

CITATION: Atkinsréalis Construction (Pacific) Inc. v. GIP Construction
Ontario East Ltd., 2026 ONSC 4785
COURT FILE NO.: CL-26-00000307-0000
DATE: 20260819

ONTARIO SUPERIOR COURT OF JUSTICE

RE:,

ATKINSRÉALIS CONSTRUCTION (PACIFIC) INC.,
Applicant

-and-

GIP CONSTRUCTION ONTARIO EAST LTD.,
Respondent

BEFORE: FL Myers J

COUNSEL: *Robert Stellick and David Ionis*, for the Applicant
Gary Brummer and Leah Mangano, for the Respondent

HEARD: August 18, 2026

ENDORSEMENT

The Motion

- [1] The Applicant seeks an order staying an arbitration pending the outcome of this proceeding in which the Applicant challenges the Arbitrator. The Applicant alleges that it has a reasonable apprehension of bias.
- [2] The application hearing commenced July 15, 2026. It did not finish that day. The application will be completed on September 22, 2026. As a result of that delay, the Applicant now seeks a stay of the arbitration to prevent it from recommencing on October 5, 2026 as scheduled.
- [3] This motion is brought under s. 13 (7) of the *Arbitration Act, 1991*, SO 1991, c 17. Neither party was able to find any case law specifically interpreting s. 13 (7). They agree however that the law applicable to stays of proceedings generally should apply with a lens or nuanced by the fact that the issue arises in the course of a commercial arbitration under the statute.

Framing the Issue

- [4] The parties are engaged in an arbitration process to resolve issues that arose in a construction project. They chose the Arbitrator who has a depth of experience in the field. He also holds himself out as bringing a very active style to his arbitration proceedings. This too was known to the parties (or ought to have been known) from the outset.
- [5] The Arbitrator's style of engagement was the subject of objections in a different application before my colleague Woodley J. in *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485. The same arguments of bias and lack of procedural fairness were made against the Arbitrator's conduct in that case. The complaints were dismissed by the judge. She found that on the facts before her the claims made against the Arbitrator did not amount to a reasonable apprehension of bias. She held:

165. Having reviewed and considered the interactions between the Arbitrator and counsel and the witnesses at trial, I am struck by the Arbitrator's preparedness for each witness and each day of hearing. The Arbitrator's questions and comments evidence that he is a truly a subject matter expert who seeks to find the truth. In his pursuit of the truth, the Arbitrator asked many questions of many witnesses but in my view did not become an advocate for either party. Instead, he positioned himself between the parties and poked and prodded each witness to ensure that both parties had a fulsome hearing, were granted an opportunity to explain their evidence, and had provided the Arbitrator with all information within their knowledge relevant to the proceeding.

166. The Arbitrator was completely engaged in the arbitration process. He appeared to have worked tirelessly to read the evidence in advance, to understand the issues, to investigate any inconsistencies, to question any items or evidence that appeared to be incongruent with the entirety of the process that he was reviewing.

167. Contrary to the Applicants' claims – I did not find bias or a reasonable apprehension of bias, instead, I found a

deeply invested, engaged Arbitrator that worked tirelessly for the parties in furtherance of his mandate, which was to determine the truth of the issues before him.

- [6] Mr. Adair submits that the facts of this case are different than those before Woodley J. In this case, Mr. Adair submits, the Arbitrator cross-examined witnesses as if he were the Respondent's counsel aiming to undermine the witnesses' evidence and the Applicant's theory of the case. Mr. Adair submits that in several of his interactions with witnesses, the Arbitrator crossed the line and entered into forbidden territory.
- [7] Like Woodley J., I find some assistance in the article written by arbitrators Glaholt and Rotterdam entitled, *Arbitrator Questioning: Sphinx or Skeptic?*, 2016 J Can C Construction Law, 81. The authors list the following outline for acceptable areas of questioning by an arbitrator:
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.
- [8] None of those areas include extensively cross-examining witnesses on the merits. Rather, the authors note that arbitrators' questions must be posed in a manner that does not create an appearance of one-sidedness or unfairness.
- [9] Mr. Adair submitted that the legal test of bias of an adjudicator is more exacting. He relies on *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47, in which the Court of Appeal held:

[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 2010 ONCA 47 (CanLII) 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.**

[Emphasis added. Notes omitted]

- [10] Mr. Adair submits that on reading the Arbitrator's questioning, he plainly created an impression that he adopted the Respondent's positions on facts, issues, and credibility.
- [11] There is an issue about whether commercial arbitrators are held to the same standards of fairness and bias as trial judges. In *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] SCR 3, the Supreme Court of Canada applied the same principles for assessing a reasonable apprehension of bias of arbitrators as apply to judges of the court (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.

- [12] I make no final ruling on any legal or factual issue today, of course, as this is a motion for a stay rather than a decision on the merits. The hearing before me is not yet completed.
- [13] The arbitration is scheduled to continue on October 5, 2026 to hear two or three days of expert evidence.
- [14] The Applicant seeks a stay only to deal with the fact that the delay in this hearing runs the parties too close to the October 5, 2026 scheduled resumption date.

Procedural Facts

- [15] On December 17, 2025, after eight days of evidence in the arbitration, the Applicant advanced its motion asking the Arbitrator to recuse himself. By decision released April 18, 2026, the Arbitrator ruled that there was no basis for him to be recused.
- [16] The parties appeared before the Arbitrator on May 15, 2026 to discuss continuation of the arbitration while the Applicant challenged the decision not to recuse himself in this application. The Arbitrator ruled that the arbitration should be completed by the end of June, 2026. He reasoned, among other things, that the parties bargained for an expeditious proceeding and the court would be better off with a decision on the merits.
- [17] The court often does prefer to see an Arbitrator's final decision before reviewing even an interlocutory issue (to the extent they may be reviewable). But a decision written by a tribunal that is later held to have acted unfairly by creating a reasonable apprehension of bias is of no value to anyone. It would be tainted in all respects.
- [18] The parties were before Kimmel J. on May 25, 2026 to schedule the hearing of this application to challenge the Arbitrator's determination that he should not be recused. She suggested that with an expedited hearing date available in July, they might be ready to resume the arbitration without the need to bring a stay motion.

Section 13

- [19] Section 13 of the *Arbitration Act, 1991* prescribes an extraordinary process. It allows challenges to be made against an arbitrator during a hearing for two very limited grounds. One of the grounds is where "circumstances exist that may give rise to a reasonable apprehension of bias." It is an exception to the general rule that challenges to the process need to await the final outcome of the proceeding.

[20] The statute provides specific steps for bringing a bias challenge. It requires an expedited process. Once the arbitrator rules on his or her own view of the issue, the challenger has ten days to come to court or he must forever hold his peace.

[21] Subsection 13 (7) governs this motion. It says:

Arbitration may continue

(7) While an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and make an award, unless the court orders otherwise.

[22] The default outcome under this section is that the hearing may continue while the court challenge is underway “unless the court orders otherwise.” The Legislature has not seen fit to prescribe any test or grounds for the court to consider on a request to stay the arbitration pending the hearing of the application.

The Common Law Test for a Stay

[23] I agree with the parties that in the absence of a specified test, the court should default to the common law test applicable to stays of proceedings. The basic requirement is for the court is to consider the justice of the case or the interests of justice reviewing all relevant factors (holistically of course). The court is guided as well by the tripartite test for interlocutory injunctions or stays set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC).

[24] I also agree with Ms. Mangano that the statutory background is important here. Statutory interpretation requires the court to consider the purpose of the statute and the context of a provision within the statutory scheme.

[25] I accept that the statutory goal to respect the independence of the arbitral process generally weighs in favour of giving a high degree of deference to arbitrators’ decisions and favours the completion of the arbitration prior to judicial review.

[26] Those goals inform the default provision in s. 13 (7). That is, the section starts with the indication that despite there being a challenge in court, an arbitrator may continue the proceeding unless a court orders otherwise. Before a challenge to the court can even be made, the arbitrator must have made a decision that he or she is entitled to

continue to hear the proceeding despite the allegation of unfairness or bias. It is clear therefore that the mere bringing of an application in court to assert the issue of bias does not necessarily shut down the arbitration. In fact, it is reasonable to expect that arbitrators, having already ruled that they are entitled to sit, will likely want to keep the process moving toward a conclusion.

The Strength of the Case on its Merits

- [27] In my view, this background matters. Where an applicant seeks a stay under s. 13 (7) of the *Arbitration Act, 1991*, I do not think that is enough for it to show that it has just a serious issue to be tried.
- [28] Valid challenges to hearings in court or before other tribunals based on a reasonable apprehension of bias are few and far between. Bias and an appearance of bias are overused allegations that are rarely made out on the facts. It cannot be enough to stop a process to which the parties agreed just to show that there is a claim against the arbitrator that is not frivolous.
- [29] In my view, it is appropriate to use the higher standard of a “strong *prima facie* case” when considering a stay of an arbitration under s. 13 (7) of the *Arbitration Act, 1991*. The need to prove a strong case that is likely to succeed is appropriate recognition of the strong presumption of independence enjoyed by arbitrators and judges alike. It also respects the need for the court to proceed warily and with deliberation before wading into an arbitration.
- [30] The evidence on this application consists of the transcripts of the arbitration proceedings to date. There are no cross-examinations coming. Unlike an interlocutory injunction motion, there is no reason to fear that it might be too early in the development of the evidentiary record to require a high level of proof. Here the evidence is already fixed.
- [31] I have the benefit of having reviewed the Arbitrator’s ruling on his own view of the Applicant’s allegations. I am troubled by the Arbitrator’s understanding of the definition of cross-examination. He relies on a dictionary definition that says that cross-examination is conducted by counsel opposite to the party who called the witness. Therefore, the Arbitrator reasoned, that since he is not a party or the party opposite, he could not have been cross-examining by definition. He also says that his questions were not intended to be for any of the acknowledged purposes of cross-examination (destroying the witness’s evidence, obtaining evidence for one’s case, or discrediting the witness).

- [32] But that misses the point. Mr. Adair submits that the Arbitrator improperly took on the role of counsel opposite by asking questions designed to discredit his witnesses' evidence or to undermine the credibility of his witnesses. Mr. Adair submits that the Arbitrator improperly "descended into the arena" as a combatant.
- [33] The Arbitrator finds that cross-examination depends on the questioner's intention. He found that he was not cross-examining because he was not a party intending to advance one of the purposes of cross-examination. His only intention was to find the truth.
- [34] But that would mean that it is impossible for a judge's questioning to ever cross the line because the judge is not a party and intends only to find the truth. Were that so, then hundreds of years of case law that finds judges to have improperly descended into the arena and thereby created a reasonable apprehension of bias are all wrongly decided.
- [35] I do not accept that were an arbitrator to construct and ask a line of leading, pointed questions, designed to undermine a witness's testimony or credibility, that the arbitrator's good motive precludes a finding that he conducted an impermissible cross-examination or improperly usurped the role reserved for opposing counsel.
- [36] I am not yet ready to go through specific instances of questions in the transcripts that have been referred to me by Mr. Adair in argument. I still need to finish hearing the submissions of counsel for the Respondent and review the transcripts in light of both side's submissions. I am not making findings on any specific evidence.
- [37] But, at the stage, I am satisfied that the Applicant has made out a strong *prima facie* case. That is, what I have seen already leads me to believe that the Applicant has a strong position that could well succeed. It is not just "not frivolous." I have serious concerns about the propriety of several of the Arbitrator's interventions to which I have been referred. They seem to me in this case to go well beyond the description of the questioning described by Woodley J. But that is an impression that remains subject to weighing the submissions made on behalf of the Respondent.
- [38] The Respondent has advanced numerous submissions about the knowledge and reasonable expectations of the Applicant; the differences between the role of a judge and an arbitrator; differences between public court and regulatory proceedings compared to private commercial

arbitration proceedings; weighing the quantity and quality of each and every one of the various interventions by the Arbitrator on both sides; and more.

- [39] There are many issues to be considered. The burden is and remains only on the Applicant. But its *prima facie* case is more than sufficient to require a practical burden to be met by the Respondent.

Irreparable Harm and the Balance of Convenience

- [40] The delay caused by the stay sought here will be brief. While there has been an eight-month delay so far, that was not the doing of the Applicant alone. The Arbitrator determined that the arbitration would not proceed while he spent the first several months dealing with the Applicant's motion to ask him to recuse himself.
- [41] Justice Kimmel gave an expedited date that allowed the parties to book a resumption of the arbitration in October. This stay is really from a presumed date for release of my decision shortly after July 15 and the new release date that will be shortly after September 22, 2026.
- [42] While I understand Mr. Adair wanting more than two weeks to decide and prepare people to continue the hearing, he should not need a lot more than that.
- [43] Mr. Adair's undertaking to proceed expeditiously is his bond.
- [44] The Arbitrator also posited the possibility that he could complete the expert evidence and then leave submissions and the decision to await the outcome of this proceeding. I do not understand what that would accomplish. It would not move the proceeding to an expeditious finish which the Arbitrator said they parties agreed upon. Neither would it arm the court with the Arbitrator's decision as discussed by him.
- [45] In my view, requiring the Applicant to appear before the Arbitrator now would be irreparable harm. It would undermine the justice of the proceeding in light of the finding that there is a strong *prima facie* case on the merits.
- [46] In *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Huscroft JA wrote:

The effect of bias in commercial arbitration

- [42] It is important to reiterate that a reasonable apprehension of bias is no minor procedural breach. It is a finding that the integrity and legitimacy of an adjudicative

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

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

- [47] There may be cases like cases like *Xanthoudakis v. Ontario Securities Commission*, 2009 CanLII 30146 (ON SCDC), in which institutional bias allegations did not implicate the actual arbitrator's conduct. This case is closer to the facts of *Ontario Provincial Police v. Macdonald*, 2008 CanLII 63164 (ON SCDC) where the court found that appearing before the same tribunal would amount to irreparable harm. Moreover, like that case, I see only a brief delay being caused by this stay as discussed above.
- [48] In this case, the irreparable harm and balance of convenience issues are nearly merged. Assessing who will be prejudiced more by a stay or no stay raises the same issues as are discussed under irreparable harm i.e. the prejudice of appearing before the Arbitrator in light of the serious allegations made and the minor deferral of the proceeding actually being discussed.
- [49] It follows that I find that the Applicant will suffer irreparable harm if forced on now and the balance of convenience favours a short stay rather than scurrying just to hear expert evidence.

[50] I am satisfied that it is in the interests of justice to stay the arbitration pending the outcome of this proceeding.

FL Myers J

Release Date: August 19, 2026