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THE DOCKSIDE COVE “FIVE”

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A quarterly selection of significant Canadian court decisions about arbitration practice and procedure, curated by The Honourable David M. Brown, FCI Arb, 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

QUEBEC SUPERIOR COURT (COMMERCIAL CHAMBER)

Association des ressources intermédiaires d’hébergement du Québec c. Santé Québec, 2026 QCCS 1360

Issue: AI hallucination and award drafting, or the boundaries circumscribing an arbitrator’s use of generative AI in drafting an award.

Facts: A party to an arbitration agreement issued a notice of arbitration. The counter-party took the position that the notice was invalid as it was delivered long after the time prescribed by the arbitration agreement and, consequently, sought the dismissal of the arbitration request. The arbitrator conducted a half-day hearing on the matter, following which he granted the dismissal request.

There followed an application to court to set aside the award under Quebec civil law. Two grounds to set aside were advanced: (i) the award was contrary to public policy as it contravened the prohibition in the *Quebec Civil Code* against contractually modifying limitation periods; and (ii) the award did not comply with the required arbitration procedure since the arbitrator had delegated part of his decision-making power to a generative artificial intelligence tool.

Disposition: The court did not give effect to the applicants’ public policy argument. But it was persuaded by the second ground of challenge and set aside the award. The court’s discussion of the use of AI in drafting arbitral awards merits national attention and reflection by all arbitrators.

The *Quebec Civil Code* identifies limited grounds for setting aside an arbitral award. One such ground is that “the applicable arbitration procedure has not been respected” (“la procédure arbitrale applicable n’a pas été respecté”). The court observed that by choosing an arbitrator to hear their dispute, parties are entitled to expect that the arbitrator will make the decision. As well, a failure to comply with the “arbitration procedure” is not limited to the hearing procedure but may include a violation related to the arbitrator’s deliberation.

In concluding that arbitrators cannot delegate their decision-making powers to third parties, Sheehan J. stated:

[86] The primacy given to the autonomy of the parties' will in the choice of the arbitrator, the importance of drafting the reasons to ensure an informed decision, the arbitrator's duty to maintain the secrecy of the deliberations and the imperative to maintain public confidence in the arbitration process justify that the decisions be drafted by the arbitrator chosen by the parties without delegation to third parties.

[87] The rule is not intended to prohibit the use of researchers, clerks, translation or citation assistance, or even reference to notes and authorities prepared by lawyers. The rules of natural justice do not prohibit decision-makers from consulting colleagues. Furthermore, the involvement of third parties in the drafting process must not compromise the integrity of the process and must maintain responsibility for the drafting with the decision-maker in order to avoid any interpretation that a third party has taken control or been delegated the task of drafting the reasons. The maxim "*he who decides must hear*" is a consequence of the rule *audi alteram partem*, "insofar as a litigant is truly 'heard' only if he or she is heard by the one who will decide his case." (unofficial translation using Google Translate)

Applying those principles to the case before it, the court noted that several of the legal decisions cited by the arbitrator in his reasons did not exist and some decisions did not support the legal proposition for which the arbitrator cited them. The court continued, at paras. 113-121:

[Google Translate]

[113] The references mentioned above are central to the Arbitrator's reasoning. These constitute the only doctrinal or jurisprudential references used as legal support for the Award. Other jurisprudential references are included in sections of the Award that summarize the parties' positions.

[114] The preponderance of evidence therefore leads to the conclusion that the Arbitrator's authority was delegated and that he abdicated his role in reviewing the result.

[115] This conclusion is necessary because all the doctrinal and jurisprudential references on which the Arbitrator relies are non-existent and "hallucinated".

[116] For this reason, the Award must be set aside.

[117] This conclusion does not imply that every award that cites erroneous references or uses artificial intelligence as a drafting tool should suffer the same fate. It may, for example, be conceivable that there will be cases where the use of artificial intelligence will have been minimal or that it will have addressed a less important issue.

[118] In such cases, weighing the nature of the breach in relation to the arbitration proceedings initiated, determining the impairment of the integrity of the proceedings, and assessing the impact of the breach on the award could lead to a different result.

[119] On the other hand, where the standard of review is different, for example in a case of appeal (error of law or manifest and decisive error of fact) or judicial review (reasonableness), the absence of error or a decision deemed reasonable could lead to the maintenance of the decision notwithstanding a breach of procedure. There is no need to decide that here.

[120] In the present case, the breach is significant. It is likely to affect the parties' confidence in the outcome and in the arbitration system in general. Since non-existent decisions are central to the arbitrator's

reasoning, a party may reasonably believe that a more thorough review of the decisions would have prompted him to reconsider his position.

[121] Therefore, it is justified to conclude that the failure probably had a significant impact on the outcome.

[Original]

[113] Les références mentionnées ci-haut sont au coeur du raisonnement de l'Arbitre. Elles constituent les seules références doctrinales ou jurisprudentielles utilisées comme appui légal à la Sentence. Les autres références jurisprudentielles sont comprises dans des sections de la Sentence qui résument les positions des parties.

[114] La preuve prépondérante mène donc à la conclusion que l'autorité de l'Arbitre a été déléguée et qu'il a abdiqué à son rôle de revoir le résultat.

[115] Cette conclusion s'impose du fait que l'ensemble des références doctrinales et jurisprudentielles sur lesquelles l'Arbitre s'appuie sont inexistantes et « hallucinées ».

[116] Pour ce motif, la Sentence doit être annulée.

[117] La présente conclusion n'implique pas que toute Sentence qui cite des références erronées ou qui utilise l'intelligence artificielle comme outil de rédaction devrait subir le même sort. On peut, par exemple, penser qu'il y aura des cas où l'utilisation de l'intelligence artificielle aura été minimale ou qu'elle porte sur un enjeu moins important.

[118] Dans de tels cas, la pondération de la nature du manquement au regard de la procédure d'arbitrage engagée, la détermination de l'atteinte à l'intégrité de la procédure, et l'évaluation de l'impact du manquement sur la sentence pourrait mener à un autre résultat.

[119] D'autre part, lorsque la norme de contrôle est différente, par exemple, dans un cas d'appel (erreur de droit ou erreur manifeste et déterminante de fait) ou de contrôle judiciaire (raisonnabilité), l'absence d'erreur ou une décision qualifiée de raisonnable, pourrait entraîner le maintien de la décision nonobstant un manquement à la procédure. Il n'est pas nécessaire d'en décider ici.

[120] Dans le cas présent, le manquement est important. Il est susceptible d'affecter la confiance des parties dans le résultat rendu et dans le régime d'arbitrage en général. Puisque les décisions inexistantes sont au coeur du raisonnement de l'arbitre, une partie peut raisonnablement penser qu'une vérification plus approfondie des décisions l'aurait incité à revoir sa position.

[121] Dès lors, il est justifié de conclure que le manquement a probablement eu un impact important sur le résultat.

The court set aside the award and ordered the parties to choose a new arbitrator.

BRITISH COLUMBIA COURT OF APPEAL (CHAMBERS)

mCloud Technologies Corp. v. Wynward Insurance Group, 2026 BCCA 219 (Chambers)

Issue: Does the appeal court have jurisdiction to accept an amendment to a leave application under s. 59 of the B.C. *Arbitration Act* after the 30-day limit in s. 60 of the Act has expired?

Facts: Section 60 of the B.C. *Arbitration Act* provides that an application for leave to appeal under s. 59(3) “must be brought no more than 30 days after the date on which the ... applicant receives the arbitral award ... on which the ... application is based.” The appellants filed a leave application from an award within the statutory 30-day period. The appellants subsequently sought to amend their leave application after the expiry of the 30-day period. The respondents opposed, arguing the court lacked the jurisdiction to amend a leave application after the 30-day period.

Disposition: The Chambers judge disagreed, concluding that the court had jurisdiction under the Act to consider amendment applications filed after the time limit in s. 60. However, in considering an amendment request the court will consider the nature of the amendment: “Where it is substantive and so significant that it changes the nature of the appeal, an application to amend amounts to an application for an extension of time.” Since the court does not have jurisdiction to grant extensions of time to appeal from an arbitration, if a proposed amendment is so significant that it amounts to an application for extension of time, it cannot succeed. If the proposed amendment does not amount to an application for extension of time, the court should consider whether it is in the interests of justice to grant the amendment.

Applying those principles, the Chambers judge concluded that the amendments the appellants had made to their leave application fundamentally changed their appeal such that it amounted to an impermissible application for an extension of time to appeal. The court stated:

If parties could simply file “placeholder” notices of appeal and leave application materials to satisfy the time limit in s. 60, as these appellants have done, that would subvert the whole purpose of the efficient recourse to the courts the legislature intended in setting the 30-day limit in s. 60.

ONTARIO COURT OF APPEAL

InFrontier AF LP v. Rahmani, 2026 ONCA 289

Issue: In recognizing the enforceability of a foreign arbitral award in Ontario did the application judge err by considering the law of the jurisdiction in which an arbitration was conducted?

Facts: An arbitration conducted in the Dubai International Financial Centre resulted in an award against the appellant, Rahmani, of over USD\$2.5 million. The respondent, InFrontier, applied for recognition and enforcement of the award in Ontario under the *International Commercial Arbitration Act, 2017*. The appellant resisted, relying on Article V 1(d) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* that provides recognition may be refused where the arbitral procedure “was not in accordance with the agreement of the parties”. The application judge did not accept the appellant’s argument and recognized the award as enforceable.

The appellant appealed arguing that the application judge had erred in considering the law of Dubai in determining that the appellant had not established the ground set out in Article V 1(d) of the *Convention*. The appellant contended that the application judge was not permitted to consider the law of Dubai – the place where the arbitration was conducted – because the parties had an agreement about arbitral procedure.

Disposition: The Court of Appeal dismissed the appeal, holding that the application judge did not, contrary to the Convention, allow the law of the place of arbitration to oust or override the parties’ agreement about the applicable procedure. Instead, the application judge had interpreted their agreement to determine what procedure they had agreed to. He found that the parties agreed to rules in place at the time of agreement or “such amended version” as had been adopted when their arbitration commenced. The application judge considered the law of Dubai as it bore on the questions of whether the rules had been amended and what that amended version was.

In the appeal court’s view, the application judge’s interpretation of the agreement, and his finding of what the amended version of the rules was, was free of extricable legal error and subject to deference on appeal.

SASKATCHEWAN COURT OF APPEAL

Welter v. Parrish & Heimbecker Ltd., 2026 SKCA 62

Issue: Default proceedings and procedural fairness: Did the Chambers judge err in recognizing and enforcing a default foreign arbitral award against the appellant, Mr. Welter, pursuant to? *The Enforcement of Foreign Arbitral Awards Act*?

Facts: Parrish & Heimbecker Ltd. contracted to purchase canola from Mr. Welter. Article 12 of the contract provided that the parties arbitrate any dispute pursuant to the National Feed and Grain Association’s (“NFGA”) Arbitration Rules. Welter did not deliver the canola by the agreed upon date. P&H submitted an arbitration complaint to the NFGA. Although Welter communicated with the NFGA about the arbitration process, he did not sign its arbitration services contract. In the result, NFGA granted P&H a default award against Mr. Welter. The Chambers judge rejected Welter’s submissions that the default award should not be recognized and enforced.

In his appeal, Mr. Welter that submitted the Chambers judge had made numerous errors including by: (a) enforcing an award that was rendered in a procedurally unfair way; (b) failing to recognize that the award was invalid because it was granted by default without a hearing before a properly constituted tribunal; (c) enforcing a contract that contained an “agreement to agree” on future and uncertain terms; (d) failing to recognize that the process under the NFGA Rules was not neutral; and (e) enforcing an award that did not meet the statutory prerequisites for enforcement.

Disposition: One of Mr. Welter’s key submissions was that the default procedure used by the NFGA lacked procedural fairness. The appeal court rejected his submission, stating:

Mr. Welter says that an award rendered administratively in default is somehow less valid or enforceable than an award rendered after a hearing. He says that any objections to matters such as jurisdiction could not be made without an arbitral panel being constituted and a hearing occurring.

I am not persuaded that this argument has merit. I say this as the Chambers judge found that the parties agreed on an arbitration process governed by the Rules, and the Rules provide that an award may be entered in default where a party refuses to engage in the NFGA arbitration process. Specifically, the Rules

require parties to return an executed arbitration services contract within 15 days from receiving one from the NFGA secretary (Rule 2(D)). If a party fails to do so, or fails to pay the arbitration service fee, “the NFGA Secretary may without further submissions of the parties enter a default judgment” (Rule 2(E); see also Rule 10(A)). That is precisely what occurred here. Mr. Welter was provided with the arbitration services contract executed by P&H on January 12, 2022, and again in July of 2022, and failed to sign and return it ... The NFGA secretary thereafter entered the award against him in accordance with the Rules the parties had agreed to, without the need for further proceedings.

...

The bottom line is that Mr. Welter agreed that the Rules governed the arbitration of his dispute with P&H. After P&H submitted an arbitration complaint, Mr. Welter was required to respond. In the absence of a response, the Rules allowed for an award to be rendered administratively in default. The Chambers judge was alive to all of this and did not fail to consider any issues associated with notice or procedural fairness, as the Rules did not require a tribunal to be constituted before an award could be granted in these circumstances. In short, there was no deficiency in the evidence before the Chambers judge as to how the award was issued or its propriety under the Rules. It was clear on the record that the award was issued in default pursuant to the Rules because Mr. Welter failed to engage in a process he agreed to in his contract with P&H.

Given the record and the findings of fact made by the Chambers judge, the appeal court saw no merit in Mr. Welter’s other submissions.

ONTARIO SUPERIOR COURT OF JUSTICE

Abouzeid v. eXp Realty of Canada Inc et al, 2026 ONSC 3329

Issue: Was an arbitration agreement invalid, and therefore a basis for refusing to stay a court action under s. 7(2) of the Ontario *Arbitration Act*, because JAMS, an arbitration service provider, administered most of the arbitrations brought by the party seeking to stay the court action?

Facts: Mr. Abouzeid commenced a court action seeking relief in respect of an Independent Contractor Agreement (“ICA”) he had entered into with eXp Canada. The version of the ICA in force at the time it was terminated by eXp contained an arbitration clause that required any disputes under the ICA to be decided by binding arbitration, which was to be administered by JAMS and held before a single arbitrator in accordance with JAMS rules. An earlier 2022 version of the ICA’s arbitration clause provided that:

The arbitration shall be administered by JAMS pursuant to the JAMS International Arbitration Rules and in accordance with the expedited procedures in those rules or pursuant to JAMS' Streamlined Arbitration Rules & Procedures and which can be found at: www.jamsadr.com. Judgment on the award may be entered in any court having jurisdiction ... Of the three arbitrators, the Chair must previously have served as Chair or sole arbitrator in at least 10 arbitrations where an award was rendered following a hearing on the merits and one of the wing arbitrators must be an expert in the area of residential real estate brokerage transactions.

In resisting eXp's request for a stay of his court action, Mr. Abouzeid argued that there was no valid or enforceable arbitration agreement because the clause upon which eXp Canada relied would force Mr. Abouzeid to have his dispute resolved by a specific service (JAMS) with a long-standing monopoly on resolving eXp Canada's disputes. Consequently, that clause precluded the possibility of an independent arbitrator who would act impartially, rendering the clause contrary to public policy and invalid.

Disposition: The motion judge rejected Mr. Abouzeid's submission, stating:

The arbitration agreement in the ICA does not place any restriction on who may be selected to be the sole arbitrator under the 2025 version of the ICA, if applicable, or who may be selected to be on the three person panel under the 2022 version of the ICA, if applicable (except for requirements that the Chair must previously have served as Chair or sole arbitrator in at least 10 arbitrations where an award was rendered following a hearing on the merits and one of the wing arbitrators must be an expert in the area of residential real estate brokerage transactions).

There is no requirement in either version of the ICA that an arbitrator must be selected from the JAMS roster of arbitrators. The fact that the arbitration is required to be administered by JAMS pursuant to the JAMS rules does not affect who the decisionmaker or decisionmakers will be.

...

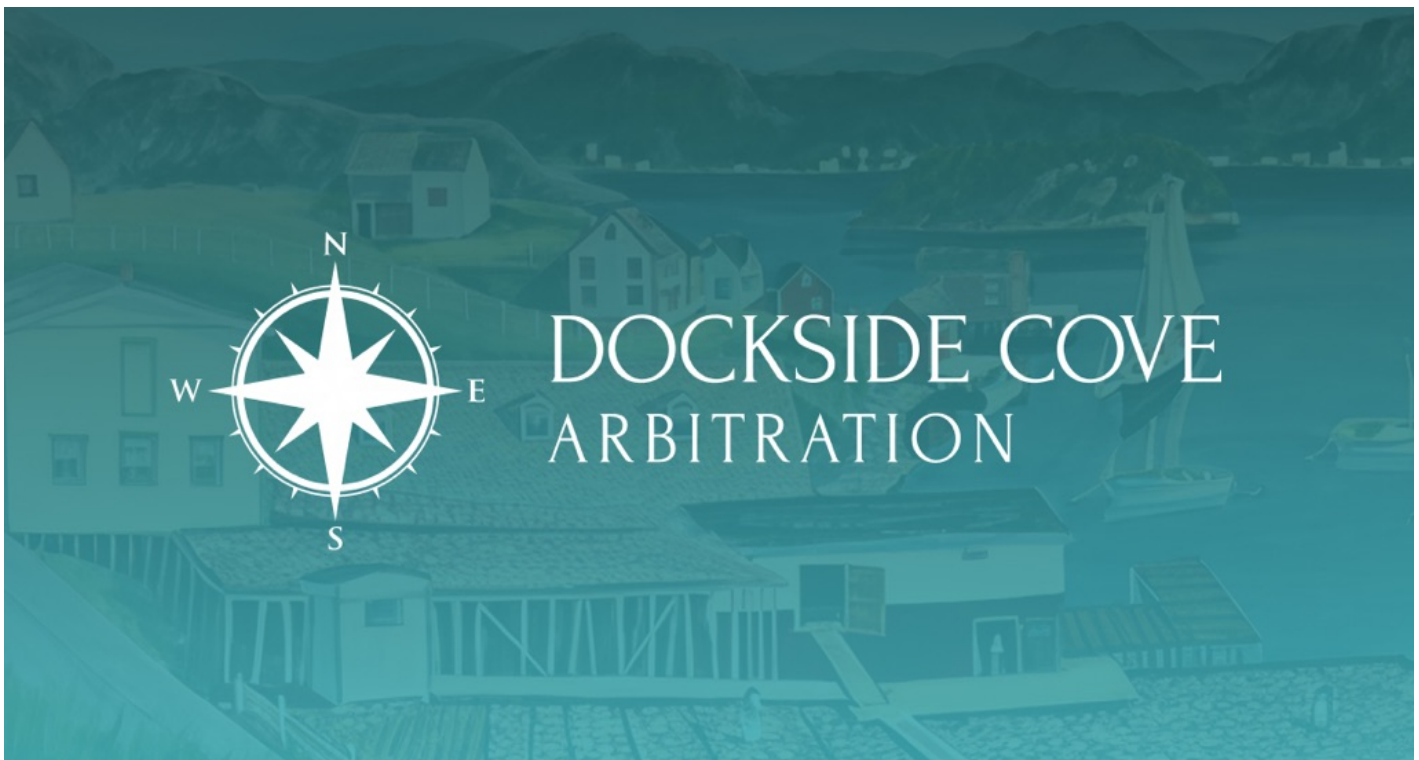
The arbitration agreement in either version of the ICA does not preclude the selection of an independent arbitrator or arbitrators. There is no requirement in either version of the ICA that JAMS will provide an arbitrator, or that the arbitrator(s) must be selected from a roster maintained by JAMS. Mr. Abouzeid's submission that the dispute resolution clause in the ICA precludes the possibility of an independent arbitrator who can act impartially is unfounded.

The motion judge also rejected Mr. Abouzeid's submission that the arbitration agreement was unconscionable, largely on the basis that Mr. Abouzeid did not file an affidavit in response to the stay motion, with the result that he provided no evidence of the circumstances in which the ICA was executed. The motion judge granted the requested stay of the court action.

CONTACT INFORMATION:

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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.