# THE DOCKSIDE COVE "FIVE"

Issue 2:
**January 2026**

*Cases reported in Q4 of 2025*

A quarterly selection of five significant Canadian court decisions on arbitration practice and procedure, curated by The Honourable David M. Brown, FCIArb, principal of Dockside Cove Arbitration, who offers arbitration and mediation services in commercial and estates disputes as a roster member of Arbitration Place, Toronto and Ottawa. Mr. Brown also offers appeal advocacy advisory services. (dmbrown@arbitrationplace.com)

## BRITISH COLUMBIA COURT OF APPEAL

### *BEAR MOUNTAIN RESORT & SPA LTD. v. ECOASIS RESORT AND GOLF LLP, 2025 BCCA 368* (October 28, 2025)

**Issue:** Panel review of whether a single judge erred in denying leave to appeal a commercial arbitration award for damages for breach of a contractual operations agreement.

**Disposition:** The panel dismissed the application to vary the refusal of the Chambers Judge. The panel repeated that the issue of whether a leave application under the *B.C. Arbitration Act* raises an extricable question of law is, itself, a question on which no deference is owed. The applicant initially advanced eight errors that it contended amounted to extricable questions of law. By the time of the hearing, it had whittled its list down to three errors: the arbitrator had (i) assessed damages and applied contingency reductions based on speculation only; (ii) made a finding contrary to one made in the liability award; and (iii) misapprehended the evidence.

The panel conducted a detailed review of the award. It agreed with the Chambers Judge's conclusion that, in the context of the case and the arbitrator's reasons for the award, the alleged errors did not give rise to an extricable question of law. At best, some amounted to no more than alleged errors of mixed fact and law.

**Significance:** While the panel's reasons are rooted squarely in the specific award in question, its analysis can assist counsel in assessing the appellate approach to characterizing alleged errors in an award and whether a specific error rises to the level of an extricable question of law that could support an application for leave to appeal.

## ***SINCLAIR v. T.D.M.C. HOLDINGS LTD.*, 2025 BCCA 402 (PANEL DECISION) (**November 20, 2025**)**

**Issue:** What governs the time limit for filing an application for leave to cross-appeal an arbitral award: the *B.C. Arbitration Act* or the *B.C. Court of Appeal Rules*?

**Disposition:** The previous issue of *The "Five"* described the background to the Chambers application and this panel eview application. The applicants applied to appeal the arbitral award within the time limit of 30 days provided for in the *B.C. Arbitration Act*. Although the respondents' application for leave to cross appeal was filed more than 30 days after the award was issued, it was filed within the 15 days of service of the application for leave to appeal stipulated for cross-appeals in the *Court of Appeal Rules*. A motion was brought to quash the application for leave to cross-appeal. The Chambers Judge dismissed the application to quash, concluding the time period set out in the *B.C. Court of Appeal Rules* applied.

The panel disagreed, allowed the application to review, varied the order of the Chambers Judge, and quashed the application for leave to cross-appeal.

The panel's analysis focused on the meaning of the word "appeal" contained in ss. 59 and 60 of the *B.C. Arbitration Act*. It concluded that a cross appeal "is simply an appeal brought from a judgment or award where another party has appealed first, and which raises different grounds of appeal from those underlying the first appeal. Instead of having two separate files in the court registry, they are combined as one, with the second in time being designated a 'cross appeal'." It therefore followed, in the panel's view, that a cross-appeal falls within the meaning of "appeal" as used in ss. 59 and 60 of the *Arbitration Act*. Consequently, an application for leave to appeal must be brought within 30 days of the arbitral award, whether it could be described as a "cross appeal" or not, and the Court of Appeal had no jurisdiction to extend the 30-day period once it has expired.

**Significance:** The panel recognized that its interpretation of the statute could have harsh results – e.g. precluding a cross-appeal where the party seeking leave to appeal waits until the last minute to file its application, a situation highlighted by the Chambers Judge. The panel therefore called for the Legislature to intervene to amend the *Arbitration Act* stating, at para. 51: "The value of those practical considerations, however, leads me to urge the Legislature to give careful consideration to amending the *Arbitration Act* to include a separate time limit for the filing of a cross appeal as that procedure is contemplated in the *CA Act*."

## **GREEN LIGHT SOLUTIONS CORP. v. KERN BSG MANAGEMENT LTD, 2025 BCCA 408** (November 25, 2025)

**Issue:** Did the arbitrator's failure to provide the parties with an opportunity to make submissions on costs before making the cost award amount to a breach of procedural fairness that gave rise to an extricable question of law in respect of which leave to appeal could be granted?

**Disposition:** The arbitration involved a dispute over the performance of a construction contract. The arbitrator made cost awards, apportioning the costs 60/40 in favour of one party, which translated into a cost award in the range of $400,000 to $460,000 in respect of a $1.63 million claim.

The Chambers Judge denied leave to appeal the cost component of an award on the basis that it did not raise a question of law. The panel reversed and granted leave to appeal the cost component of the award.

A term in the arbitration's Procedural Order No. 1 contemplated that the parties would make submissions on costs. The parties' written submissions on the merits included requests for costs and "some submissions in support". The panel observed that the submissions "were clearly made" in anticipation of one of the parties being wholly successful on the merits but the parties were not given the opportunity prior to the arbitrator's 60/40 apportionment of costs to make costs submissions based on the substantive outcome of the arbitration.

The panel noted there was no dispute that the arbitrator's failure to give the parties an opportunity to make cost submissions after the substantive issues had been decided was a breach of procedural fairness that could have grounded an application to set aside the cost award under s. 58(1)(h) of the *B.C. Arbitration Act*: namely, the failure to give an applicant a reasonable opportunity to present its case or to answer the case presented against it. The issue on the panel review application was the correctness of the single judge's conclusion that an alleged breach of procedural fairness within s. 58(1)(h) could not give rise to a question of law for the purpose of the leave to appeal requirements set out in s. 59(2) of the Act.

The panel concluded that an allegation of procedural unfairness could fall within the ambit of s. 59(2) thereby giving rise to an extricable question of law because: (i) a breach of procedural fairness generally is viewed as giving rise to a question of law; (ii) there is no conflict between ss. 58 and 59 of the Act; (iii) there is no indication of a legislative intent to make the s. 58 set aside procedure the exclusive procedure for reviewing questions of law falling within s. 58(1); and the interpretation supporting a two-route structure of set aside and leave to appeal is the one most consistent with the general objectives of efficiency and finality in arbitration.

Having concluded that the alleged breach of procedural fairness was a question of law falling within s. 59(2), the panel went on to consider afresh whether leave to appeal should be granted. It concluded the importance of the result to the parties justified the intervention of the court: "Although not yet finally quantified, the costs award potentially exposes [Green Light Solutions] to a liability of between $400,000 and $466,000. This is substantial relative to Kern's claim, which it valued at about $1.63 million, and justifies this Court intervening."

## ONTARIO SUPERIOR COURT OF JUSTICE

### ***2859824 ONTARIO LIMITED V. GEN DIGITAL INC., 2025 ONSC 6360*** (November 20, 2025)

**Issue:** Where the parties had initiated an arbitration regarding the performance of a computer software contract but the arbitral tribunal had not yet been constituted, should a court grant an interim injunction to prevent one of the parties from decommissioning the software in issue until a constituted tribunal had the opportunity to adjudicate the request for an interim injunction?

**Disposition:** Interac contracted with Gen Digital to become licencee of Gen Digital verification technology and to purchase certain services from Gen Digital for at least seven years. As a result of certain disagreements between the parties, Gen Digital delivered "end-of-life notices" stating it would decommission key elements of its platform software at the end of September 2025.

In response, Interac: (i) commenced an arbitration under the contracts seeking a variety of relief, including an order restraining Gen Digital from terminating certain essential services; and (ii) then started an application that asked the court to grant an interlocutory injunction to prevent Gen Digital from decommissioning the platform services, at least until the arbitral tribunal had been constituted and had the opportunity to consider a request for an interim injunction.

The motion judge applied the "serious issue to be tried" standard, concluding that the contract was not one for personal services that might require meeting a higher merits standard. She accepted that the decommissioning of the software platform would cause Interac irreparable harm, both in the sense of interfering with Interac's core digital verification business as well as affecting its business reputation. The motion judge was persuaded that the balance of convenience favoured Interac, especially in light of contractual provisions that entitled Interac to seek equitable relief in the event of a default by Gen Digital.

The court granted an injunction "pending the outcome of the Arbitration but subject to any further order that the arbitral tribunal may make in the interim". The motion judge explained:

> Since Interac's request for an interim interlocutory injunction pending the outcome of the Arbitration has been fully briefed and argued, it would be highly inefficient for the court to render a decision on an interim interim basis only to require the parties to argue the interlocutory injunction motion all over again in the Arbitration proceeding. Accordingly, the injunction is granted on the expectation that there will not be a further interim injunction hearing before the arbitral tribunal, unless the tribunal determines that to be appropriate.

Notwithstanding that commentary by the motion judge, the specific terms of her order did not purport to fetter the power of the tribunal, once constituted, to consider a request for interim relief.

## *LOCHAN V. BINANCE HOLDINGS LIMITED, 2025 ONSC 6493*

**Issue:** Whether the Ontario court should issue an anti-suit injunction in respect of Hong Kong arbitration proceedings initiated by the Ontario defendant's "alter ego".

**Disposition:** In 2024, the Ontario court certified the plaintiffs' class action against Binance Holdings that alleged Binance's cryptocurrency trading platform violated Ontario securities legislation. Binance had sought to stay the proceeding prior to its certification but its application for a stay was dismissed on the basis the arbitration clause in the investor account agreements was void as contrary to public policy and unenforceable. The Ontario Court of Appeal upheld the refusal of a stay.

Nevertheless, Binance, through a related company – Nest – commenced an arbitration in Hong Kong against the Ontario representative plaintiffs. In turn, they moved for an anti-suit injunction to stop the Hong Kong arbitration.

The motion judge granted the injunction, holding that "the pending arbitration commenced by Nest against the representative Plaintiffs is little more than a transparent attempt to render Ontario court rulings ineffective. Binance seeks to grant itself immunity from judgment in any legal process but the one already adjudged to be unconscionable and contrary to public policy – a Hong Kong arbitration." In reaching that conclusion, the motion judge found that: (i) Nest, as Binance Operator, was, "for all intents and purposes, no more and no less than Binance" and the alter ego of Binance; (ii) Nest's claim in the Hong Kong arbitration did not raise an entirely different claim than the Ontario action but was designed to undermine the plaintiffs' claim in the Ontario action; and (iii) Binance's argument that the Hong Kong arbitrators should first decide whether they had jurisdiction over the claim was merely a "replica" of the competence-competence argument advanced by Binance in the earlier stay litigation, which the Court of Appeal had rejected.

The motion judge concluded the plaintiffs had satisfied the requirements for an anti-suit injunction set out in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board*), [1993] 1 SCR 897, stating:

> In commencing arbitration under an arbitration agreement already determined to be unconscionable and contrary to public policy, and in seeking in that forum to claw back – effectively, to neuter – any award by the Court to the Plaintiffs, Binance has taken the very impermissible route against which the Supreme

Court warned. Preventing this type of "abuse of the courts" lies at the heart of the remedy of an anti-suit injunction: *Amchem*, at 928.

## OTHER DECISIONS

A large number of arbitration decisions were released in Q4 2025 by the Alberta Court of King's Bench and the Ontario Superior Court of Justice, as well as one by the Ontario Court of Appeal in the context of a labour arbitration. While it is beyond the scope of "The Five" to summarize each, for the sake of completeness the decisions are listed below, with a short description of the key issue:

1/ *Bancora Minerals Ltd. v. Orr-Ewing (Estate)*, 2025 ABKB 579: Denial of a stay of a prior-in-time action in favour of an International Centre for Settlement of Investment Disputes arbitration, but with some case management finesses regarding the timing of the trial.

2/ *Lawrence v. Wood*, 2025 ABKB 594: Denial of leave to appeal or set aside an award, with an extensive discussion of the issue of whether the arbitration panel was *functus officio* when it made the award.

3/ *Heine v. Worsfold*, 2025 ABKB 650: Detailed discussion of the assessment of costs under the Alberta regime for the dismissal of an application to set aside an award that incorporated a settlement reached during a med/arb process.

4/ *Alberta Investment Management Corporation v. LAPP Corporation*, 2025 ABKB 673: Dismissal of an application to set aside an arbitrator's interim cost award that required the parties to bear their own costs pending the final award of costs. The court found the arbitrator had the jurisdiction to make such an interim award.

5/ *De Meyer v. Pedora*, 2025 ABKB 682: Declaration that appeal originating documents filed by a self-represented applicant but mistakenly altered by the receiving court clerk were filed within the time prescribed for commencing an appeal.

6/ *Bot Construction v. Minister of Transportation*, 2025 ONSC 6184: Dismissal of an appeal from an award regarding a claim for "excess rock" removal costs incurred in performing a highway construction contract. The appeal judge did not give effect to arguments that the arbitrator had erred by ignoring evidence and in calculating damages.

7/ *Burstein v. Burstein*, 2025 ONSC 6353: Application to stay a court proceeding on the basis that an arbitration clause in a unanimous shareholders agreement applied to the dispute was granted, with the court concluding that the technical requirements set out in *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, had been satisfied.

8/ *R.W. Tomlinson Limited v. Labourers' International Union of America, Local 527*, 2025 ONCA 861: An extensive discussion in the context of a labour arbitration of the principles of subject-matter jurisdiction and the jurisdiction of the court over claims by parties not bound by the collective agreement.

## CONTACT INFORMATION:

Information about the experience and practice of The Honourable David M. Brown, FCIArb, can be found on the websites of Dockside Cove Arbitration (www.docksidecove.ca) and Arbitration Place (www.arbitrationplace.com).

Mr. Brown can be contacted at: dmbrown@arbitrationplace.com.

DOCKSIDE COVE
ARBITRATION

**About the name**: "Dockside" was the name of my maternal grandparents' home in Burin, Newfoundland, a home we acquired, restored, and enjoyed for two decades. As the name suggests, Dockside was located beside one of the many coves that make up Burin's outstanding harbour. The background in the logo above depicts how the cove looked in my grandparents' time, cod flakes and all.