

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
The Corporation of the Municipality of Middlesex Center	)	Paula Lombardi and Michael Polvere, for the Applicant
	)	
APPLICANT	)	
	)	
– and –	)	
	)	
South Winds Development Co. Inc.	)	Williams Chalmers and Matthew Patterson, for the Respondent
	)	
RESPONDENT	)	
	)	
	)	
	)	HEARD: JUNE 3, 2026

REASONS FOR JUDGMENT

MOSER J.

Overview

- [1] The Corporation of the Municipality of Middlesex Center and South Winds Development Co. Inc. voluntarily and mutually entered into an arbitration agreement. This agreement prevents any route of appeal. The only term within the agreement that allows this court to review the Arbitrator’s Ruling (“Ruling”) refers to s. 46(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17. In short, unless the Municipality can show that the Arbitrator breached natural justice and procedural fairness, the Ruling must stand.

- [2] The parties had an arbitration set to proceed September 15, 2025. It was set for three weeks. The hearing was adjourned to September 19 to allow the parties to exchange additional documentation. During the lead up to the hearing, the parties exchanged a hearing management plan. The original estimate of a three-week hearing ballooned to 11 weeks.

- [3] South Winds decided to course-correct; they requested a case conference, as it was entitled to do under the arbitration agreement, for Friday, September 19. The expense of an 11-week hearing made South Winds reevaluate their strategy. At the case conference, South

Winds requested leave to bring a motion at the outset of the hearing on Monday, September 22. This motion required the Arbitrator to interpret the contractual terms potentially dispositive of many of the issues to be decided. If South Winds was correct in how they believed the contract should be interpreted, the length of the hearing would be dramatically reduced, witnesses could be avoided, and the remaining issues simplified.

- [4] The Municipality bristled. They were poised to begin a full hearing. Witnesses had been prepared and they were ready to go. Claiming unfairness and impossibility, the Municipality argued against this motion being heard at all. In the alternative, the Municipality submitted that at least 6 weeks of time, preferably more, was needed to prepare for South Winds' motion.
- [5] At the case conference, the Arbitrator heard both sides. She took time to consider their conflicting positions. The Municipality raised procedural unfairness; South Winds pleaded common sense. First, the Arbitrator made the decision that South Winds' motion will proceed and that such a motion complied with procedural fairness. Next, she heard submissions on when this motion would proceed. The Municipality suggested the dates in December 2025 that had already been secured. South Winds suggested the last day in the currently scheduled three-week block, allowing two weeks to prepare. Again, the Municipality objected citing this would be impossible to prepare in such a short time frame and thus procedurally unfair.
- [6] South Winds also submitted that the motion should follow opening submissions at the hearing. The Municipality argued that the motion should be heard before opening submissions.
- [7] The Arbitrator decided that two weeks was sufficient time to prepare for this contractual interpretation motion. The Arbitrator agreed with the Municipality that the motion should be heard in advance of any opening submissions. The motion was ordered to proceed on October 3, 2025. The parties were instructed to establish a timetable for the exchange of materials. The parties agreed to a timetable. Factums were exchanged. Affidavits were prepared and filed.
- [8] The Municipality did not argue insufficient time to prepare for South Winds' motion in their written submissions or at any point during the October 3 motion. Nor did the Municipality seek an adjournment at the outset of the motion. There were no submissions by the Municipality at the hearing to suggest a lack of preparedness, or that they needed more time to properly respond. In fact, the Municipality's argument was clear, cogent and concise. It was supported by affidavits and they made fulsome submissions. It is commendable that they were able to prepare a comprehensive response in only two weeks' time.
- [9] The Arbitrator heard submissions, she reviewed the written materials and, on November 5, she released her Ruling. South Winds prevailed. The Arbitrator found that the certified costs submitted by South Winds' engineers, absent allegations of fraud (and there were none), were not subject to approval by the Municipal Engineer. This interpretation of the

contract means that all outstanding certified costs, defined in the cost sharing agreement (“CSA”), must be paid by the Municipality to South Winds. This contractual interpretation resulted in an award owing to South Winds.

- [10] The Municipality appeals to this court under s. 46 (1) 6 of the *Arbitration Act*, after an unfavourable s. 44 corrections application on the claimed basis of not being afforded procedural fairness.

Background

The Underlying Dispute

- [11] I am only outlining the background facts relevant for this application not already contained in the overview.
- [12] On October 18, 2017, the Municipality and South Winds, a developer, entered into a subdivision agreement and CSA in connection with the development of a residential subdivision in Kilworth, Ontario.
- [13] This litigation concerns a dispute between the Municipality and South Winds, regarding the costs payable under the CSA, as it relates to the sharing of costs amongst the parties for the provision of infrastructure services being constructed as part of the development.
- [14] The Municipality and South Winds were unable to resolve many of their issues. This was largely due to the Municipal Engineer’s dissatisfaction with the supporting materials provided by South Winds in respect of costs incurred. As a result, the Municipal Engineer declined to approve many of the costs certified by South Winds’ engineers.
- [15] The parties have been in arbitration for over three years and in May 2025, they entered into an arbitration agreement appointing their fourth arbitrator. This review is of the fourth arbitrator’s ruling. Due to unforeseen circumstances, a fifth arbitrator has now been appointed.

The s. 44 Corrections Application

- [16] After receiving the Ruling, the Municipality requested that the Arbitrator correct her decision pursuant to s. 44 of the *Arbitration Act*. Specifically, the Municipality requested that the Arbitrator correct an “injustice caused by an oversight and several procedural injustices amounting to a denial of natural justice.”
- [17] This application for judicial review poses a unique situation in which the issues closely resemble those raised in the corrections application, where the arbitrator addressed the following: Why and how she came to the calculation of the award, why the evidence of the South Winds’ engineers would not have assisted in her analysis, why the certifications were accepted as binding, that she was not presented with any admissible evidence establishing that the auditor imposed binding documentary requirements beyond clarification, and why

the expedited timetable did not result in procedural unfairness. She observed that “rejecting an argument does not constitute ignoring it.”

- [18] I am cognizant that the Arbitrator cannot review her own decision. I mention her Ruling on the request for corrections as background on how this matter travelled along its path before coming in front of me.

The Standard of Review

- [19] Since the arbitration agreement between the parties indicates no right to appeal, the Municipality’s only recourse to bring this before the court is by way of an application under s. 46. This section allows a court to set aside an award made by an Arbitrator on specific grounds. The Municipality relies on subparagraphs 6 and 7, which outline that “the applicant was not treated equally and fairly, and was not given an opportunity to present a case or to respond to another party’s case or was not given proper notice of the arbitration of the appointment of an Arbitrator.” Further, that “the procedures followed in the arbitration did not comply with this Act.”
- [20] The question on review pertains to whether the requisite level of procedural fairness has been afforded (*Baffinland v. Tower-EBC*, 2022 ONSC 1900, at paras. 79-70, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 DLR (4th) 193).
- [21] Section 46(1) of the *Arbitration Act* enshrines the court’s supervisory responsibility to ensure that all parties to an arbitration are given the benefit of a fair procedure. The Municipality acknowledges they do not have a broad right of appeal, nor does the *Arbitration Act* empower me to review the reasonableness or correctness of the Arbitrator’s decision. In fact, on this application, the Municipality said I am not to concern myself with the substance of the parties’ dispute at all; I must only consider whether the arbitration was conducted and decided in compliance with Ontario law and the requirements of procedural fairness.
- [22] In oral submissions to me, the Municipality amended its position on timing and procedural fairness. Their amended position is that they had enough time to prepare for the legal issue of contractual interpretation for the October 3 motion. They accept the legal ruling of the arbitrator as it goes to the interpretation of the CSA. The Municipality submits it was the process used to arrive at the award amount that was procedurally unfair.
- [23] I find that the Municipality is attempting to avoid the terms of the arbitration agreement. They are asking me to go outside of the scope of the agreement and decide a question of law and/or a question of law and fact. In other words, this is an appeal disguised as a review of procedural fairness. As the timing issue has been conceded in oral arguments, the issues on procedural fairness remaining a claimed lack of ability for the Municipality to make their case in full. I find that the Municipality was able to make their case in full, and therefore procedural fairness was followed.

- [24] This Court has no jurisdiction to decide on the substance of the arbitrator's decision. The Ruling and award must stand.

Issues

- [25] The issues to be determined in this case are as follows:

1. Did the Arbitrator follow her role under the Arbitration Agreement?
 - a. What was agreed between the parties?
 - b. The *Arbitration Act* and related law.
 - c. The application of the agreement and the related law.
2. Was the process procedurally fair?
 - a. Timing:
 - i. Time to prepare for the October 3 motion.
 - ii. Time to respond to South Winds' reply factum.
 - b. Refusal to hear and test evidence:
 - i. Refusal to hear evidence from the Municipality.
 - ii. Refusal to allow the Municipality to cross-examine South Winds' engineers.

1. Did the Arbitrator Follow her role under the Arbitration Agreement?

(a) What was agreed between the parties?

- [26] The arbitration agreement, dated May 22, 2025, is binding. I reproduce portions of the Arbitration Agreement here:

1) The issues in dispute between the parties, as set out in the pleadings, and to be further set out in the Parties respective arbitration statements, shall be determined by the Arbitrator acting as the sole arbitrator by arbitration proceedings conducted in accordance with a procedural protocol to be established by the Arbitrator in consultation with the Parties.

...

5) At any time prior to the commencement of the evidentiary hearing, the Arbitrator, on her own initiative or at the request of the Parties, may convene one or more pre-hearing conferences to deal with any matters that may arise during the course of the Arbitration, including but not limited to logistical issues relating to the hearing,

including without limitation: the order, nature and duration of opening and closing statements; the nature and order of the presentation of evidence (including both documentary and viva voce evidence); the identity and number of witnesses that the Parties intend to call; the length of time that the Parties anticipate will be required to present their respective cases; and the duration of the hearing. Unless the Parties otherwise agree in writing, such conferences may, at the discretion of the Arbitrator, take place by teleconference or videoconference.

6) The timetable for the Arbitration shall be set out in procedural orders made during the arbitral proceedings, on hearing submissions of the Parties.

7) The Parties confirm that the Arbitrator may direct any Party to do all such things during the arbitral proceedings as may reasonably be necessary to enable a final award to be made fairly and efficiently.

8) The nature and order of the presentation of opening statements, closing submissions, and evidence at the hearing shall be determined by agreement of the Parties or, failing agreement, by the Arbitrator upon hearing the submissions of the Parties. In addition, the Parties may agree to, or the Arbitrator may direct, the exchange and delivery of written opening and closing submissions.

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.

10) The Arbitrator shall, subject to any agreements of the Parties, determine the admissibility, relevance, materiality, and weight of evidence, taking into account principles of legal privilege including, without limitation, lawyer-client privilege, litigation privilege and settlement privilege.

...

34) The Arbitrator's award(s), including interim awards, if any, shall be final and conclusive, and shall not be subject to appeal or review

by any court, otherwise than pursuant to s. 46(1) of the *Arbitration Act*, 1991. [emphasis added.]

- [27] The agreement is clear. Neither party has any right of appeal. The substance of the Arbitrator's decision, her legal analysis and her factual findings cannot be reviewed unless the Municipality can show a breach of procedural fairness.

(b) The *Arbitration Act* and Related Law

- [28] Sections 19(1) and 19(2) of the *Arbitration Act* requires that the arbitration be conducted in a manner that treats all parties equally and fairly and that each party be given an opportunity to present and respond to the case.
- [29] Subsection 46(1) 6 of the *Arbitration Act* provides that the court may set aside an award where the applicant was not treated "equally and fairly," and was not given an opportunity to present a case or respond to another party's case. Additionally, s. 46(1) 6 allows a court to set aside an award when the procedures followed in the arbitration did not comply with the Act.
- [30] In an application under s. 46(1) 6 of the *Arbitration Act*, the court has stated that to assess the level of procedural fairness it must "examine various factors including sufficiency of opportunity granted to parties' counsel to present their case and the thoroughness of the procedure engaged by the parties" (*Mattamy (Downsview) Limited. v. KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013, at para. 54, citing *Baffinland v. Tower-EBC*, 2022 ONSC 1900, at paras. 84, 89).
- [31] In this case, I am only permitted to ask if the Arbitrator acted within the bounds of authority granted under the arbitration agreement (*Aquanta Group Inc. v. Lightbox Enterprises Ltd.*, 2023 ONSC 971, at para. 17). I am not to ask if the Arbitrator's decision was unreasonable or incorrect.
- [32] The Court of Appeal for Ontario repeatedly emphasizes the narrow basis for setting aside an arbitral award under s. 46 of the *Arbitration Act*. I must not be concerned with the substance of the parties' dispute, and s. 46 is not to be treated as an alternate appeal route: *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, 476 D.L.R. (4th) 500, at para. 2; *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, at paras. 20-27, 40-44, leave to appeal refused, [2019] S.C.C.A. No. 202; *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras. 5, 40.
- [33] As held in *Nuroh v. TD General Insurance Co.*, 2025 ONSC 6997, 2025 A.C.W.S. 6082, at para. 25:

[T]he degree of procedural fairness required is determined by reference to all the circumstances of the case, including
(i) the nature of the decision being made, and the process

followed in making it, (ii) the nature of the statutory scheme, (iii) the importance of the decision to the individual or individuals affected, (iv) the legitimate expectations of the person challenging the decision, and (v) the choices of procedure made by the administrative decision maker itself: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 21-28; see also *Vavilov*, at para. 77.

- [34] However, the court must be cautious and not dictate what it considers the optimal procedure among many options that satisfy the duty of fairness. It is only when the circumstances of natural justice and procedural fairness have not been met that a court will intervene (*Nuroh*, at para. 28).

(c) Application of the Agreement and Related Law

- [35] Applying the test in *Baker* as recently recited in *Nuroh*: The Arbitrator's decision turned on an issue of contractual interpretation. The process followed was akin to a summary judgment motion. The parties have no issue with the statutory scheme. The importance of the decision to the Municipality concerned how much money they owed South Winds. The fact that they owed money under their contractual obligations was not in issue. The fact that the money came from rate payers was considered by the Arbitrator. The Municipality does not escape its contractual obligations because it is a public body (*Bank of Montreal v. Quebec (Attorney General)*, [1978] 1 S.C.R. 565, 96 D.L.R. (3d) 586, at p. 574). The Municipality's expectations were bound to the arbitration agreement. They handed over choice of procedure to the Arbitrator in the agreement.
- [36] The Municipality claims that procedural fairness refers to: 1) the right to be heard, 2) the right to an independent and impartial hearing, and 3) having a fair opportunity to contradict or correct prejudicial statements. Courts have consistently agreed with the first two points (*Nasjje Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978 at para. 38-40; *The Tire Pit Inc. v. Augend 6285 Yonge Village Properties Ltd.*, 2022 ONSC 6763, at para. 23; *Highbury Estates Inc. v. Bre-Ex Limited.*, 2015 ONSC 4966, at para. 21). However, no authority was provided on procedural fairness including a fair opportunity to contradict or correct prejudicial statements.
- [37] As in *Optiva Inc. v. Tbaytel*, 2022 ONCA 646, 163 O.R. (3d) 439, the parties gave the Arbitrator the power to determine the procedure to be followed. Evidence could be presented as *viva voce* evidence or as documentary evidence. The Arbitrator exercising her power cannot be seen as a breach of procedural fairness (*Optiva*, at para. 49).
- [38] Allowing South Winds' motion was procedurally fair. The motion addressed an issue - contractual interpretation - that went to the heart of the parties' dispute, similar to a summary judgment motion. It is recognized that the advantages of a properly invoked summary judgment process, like the motion brought by South Winds, have equal

application in both the arbitration and civil trial context (*Optiva*, at para. 38; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 27).

- [39] The Arbitrator decided that the parties' contract meant that once costs were certified by South Winds' engineers, they must be paid by the Municipality. Absent any allegations of fraud, the Municipal Engineer did not have the authority to approve or challenge certified costs. The Municipality never raised the issue of fraud. Therefore, all the evidence that the Municipality claims it was unable to call, or argue it was unable to make, is irrelevant to this legal interpretation of the costs sharing agreement contract.
- [40] The Municipality asserts that the parties, rather than the Arbitrator, chose the manner of procedure for the arbitration. This is undermined by the text of the agreement, which empowers the Arbitrator to choose the nature of the evidence heard and to make any procedural directions necessary to achieve a fair and efficient hearing of the dispute.

2. Was the process procedurally fair?

(a) Timing

i. The time to prepare for the October 3 motion

- [41] I find that the Municipality had sufficient time to prepare for the October 3 motion. The evidence supporting this is their fulsome submissions on October 3, their well-crafted written argument and the affidavits filed. I agree with the Municipality's submission during the October 3 motion, that they had indeed "moved mountains". However, as mentioned, the Municipality conceded before me in oral submissions, that they had sufficient time to prepare their legal argument on contractual interpretation for South Winds' October 3 motion. This was a reasonable concession.
- [42] The Municipality used the time it had already set aside for the hearing to prepare for a straightforward issue of contractual interpretation. In the Arbitrator's reasons for the s. 44 corrections application, she took note of the Municipality's preparation work for the October 3 motion: They billed 273.4 hours and filed 1000 pages of documents. The Municipality came prepared on October 3.
- [43] While the Municipality raised concerns of procedural fairness at the September 19 case conference, as of October 3, that argument had evaporated. There was no mention of a breach of procedural fairness regarding timing in their factum filed with the Arbitrator, and they did not make submissions during the October 3 motion that they did not have enough time to prepare.

ii. Time to respond to South Winds' reply factum

- [44] The Municipality argues an additional timing issue: receiving South Wind's reply factum on the morning of October 3. The timetable for exchanging documents for the October 3 motion was agreed to in advance between the parties. The Arbitrator had not yet reviewed

the reply factum at the outset of the motion and South Winds gave up an hour of their allotted time so the Arbitrator could review their reply factum.

- [45] In South Winds' reply factum they acknowledged a typographical error in one of their claimed amounts, they conceded a nominal amount, and they agreed there was one instance of double counting as raised in the Municipality's factum. South Winds amended its figure of costs owing from \$6,072,613.71 to \$4,689,693.56. In addition to the conceded amount and mathematical corrections, this reduction was due, in part, to an amount of approximately \$1.3 million that was already agreed to between the parties that could now be removed from their motion.
- [46] In oral submissions on October 3, the Municipality did not object to South Winds' reply factum. The Municipality acknowledged that South Winds prepared their reply factum in only twelve hours and likened the reply to oral argument as there were no pin-point references made in the reply factum (Oct 3, 2025, transcript p.194-95).
- [47] Due to the foregoing, I find that the late filing of the reply factum did not breach natural justice or procedural fairness.

(b) Refusal to hear and test evidence

- [48] The Municipality maintains that many of the infrastructure costs under the CSA should never have been certified. They argue that the Arbitrator:
- i. refused to hear evidence from the Municipality; and
 - ii. denied the Municipality the opportunity to cross-examine South Winds' engineers.

i. Refusal to hear evidence from the Municipality

- [49] The Municipality submits that the Arbitrator refused to hear evidence regarding calculation errors in the South Winds' engineers' certified costs. The Arbitrator did not "refuse" to hear this evidence. This evidence was squarely before the Arbitrator in the motion. The Municipality explained their position in paragraph 1 of their October 3 factum, "[t]he Claimant's math is overlapping, duplicative, cannot be supported and claims contradictory amounts. It cannot be relied upon; and it would be inappropriate to utilize such inaccurate and flawed figures". The Municipality stressed the conflicting evidence, incomplete and duplicative issues to explain why the Municipal Engineer cannot approve the certified costs.
- [50] On October 3, the Municipality's position was clear: the CSA's Schedule G clause 6 set out a two-step process. First, the invoices are certified by the South Winds' engineers; second, the Municipal Engineer must approve the expense.
- [51] The Arbitrator disagreed with the Municipality's interpretation of that clause. She held that the Municipal Engineer's approval was not required for the costs certified by South Winds' engineers in cases where there was no allegation of fraud.

- [52] During oral submissions, the Arbitrator asked “if the parties could agree” on submissions regarding the various numeric outcomes of the motion. That is, could the Municipality and South Winds get together to provide these numbers to the Arbitrator. South Winds agreed to this proposal and the Municipality said they needed instructions.
- [53] As it happened, the parties did not confer, they did not provide any numeric values to the Arbitrator, so she had to use the numbers that were before her. Not conferring with South Winds and not giving numeric values to the Arbitrator was the Municipality’s prerogative, but they must live with that choice. Suggesting that the numbers arrived at by the Arbitrator were based on faulty information and amounted to a breach of procedural fairness is incorrect.
- [54] The Ruling speaks to this. The Arbitrator recognized that the Municipality noted several errors in the calculation of amounts that South Winds said were owing. This resulted in South Winds amending its position, acknowledging some of the errors, and resubmitting the amount owing in its reply factum as \$4,689,693.56 (Ruling, at para. 20).
- [55] The Municipality also asserts that the Arbitrator denied procedural fairness by “neglecting to provide the Municipality with an opportunity to make submissions on the Municipal Auditor’s request for documentation”. I find that this submission does not withstand close examination.
- [56] Like in *Optiva*, there was no procedural unfairness here. The Municipality was not denied the opportunity to present any evidence that it wanted to present. The Municipality chose to present the case it wanted to argue. The Municipality had a full and fair opportunity to challenge the case put forward by South Winds (*Optiva*, at para. 50).
- [57] The Municipality set out its position on the requirements of municipal auditors in its October 3 factum. It is the Arbitrator’s decision on the issue that is objected to, not the evidence it was permitted to adduce on the motion. There is nothing procedurally unfair about the Arbitrator’s findings of fact on this issue. It is what the parties empowered the Arbitrator to do.

ii. Refusal to allow the Municipality to cross-examine South Winds’ Engineers

- [58] At the September 19 case conference, the Municipality suggested that South Winds’ motion could be done as a paper record with all the affidavits filed and cross-examined prior to the motion being heard. In short, the Municipality was suggesting that the motion could be akin to a full paper hearing encompassing many of the witnesses anticipated at the 11-week hearing.
- [59] South Winds opposed that suggestion. Explaining that they were not seeking to convert the hearing itself. Rather, they simply wanted the issue of contractual interpretation determined in advance of the hearing. South Winds submitted that shifting costs from the hearing to counsels’ time spent preparing for a full paper hearing, the same length of the 11-week hearing, would not reduce the costs.

- [60] The Municipality argues that it was denied the opportunity to cross-examine South Wind's engineers. The factual premise of that argument is flawed. South Winds did not file any affidavits of their engineers for the October 3 motion. Therefore, it is disingenuous to say that the Arbitrator "refused" the Municipality's opportunity to cross examine South Winds' engineers. There were no affidavits or evidence from the engineers to cross-examine at the motion.
- [61] *Nuroh* is distinguishable on its facts. In that case, the tribunal refused to allow the appellant to cross-examine a key witness where another witness testified and was cross-examined on the same issue. Here, by contrast, the Arbitrator had no affidavit evidence from South Wind's engineers before her and therefore could not and did not deny the Municipality any opportunity to cross-examine those individuals.
- [62] The Municipality is likening itself to *Mattamy* by asserting it was denied a meaningful opportunity to present its case within the meaning of s. 46(1) 6. In *Mattamy*, the arbitrator unilaterally decided not to allow Mattamy to present evidence on a new issue despite the fact that the respondent was consenting to its admission. Here, the Municipality says denying it the right to cross-examine South Winds' engineers is the same thing. It isn't.
- [63] Prior to October 3, the Municipality had one of South Winds' engineers on their own witness list for the full hearing of this matter. However, the Municipality did not file an affidavit from that engineer in its October 3 materials. The Municipality has since prepared an affidavit from that same South Winds' engineer. There is no evidence before me explaining why such an affidavit was not prepared for the October 3 motion. He was a witness for the Municipality; his evidence was known to them.
- [64] In any event, failure to allow cross examination is not necessarily a denial of natural justice. It is only when the refusal of cross-examination "interferes with the ability of a party to address key issues or essential elements of its case" that a breach of natural justice or procedural fairness has been found (*National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230, at para. 23).
- [65] Even if one accepts that the Arbitrator refused cross-examination, which I find she did not, any such cross-examination of South Winds' engineers on the October 3 motion was irrelevant. The question before the Arbitrator was to determine the meaning of the language used in the agreements, not the subsequent conduct of the parties or the manner in which the costs became certified.
- [66] The Arbitrator outlined the task before her as interpreting the agreement between the parties to ascertain the parties' objective intent. She held that this was not an inquiry into the validity of the certifications themselves and that cross-examination of the certifying engineers would not advance her analysis. It was the meaning and intent of the contractual language, not the subjective understanding of the contract nor the conduct of the individuals involved. Her role was to "interpret the agreements based on their language and context, not to assess the parties' *post hoc* explanations of what they believed those terms to mean or how they applied them in practice" (Ruling, at para. 50).

- [67] The Arbitrator was also cognizant of the role of the Municipality and its obligation to its ratepayers. However, she held that it does not constitute a “grave consequence” for the Municipality to be held to its contractual obligations and “the fact that one of the parties to this arbitration is a municipality does not relieve it of its legal obligation nor does it alter the evidentiary standards or analytical framework” required (Ruling, at para. 52). I agree.
- [68] Lastly, the Municipality asks that I take judicial notice that they did not have enough time to summon witnesses for October 3. There is no evidence for me to support that request, and it is not a matter of which judicial notice may properly be taken.

Conclusion

- [69] The Arbitrator fully appreciated the differences between the parties’ positions on the motion. South Winds framed its motion as a motion to interpret the wording of the CSA: Does the CSA authorize the Municipal Engineer to challenge South Winds’ engineers’ certifications absent bad faith, fraud, or knowing or willful disregard of duty? South Winds also sought the Municipality to identify the component costs of the Option Price to which the Transfer Payment shall be applied – however this second issue became moot given the Arbitrator’s decision.
- [70] The Arbitrator acknowledged that the Municipality framed the motion differently and identified its own issues for consideration. The first dealt with the question of sufficiency of evidence for the motion. The second issue dealt with a lack of clear evidence resulting in an unfair and unreasonable avenue to force the Municipality to calculate a number for the Option Price. The final issue for the Municipality concerned contractual interpretation, framed as South Winds attempt to delete a condition precedent in the CSA that was agreed upon by the parties – the term that authorized the Municipal Engineer to approve of the South Winds engineers’ cost certifications (Ruling, at paras. 41-42).
- [71] The Arbitrator was clear, “I do not agree that the issues, as framed by the Municipality, properly reflect the matters to be determined on this motion. South Winds has brought a motion seeking contractual interpretation, and I will proceed on the basis of the contractual issues as defined by South Winds, the Moving Party” (Ruling, at para. 43).
- [72] Additionally, the Arbitrator acknowledged access to justice issues raised by the Municipality. For example, the suggestion that South Winds was invoking the threat of a protracted hearing as a tactic to secure a favourable outcome; that the Municipality objected to the form and substance of the evidence; and that the engineers themselves ought to have filed evidence and been cross-examined on them (Ruling, at paras. 46-48). These issues were squarely dealt with by the Arbitrator. She identified them, analyzed them and, ultimately, rejected them. She did not accept the Municipality’s characterization of the motion or its criticism of the evidence adduced by South Winds. She held that this motion was a proper and efficient operation of the arbitration process (Ruling, at para. 49).
- [73] If one accepts the legal ruling of the Arbitrator – once the South Winds’ engineers certified costs, the Municipality must pay those costs absent an allegation of bad faith, fraud, or

knowing or wilful disregard of duty – the evidence surrounding the certifications is irrelevant. The Municipality advanced their argument and they lost. The Arbitrator found in favour of South Winds. The correctness or reasonableness of that decision is not on the table for me to review.

- [74] I find that the Municipality put forward a well formulated and persuasive argument. They effectively pooled their resources in a short time. They did not appear on October 3 requesting an adjournment. They did not seek a future date to file or call further evidence. They took a stand that South Winds was attempting to remove a clear condition precedent in the CSA and that the result would set a dangerous precedent. They submitted that the evidence provided by South Winds was inadmissible hearsay evidence wholly insufficient to support the motion. They provided examples of double counting and inaccuracies in South Winds' certifications. They pointed to other agreements between the parties where the Municipality was granted authority to approve. They presented case law to support their position. In effect, procedural fairness is evidenced in their factum, and in their submissions.
- [75] The Arbitrator had all the Municipality's arguments before her. She made her decision. The Municipality was unsuccessful. The parties agreed to final and binding arbitration. There was no breach of procedural fairness.
- [76] It is incorrect to suggest that the Arbitrator *mistakenly* took the certifications at face value. They were *intentionally* taken at face value. The Ruling of the Arbitrator and the award stands and the application is dismissed.

Costs

- [77] I encourage the parties to agree on the issue of costs. However, if an agreement cannot be reached, each party may provide written submissions on costs, not exceeding three (3) double-spaced pages, together with an attached bill of costs. These submissions shall be delivered within thirty (30) days of the release of this decision. In the absence of submissions in 30 days, I will assume costs have been resolved as between the parties.

Justice J. Moser

Released: September 10, 2026

CITATION: Middlesex Centre (Municipality of) v. South Winds Development Co. Inc., 2026
ONSC 5113

COURT FILE NO.: CV-25-3256

DATE: 20260910

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

The Corporation of the Municipality of Middlesex
Center

APPLICANT

– and –

South Winds Development Co. Inc.

RESPONDENT

REASONS FOR JUDGMENT

Moser J.

Released: September 10, 2026