THE DOCKSIDE COVE "FIVE"

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Cases reported in Q1 of 2026

A quarterly selection of significant Canadian court decisions about 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

Issue: Estoppel and serial arbitration awards on the same issue: Where a commercial real estate lease requires the amount of rent payable for a renewal period to be determined by arbitration in the absence of the parties' agreement, what effect must be given to an arbitral interpretation of the rent provision for the initial renewal period by a subsequent arbitration panel convened to determine the rent for a later renewal period?

Vancouver School District No. 39 v. Kingsgate Property Ltd., 2026 BCCA 98

Facts: A 25-year 1972 lease between the Vancouver School Board and a commercial lessee provided for seven renewal periods of 10 years each and an eighth for 4 years. The lease stipulated that the basic rent for a renewal term would be based on the market value of the lands "valued at that time if vacant and ready for immediate development to their highest and best lawful use by a person … ready, willing and able to purchase and develop the said lands for that immediate use". At the time of the first renewal, the parties were unable to agree on the renewal rent so, in accordance with the terms of the lease, that issue was referred to arbitration.

That 1999 Arbitration Panel interpreted the terms "immediate use" and "immediate development" in the lease's renewal rent provision as requiring a determination of market value based on an "outright approval use" under the applicable zoning regulations and not a "conditional use" that might be obtained using a much longer zoning approval process.

The parties were unable to agree upon the rent for the subsequent third renewal term and the 2022 Arbitration Panel was struck. Without diving into the technical details of the evidence, the 2022 Arbitration Panel adopted a different interpretation of the lease's renewal rent provisions based largely on the evidence of a planning consultant that no use of the property could be considered "immediate" by the 1999 Panel's definition. The 2022 Arbitration Panel set the market value for the property on the basis that the lands could be put to either outright or conditional use, if vacant and ready for immediate development.

The lessee sought and obtained leave to appeal the 2022 Award to the trial court under the former 1996 *B.C. Arbitration Act*. A chambers judge granted a stay of the 2022 Award. (One issue subsequently before the B.C.

Court of Appeal was whether the chambers judge had the jurisdiction to make such an order. The appeal court judges agreed that he did.) On the appeal of the substantive issue regarding the interpretation of the renewal rent provision, the chambers judge concluded that the 2022 Award was incorrect and unreasonable as it was based on an erroneous conception of the issues to which estoppel applied. The Board appealed that decision.

Disposition: The Court of Appeal divided on the substantive issue of the interpretation of the lease renewal rent provision. Stepping into the shoes of the chambers judge and applying the correctness standard to the lease interpretation issue, the majority concluded, at paras. 201-203:

> [It] is my view that the 2022 Panel erred when it conducted a fresh interpretation of the lease renewal term, unconstrained by the findings of the 1999 Award. As a result, the 2022 Panel erred in its identification of the issue to which issue estoppel applied. Separately, it is my view that the 2022 Panel erred by considering irrelevant factors in determining not to apply issue estoppel. Just because the rent payable under the lease will be reset again in the future does not mean that litigation on the same issue between the same parties should be permitted … In this case, the 2022 Award created a second interpretation of the same lease provision in circumstances where the parties should be entitled to expect certainty.
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> The majority of the 2022 Panel ("2022 Majority") found the 1999 Panel's interpretation of the lease to be "unworkable" because (based on different evidence from that before the earlier tribunal), there was now no use to which the property could be put that was "immediate" and "unconditional" as the 1999 Tribunal had interpreted the lease to require. The 2022 Majority thus reasoned its "proper" interpretation of the lease renewal term allowed it to exercise its discretion against applying issue estoppel.
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> [The dissenting judge] stated he could see no basis upon which we can say that conclusion was not available to the 2022 Panel. Respectfully, on a correctness review, I do not agree with this determination. In my view, the 2022 Majority erred by conducting a fresh interpretation of the lease renewal term without proper consideration of the 1999 Panel's interpretation of the same term. This approach impacted the issue estoppel analysis. The chambers judge, correctly in my view, found that this failure constituted a legal error warranting appellate intervention.

BRITISH COLUMBIA COURT OF APPEAL (CHAMBERS)

Issue: Whether to grant leave to appeal arbitration awards rendered in commercial contract disputes: Does the appeal raise "any question of law"?

During Q1 of 2026, there were several B.C.C.A. Chambers decisions that considered applications for leave to appeal from awards.

Two applications for leave were denied:

***CIMIC Morningstar Investments Ltd. v. Chandos Construction Ltd.*, 2026 BCCA 2 (Chambers)**

CIMIC Morningstar Investments Ltd. involved a mixed-use building construction contract. The grounds of appeal alleged that the arbitrator had erred in: (i) interpreting the contract's notice requirements; (ii) applying the doctrine of promissory estoppel; (iii) relying on the "prevention principle" to deny the owner's right to rely on a liquidated damages provision; and (iv) misapprehending certain evidence. The court held that none of the grounds of appeal raised questions of law or, alternatively, if the grounds did, they did not meet the importance requirements set out in ss. 59(4)(a), (b), or (c) of the 2020 B.C. *Arbitration Act*.

***1180264 B.C. Ltd. v. CCM Investment Group Ltd.*, 2026 BCCA 25 (Chambers)**

In ***1180264 B.C. Ltd.***, which involved a long-term parking lease, the grounds of appeal alleged that the arbitrator had erred in: (i) failing to read the terms of the lease as a whole; (ii) rewriting the contract to create a different bargain; (iii) misapprehending the evidence; and (iv) relying on inadmissible evidence. The court held that none of the grounds of appeal raised questions of law.

On the other hand, one decision granted leave to appeal:

***Sinclair v. T.D.M.C. Holdings Ltd.*, 2026 BCCA 47 (Chambers)**

In ***Sinclair v. T.D.M.C. Holdings Ltd.***, leave to appeal was granted from an award made in an arbitration concerning the enforceability of a proposed amendment to a property management agreement. Section 11 of the Agreement stated:

> 11. No Beneficial Owner shall be entitled to reimbursement or payment for services rendered, save and except pursuant to the Property Management Agreement. The Beneficial Owners shall execute and deliver a Management Agreement with Invermay Holdings Ltd. and Fill-A-Niche Holdings Ltd. or such other property manager as the Beneficial Owners shall decide upon from time to time pursuant to paragraph 5 hereof, upon terms and conditions as mutually agreed between all the parties.

The court concluded that the applicant had identified an arguable extricable question of law, namely: whether the Arbitrator erred in principle by extending the duty to exercise contractual discretion in good faith to s. 11 of the Agreement. Specifically, did s. 11 contain an "agreement to agree", which is unenforceable and, as a matter of principle, cannot be rendered enforceable by overlaying it with the duty to exercise contractual discretion in good faith? The court explained, at para. 63:

> I, of course, recognize that simply describing an issue as involving the scope of the duty of good faith contractual performance does not necessarily mean that it truly is an extricable question of law. The division hearing the appeal may decide that in this case it is not. But I am satisfied that the second issue advanced by the Sinclair Group meets the threshold for identifying an issue of law alone. This question engages the intersection between the principles of contract law that deem agreements to agree as unenforceable and the scope of the duty to exercise contractual discretion in good faith.

The court was also satisfied that the issue was of importance to the parties and of general importance.

ALBERTA COURT OF APPEAL

Arsopi v. ARVOS GmbH, 2026 ABCA 49

Issue: Did the chambers judge err in failing to stay or strike out a third-party claim for statutory contribution on the basis that the dispute was not subject to the arbitration clause between the parties to the third-party claim?

Facts: The defendant, ARVOS GmbH, designed and manufactured a waste heat exchanger that ultimately was sold to the plaintiff, Orica Canada Inc. ARVOS sub-contracted with Arsopi to manufacture the equipment. The subcontract stated that it was governed by German law and that all disputes arising out of or in connection with the subcontract had to be arbitrated in Germany.

A problem arose with the equipment and Orica sued ARVOS, alleging defects in the equipment. ARVOS defended and then filed a third-party claim against Arsopi advancing claims based on common law obligations, contractual obligations, and statutory rights of contribution under the *Tort-Feasors Act*, RSA 2000, c. T-5 (the *"TFA"*). Arsopi applied to strike or stay the third-party claim on the basis of the *International Commercial Arbitration Act*, RSA 2000, c. I-5.

The chambers judge stayed those third-party claims that sounded in tort and contract on the basis that ARVOS and Arsopi had agreed to arbitrate their disputes in, and pursuant to the law of, a foreign country. However, the chambers judge refused to stay the third-party claim based on the *TFA*, characterizing the *TFA* claim as essentially one between the plaintiff, Orica, and Arsopi and, therefore, falling outside the scope of the arbitration clause between ARVOS and Arsopi.

Arsopi appealed the chambers judge's refusal to stay or strike the third-party *TFA* claim.

Disposition: The Court of Appeal reversed and stayed the entirety of the *TFA* claim. It held that the *TFA* claim was fundamentally a claim between ARVOS and Arsopi because under Alberta law a *TFA* claim is a right that belongs to a defendant tortfeasor, such as ARVOS.

Applying the principles enunciated in *Kaverit Steel and Crane Ltd v Kone Corporation*, 1992 ABCA 7, leave to appeal to SCC refused, 22906 (24 September 1992), the appeal court concluded that the *TFA* claim fell within the scope of the arbitration clause as a dispute "arising out of or in connection with" the agreement between ARVOS and Arsopi and therefore should be stayed.

On this point the court concluded that "the phrase, '[a]ll disputes arising out of or in connection with the Contract' is broad and does not indicate an intention to limit arbitration to disputes about rights and obligations created within the four corners of the subcontract. If that was the intent, the parties could have referred to disputes 'under' the contract to narrow the scope of the arbitration clause: see *Kaverit* at para 29."

ONTARIO COURT OF APPEAL

Sociedad Concesionaria Metropolitana de Salud S.A. v. Webuild S.p.A., 2026 ONCA 28

Issue: Whether a foreign arbitral award can be enforced in Ontario, not against the judgment debtor, but against a non-party to the arbitration who contests liability.

Facts: A Chilean arbitrator awarded *Sociedad Concesionaria Metropolitana de Salud S.A.* damages against Astaldi S.p.A. Following restructuring proceedings in Italy, some of Astaldi's assets were spun off to Webuild S.p.A pursuant to a Partial Spin-Off Agreement.

Sociedad applied to the Ontario court for an order enforcing the award against Webuild, which had not been a party to the Chilean arbitration. Webuild moved to stay the proceedings for want of jurisdiction or *forum non conveniens*, arguing that whether Webuild had assumed Astaldi's liabilities relating to the arbitration was a threshold issue that required determination before enforcement of the award could be adjudicated.

The motion judge accepted Webuild's position that liability and enforcement were severable issues and that Italy was the appropriate forum to determine liability. The motion judge granted a temporary stay of Sociedad's application proceedings pending determination of Webuild's liability by the Italian courts.

Disposition: The Court of Appeal dismissed Sociedad's appeal. Given that the underlying obligation was hotly contested, the court held that it must be determined before an order for enforcement could be sought. As well, the court deferred to the motion judge's findings that Italy, not Ontario, was the most convenient forum for the determination of Webuild's liability to Sociedad.

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)

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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.