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ARBITRATOR QUESTIONING: WHEN DOES SKEPTICISM BECOME ADVOCACY? *ATKINSRÉALIS v GIP CONSTRUCTION*

The Case

In *Atkinsréalis Construction (Pacific) Inc. v. GIP Construction Ontario East Ltd.*, 2026 ONSC 5666 ("***Atkinsréalis***"), the Ontario Superior Court of Justice (Commercial List considered the permissible scope of an arbitrator's questioning of witnesses and the circumstances in which an arbitrator's conduct may give rise to a reasonable apprehension of bias, warranting their removal from an arbitral proceeding.

Atkinsréalis involved similar facts, and the same arbitrator, as *Dufferin v Morrison Hershfield,* 2022 ONSC 3485 ("***Dufferin***"), yet the Court in *Atkinsréalis* reached the opposite result. The two decisions can look hard to reconcile, but a close reading shows that the difference lies in how the arbitrator questioned witnesses in each case.

Justice Myers in *Atkinsréalis* also issued a preliminary decision, reported at *Atkinsréalis Construction (Pacific) Inc. v. GIP Construction Ontario East Ltd.*, 2026 ONSC 4785 (the "**Stay Decision**"), on whether the arbitration should be stayed while the application to remove the arbitrator was pending. The Stay Decision appears to be the first reported case interpreting s. 13(7) of Ontario's *Arbitration Act, 1991*.

Background Facts of *Atkinsrealis*

The *Atkinsréalis* arbitration arose from the Trillium Line Extension Stage 2 Project in Ottawa. Atkinsréalis Construction (Pacific) Inc. ("**ATRL**") was the prime contractor, and GIP Construction Ontario East Ltd. ("**GIP**") was its roadworks subcontractor. The parties had competing claims arising from delays and changes to the scope and timing of the work.

The parties agreed to arbitrate their disputes and appointed an experienced construction arbitrator. Both knew the arbitrator preferred a somewhat inquisitorial approach to hearings and accepted it. His terms of appointment expressly permitted him 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".

The hearing commenced on December 8, 2025. On the eighth day of the hearing, after the examination of the fact witnesses had concluded, ATRL challenged the arbitrator on the basis that his questioning of its witnesses gave rise to a reasonable apprehension of bias.

The arbitrator dismissed the challenge. ATRL then applied to the Superior Court under s. 13(6) of the *Arbitration Act, 1991* for an order removing the arbitrator.

The arbitrator ruled that the arbitration should continue while the challenge was before the court. ATRL successfully moved to stay the arbitration pending the outcome of the application.

Standard for a Stay of Proceedings

In the Stay Decision, Justice Myers had to decide whether the arbitration should continue while the challenge was pending. Section 13(7) of the *Arbitration Act, 1991* provides that, 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". Neither party could find case law interpreting the provision.

Justice Myers applied the common law test for stays, guided by the tripartite test in *RJR-MacDonald Inc v Canada (Attorney General)*, but read in light of the statutory scheme. The Act's goal of respecting the independence of the arbitral process favours deference to arbitrators and the completion of the arbitration before judicial review (Stay Decision, para. 25). The default position under s. 13(7) is therefore that the arbitration continues, and a challenge in court does not by itself shut the arbitration down (Stay Decision, para. 26).

At the threshold stage, the Court held that it is not enough to show a serious issue to be tried. Observing that bias is an "overused" allegation that is rarely made out, Justice Myers required the higher standard of a "strong prima facie case", recognizing the strong presumption of independence enjoyed by arbitrators and judges alike. That standard was also appropriate because the evidentiary record, consisting of the arbitration transcripts, was already fixed. On the record before him, Justice Myers was satisfied that ATRL had met that standard.

On irreparable harm, Justice Myers held that requiring ATRL to continue appearing before the arbitrator in light of a strong prima facie case of bias would itself be irreparable harm, relying on the Court of Appeal's statement in *Vento* that a reasonable apprehension of bias irreparably compromises the integrity of an adjudicative process. In such cases, irreparable harm and the balance of convenience are "nearly merged", particularly when, as here, the stay would cause only a brief delay. As he put it, an award by a tribunal later found to have created a reasonable apprehension of bias "is of no value to anyone". The Court also rejected the suggestion that the arbitrator could hear the expert evidence and then await the Court's decision, as this would neither expedite the proceeding nor assist the Court. The stay was therefore granted.

The Decision on the Challenge Application

1. Parties Can Agree to an Inquisitorial Process, but Not an Unfair One

Having stayed the underlying arbitration, Justice Myers then dealt with the bias challenge itself. He began with the statutory framework.



Section 19 of the *Arbitration Act 1991* requires the parties to an arbitration to be treated equally and fairly, while s. 3 expressly prevents parties from contracting out of those requirements.

The Court recognized that arbitration allows parties considerable flexibility in designing the process by which their disputes will be resolved. Parties can select arbitrators with specialized knowledge and agree to procedures that differ from those ordinarily followed in court. That flexibility may include permitting an arbitrator to take a more inquisitorial approach to the evidence.

However, an agreement to an inquisitorial procedure does not displace the arbitrator's duty of impartiality.

Justice Myers referred to the Supreme Court of Canada's decision in *Szilard v. Szasz*, [1955] SCR 3, and the Ontario Court of Appeal's more recent decision in *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82, which confirm that the requirement of impartiality applies to arbitrators as it does to judges.

The reasonable apprehension of bias test is objective: whether an informed person, viewing the circumstances realistically and practically, would reasonably apprehend that the arbitrator might not decide the dispute fairly. Actual bias or an intention to favour one party need not be established.

This was important in *Atkinsréalis*, where the parties had expressly agreed to the arbitrator's questioning of witnesses. Justice Myers stated that even though an arbitrator's expertise and familiarity with the evidence may justify a more active role in questioning, party agreement cannot override the statutory requirement of impartiality.

2. When an Arbitrator's Questioning Crosses the Line into Advocacy

The central issue in *Atkinsréalis* was whether the arbitrator's questioning of witnesses had crossed the line into impermissible cross-examination. Justice Myers explained at paragraph 63, "subject to contextual factors", arbitrators, like judges, "**must not** cross-examine" because questioning in that way and for those purposes is the role of adversarial counsel and is inconsistent with the neutrality required of a decision maker.

The concern, as Justice Myers explained at paragraphs 65–67, is that cross-examination is inherently not neutral: it involves controlling a witness through leading questions to elicit desired evidence, undermine evidence already given, or impair the witness's credibility. The examiner seeks to put words in the witness's mouth and knows in advance what they want the witness to say. In Justice Myers' view, this form of questioning is not simply a means of clarifying evidence or searching for the truth; it is designed to advance the examiner's position, creating a risk that an arbitrator who adopts this approach will appear to have departed from neutrality.

That does not mean that every leading question gives rise to a reasonable apprehension of bias. At paragraph 68, Justice Myers emphasized that the impugned conduct must be assessed "in its full context", having regard to the strong presumption of neutrality and the high threshold set by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board*, [1978] 1 SCR 369. Nor is the arbitrator's subjective intention determinative: a stated intention to conduct an inquisitorial search for the truth does not answer whether the conduct gives rise to a reasonable apprehension of bias.

3. Application to the Facts

Applying these principles, Justice Myers found that the arbitrator's questioning of two ATRL witnesses went

beyond permissible inquiry and, in its context, crossed into cross-examination.

In questioning the first ATRL witness, the arbitrator began with seemingly general questions about how contractors deal with disputed changes. Through leading questions, he narrowed the witness's answers to a list of options that did not include termination, a key issue in the arbitration. He later returned to those answers, dismissed the witness's attempts to explain ATRL's position, and pressed him to admit that ATRL had not pursued any of the listed options before terminating GIP (paras. 74 and 78-79). Justice Myers characterized this sequence as "classic cross-examination technique": pinning a witness to seemingly harmless points early on and confronting them with those admissions later (para. 75).

The arbitrator's questioning of a second ATRL witness raised similar concerns. He questioned the witness about counsel's role in drafting his witness statement and dismissed portions of it as "spin" (paras. 83 and 87). Justice Myers accepted that evidence extending beyond a witness's personal knowledge may properly be given less weight. However, he found that the questioning went further by targeting the witness's credibility because counsel had drafted the evidence, rather than focusing on its factual basis. Notably, a GIP witness whose evidence raised similar concerns was not subjected to the same questioning.

What proved decisive was the nature and context of these interventions, not the mere use of leading questions. Considering the questioning as a whole, Justice Myers concluded that a reasonable observer could conclude the arbitrator had prejudged the outcome and, as such, might decide the arbitration unfairly.

Comparison with *Dufferin*

Atkinsréalis stands in contrast to *Dufferin*, where Justice Woodley of the Superior Court of Justice dismissed a similar challenge arising from a matter involving the same arbitrator.

In *Dufferin*, a party applied to remove the arbitrator alleging that he had shown prejudgment, pursued admissions adverse to its case, and failed to take a balanced approach to the witnesses called by each party. As in *Atkinsréalis*, the procedural order expressly allowed the arbitrator to question any witness and to interject at any time. He had also received extensive written evidence before the hearing.

Justice Woodley reviewed the complete transcripts and rejected the challenge. She found "no significant difference in the Arbitrator's approach to any of the witnesses". He asked difficult questions of witnesses on both sides and always allowed counsel to follow up (paras. 124, 135 and 151). Where both sides face equally hard questions, it is difficult to see how an informed observer, considering the "full context" that *Atkinsréalis* also requires, could conclude that the arbitrator had prejudged the issues in favour of one party.

The arbitrator had questioned the party's witnesses about an apparent change in position. Justice Woodley found that these questions flowed logically from the evidence. They gave the witnesses a chance to explain the inconsistency before any decision was made (paras. 126 and 148). She concluded that the arbitrator had not become an advocate for either party but was advocating for the truth, wherever that led.

How Can the Decisions Be Reconciled?

On their face, *Atkinsréalis* and *Dufferin* appear to present contrasting outcomes concerning similar allegations of bias. Justice Myers himself described the issues in *Dufferin* as "very similar" (para. 57). However, the decisions are not necessarily inconsistent. The difference is better explained by the lens each court applied to the arbitrator's questioning.

In *Dufferin*, Justice Woodley's main focus was even-handedness. She reviewed the complete transcripts and found no significant difference in the Arbitrator's approach to any of the witnesses (para. 124). That finding was central to her rejection of the advocacy allegation: the arbitrator "did ask difficult questions, but he asked them of all witnesses" (para. 135). She also appeared to give weight to the arbitrator's purpose, finding that his interventions were intended to ensure "a fair and independent process" (para.

123). She accepted that questioning by an expert tribunal, even if pursued extensively and vigorously, is acceptable if it is aimed at clarifying the evidence (para. 161).

In *Atkinsréalis*, Justice Myers focused on the nature of the questioning. Like Justice Woodley, he accepted that the arbitrator was highly prepared. The question for him was whether the questioning had moved beyond clarification into adversarial cross-examination, used to secure desired admissions, undermine evidence or impair credibility (para. 65). Not every leading question crosses that line (para. 68), but questioning of that kind "helps one side and hurts the other by design" (para. 104). Unlike Justice Woodley, Justice Myers gave no weight to the arbitrator's purpose, holding that "the intention of the arbitrator or judge is not relevant" (para. 64).

Unequal treatment also played a role in *Atkinsréalis*. Justice Myers found that only ATRL's witness was cross-examined to undermine his credibility, while a GIP witness with similar issues was not (paras. 84 and 89). But he saw no value in the broader comparison that had been decisive in *Dufferin*. GIP pointed to "competing snippets" to show that its own witnesses were asked similar questions (para. 97), and Justice Myers declined to engage with them, holding that the cross-examinations of ATRL's witnesses "so plainly cross the line" that nothing would be gained by examining "disembodied snippets of the transcripts" (para. 98). The reasons do not identify the questions GIP relied on; presumably, they were not of the same kind as those put to ATRL's witnesses.

Taken together, the decisions draw a line between testing evidence to understand it and questioning that objectively appears to advance one party's case. An arbitrator may put an apparent inconsistency to a witness and invite an explanation. This was a key feature of the questioning approved in *Dufferin*, where the arbitrator told the witness, "I am giving you an opportunity to explain how this works, from your perspective" (para. 155). However, *Atkinsréalis* holds that a series of leading questions designed to secure adverse admissions or attack credibility is "presumptively on the wrong side of the line" (para. 103). That holds even where the arbitrator is even-handed and acting in good faith.

Sphinx or Skeptic?

The arbitrator, Justice Myers, and Justice Woodley all adopted Glaholt and Rotterdam's article, *Arbitrator Questioning: Sphinx or Skeptic?*, published in the *Journal of the Canadian College of Construction Lawyers* in 2016.[1] Justice Woodley agreed with the authors' observation that an arbitrator selected for subject matter expertise is better in the role of skeptic than Sphinx, provided that active skepticism does not become advocacy. The arbitrator relied on the breadth of areas of questioning listed by Glaholt and Rotterdam, but Justice Myers drew attention to the qualification that questioning must not create an appearance of one-sidedness or unfairness and that they did not specifically mention cross-examination (paras. 53–55).

Must Counsel Object to Every Question?

Both decisions also considered whether failing to object to an arbitrator's questioning at the time it happens prevents a later challenge. In *Dufferin*, Justice Woodley held that a party need not object before bringing a challenge. This is because a reasonable apprehension of bias may arise from the cumulative effect of a series of questions or comments, even where no single intervention would justify a challenge (paras. 84–91). Justice Myers took a similar approach in *Atkinsréalis*. Because parties cannot consent to unfair proceedings, a failure to object is relevant only to the question of the *bona fides* of the timing of raising the bias issue (paras. 106 and 111).

[1] Glaholt & Rotterdam, "Arbitrator Questioning: Sphinx or Skeptic?" (2016) Journal of the Canadian College of Construction Lawyers 81, cited in *Dufferin*, paras. 137, 161 and 168, and *Atkinsréalis*, paras. 53–55.



The practical lesson is that counsel need not object to every question to preserve a challenge. They should, however, act promptly once sufficient grounds exist, and keep in mind any statutory or institutional time limits.

Why This Matters for Construction Arbitration

The attraction of arbitration, whether domestic or international, is not simply that parties can resolve their disputes privately. It is also that they can select a decision maker with experience and expertise relevant to their dispute.

In construction arbitrations, that expertise can be particularly valuable. Arbitrators may be required to assess complex delay analyses, competing engineering opinions, extensive contemporaneous project records, and contractual arrangements that are not always familiar to judges. An arbitrator with experience in these matters may identify inconsistencies or gaps in the evidence that warrant further explanation. In international arbitration, the parties and counsel may also come from different legal traditions, with very different expectations of how actively a tribunal should question witnesses.

The decision in *Dufferin* recognizes the value of that approach. Indeed, the Court placed considerable weight on the arbitrator's preparation and ability to use his knowledge of the dispute to identify the important issues.

Atkinsréalis complements this. Its approach to the equal-treatment issue is open to debate, since Justice Myers declined to compare the questioning of each side's witnesses (para. 98). Still, it rightly accepts that context matters: an expert arbitrator may come into the hearing "hot", and not every leading question will create a reasonable apprehension of bias (paras. 68 and 90). But context cannot displace the "fundamental requirement that the Arbitrator must be neutral" (para. 105).

There are several practical implications.

First, parties should consider carefully the procedures they agree to when appointing an arbitrator. A provision authorizing an arbitrator to question witnesses may be appropriate, particularly where the parties expect the arbitrator to use specialized expertise to understand the evidence. However, such a provision does not displace the statutory requirements of neutrality and fairness.

Second, a party challenging an arbitrator should consider early whether to seek a stay. The default outcome is that the arbitration continues, and an arbitrator who has rejected a challenge can be expected to keep the process moving. A stay will be granted only where the applicant can show a strong prima facie case, so the record supporting the challenge should be developed carefully from the outset.

Third, an arbitrator's familiarity with the evidence does not, by itself, determine whether a particular line of questioning is appropriate. The distinction lies in how the questions are framed and pursued.

Fourth, full context still matters. It carried less weight in *Atkinsréalis*, and we do not know which questions put to the GIP's witnesses Justice Myers considered less difficult than those put to ATRL's witnesses. In our view, *Dufferin* remains good law. It can be distinguished as a case where the full record showed that the arbitrator asked both sides equally difficult questions in pursuit of the truth, wherever it led.

Finally, agreeing to an inquisitorial process does not mean counsel must accept all questioning without objection. Concerns should be raised promptly.

In practice, the line between legitimate inquiry and advocacy is not always obvious during a lengthy hearing. A question meant to clarify evidence can grow into a more extensive examination, especially where the answers raise further questions. The test is whether the arbitrator's interventions, taken as a whole, objectively create a reasonable apprehension that the arbitrator may not decide the matter impartially.

Conclusion

Key takeaways for counsel and arbitrator:

- **An arbitration can be paused while a bias challenge is pending, but the bar is high.** The arbitration continues during a court challenge unless the court orders otherwise. A party seeking a

stay under s. 13(7) must show a strong prima facie case, not merely a serious issue to be tried.

- **An arbitrator can ask difficult questions, but there are limits.** An arbitrator may question witnesses to clarify evidence, test inconsistencies, and better understand technical matters. However, questioning that takes on the character of adversarial cross-examination is impermissible and may give rise to a reasonable apprehension of bias.
- **Parties cannot contract out of impartiality.** Even where parties agree to an inquisitorial arbitration process, the arbitrator remains subject to the mandatory requirements of equality and fairness under Ontario's *Arbitration Act, 1991*.
- **Objections need not be made to every question.** A reasonable apprehension of bias may arise from the cumulative effect of an arbitrator's conduct. However, challenges must still be brought promptly and within the applicable time limits.
- **Context matters.** In *Dufferin*, the Court upheld extensive but even-handed questioning by an arbitrator aimed at clarifying evidence. In *Atkinsréalis*, the questioning was used to secure admissions and attack credibility, and the arbitrator was removed.

Neither decision sets a precise limit on how much questioning is permissible, and neither suggests that arbitrators should avoid challenging evidence or identifying inconsistencies. Both reinforce the guidance in *Arbitrator Questioning: Sphinx or Skeptic?*: an arbitrator chosen for subject matter expertise is better in the role of skeptic than Sphinx, provided that active skepticism does not become advocacy.









JARBEAU v MCLEAN, 2017 ONCA 115, AND THE PLAINTIFF'S PATH TO RECOVERY IN SOLICITOR'S NEGLIGENCE

Introduction

When a lawyer's negligence deprives a client of the opportunity to pursue a claim, how should damages be assessed? Can the client point to a lost opportunity and collect a payout, or does the client need to prove the underlying case on its merits?

In *Jarbeau v. McLean*, 2017 ONCA 115, the Ontario Court of Appeal answered this question with clarity. Where a "trial within a trial" finds that the plaintiff would have succeeded in the underlying action, the plaintiff may recover the resulting damages from the lawyer. Evidence is required to prove such damages. Loss of chance damages are reserved for situations where it is "practically impossible" to determine what would have happened "but for" the solicitor's negligent conduct.

The Facts

The respondents, Darren and Lillian Jarbeau, purchased a new home from Thermolith Homes Limited that was fundamentally defective, as it did not meet the standards set by Ontario's building code. The Jarbeaus' damages might have been avoided if the engineer they hired, Larry Nelson, had not negligently certified the design and construction of the home.

The Jarbeaus hired a lawyer to pursue those responsible. The lawyer sued the builder, the municipality, and the warranty corporation; however, he failed to sue the engineer within the limitation period. His erroneous advice was that the Jarbeaus did not have a cause of action against the engineer because they did not have a contract with him.



After settling the action against the builder, municipality, and warranty corporation for $75,000, the Jarbeaus sued their lawyer. Their claim was straightforward: "but for" the lawyer's negligence, they would have successfully sued the engineer and recovered all of their losses. On the eve of trial, the lawyer admitted his advice was negligent. The trial therefore focused entirely on whether his negligence caused the Jarbeaus any damages. This was assessed through a "trial within a trial" of the claim that could have been brought against the engineer.

A jury found in the Jarbeaus' favour, assessing the cost to repair the home at $433,000 and diminution in value at $265,000, ultimately producing a net award.

The Appeal: Was the Plaintiff's Burden Met?

On appeal by the lawyer, the question was whether the Jarbeaus had done enough to earn full recovery or whether their damages should be discounted. The appellant argued that the trial judge improperly instructed the jury, as the jury was not told that the Jarbeaus' claim was about the loss of a *chance* to successfully sue the engineer. Under this framework, the Jarbeaus would be entitled only to damages in proportion to the probability that their action against the engineer would have succeeded, an amount the appellant submitted was "necessarily less than 100%".

The appellant asked the Court to reduce damages by 10-20% to reflect the contingency that an action against the engineer may not have succeeded or may have settled for less than the total loss.

The Court's Analysis

Justice Pardu, writing for the Court, rejected this argument.

The "But For" Test as Default

The Court affirmed that the "but for" test, as set out in *Clements v Clements*, 2012 SCC 32, is the appropriate test for causation in negligence in all but rare cases. The Supreme Court of Canada stated in *Clements*:

> The plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred. Inherent in the phrase 'but for' is the requirement that the defendant's

> negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence.

The Court helpfully summarized the elements of a cause of action for breach of contract based on solicitor's negligence by citing from *Folland v. Reardon* (2005), 2005 CanLII 1403 (ON CA):

> In most cases of solicitor's negligence, liability rests on both a tort and contractual basis.
>
> […]
>
> If a defendant breaches his contract with the plaintiff and as a result the plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable.
>
> A plaintiff can recover damages for lost chance in an action for breach of contract if four criteria are met:
>
> a) The plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss.
>
> b) The plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation.
>
> c) The plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself.
>
> d) The plaintiff must show that the lost chance had some practical value.
>
> Where a plaintiff in a tort action arising out of solicitor's negligence can establish on the balance of probabilities that but for the negligence he or she would have avoided the loss, he or she should be fully compensated for that loss.
>
> Where a plaintiff can only establish that but for the solicitor's negligence he or she lost a chance to avoid a loss, a claim for breach of contract may permit recovery for the value of that chance.

The Nature of the Jarbeaus' Claim

The Court held that the appellant's submission misunderstands the nature of the Jarbeaus' claim. If the claim against the engineer had been litigated, it would have been assessed on the balance of probabilities. If the Jarbeaus had persuaded a judge or jury on that standard, they would have been entitled to full recovery. The appellant's negligent advice precluded them from litigating that claim.

Critically, the Jarbeaus were able to reproduce the evidence they would have led at the unrealized trial through the device of a "trial within a trial", and in doing so, proved that they would have recovered 100% of their loss against the engineer.

Loss of Chance as a Residual Doctrine

The Court explained that loss of chance is reserved for situations where it is "practically impossible" to determine what would have happened but for the solicitor's negligent conduct. Only in cases where the plaintiff genuinely cannot reconstruct the underlying action, have courts allowed a plaintiff to advance a claim for loss of the chance to recover. In those cases, a court will assess the chances that the plaintiff had to succeed in the underlying action and award damages on that basis.

That was not the case at hand, as the Jarbeaus advanced a "trial within the trial" on a balance of probabilities standard and were entitled to recover in full. The trial judge's instructions collapsed treatment of the lawyer's negligence and the engineer's negligence, consistent with the notion of a "trial within a trial" approach.



What Can a Plaintiff Actually Recover?

What a plaintiff can recover depends entirely on what they can prove. The British Columbia Court of Appeal articulated this in *Nichols v Warner, Scarborough, Herman & Harvey*, 2009 BCCA 277, citing the Alberta Court of Appeal in *Fisher v Knibbe*, 1992 ABCA 121:

SCENARIO	*OUTCOME*
The trial within a trial finds the plaintiff would have succeeded in the underlying action.	100% of lost damages awarded against the solicitor.
The trial within a trial finds the plaintiff would not have succeeded.	Only nominal damages may be awarded.
Too much time has passed, making a trial within a trial impossible.	The court must calculate the value of the lost opportunity and award damages on that basis.

The *Jarbeau* case fell squarely into the first category: the jury conducted a full trial within a trial and found the engineer negligent. The engineer himself admitted at the lawyer's negligence trial that he had erred.

Practical Implications for Plaintiffs

Full recovery in *Jarbeau* was only achieved after the plaintiffs put significant time and cost into their claim against their lawyer. The Jarbeaus did not just point to an absent party or a missed limitation period and claim they could have succeeded against in litigation if no error was made by the lawyer. They had to effectively mount an entire case against what would have been the original defendant, the engineer, years after the fact, and prove the negligence of the present defendant, the lawyer, in front of a jury. That is not a small undertaking.

To mount a credible trial within a trial, the Jarbeaus:

- **Retained expert witnesses.** They called a professional engineer to provide opinion evidence on the cost to repair the home, and a real estate appraiser to testify on fair market value and diminution in value. Expert reports had to be prepared, updated, and defended under cross-examination.
- **Preserved and reproduced a robust evidentiary record.** Documents from the original construction, the engineer's certification, building code violations, and the earlier litigation all had to be assembled and presented coherently to a jury that had no prior context.
- **Obtained contractor estimates.** The Jarbeaus secured a detailed pricing estimate from Fry's Construction Limited for razing and rebuilding the home ($362,334.50), which went before the jury as evidence of the cost to remedy the engineer's negligence.
- **Endured a full jury trial.** This was not a summary proceeding. It was a two-week trial with live testimony, expert cross-examination, and closing submissions, all to prove the underlying negligence case that the lawyer's error had prevented them from bringing in the first place.

The Court in *Jarbeau* acknowledged that other factors could affect the assessment of damages in lawyers' negligence actions. For example, if a plaintiff could have obtained judgment in the underlying litigation, but there was no possibility of collecting it because the tortfeasor was insolvent or uninsured, only nominal damages against the lawyer might follow.

This is another dimension of lawyers' negligence cases: not only must the plaintiff prove the underlying negligence, but they must also be prepared to address collectability and other practical obstacles to recovery or else they will end up with only nominal damages.

In summary, when a plaintiff asserts a claim against a lawyer for failure to properly advance a claim against a party, the plaintiff needs to be prepared to invest significant time and money into reconstructing the case they lost the opportunity to litigate. That means retaining experts early, preserving documents meticulously, and being ready to prove every element of the underlying claim as though the plaintiff were litigating it fresh, in addition to establishing the negligence of the lawyer. If a "trial within a trial" approach is undertaken successfully, the plaintiff may be entitled to fully recovery against the lawyer, as opposed to a reduced award on an assessment of a loss of chance.

The principles enunciated in *Jarbeau* continue to hold true. Courts have cited and adopted the Ontario Court of

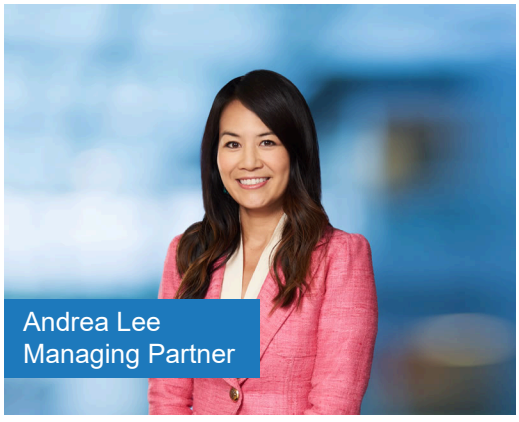
Appeal's decision with respect to lawyers' negligence claims, the "trial within a trial" approach and loss of chance, both in construction contexts and beyond.

For example, in *Bazar v Chisholm*, 2020 ONSC 593, the Court employed a "trial within a trial" to determine if solicitor negligence caused the plaintiffs' underlying financial losses in a real estate dispute. In that case, the court analyzed the underlying transaction's merits to evaluate what would have occurred "but for" the negligence, concluding that the solicitor's breach in that case caused specific damages.

By way of another example, in *Hopkins v. Murphy*, 2024 ONSC 3698, a plaintiff sued their lawyer for recommending an allegedly improvident settlement following a motor vehicle accident. The plaintiff asked the Court to apply the "loss of chance" doctrine instead of the traditional "improvident settlement" framework, which requires a trial within a trial to assess what the plaintiff would have recovered had the case gone to trial.

The action was dismissed. The Court held that even if the loss of chance approach were applied, the plaintiff would still fail at the first stage because they could not establish, on a balance of probabilities, that the defendant lawyer was negligent by failing to meet the standard of care of a competent member of the profession. In particular, the Court noted that no expert evidence was called to support this threshold requirement.







ONTARIO COURT CLARIFIES THE MEANING OF "IMPROVEMENT" UNDER THE *CONSTRUCTION LIEN ACT*

Introduction

In *Bradley-Kelly Construction Ltd. v GIP Construction Ontario East Ltd.*, 2026 ONSC 5180, the Ontario Superior Court of Justice addressed a question of central importance to construction lien law: when does work performed by a subcontractor across multiple sites on a single project constitute work on a single "improvement" for the purposes of lien preservation timelines under the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "***Act***"?

Background

The dispute arose in the context of the City of Ottawa's Trillium Line Extension — Ottawa Stage 2 Light Rail Transit project (the "**Project**"). AtkinsRéalis Construction (Pacific) Inc. ("**Atkins**" was the general contractor, and GIP Construction Ontario East Ltd. ("**GIP**" was engaged as a subcontractor under a single subcontract covering works at several locations.

Bradley-Kelly Construction Ltd. ("**Bradley-Kelly**", a sub-subcontractor, entered into two separate subcontracts with GIP — one for the Earl Armstrong Road site (the "**EA Subcontract**" and one for the New Walkley Yard (the "**Walkley Subcontract**". The parties all agreed that the scope of work under Bradley-Kelly's subcontracts was for work on the Project.

Bradley-Kelly last worked at the Earl Armstrong site on December 27, 2023, and at the Walkley site on January 25, 2024, and preserved separate claims for lien on February 15, 2024.

The parties agreed on the quantum of either lien, and the fact that the old *Construction Lien Act* provisions governed.

The Central Issue on the Motion

As Justice Perron succinctly put it:

> At the heart of these motions, there is one central issue in dispute that ultimately determines whether the EA Claim for Lien was timely: was the project a single improvement, or was the work performed by Bradley-Kelly completed on two sites that constitute separate improvements?

Under subsection 31(3)(a)(ii) of the *Act*, a subcontractor's lien expires 45 days after the person last supplied services or materials to the "improvement".

If the work was a single improvement, Bradley-Kelly's last day of supply was January 25, 2024, and the Earl Armstrong lien preserved on February 15, 2024, was preserved within the 45-day window. If the work constituted multiple improvements, then the last day of supply at Earl Armstrong was December 27, 2023, and the 45-day period would have expired on February 13, 2024 — two days before the lien was preserved.

Atkins did not dispute the timeliness of the lien registered on the Walkey site but brought a motion to declare the lien registered on the Earl Armstrong site to be expired.

Ultimately, Justice Perron dismissed Atkins' motion, finding that the Earl Armstrong lien was timely, having been registered within 45 days of the last date of supply of services and materials to the "improvement".



The Legal Framework: Defining "Improvement"

The Court reviewed the statutory definition of "improvement" under section 1 of the *Act* and the established jurisprudence on determining whether work was performed on the "same improvement". Justice Perron confirmed that the question of "same improvement" is largely a "fact-finding exercise" and that the governing principle is the establishment of some "nexus" between the work done that makes it a "common effort" — the coordination of the contract work toward a "common purpose or goal", as the same improvement can have one contract or many contracts.

Justice Perron also relied on the Divisional Court's decision in *Prasher Steel Ltd. v Pre-Eng Contracting Ltd.*, 2024 ONSC 4772, which held that it is immaterial whether a subcontractor provides services or materials under one or multiple subcontracts — the lien arises upon first supply and persists until expiry following the date of last supply of services or materials to the improvement.

Analysis and Decision

In her analysis, Justice Perron found that Bradley-Kelly's work at both sites was performed on a single improvement, relying on the following:

1. **Overwhelming evidence of a single "improvement":** There had been a single procurement process and prime contract; unified general contractor oversight; a single certificate of substantial performance issued in respect of the Project; a single holdback fund for the Project; and the Project could not operate until work on all sites were complete.

2. **Contiguity of the lands:** Bradley-Kelly adduced evidence that the lands on which the work was performed were contiguous — rails connected the main light rail track to the New Walkley Yard, and the Earl Armstrong road widening was done immediately in front of the Bowesville Park and Ride station. Drawing on the Divisional Court's reasoning in *Caledon (Town) v 2220742 Ont. Ltd.*, 2024 ONSC 4555, Justice Perron held that contiguity of land is a relevant factor in determining what constitutes an "improvement". Unlike in *Caledon*, where the lands were not contiguous, the evidence here demonstrated the opposite.

Justice Perron noted that there was an absence of any evidence in Atkins' materials that would support the existence of multiple improvements in this case.

Ultimately, Justice Perron agreed that "an 'improvement' under the under the *Act* is the "alteration, addition, repair, construction, erection, or installation on the same or contiguous lands, of coordinated work being completed towards a common purpose or goal".

Conclusion

Bradley-Kelly v GIP Construction clarifies how the concept of "improvement" applies to large-scale, multi-site infrastructure projects. The decision underscores the importance of substance over form: where work at different sites serves a common purpose, is carried out under a unified project structure, and is performed on contiguous lands, it could be treated as a single improvement for lien preservation purposes.

For subcontractors and sub-subcontractors on complex projects who enter into multiple contracts, the decision provides some guidance that lien timelines will be assessed by reference to the last date of supply to the improvement as a whole, not to individual sites or subcontracts.



ONTARIO DIVISIONAL COURT UPHOLDS DISQUALIFICATION FROM PUBLIC PROCUREMENT PROCESS FOLLOWING PROHIBITED CONTACT



In *Land Design Inc. v. Ontario Infrastructure and Lands Corp.*, 2026 ONSC 4690 ("***Land Design***"), the Ontario Divisional Court considered whether Infrastructure Ontario's decision to disqualify a proponent from a public procurement process, following contact with the Premier of Ontario and a Minister of the Crown, was reasonable and procedurally fair.

The decision addresses when public procurement decisions are subject to judicial review, how prohibited contact provisions in requests for proposals are interpreted and enforced, and the scope of a procuring authority's discretion to disqualify a proponent to protect fairness, and perceived fairness, of a competitive process.

Factual Background and Procedural History

The dispute in *Land Design* arose from a request for proposals ("**RFP**" issued by Ontario Infrastructure and Lands Corporation, operating as Infrastructure Ontario ("**IO**", for construction administration services in connection with the redevelopment of Ontario Place in Toronto (the "**Project**". Land Design Incorporated ("**LANDinc**", a landscape architecture and design firm, had previously performed design work on the Project, including developing a three-dimensional model of the proposed redevelopment (the "**3D Model**".

The RFP prohibited proponents from lobbying to influence the procurement process and restricted contact with specified individuals, including the Premier of Ontario and Members of Provincial Parliament, on matters related to the RFP process. The RFP also afforded IO discretion to disqualify proponents for prohibited contact or attempted contact.

On May 11, 2026, shortly after LANDinc entered the RFP process, a junior LANDinc employee met the Premier of Ontario at an event and discussed the 3D Model. Following the Premier's expression of interest in viewing the model, the employee contacted the Premier's office to arrange a visit. On May 26, 2026, the Premier and Ontario's Minister of Tourism attended LANDinc's offices, viewed the 3D Model, and engaged in discussions with LANDinc personnel (the "**Visit**").

After learning of the Visit, IO raised concerns that LANDinc had contravened the RFP's prohibited contact provisions. Following an investigation and written submissions from LANDinc, IO disqualified LANDinc from the RFP process on June 11, 2026, and subsequently upheld its decision on reconsideration. LANDinc commenced an application for judicial review, challenging the reasonableness and procedural fairness of its disqualification.

The Decision

Jurisdiction to Judicially Review Public Procurement Decisions

At the outset of its analysis, the Court considered whether IO's decision was subject to judicial review under the *Judicial Review Procedure Act*, RSO 1990, c J.1.

The Court noted that judicial review is "directed at public decision-making" and is available only where the impugned decision involves an "exercise of state authority" that is "sufficiently public in character".

In determining whether that threshold was met, the Court considered the factors identified in *Air Canada v Toronto Port Authority*, 2011 FCA 347, including the nature of the decision-maker, the character of the decision, its relationship to statutory or governmental functions, and the suitability of public law remedies.

The Court noted that public procurement decisions are not automatically subject to judicial review merely because they involve a public authority. Rather, jurisdiction must be assessed on a case-by-case basis, having regard to the particular circumstances of the decision under review.

In this case, the Court identified several factors supporting the availability of judicial review. These

factors included the significant public interest associated with the redevelopment of Ontario Place, the substantial nature of the proposed services contract, and the involvement of senior elected officials in circumstances raising concerns about the integrity of the procurement process. Of particular importance was the purpose of the prohibited contact provisions, which sought to prevent proponents from obtaining, or appearing to obtain, an unfair advantage through contact with political officials.

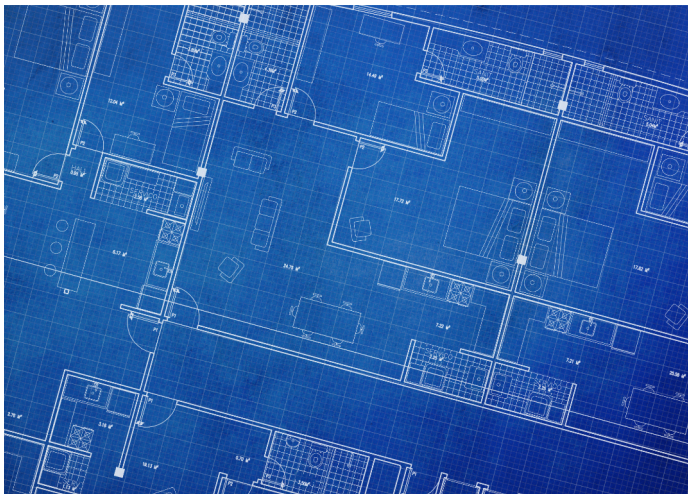
Project scale and contract value alone would not justify judicial review; it was their combination with concerns about the integrity and perceived independence of the procurement process that gave the decision a sufficiently public character. The Court therefore concluded that it had jurisdiction to review IO's disqualification decision.

Reasonableness of IO's Disqualification Decision

Having established jurisdiction, the Court considered whether IO reasonably concluded that LANDinc had contravened the RFP's prohibited contact provisions and, if so, whether disqualification was a reasonable exercise of IO's discretion.

In challenging the finding of prohibited contact, LANDinc advanced two principal arguments. First, it argued that the Visit was consistent with its legitimate expectations arising from an earlier meeting with IO personnel. Second, it submitted that IO had failed to undertake an adequate investigation into the circumstances surrounding the Visit.

With respect to legitimate expectations, LANDinc argued that an earlier meeting at its offices with IO personnel, which occurred after the RFP process had commenced, led it to reasonably believe that the subsequent Visit involving the Premier and the Minister was similarly permissible.



The Court rejected this argument, noting that the doctrine of legitimate expectations generally concerns representations about the procedures a decision-maker will follow, rather than the substantive outcome of a decision. The Court also observed that LANDinc had not properly advanced a legitimate expectations argument in its original submissions to IO or its request for reconsideration.

The Court further distinguished the earlier meeting with IO personnel from the Visit. In particular, the Visit did not arise as a matter of course under LANDinc's existing contractual relationship with IO, but resulted from LANDinc leveraging its previous work on the Project to arrange a meeting with senior political officials. In those circumstances, the Court concluded that the earlier meeting did not provide a reasonable basis for LANDinc to believe that contact with the Premier and the Minister was permitted during the RFP process.

The Court also rejected LANDinc's argument that IO had failed to conduct an adequate investigation. LANDinc maintained that IO ought to have obtained additional information from the Premier's office and other government officials to determine the circumstances surrounding the Visit. However, the Court concluded that IO had sufficient information to determine whether the RFP had been contravened, including LANDinc's own account of the events and the correspondence arranging the Visit.

While LANDinc disputed whether it had initiated contact with the Premier, the Court considered that distinction to be of limited significance. The evidence established that the initial encounter developed into a planned visit over approximately two weeks, during which LANDinc personnel coordinated with the Premier's office. The Court emphasized that the responsibility for complying with the RFP rested with LANDinc, regardless of whether the Premier had initially expressed interest in viewing the 3D Model.

Having concluded that IO reasonably found a contravention of the RFP, the Court considered whether disqualification was a reasonable response.

LANDinc argued that the disqualification decision was arbitrary and procedurally unfair. The Court rejected this argument, emphasizing that the RFP expressly authorized IO to disqualify a proponent for prohibited contact.

The Court distinguished between an incidental encounter with a prohibited person and the circumstances

surrounding the Visit. It acknowledged that a chance encounter, or an initial contact that went no further, would likely not, without more, warrant sanction. The appropriateness of disqualification must instead be assessed in light of the circumstances and the need to protect the integrity of the procurement process.

Here, however, the initial encounter had developed into a planned meeting involving the Premier, a Minister of the Crown, and senior LANDinc personnel. The Court found it reasonable for IO to conclude that LANDinc had leveraged its position as an incumbent service provider to secure access to senior political officials in a way that could appear to give it an unfair advantage over competing proponents.

The Court stressed that the integrity of a public procurement process depends not only on whether proponents obtain an unfair advantage, but also on whether the process is reasonably perceived as fair by all participants.

The Court therefore concluded that IO's decision to disqualify LANDinc was a reasonable exercise of its discretion and was consistent with its obligation to preserve the fairness and appearance of fairness of the RFP process.

Procedural Fairness

LANDinc also argued that IO had breached its duty of fairness by disqualifying it from the procurement process. The Court rejected this argument, holding that IO's duty to administer the RFP fairly was owed not only to LANDinc, but to all proponents.

The Court observed that even-handed enforcement of procurement rules is an important component of that duty. Where conduct raises concerns about a potential breach of the RFP, the procuring authority's investigation and response may serve its obligation to ensure that no proponent gains, or appears to gain, an unfair advantage.

IO had notified LANDinc of its concerns, identified disqualification as a potential consequence, and gave LANDinc an opportunity to respond. Following the initial decision, IO also considered LANDinc's further submissions on reconsideration. The Court was therefore satisfied that the process was procedurally fair.

The Court also rejected LANDinc's attempt to characterize its disagreement with IO's substantive findings as a procedural fairness issue. The Court distinguished between the fairness of the process followed and the reasonableness of the substantive decision, concluding that LANDinc had not established a breach under either analysis.



Breach of Contract Arguments

Finally, LANDinc advanced alternative arguments founded on breach of contract.

The Court concluded that it lacked jurisdiction to determine those claims on an application for judicial review, as contractual claims fall within the jurisdiction of the Superior Court of Justice.

The Court nevertheless recognized that, in appropriate circumstances, interim relief may be available where a proceeding has been brought before the Divisional Court but ought to have been commenced before the Superior Court of Justice, and where requiring the parties to pursue that alternative process could occasion an injustice.

In declining to intervene in this case, the Court observed that LANDinc's contractual claims appeared weak. In particular, the RFP expressly provided that the procurement process did not create contractual relations between IO and proponents.

The Court also rejected the suggestion that a binding non-disclosure agreement entered into in connection with the RFP rendered the procurement process itself contractual in nature.

Given these conclusions, the Court declined to grant interim relief and dismissed the application.

Commentary

The decision in *Land Design* provides guidance on the circumstances in which public procurement decisions may be subject to judicial review and the discretion afforded to procuring authorities when enforcing the rules governing competitive procurement processes.

The Court's treatment of jurisdiction is particularly informative. Although it accepted jurisdiction, the Court did not recognize a general right of judicial review in procurement matters; proponents seeking review will need to show that the decision is sufficiently public in character.

In that regard, the decision suggests that concerns involving the integrity and perceived independence of a public procurement process may provide a stronger basis for judicial review than the scale or financial significance of the project alone.

The Court's analysis of the prohibited contact provisions also has practical implications for proponents participating in public procurement processes.

Notably, the Court's conclusion did not depend on a finding that LANDinc had engaged in deliberate lobbying or had actually obtained an advantage over competing proponents. Rather, the concern was that the Visit could reasonably be perceived as conferring an unfair advantage, particularly given LANDinc's existing involvement in the Project and its access to senior political officials.

The test is not only whether particular conduct is intended to influence a procurement process, but whether it could reasonably appear preferential.

At the same time, the Court recognized that not every instance of prohibited contact will necessarily warrant disqualification. The discretion to disqualify a proponent must be exercised reasonably and in light of the particular circumstances. The distinction drawn by the Court between a chance encounter and a subsequently arranged meeting illustrates the importance of assessing both the nature of the contact and the conduct that follows.

For proponents, including consultants and contractors involved in large public infrastructure projects, the decision also highlights the risks associated with participating in successive stages of a project. Existing involvement may create legitimate opportunities for interaction with project stakeholders, but it does not relieve a proponent of its obligations under a new procurement process.

The Court's observations concerning LANDinc's internal compliance processes are particularly relevant. Although the initial contact arose from an encounter involving a junior employee, the Visit was subsequently arranged over approximately two weeks, with senior LANDinc personnel involved in the communications. The Court observed that there had been sufficient opportunity for those responsible for compliance to recognize that the Visit could contravene the RFP.

Procurement requirements, particularly restrictions on communications with specified individuals, should be communicated and understood throughout an organization, not only by the bid team. Junior employees may not appreciate these restrictions so proponents should ensure that staff at all levels understand them and that potential issues are identified early.

Ultimately, *Land Design* confirms that procurement fairness is owed to all participants: where a proponent's conduct creates a reasonable perception of unfair advantage, disqualification may be justified even without evidence that the outcome was actually influenced.





BOUND BY THE BID: SUBCONTRACTOR CANNOT WALK AWAY FROM ITS TENDER WITHOUT A REASONABLE OBJECTION

What happens when a subcontractor whose price was carried into a successful bid, decides it no longer wants to do the work? Often, the subcontractor will argue that no contract was ever formed, because no subcontract was signed and the parties never agreed on all of its terms. In *Manorcore Group Inc. v. IBL Structural Steel Limited*, 2026 ONSC 4517 ("***Manorcore***"), the Ontario Superior Court of Justice rejected that argument. In doing so, it provided a helpful reminder of how of the "Contract A/Contract B" tendering framework operates as between contractors and subcontractors.

Background

Manorcore Group Inc. ("**Manorcore**"), a general contractor, submitted a tender in March 2018 for the construction of an addition to the Wal-Mart Canada Corp. ("**Wal-Mart**") store at the Pen Centre in St. Catharines. IBL Structural Steel Limited ("**IBL**"), a structural steel supplier and installer with whom Manorcore had no prior business relationship, provided Manorcore with an unsolicited quotation dated March 7, 2018 (the "**Quotation**") to supply and erect the structural steel for the project. After verbal discussions between the parties, the lump sum price in the Quotation was increased to approximately $670,000.

Manorcore carried IBL's price in its bid and identified IBL as its structural steel provider. Wal-Mart awarded the contract to Manorcore on April 13, 2018.

At Manorcore's request, IBL provided a revised quotation on May 14, 2018 (the "**Revised Quotation**"), which adjusted the price of steel to account for newly imposed tariffs and adopted an alternate layout, for a total price of $690,000 plus HST. Although the form of the Revised Quotation provided for the signature of both parties, Manorcore never signed it. Instead, on May 15, 2018, Manorcore sent IBL its standard form Letter of Intent (the "**LOI**"), which IBL never signed.

The parties met on May 23, 2018 to discuss scope and schedule. At the end of the meeting, and as subsequently confirmed in writing, IBL advised that it would not be proceeding with the job. Manorcore requested further meetings to resolve the issue, but IBL maintained its position. Manorcore then retained Steelcon Fabrication Inc. ("**Steelcon**"), the second-lowest bidder, to perform the work, and sued IBL for the $271,200 in additional costs that it incurred as a result.

The Positions of the Parties

IBL relied on ordinary principles of offer and acceptance, arguing that the Revised Quotation was never accepted, and that the LOI was a counteroffer which IBL never accepted. Manorcore, in turn, relied on the law of tender, arguing that a binding contract arose when Wal-Mart accepted its bid.

The Decision

Justice Reid sided with Manorcore. The Court applied the Contract A/Contract B regime established in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 SCR 111, and the Court of Appeal for Ontario's decision in *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* (1999) 43 OR (3d) 325 (CA). It confirmed that the framework applies equally between contractors and subcontractors and that, unlike in ordinary contract law, communication of acceptance is unnecessary in the tendering environment. The subcontractor must maintain its bid, and the successful contractor is obligated to enter into a subcontract on the terms of the subcontractor's proposal, absent a reasonable objection. Logically, the Court held, those obligations also operate in reverse: the subcontractor is bound to enter into Contract B unless it has a reasonable objection.

Applying these principles, the Court found that Contract A was formed when Manorcore submitted its bid using IBL's price and naming IBL as its steel provider, and that Contract B came into existence when Wal-Mart accepted Manorcore's bid. Because Contract B was already in effect, it did not matter that the Revised Quotation was later prepared, delivered, and never signed.

The more difficult question was whether IBL had a reasonable objection sufficient to relieve it of its obligations. The Court found that neither a perceived threat of litigation, nor the lack of a signature on the Revised Quotation or the LOI, constituted a reasonable objection. IBL also pointed to a number of terms in the LOI that were not contained in the Revised Quotation, including templates for drilling and anchor-setting and a $5 million insurance requirement. The Court accepted that

major differences could theoretically vitiate the contract, as what is "reasonable" depends on the facts of the case.

Ultimately, however, the Court found it unnecessary to decide whether those differences were significant. The Revised Quotation was stated to be based on the CISC *Code of Standard Practice for Structural Steel*, which provides that the governing contract is the CCA 1 standard form subcontract. The CCA 1 contains comprehensive dispute resolution provisions, including an obligation to make all reasonable efforts to resolve disputes by amicable negotiation. Rather than engage in that process, IBL simply walked away. As the Court held, where the parties are required to negotiate a resolution of any dispute and one party fails to do so, that party cannot be said to have made a reasonable objection.

On damages, the Court awarded Manorcore the full $271,200 claimed, being the difference between Steelcon's price of $1,050,900 (including HST) and IBL's price of $779,700 (including HST), together with prejudgment interest. The Court rejected IBL's suggestion that Wal-Mart may have reimbursed Manorcore as speculative, given Manorcore's stipulated price contract with Wal-Mart.

Takeaways and Practice Tips

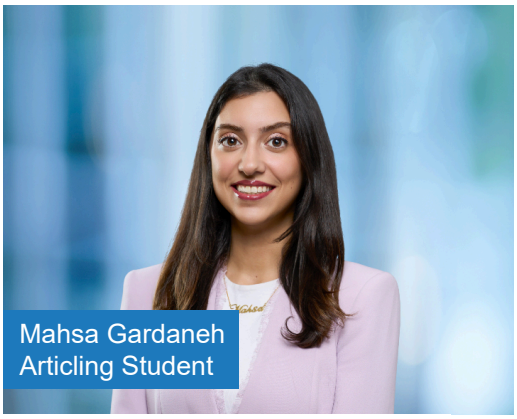
First, *Manorcore* confirms that, in the tendering context, a subcontractor's obligations can crystallize well before any subcontract is signed. A subcontractor whose price is carried in a successful bid will generally be bound to enter into a subcontract on the terms of its bid, and cannot rely on the absence of a signature, or on ordinary offer and acceptance principles, to escape that obligation.

Second, while a subcontractor may be excused where it has a reasonable objection, that objection will be assessed on the facts of each case. Notably, where the parties' documents incorporate, even indirectly, a dispute resolution process such as that contained in the CCA 1, a party that refuses to engage in that process before walking away will have difficulty establishing that its objection was reasonable.

With that in mind, subcontractors should carefully review the scope, pricing, and incorporated terms of their quotations before submitting them, recognizing that standard references such as the CISC Code may bring the CCA 1 and its dispute resolution provisions into play. Where a subcontractor objects to additional terms proposed by a contractor after the award, it should raise those concerns promptly, document them, and negotiate in good faith rather than simply refusing to proceed.

Contractors, for their part, should ensure that any terms they seek to add after the award are consistent with the subcontractor's bid and the industry standard forms. They should document their efforts to resolve any disagreement, as Manorcore did by requesting further meetings with IBL.





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