# Ontario Superior Court removes arbitrator for "descending into the arena" through cross-examination

**by *Practical Law Arbitration*, with *Fasken***

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In *Atkinsréalis Construction (Pacific) Inc v GIP Construction Ontario East Ltd, 2026 ONSC 5666*, the Ontario Superior Court ordered the removal of an arbitrator, finding that his questions amounted to cross-examination of the applicant's witnesses, giving rise to a reasonable apprehension of bias.

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The Ontario Superior Court of Justice (SCJ) has removed an arbitrator from ongoing arbitration proceedings for reasonable apprehension of bias.

The parties jointly appointed the arbitrator to adjudicate multiple claims arising from delays on a municipal transit project, favouring the arbitrator's specialised expertise in construction. After the examination of all fact witnesses, the claimant (ATRL) moved for the arbitrator to remove himself under section 13 of the Canadian Arbitration Act 1991, SO 1991, c 17 (AA 1991) alleging that his questions to ATRL's witnesses gave rise to the appearance of impartiality.

In dismissing ATRL's challenge, the arbitrator emphasised that the parties had chosen an arbitrator who could apply their expertise to the dispute, and that the parties had agreed to his interventionist style from the outset. The respondent (GIP) argued that the arbitrator asked its witnesses similar questions.

ATRL applied to the SCJ for his removal. Justice Myers held this was a "clear case of an arbitrator 'descending into the arena' and thereby creating reasonable apprehension of bias to an objective observer".

The court emphasised that arbitrators must be neutral, independent decision-makers; they cannot descend into the adversarial arena to cross-examine witnesses. The court explained that cross-examination is a questioning technique that "seeks to put words in the witness's mouth", not a "simple search for the truth". Leading questions are not necessarily prohibited but arbitrators must take care to ask questions without giving rise to the appearance of advocacy for one party.

Here, the arbitrator crossed the line through questions designed to undermine ATRL's position and the credibility of its witnesses, including preparing questions in advance to pin witnesses with prior inconsistent statements and interrupting witnesses to raise inconsistencies without giving witnesses a chance to explain.

The court also took issue with the arbitrator's reasoning that ATRL had failed to object to his questions during the hearing. Justice Myers found that counsel for ATRL did object to questions which crossed the line. Regardless, the court found no evidence that ATRL had applied for tactical reasons.

This decision reinforces the importance of, and appearance of, neutrality in alternative dispute resolution. Parties cannot contract out of an arbitrator's duty to treat parties equally and fairly under section 19 of the AA 1991. While parties have leeway in designing their own arbitration procedure, the parties' agreement to a more inquisitorial approach in this case did not authorise the arbitrator to cross-examine witnesses.

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Case: *Atkinsréalis Construction (Pacific) Inc v GIP Construction Ontario East Ltd, 2026 ONSC 5666 [CL-26-00000307-0000] (7 October 2026)* (Justice FL Myers).

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