ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

ENDORSEMENT

COURT FILE NO.:	**CV-25-00747880-00CL**	**DATE:**	**August 31, 2025**

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TITLE OF PROCEEDING: **METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1251**
v.
THE WINDSOR ARMS HOTEL CORPORATION

BEFORE: **Justice OSBORNE**

PARTICIPANT INFORMATION

For Applicant:

Name of Person Appearing	Name of Party	Contact Info
Simon Bieber Sean Blakeley	Metropolitan Toronto Condominium Corporation No. 1251	sbieber@agbllp.com sblakeley@agbllp.com

For Respondent:

Name of Person Appearing	Name of Party	Contact Info
Kevin Sherkin Samantha Del Frate	The Windsor Arms Hotel Corporation	ksherkin@millerthomson.com sdelfrate@millerthomson.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicant seeks an order disqualifying and removing the Arbitrator, and if necessary, interim and interlocutory relief staying the Arbitration until this Application can be heard and determined.

2. For the reasons that follow, the Application is granted, and the Arbitrator is disqualified.

3. These reasons are more summary in nature than they might otherwise be, given that the parties have advised that the Arbitration has been rescheduled to proceed in less than two weeks, with the result that they jointly requested that a decision be rendered as soon as possible.

4. The parties agree on the applicable law and on virtually all of the relevant facts.

The Test

5. The only issue on this Application is whether the Arbitrator should be removed as a result of a reasonable apprehension of bias.

6. This Court has the jurisdiction to remove an arbitrator as provided in s. 13(1) of the *Arbitration Act, 1991*, c. 17, where "circumstances exist that may give rise to a reasonable apprehension of bias".

7. Two things plainly flow from the language of that statutory provision. First, the Court need only be satisfied that the circumstances *may* give rise to a reasonable apprehension. Second, there need not be any finding of actual bias, or even an intention to be biased. The issue is only whether there is an apprehension that there may be a bias, and whether that apprehension is reasonable.

8. The test is objective. The Court must be satisfied that an informed and reasonable person, viewing the matter realistically and practically, and having thought the matter through, would have an apprehension of bias. See: *MDG Computers Canada Inc et al v MDG Kingston Inc.* et al, 2013 ONSC 5436 ("*MGD*") at para 14; *Kingdon v. Kramer*, 2015 ONSC 397 at paras. 9 and 10.

9. The Supreme Court expressed the test in very similar terms in *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369 ("*Committee for Justice and Liberty*") at pp. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

10. The Court of Appeal for Ontario has observed that the appearance of bias is just as important as the reality and that "fine distinctions and legal technicalities [should] be avoided." Even where the adjudicator may, with justification, believe that they are unbiased, if the appearance of bias is present, they should withdraw from the case: *Benedict v Ontario*, (2000), 51 O.R. (3d) 147, [2000] OJ No 3760 at paras. 28 and 29. While that case involved a challenge to the impartiality of a judge, the same principles apply to an arbitrator.

11. The Court of Appeal recently considered the removal of an arbitrator in the context of an international commercial arbitration proceeding pursuant to the UNCITRAL *Model Law* and the *International Commercial Arbitration Act, 2017*. While that case involved the failure on the part of the arbitrator to disclose an engagement with respect to a second unrelated arbitration, the test applied for a reasonable apprehension of bias in an arbitration proceeding pursuant to the *Model Law* is essentially the same as under the *Arbitration Act* applicable here: *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc.,* 2024 ONCA 839 ("*Aroma*").

The Facts

12. The Applicant, Metropolitan Toronto Condominium Corporation No. 1251, owns the common elements of the residential portion of the property at 18/22 St. Thomas Street in Toronto, Ontario. The Respondent, The Windsor Arms Hotel Corporation, owns and operates a luxury hotel occupying the first four floors of the building.

13. On June 8, 1999, the parties entered into a reciprocal agreement governing their relationship and shared responsibilities over shared spaces, services and utilities in the building. Since the reciprocal agreement was entered into, the parties have had numerous disputes over issues such as responsibility for cost-sharing, maintenance and upgrades to facilities in the provision of shared services.

14. After having unsuccessfully negotiated a resolution of the issues over a period of some years, the parties engaged the Arbitrator to conduct a mediation-arbitration.

15. A mediation was held on September 14, 2023, but it too was ultimately unsuccessful. That triggered the Arbitration, which was scheduled on consent to proceed on July 7, 2025 and continue for five days.

16. One central issue on the Arbitration was whether Harmonized Sales Tax (HST) was applicable to certain fees paid and payable between the Applicants and the Respondent.

17. The Applicant had delivered its Arbitration Record months before the Arbitration (pursuant to the Arbitrator's Procedural Order #2). That Record included an expert report from a lawyer proposed to be called by the Applicant as an expert witness to offer opinion evidence about the HST issues, Mr. Jesse Brodlieb ("Brodlieb").

18. Brodlieb is a tax lawyer who had provided an expert opinion as to whether HST was in fact payable by the Applicant on certain fees charged by the Respondent Hotel. If HST were payable, Brodlieb offered a proposed methodology for the quantification of the amounts owing.

19. July 7, 2025 was a Monday. At 11:58 PM on July 5 (i.e., the preceding Saturday night, just before midnight) the Arbitrator wrote to the parties to advise of the existence of – in his words – "a clear appearance of conflict".

20. That clear appearance of conflict involved Brodlieb. He had recently referred a separate, unrelated litigation matter to the Arbitrator's law firm.

21. The Arbitrator's Saturday night email is sufficiently important to be reproduced in full:

> I am duty bound to disclose that his firm has referred a litigation matter to my firm. Mr. Brodlieb is the instructing lawyer on the matter. I have been tasked with preparing the pleadings and assuming carriage of it.
>
> I disclose that Mr. Brodlieb and I have exchanged emails concerning the litigation matter. I certify that no discussions were had with respect to his involvement in this arbitration. The first I learned of his involvement was on Saturday 11:45 pm as I was reviewing the materials. I have had no other prior dealings with Mr. Brodlieb that I can recall.
>
> There is a clear appearance of conflict which I now disclose.

22. The Arbitrator proposed three options for the parties to consider or propose an alternative. His Saturday night email continued:

> I ask that the parties confer to discuss how this conflict is to be managed. The options appear to me to be that I resign as the arbitrator in this matter, or the parties in writing acknowledge the conflict and waive it. A third option would be to exclude the evidence of Mr. Brodlieb with some adjournment to secure the opinion of another expert. Another approach is to admit the evidence on the assumption that the expert is qualified and the contents of the report are relevant. I am open of course to other suggestions.

23. The next day, on Sunday, July 6, counsel for the Respondent asked the Arbitrator to explain the conflict, taking the position that there was no issue. Counsel for the Respondent also suggested a fourth option that the Arbitrator did not mention: "the client of Mr. Brodlieb could retain someone else and you would no longer act."

24. The Arbitrator responded within a few minutes to advise that regardless of whether the Respondent viewed the matter as a conflict, he would not proceed [the following day] unless all parties agreed he could:

> Thanks, [counsel].
>
> I appreciate your comments, there has been a lot of recent case law about conflict of interest in Arbitration.
>
> EG the [*MDG Computers*] case.
>
> I am more than happy to proceed tomorrow. Provided that everyone signs off in one way or another about what might be perceived to be a conflict of interest.
>
> Just rack it up to my very conservative nature.

25. The next day, on July 7, the Applicant determined that, given the significance of the HST issue in the Arbitration, it declined to waive the conflict. The Respondent took the position that, with or without a waiver, there was no conflict, and the Arbitration should proceed as scheduled.

26. The Arbitrator then reversed his position expressed in his two electronic mail messages, and refused to resign. He advised the parties that:

> In light of the position taken by [counsel for the Respondent], I do not think I can or should resign.
>
> I would have resigned if [the Respondent] had agreed with [the Applicant] that there was a straight line between my disclosure and some anticipated apprehension of bias (which is what I assume your client may believe).
>
> My email of Saturday night set out options and was not intended to take a preemptive position. I trust this clarifies matters.

27. Several further electronic mail messages from the Arbitrator followed, in which he continued to suggest that the Arbitration could and should proceed. He referenced a number of authorities, including some of the authorities I have referred to above. Ultimately, the Arbitrator advised that if the Applicant still wished to pursue the matter, it would have to bring a formal motion seeking his removal. As directed, the Applicants brought that motion.

28. The next day, on July 8, the Applicant suggested that a possible solution that would avoid the motion and the issue would be that the Respondent could acknowledge that the issue of the payment of HST by the Applicant to the Respondent was beyond the jurisdiction of the Arbitrator (i.e., the Canada Revenue

Agency would determine whether or not it took the position that HST was exigible, and the CRA was not bound by any decision of the Arbitrator). The Respondent took the position, relying, in part on a Reciprocal Agreement entered into by the parties earlier, that the Arbitrator did have the jurisdiction to address the HST issue.

29. The motion was heard by the Arbitrator three days later on July 10, 2025. By Award dated July 13, 2025, the Arbitrator decided that there was no conflict, and dismissed the motion. The Applicant therefore brought this Application.

Analysis

30. In my view, the apprehension of bias is reasonable, and in the somewhat unique circumstances of this case, the Arbitrator should be disqualified.

31. If the issue were limited to merely the fact that a proposed expert witness in an upcoming arbitration referred an unrelated matter to the Arbitrator's law firm, that may not be sufficient to justify disqualification. But in the particular circumstances of this case, that is only the initial event in the chain of several relevant events that in my view, considered together, give rise to a reasonable apprehension of bias.

32. The timing of the disclosure was unfortunate, and it is regrettable that the Arbitrator realized that there was an issue only some 30 hours before the commencement of the Arbitration hearing, when he had been in possession of the proposed expert's report for many months (and therefore knew of the expert's identity). However, I accept that that is when the Arbitrator adverted to the issue, and initially, he acted entirely appropriately and swiftly when he disclosed the issue to the parties, precisely as he ought to have done.

33. In my view, the reasonableness of the apprehension of bias flows from the manner in which the potential conflict was managed thereafter.

34. First, the Saturday night email from the Arbitrator was not limited to simply identifying a potential issue, and requesting that the parties consider how to proceed. In material respects, it went much further. The Arbitrator confirmed in his email that:

    a. he was duty-bound to disclose the referral to his firm of the other matter;

    b. Brodlieb was the instructing lawyer on the other matter;

    c. he (the Arbitrator) was the lawyer at his firm specifically tasked with drafting the pleadings and taking carriage of that matter (i.e., the relationship was not simply between Brodlieb and the Arbitrator's law firm. The Arbitrator himself would have carriage of the new matter referred by Brodlieb);

    d. he (the Arbitrator) and Brodlieb had exchanged emails about the other litigation matter;

    e. he (the Arbitrator) had already concluded that there was a "clear appearance of conflict";

    f. he considered an appropriate resolution of the matter to be one of three options (or others if agreed by the parties), none of which contemplated his continuing as Arbitrator over the objections of either party:

        i. he would resign;

        ii. both parties would formally waive the conflict; or

iii. the proposed expert, Brodlieb, would not testify and the hearing would be adjourned so the Applicant could retain another expert.

35. In my view, this communication from the Arbitrator is centrally relevant to the reasonableness of the apprehension of bias. The communication was to the effect that he had determined that there was a "clear appearance of conflict". This determination was made by the one person who had full knowledge of both matters: the Arbitrator himself.

36. Second, the email from the Arbitrator the next day reiterated and repeated a second time his conclusion that there was an appearance of a conflict of interest, sufficiently important that he was not prepared to proceed unless both parties waived the conflict.

37. That second email reinforces the reasonableness of an apprehension of bias. Indeed, one could conclude that this ought to have been the end of the matter right there. The Arbitrator, having himself made the decision, needed to obtain a waiver from both parties or withdraw (precisely as he initially agreed to do), even without the subsequent events that further compounded the issue. This is discussed further below in the context of the Award of the Arbitrator.

38. Third, the Applicant requested production of the electronic mail communications between the Arbitrator and the expert so that it (the Applicant) could evaluate the seriousness of the issue. The request was refused, on the basis that those communications were privileged. That refusal may well have been justified and indeed even appropriate, but it further informs the reasonableness of the apprehension of bias.

39. The Applicant has no knowledge whatsoever of the other matter, of the issue in that proceeding, of the position of the proposed expert, Brodlieb, or the relationship between Brodlieb as the instructing individual and the Arbitrator as the specific person to whom the matter had been referred and who would have carriage of the matter. Left completely in the dark as to that other matter and the relationship of the key expert witness and the Arbitrator who would decide the key issue on which the witness opined in this case, the Applicant continued to have an apprehension of bias. Considered objectively, that apprehension was reasonable.

40. Fourth, the abrupt (and in my view, largely unexplained) about-face and reversal of position by the Arbitrator contributed further still to the reasonableness of the apprehension of bias. The Arbitrator himself (quite properly) raised the issue first, having determined that there was a "clear appearance of a conflict". The Respondent then suggested that there was no issue, and the Arbitrator maintained his position that he would not proceed unless both parties provided a waiver. That was also appropriate. But he then effectively reversed himself and took the position that notwithstanding that the Applicant declined to waive the conflict, since the Respondent objected to him withdrawing, he would proceed anyway. This fact alone speaks to the reasonableness of the apprehension.

41. Fifth, in the midst of the email exchanges about this issue, the Arbitrator convened a case conference to discuss the path forward. The Applicant submitted that the direction from the Arbitrator, excluding the parties and directing that counsel only should attend, further increased the concern of the principals of the Applicant and, in my view, the objective reasonableness of their apprehension that there may be a bias.

42. The Respondent submitted that the Arbitrator had not, in fact, excluded the parties. He clearly did: his electronic mail case management direction to convene the case conference stated in relevant part: "Clients should NOT attend this meeting." [CAPS in original]. That message followed on the Arbitrator's earlier email to the effect that before the parties and their counsel all convened with the Arbitrator to discuss next steps, "the lawyers and I should have a brief chat".

43. There is nothing improper about an Arbitrator conducting a case management conference with counsel. However, in the particular circumstances here, the intentional exclusion of the clients contributed to the objective reasonableness of their apprehension.

44. Sixth, in one of the numerous email messages from the Arbitrator on Monday, July 7, he advised that: "and for what it is worth, I was advised this morning by [Brodlieb] that I am to deal directly with his client and take instructions exclusively from them." While I have no doubt that in so advising the parties, the Arbitrator was trying to manage the conflict, the problem, again in the circumstances of these fast-moving events between Saturday night and through the day on the following Monday, was that this disclosure of the fact that the Arbitrator had had yet further communications with the witness and had apparently made arrangements to manage it by excluding him (as the referring lawyer) and dealing directly with the clients and the other matter, did nothing to make the already existing apprehension of bias less reasonable.

45. Seventh, the Arbitrator directed the parties, in yet another of his emails, on Monday, July 7, to the Mediation/Arbitration Agreement entered into by the parties, and particularly Article 9. That provision provided that the parties and their counsel acknowledged that they may or have retained, employed, or consulted with experts who may have been retained or implied by the Mediator / Arbitrator in the ordinary course of the practice of law. The Mediator / Arbitrator was required to disclose such retainer or retainers, and the parties expressly waived any appearance of conflict or apprehension of bias arising therefrom.

46. In fairness to him, the Arbitrator queried in his email message to counsel whether that provision applied to the present circumstance directly or by extension. At the hearing of this Application, the Respondent suggested that it did. In my view, Article 9 does not apply. A plain reading of the provision discloses that it is directed towards a situation where a proposed expert witness in the Arbitration may have been an expert witness retained by the Arbitrator in another matter. That is not what happened here, and in my view Article 9 does not assist the analysis.

47. At the hearing of the Application, the Respondent suggested that while this Application is a hearing of the issue *de novo* and not an appeal from the decision of the Arbitrator, I should consider, among other things, the reasons of the Arbitrator given on his Award on the Motion to Challenge dated July 13, 2025: *Canada (Attorney General) v. Aéroports de Montréal*, 2023 FC 1562, at paras. 55-56; and *Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paras 35 and 40.

48. In my view, I do not need to rely on any conclusions of the Arbitrator to reach the decision as I have, but I have reviewed the Award.

49. The Arbitrator relied on a number of the authorities referred to above, including *Aroma*, *MGD* and *Committee for Justice and Liberty*. Ultimately, he concluded that there was no reasonable apprehension of bias given that the communications between him and the expert "were about a litigation matter not in any way related to the issues are parties in the arbitration, with no evidence of any inducement" and that there was no "cogent or compelling evidence" before him to conclude that a "single business referral should result in the discharge of the Arbitrator".

50. As I observed at the outset of this Analysis section, I would agree with the Arbitrator that in many cases, a single business referral might not result in the discharge of an arbitrator. That is consistent with the approach of the Court of Appeal in *Aroma*, where it cautioned that the apprehension of bias must be reasonable; i.e., objective.

51. I have been mindful of that caution and of the fact that the subjective intention of the parties is not relevant. Here, if the only issue were the engagement of the Arbitrator in the other matter, that may not have been sufficient to justify disqualification. That was the conclusion of the Arbitrator on the motion. In addition, and to be clear, I make no finding that there was in fact any bias. The disclosure by the Arbitrator of the issue was the right thing to do.

52. The challenge for me is that this fails to take into account any of the subsequent events that inform the particular and somewhat unique events that occurred here: the initial communication from the Arbitrator himself that there was "a clear appearance of conflict", the disclosure by the Arbitrator that he had spoken again with the expert and would deal with the other matter directly with the client, the confirmation of that

conclusion and the fact that he would not proceed absent a waiver from both parties, and then his change of heart and decision that notwithstanding the absence of a waiver, he would not withdraw.

53. Here, the issue is not just the referral but also the subsequent events in attempting to manage what might otherwise have been a resolvable issue that gives rise to both the fact that the Applicant has an apprehension of bias, and to my conclusion that, viewed objectively, that apprehension is a reasonable one.

54. In particular, the Arbitrator set out in his Award the test and then described the appropriate procedure and how the test is to be applied (see paras. 55 – 62). He observed that "first, the motion is to be heard by the very judge or arbitrator that the party seeks to have recused or discharged. Although it might appear counterintuitive to do so, the sitting arbitrator or judge is believed to be the best position to determine if the impugned conduct, expression, or circumstance might give rise to a reasonable apprehension of bias." (para. 55).

55. That is exactly what the Arbitrator here in fact did as clearly confirmed in his first two electronic mail communications to the parties discussed above of July 5 and July 6, respectively. He made the initial determination. Once he did so, the only possible remedies were to obtain a waiver from each party or withdraw (also as he initially, and correctly, stated).

56. The problem here, as noted above, flows from the fact that, instead of doing one of those two things, the Arbitrator proceeded with the other subsequent events described above. Those gave rise to a reasonable apprehension of bias.

Result and Disposition

57. For all of these reasons, the Application is granted, and the Arbitrator is disqualified.

58. The Applicant seeks, if successful (as it has been), the costs of both the challenge motion before the Arbitrator and of this Application. The Respondent submits that even if the Applicant is successful, the entire issue was caused by the expert witness retained by the Applicant, such that there should be no order as to costs.

59. In my view, and considering the jurisdiction of this Court to award costs pursuant to section 131 of the *Courts of Justice Act*, and considering the factors set out in rule 57.01, the Applicant should be entitled to its costs of this Application. Records were filed, there were no cross examinations, and facta were prepared. The Application took less than one half day to argue. Accordingly, an appropriate, fair and reasonable award of costs is $4,500 inclusive of fees, disbursements and HST, payable within 30 days.

60. Order to go in accordance with these reasons.