so, perhaps without recognizing that his "search for the truth" could be seen otherwise by objective, informed, restrained, educated third parties.

Failure to Object

[106] The case law cited above expresses concern that bias arguments might be raised for tactical reasons if a party fears it may be losing a hearing. As parties cannot consent to unfair proceedings, the failure to object is itself not binding consent to biased behaviour by a decisionmaker. Rather, in the reasonable apprehension of bias analysis, the failure to object to alleged misconduct on a timely basis can be a sign that the moving party is raising the bias issue for tactical reasons instead of true concern.

[107] The Arbitrator found as a fact that ATRL was not moving to disqualify him for tactical reasons. He held expressly:

> 186. While I understand GIP's concerns in this regard, it would be inappropriate for me to ascribe any such improper motive to ATRL. To begin with, I have no evidence whatsoever to support this allegation, and to even consider it would require mere speculation on my part.

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[108] However he then seems to ascribe ill-motive to ATRL despite this holding. At para. 194 he wrote:

> 194. I have little doubt that, if Mr. Adair had serious reservations about the propriety of my questioning of ATRL's witnesses, he would have let me know in "*a measured and respectful way*", as he had been encouraged to do from the very outset of the evidentiary hearing. Had he done so, I would undoubtedly have inquired further into his concerns and modified my approach to his client's witnesses accordingly. As already noted, in the one instance where he raised something that could be considered as an objection, I immediately ceased all questioning of that witness.
>
> 195. In my view, an objective reviewer would attach considerable importance to the failure of ATRL to register objections contemporaneously with the conduct that is the subject matter of this challenge. While I do not adopt the suggestion that ATRL "lay in the weeds", I do believe that a party in ATRL's position has an affirmative duty to raise a timely objection, if it feels that the arbitrator, by the content or manner of his inquiries, is exceeding the express mandate *"to question any witness, including Party-appointed experts"* In my view, in the specific circumstances of this case, the failure to register clear objections is fatal to its success of this application.
> [Emphasis in original.]

[109] The Arbitrator seems to have found that the failure to object on a timely basis was fatal to the application to remove him although it was not a sign that ATRL lay in the weeds and there was no evidence that it brought the application tactically. Yet he then expressed little doubt about Mr. Adair's duplicity as he apparently would have objected "in a measured and respectful way" had he truly been concerned.

[110] In my view, Mr. Adair did object in a measured and respectful way. To be sure, he did not object on a question-by-question basis. Counsel in a hearing must obviously exercise great care objecting to evidence being elicited by the trier of fact. But when the Arbitrator crossed the

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line, Mr. Adair spoke up – gently and civilly as is his want. He questioned the scope and propriety of the Arbitrator's questioning more than once. He then brought the application to remove the Arbitrator while the evidentiary stage of the hearing was still under way. I reject the inconsistency of the Arbitrator finding no evidence that Mr. Adair made tactical use of the application but then questioning Mr. Adair's *bona fides*.

[111] Moreover, absent a finding that the application was brought for tactical purposes, there was no basis for the alleged failure to object to be fatal. It is only relevant to the question of the *bona fides* of the timing of raising the bias issue.

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[112] Moreover the Arbitrator contradicted his findings that the failure to object was “fatal” and that there was no evidence of a tactical use of the bias application. At para. 217 of his April 18, 2026 reasons, he wrote:

> 217. ***While not fatal to this application***, the virtual absence of contemporaneous objections or procedural complaints, coupled with the on-the-record confirmations that counsel had "no issue" with my questions, provides strong evidence that the conduct complained of was not perceived as unfair at the time.
> [Emphasis added.]

[113] So the alleged lack of objection morphed from fatal to not fatal and, at the same time, the Arbitrator switched from finding no evidence to having *strong* evidence that the application was brought despite Mr. Adair and his client not perceiving the Arbitrator’s questions as unfair at the time they were asked.

[114] I admit to being unable to ascribe much sense to these directly inconsistent holdings or to the finding that Mr. Adair failed to object on a timely basis.

[115] In my view, the Arbitrator’s misapprehension of his role and the limits imposed on him by the duty of neutrality is sufficient to lead reasonable and right-minded persons, (applying themselves to the question and obtaining thereon the required information, having viewed the matter realistically and practically and having thought the matter through) to conclude that circumstances exist that may give rise to a reasonable apprehension of bias. In other words, a reasonable person reading the cross-examinations by the Arbitrator, knowing all the context of all relevant factors, may reasonably conclude that the Arbitrator may have predetermined the outcome and, as such, may not decide the arbitration fairly.

[116] Accordingly, pursuant to ss. 13 (1) and 15 (1) of the *Arbitration Act, 1991*, I order that the Arbitrator be removed.

[117] Presumptively, costs follow the event in Ontario on a partial indemnity basis. If the parties cannot agree on costs of the motion before the Arbitrator under s. 13 (5) of the statute (if properly before me) and the

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costs of this application, ATRL may make costs submissions in writing to be delivered on or before October 14, 2026. GIP may deliver responding submissions on or before October 21, 2026.

[118] Costs submissions shall contain no more than 1,250 words and shall be accompanied by each party's Costs Outline.

FL Myers J

Released: October 07, 2026

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CITATION: Atkinsréalis Construction (Pacific) Inc. v. GIP Construction Ontario East Ltd., 2026 ONSC 5666
COURT FILE NO.: CL-26-00000307-0000

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ATKINSRÉALIS CONSTRUCTION (PACIFIC) INC.

Applicant

– and –

GIP CONSTRUCTION ONTARIO EAST LTD.

Respondent

REASONS FOR DECISION

FL Myers J

Released: October 7, 2026