CITATION: AtkinsRéalis Construction (Pacific) Inc. v. Barton Malow Canada Ltd., 2026 ONSC 5896
COURT FILE NO.: CV-25-00101625
DATE: 2026/10/23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AtkinsRéalis Construction (Pacific) Inc., Applicant

AND:

Barton Malow Canada Ltd., Respondent

BEFORE: Justice K.A. Jensen

COUNSEL: James Plotkin and Tristan Neill, Counsel, for the Applicant

Joshua Strub and Leah Mangano, Counsel, for the Respondent

HEARD: October 15, 2026

ENDORSEMENT

Introduction

[1] AtkinsRéalis Construction (Pacific) Inc. ("AtkinsRéalis") brings this motion pursuant to s. 40(2) of the *Arbitration Act, 1991* seeking an order directing the arbitrator, Bernie McGarva, to provide an explanation of certain aspects of his merits award.

[2] The request concerns the arbitrator's allocation of certain non-time-related damages. AtkinsRéalis submits that while the arbitrator identified the damages awarded in respect of specific delay events, he did not explain what portions of certain broader damages awards, including high rail costs, financing costs and cost growth, were attributable to the particular delay claims that are the subject of AtkinsRéalis' appeal. AtkinsRéalis submits that the requested explanation will assist in the determination of its pending appeal.

[3] For the reasons that follow, I dismiss the motion. I do not find it necessary to determine whether the arbitrator was *functus officio* when the request was renewed, nor do I find it necessary to decide whether s. 43(4) of the *Arbitration Act, 1991* precludes an explanation after the

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arbitration has terminated. I am prepared to assume, without deciding, that this court has jurisdiction under s. 40(2) to order an arbitrator to provide an explanation. Even on that assumption, however, the remedy sought by AtkinsRéalis is discretionary, and I am not persuaded that the discretion should be exercised in the circumstances of this case.

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Background

[4] The dispute arises out of a large construction project for which Barton Malow Canada Ltd. ("Barton Malow") acted as subcontractor to AtkinsRéalis.

[5] Following an arbitration, the arbitrator released a merits award on September 8, 2025. The merits award addressed numerous claims advanced by Barton Malow, including claims arising from project delays. The arbitrator found AtkinsRéalis responsible for four delay events and awarded damages to Barton Malow.

[6] After the merits award was released, the parties continued to participate in the arbitration process. The arbitrator subsequently rendered a further award dealing with interest and, on January 22, 2026, released a costs award.

[7] On October 8, 2025, shortly after the merits award was issued, AtkinsRéalis delivered a request pursuant to s. 40(1) of the *Arbitration Act, 1991* seeking an explanation from the arbitrator. The request asked the arbitrator to explain what portions, if any, of certain non-time-related damages awards were attributable to three particular delay events that form part of the basis of AtkinsRéalis' appeal.

[8] The arbitrator did not respond to that request. It is now common ground that the request was overlooked by the arbitrator.

[9] AtkinsRéalis took no further steps with respect to the request until March 24, 2026, more than five months later and approximately two months after the issuance of the final costs award. At that point, AtkinsRéalis renewed its request.

[10] The arbitrator invited submissions and ultimately declined to provide the requested explanation. In doing so, he noted that more than five months had elapsed between the original

request and the renewed request, described the delay as "puzzling and concerning," and concluded that the delay was unreasonable. He further stated that he considered himself "*functus officio* for all intents and purposes" and therefore no longer in a position to respond to the request. However, he expressly stated that if ordered by the court to provide a response, he would do so.

[11] AtkinsRéalis now seeks an order under s. 40(2) directing the arbitrator to provide the requested explanation.

Analysis

The Court Need Not Decide the Jurisdictional Issues Raised by the Parties

[12] The parties devoted considerable attention to the questions of *functus officio*, termination of the arbitration, and the interaction between ss. 40 and 43 of the *Arbitration Act, 1991*.

[13] AtkinsRéalis submits that a request for an explanation under s. 40 is distinct from a request for correction, reconsideration or redetermination. It argues that an explanation does not alter the substance of the award and therefore does not engage the doctrine of *functus officio*. It further submits that the omission of s. 40 from the revival provisions in s. 43(4) does not prevent an arbitrator from providing an explanation after the arbitration has otherwise concluded.

[14] Barton Malow submits that the arbitrator's jurisdiction terminated when the arbitration concluded and that the legislature's decision not to include s. 40 within the revival provisions of s. 43(4) is significant. Barton Malow also submits that the arbitrator effectively ruled on his own jurisdiction and that AtkinsRéalis failed to pursue the remedies available to challenge that ruling.

[15] In my view, it is unnecessary to decide any of those issues in order to dispose of this motion. For the purpose of this motion, I am prepared to assume, without deciding that: (1) the arbitrator retained authority to provide an explanation under s. 40; (2) the doctrine of *functus officio* does not bar such an explanation; and (3) this court has jurisdiction under s. 40(2) of the *Arbitration Act, 1991*, to direct an arbitrator to provide an explanation. However, for the following reasons, even on those assumptions the motion must be dismissed.

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The Remedy Under Section 40(2) of the Arbitration Act, 1991 is Discretionary

[16] Section 40(2) provides that where an arbitrator does not provide an explanation within the prescribed period, the court may order the arbitrator to do so. The provision is permissive, not mandatory.

[17] The use of the word "may" reflects a legislative intention to confer discretion upon the court. The existence of a timely request under s. 40(1) therefore does not automatically entitle an applicant to an order compelling an explanation. The court must consider whether such relief is appropriate in the circumstances.

[18] I accept that AtkinsRéalis made its original request within the statutory thirty-day period. However, that does not end the inquiry.

The Delay in Pursuing the Request Weighs Against Relief

[19] A central difficulty for AtkinsRéalis is the chronology. Although the request was made on October 8, 2025, AtkinsRéalis took no steps to pursue it after receiving no response from the arbitrator. Instead, the matter remained dormant for more than five months.

[20] During that period, the arbitration process continued. The parties made submissions respecting interest. The arbitrator issued a supplementary award concerning interest. The parties then made extensive costs submissions. Finally, on January 22, 2026, the arbitrator released his costs award, which all parties understood to be the final step in the arbitration.

[21] The request was not renewed until March 24, 2026. The arbitrator himself expressed concern about that delay. He found it "puzzling and concerning". He concluded that the delay was unreasonable. He observed that clarification requests are intended to be dealt with efficiently and

noted that the legislation expressly contemplates a prompt application to the court where an arbitrator does not provide a response.

[22] Those observations are significant. The arbitrator was uniquely positioned to assess the practical impact of the delay on the arbitral process and on his ability to address the request while the matters remained current.

Finality and Efficiency Are Central Features of the Arbitration Act

[23] The exercise of the court's discretion under s. 40(2) must be informed by the objectives of the *Arbitration Act, 1991*. The Act reflects a legislative intention to promote the efficient and final resolution of disputes through arbitration while limiting judicial intervention in arbitral proceedings. See, for example, *Campbell v. Toronto Standard Condominium Corporation No. 2600*, 2024 ONCA 218, at paras. 35 and 36, and *Chiarantano v. RDA Inc.*, 2025 ONSC 4466, at para. 70.

[24] Those objectives would be undermined if a party could make a timely request for an explanation, allow the request to remain dormant for many months while the arbitration proceeds to its conclusion, and then seek to revive the issue after the arbitration has otherwise ended.

[25] I agree with AtkinsRéalis' submission that the statute does not prescribe an express deadline for bringing a motion under s. 40(2). However, the absence of an express deadline does not mean that delay is irrelevant.

[26] Section 40 is directed toward obtaining prompt explanations of matters contained in an award. The statutory scheme contemplates expedition, not dormancy. In my view, a party seeking the court's assistance under s. 40(2) must pursue that assistance with reasonable diligence. That did not occur here.

The Request is Primarily Connected to the Pending Appeal

[27] A further consideration is the purpose of the requested relief. AtkinsRéalis candidly acknowledges that the explanation is sought primarily because it may assist in the pursuit of its

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appeal. It submits that the requested explanation could assist the court in determining whether leave should be granted and could assist the appeal court in assessing the practical significance of the issues raised on appeal.

[28] I acknowledge that the requested explanation may be of assistance in that regard. However, that consideration does not favour granting relief on this motion.

[29] The appeal proceedings are already before the court. The court hearing the leave application and any appeal will be in the best position to determine whether an explanation from the arbitrator is necessary for the fair and efficient disposition of those proceedings.

[30] This conclusion is reinforced by s. 45(4) of the *Arbitration Act, 1991*, which expressly authorizes the court hearing an appeal to require an arbitral tribunal to explain any matter. That provision recognizes that circumstances may arise in which an explanation is required in order to address issues properly raised on appeal.

[31] If, in the context of the leave application or the appeal itself, the court concludes that an explanation is necessary, the statute provides a mechanism by which that explanation may be obtained.

[32] In these circumstances, I am not persuaded that it is appropriate to exercise the court's discretion under s. 40(2) to compel an explanation at this stage, particularly given the lengthy delay in pursuing the request and the completion of the arbitration process in the interim.

Conclusion

[33] Assuming, without deciding, that the court has jurisdiction under s. 40(2) of the *Arbitration Act, 1991* to order the requested explanation, I decline to exercise that discretion.

[34] The motion is therefore dismissed.

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Costs

[35] If the parties are unable to agree on costs, they may make written submissions not exceeding three pages, exclusive of bills of costs, within 30 days of the date of this endorsement.

Justice K.A. Jensen

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Released: October 23, 2026

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