

COURT OF APPEAL FOR ONTARIO

CITATION: Bombardier Inc. v. Alstom Rail Sweden AB, 2026 ONCA 528

DATE: 20260721

DOCKET: COA-25-CV-0936

Gillese, Madsen and Pomerance JJ.A.

BETWEEN

Bombardier Inc.

Plaintiff (Appellant)

and

Alstom Rail Sweden AB

Defendant (Respondent)

Jennifer Teskey and Nadine Tawdy, for the appellant

Ira Nishisato, Hugh Meighen, and Benedict Wray, for the respondent

Heard: April 2, 2026

On appeal from the order of Justice R. Lee Akazaki of the Superior Court of Justice,
dated June 20, 2025.

Madsen J.A.:

I. OVERVIEW

[1] This appeal concerns the narrow question of which forum is appropriate to determine jurisdiction to hear the parties' underlying dispute: the Ontario Superior Court of Justice or the International Chamber of Commerce (the "ICC").

[2] The appellant, Bombardier Inc. (“BI”), commenced an action in Ontario against the respondent, Alstom Rail Sweden AB (“Alstom Sweden”) for the breach of a 2017 share purchase agreement (the “Ontario Action”). Alstom Sweden moved to stay the Ontario Action in favour of arbitration currently before the ICC. The motion judge stayed the Ontario Action until further order of the court.

[3] BI appeals. The main issue in the appeal is whether the motion judge erred in finding it “arguable” that Alstom Sweden, which is not a named party to the agreement to arbitrate through the ICC, can nevertheless avail itself of that agreement.

[4] For the reasons below, I conclude that the motion judge did not err. I would dismiss the appeal.

II. BACKGROUND

[5] BI is a Canadian publicly traded corporation which designs, develops, manufactures, and markets transport equipment. It is the parent of a group of companies.

[6] Alstom Sweden is a Swedish company that was, before January 29, 2021, a subsidiary of BI, at which time it was called “Bombardier Transportation Sweden AB” (“BT Sweden”). As set out below, BT Sweden was acquired by Alstom S.A. and Alstom Holdings, (collectively, “Alstom”) and subsequently renamed “Alstom Sweden”.

a. The 2017 BAHS SPA

[7] In 2017, BI sold the entire share capital of its direct subsidiary, Bombardier Aerospace (Holdings) Sweden AB (“BAHS”) to its indirect subsidiary, BT Sweden. The terms of this corporate restructuring were outlined in a share purchase agreement (the “2017 BAHS SPA”).

[8] Under art. 2.3 of the 2017 BAHS SPA, the purchase price of the share capital of BAHS would be paid through payment of a “base purchase price” and “adjustment amounts” on account of a tax loss dispute for the years 2013 to 2017 pending before Swedish authorities. Specifically, the 2017 BAHS SPA provided for the initiation or continuation of tax disputes after the closing of the sale, and that BI could claim back 50% of the amount determined by the Swedish tax authorities for the disputed tax losses.

[9] Pursuant to arts. 5.1 and 5.2 of the 2017 BAHS SPA, the parties agreed that disputes about the 2017 BAHS SPA would be governed by the laws of Ontario, and they attorned to the Ontario courts to determine all issues arising therefrom (the “attornment clause”).

b. The 2020 Blizzard SPA

[10] On September 16, 2020, Alstom entered into a sale and purchase agreement (the “2020 Blizzard SPA”) with BI and other parties to purchase the entire share capital of Bombardier Transportation (Investment) UK Limited

(“BTUK”). The sale included all of BTUK’s direct and indirect subsidiaries, collectively called the “Blizzard Group”, including BT Sweden. As mentioned above, BT Sweden became Alstom Sweden following the completion of the sale in January 2021.

[11] Clause 17.1 of the 2020 Blizzard SPA addresses “tax sharing agreements” and provides as follows:

17.1 Tax Sharing Agreements. All tax sharing agreements or arrangements that may exist between the members of the Blizzard Group and any of the B Seller or its Affiliates (other than the members of the Blizzard Group) and (without prejudice to any rights and obligations relating to Pre-Completion Tax periods) all rights and obligations shall terminate as of the Completion Date. [Emphasis added.]

[12] The 2020 Blizzard SPA defines “Affiliate” broadly, to include subsidiaries and holding companies. References to “Affiliates” appear throughout the document.

[13] “Parties” is defined as “the parties to this Agreement”. References to “parties” and “party” also appear throughout the document.

[14] Clause 21.1 of the 2020 Blizzard SPA states that the parties, on behalf of themselves and as agent for their “Affiliates” agree that the 2020 Blizzard SPA constitutes the entire agreement between the parties and supersedes any prior

agreement relating to the subject matter of the transaction (the “entire agreement clause”).

[15] Pursuant to cl. 39.1 of the 2020 Blizzard SPA (the “arbitration clause”), disputes between “parties” are to be arbitrated through the ICC, under English law:

The parties irrevocably agree that all disputes arising out of or in connection with this Agreement including any question regarding the validity, termination or any subsequent amendment of the Agreement, shall be finally settled in accordance with the Rules of Arbitration (the **Rules**) of the International Chamber of Commerce (the **ICC**).

c. The Swedish Tax Rulings and BI’s Ontario Action

[16] In 2021, the Swedish Administrative Court of Appeal adjudicated tax disputes in relation to the years 2013 – 2017, ruling in favour of BAHS. BI then sought to adjust the purchase price under the 2017 BAHS SPA tax dispute formula, seeking payment of \$24,462,275.64 from Alstom. When Alstom did not pay this amount, BI brought the Ontario Action against Alstom Sweden.

d. Blizzard ICC Arbitration

[17] Meanwhile, in 2022, Alstom initiated arbitration against BI and BTUK before the ICC, in relation to aspects of the 2020 Blizzard SPA transaction, consistent with the arbitration clause in the 2020 Blizzard SPA (the “ICC Arbitration”).¹

¹ The details of the ICC Arbitration are confidential and subject to a sealing order.

[18] Alstom Sweden took the position that the subject matter of the Ontario Action should properly be addressed within the ICC Arbitration.

[19] BI took the position that the 2017 BAHS SPA was a separate agreement between BI and BT Sweden, a non-party to the 2020 Blizzard SPA; the 2017 BAHS SPA conferred exclusive jurisdiction on the Ontario courts; and the subject matter of the Ontario Action has not been advanced in the ICC Arbitration.

[20] The ICC Arbitration is ongoing.

e. The Stay Motion

[21] In line with their position about the ICC Arbitration above, Alstom Sweden brought a motion before the Ontario Superior Court of Justice seeking a stay of BI's Ontario Action.

[22] Alstom Sweden made a four-fold argument before the motion judge: s. 17.1 of the 2020 Blizzard SPA terminated the 2017 BAHS SPA and therefore extinguished BI's claim against Alstom Sweden; if the claim was not extinguished, the preserved rights and obligations for pre-completion tax periods in the 2020 Blizzard SPA brought BI's claim within the 2020 Blizzard SPA; Alstom Sweden is subject to the arbitration clause in the 2020 Blizzard SPA as an "Affiliate"; and, BI is estopped from denying the jurisdiction of the ICC.

f. The Reasons of the Motion Judge

[23] The motion judge granted a stay of the Ontario Action in favour of arbitration. He determined that Alstom Sweden had established an arguable case that the four “technical prerequisites” set out by the Supreme Court of Canada in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, [2022] 3 S.C.R. 265 were met and that BI had not established any statutory exception to justify refusing a stay. Accordingly, on the basis of the *competence-competence* principle, the ICC should be permitted to rule first on its jurisdiction.

[24] The motion judge noted that only two of the four prerequisites were at issue, namely the existence of an arbitration agreement and whether the parties agreed to submit the subject matter of the Ontario Action to arbitration. In reaching his conclusion, the motion judge found that although Alstom Sweden was not a named party to the 2020 Blizzard SPA, it was arguably an “Affiliate”, as defined in sch. 13 of the 2020 Blizzard SPA, and entitled to benefit from the arbitration clause within it. He found it “more than arguable” that the 2020 Blizzard SPA governs the “surviving relationship” between BI and Alstom Sweden, with the right to adjust for prior tax losses incorporated into the 2020 Blizzard SPA. Finally, based on his conclusions above, the motion judge found that it was “almost obvious” that the Ontario Action was “in respect of a matter that the parties agreed to submit to arbitration, on an ‘arguable case’ standard.”

[25] The motion judge's decision specifically provides that if the ICC declines jurisdiction, the Ontario Action can be "reactivated".

III. BI'S GROUNDS OF APPEAL

[26] BI advances three grounds of appeal:

- (1) The motion judge erred in finding that an arbitration agreement exists between Alstom Sweden and BI or in finding that Alstom Sweden is entitled to benefit from the 2020 Blizzard SPA arbitration agreement, such that the *competence-competence* principle is engaged;
- (2) The motion judge failed to recognize corporate separateness by treating Alstom Sweden and its affiliates as one and the same; and,
- (3) The motion judge failed to consider principles relevant to the interpretation of the 2020 Blizzard SPA and failed to read the agreements as a whole, including the binding attornment clause in the 2017 BAHS SPA.

IV. ANALYSIS

a. The Competence-Competence Principle and the Peace River Framework

[27] The *competence-competence* principle is a foundational principle of international commercial arbitration law which holds that normally, arbitrators should be permitted to rule first on their own jurisdiction: *Peace River*, at para. 39.

This principle is both enshrined in domestic common law and under s. 9 of the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sch. 5 (“ICAA”). The *competence-competence* principle encourages the efficient resolution of disputes, giving precedence to the arbitration process.

[28] The principle is not absolute, however. Judicial resolution of challenges to an arbitrator’s jurisdiction may be appropriate on pure questions of law or where questions of mixed fact and law require only a superficial consideration of the evidentiary record: *Peace River*, at para. 42; *Uber Technologies v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at paras. 31-36; *Husky Food Importers & Distributors Ltd. v. J.H. Whittaker & Sons Limited*, 2023 ONCA 260, 480 D.L.R. (4th) 517, at para. 19. A superficial review is “one where the necessary conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties”: *Husky Foods*, at fn. 2, citing *Uber*, at para. 36.

[29] Alstom Sweden brought its stay motion under s. 9 of the ICAA, which incorporates the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985) (the “*Model Law*”) into Ontario law.

[30] Section 9 of the ICAA provides:

Where, pursuant to article II(3) of the [*New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*] or article 8 of the *Model Law*, a court refers parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[31] Article 8(1) of the *Model Law*, in turn, provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null, inoperative, or incapable of being performed. [Emphasis added.]

[32] The Supreme Court's decision in *Peace River* establishes the framework for requests to stay an action where the existence of an applicable arbitration agreement is advanced. This court has held that, while *Peace River* was crafted in the context of domestic legislation, it applies equally to stays sought under s. 9 of the ICCA: *Husky Food*, at para. 26.

[33] Under the *Peace River* framework, the applicant for the stay must show that four “technical prerequisites” are met, as follows:

- (a) An arbitration agreement exists;
- (b) Court proceedings have been commenced by a ‘party’ to the arbitration agreement;
- (c) The court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and
- (d) The party applying for a stay does so before taking any ‘step’ in the court proceedings.

[34] The applicant for the stay need only show that there is an “arguable case” that each of the prerequisites is met: *Peace River*, at para. 84; *Husky Food*, at para. 28. A finding that there is an arguable case that the prerequisites are met does not presuppose the determination by the arbitral tribunal on either jurisdiction or the substantive dispute. Rather, the underlying assumption is that if the court grants a stay and does not decide an issue in the action, then the arbitrator will decide it: *Uber*, at para. 38; *Husky Food*, at para. 17.

[35] If the four technical prerequisites are met, the onus shifts to the party resisting the stay to show that a statutory exception to a mandatory stay of proceedings applies on a balance of probabilities: *Peace River*, at paras. 76-79, 87-89, and 172; *Husky Food*, at paras. 23-25, and 29. It is “well established” in Canadian law, that absent those legislated exceptions, a court should normally refer challenges to an arbitrator’s jurisdiction to the arbitrator: *Peace River*, at para. 41; *Husky Food*, at para. 19.

b. Standard of Review

[36] BI alleges that the motion judge misapplied legal principles and made errors in the course of his contractual interpretation which it submits is reviewable on a standard of correctness.

[37] I do not accept this submission. As will be seen below, the parties do not dispute the applicable legal principles. At issue, rather, is the motion judge’s

assessment of one of the four technical prerequisites for a stay of proceedings under the established legal test.

[38] The motion judge's analysis was focused principally on contractual interpretation within a specific factual matrix, and whether it was "arguable", within that context, that the four technical prerequisites were met. His analysis is reviewable on a standard of palpable and overriding error: *Lochan v. Binance Holdings Limited*, 2024 ONCA 784, 504 D.L.R. (4th) 527, at para. 21, leave to appeal to the S.C.C. dismissed, 2025 CanLII 46535; *Husky Food*, at para. 34.

c. Issue One: Whether The Motion Judge Erred in Finding an Arbitration Agreement Exists

[39] BI submits that while the motion judge correctly stated the applicable test on the motion for a stay, he erred in its application.

[40] Specifically, BI argues that the motion judge failed to recognize that the existence of an arbitration agreement between the parties to the litigation is a prerequisite to engaging the *competence-competence* principle, and that here, it was "plain and obvious" that there was no arbitration agreement. This argument rests on the assertion that as Alstom Sweden is not a named party to the 2020 Blizzard SPA, and since the recognized circumstances in which a non-party could benefit from an arbitration agreement did not apply, it was an error of law to permit Alstom Sweden to benefit from the arbitration clause in the 2020 Blizzard SPA. BI emphasizes that the motion judge did not examine or reference the arbitration

clause, nor engage with the definition of “Parties” set out in the 2020 Blizzard SPA. Since there is no arbitration agreement, BI and Alstom Sweden did not agree to arbitrate the subject matter of the Ontario Action and, consequently the *competence-competence* principle has no foundation.

[41] In my view, BI’s argument that the *competence-competence* principle was not engaged because Alstom Sweden was not a named party to the 2020 Blizzard SPA and did not meet the narrow circumstances where a non-party may benefit from an arbitration agreement recognized in jurisprudence cannot succeed. In effect, BI posits a “threshold requirement” before the application of the *Peace River* framework, which is without foundation. Determining whether an arbitration agreement exists between the parties to the litigation falls squarely within the first *Peace River* prerequisite, namely “whether an arbitration agreement exists”, and is determined, like the other prerequisites, on an “arguable case” standard: *Husky Food*, at paras. 27-30.

[42] *Dalimpex Ltd. v. Janicky* (2003), 64 O.R. (3d) 737 (Ont. C.A.) is helpful in understanding the scope of any inquiry when a stay is sought in favour of arbitration. This court held that, at this stage in the proceedings, the court makes no final determinations regarding the arbitration agreement nor with respect to the parties thereto, citing Hinkson J.A. in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C. C.A.) as follows:

...it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the tribunal.

...

Where it is arguable that a dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement, then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[43] The motion judge specifically addressed BI's argument that there was no arbitration agreement to justify a stay because Alstom Sweden was not a party to the 2020 Blizzard SPA and could not rely on its arbitration clause. He considered the definition of "Affiliate" in the 2020 Blizzard SPA, the many references to "Affiliates" throughout the document, and found it arguable, on the text of the 2020 Blizzard SPA, that this could include Alstom Sweden. *Peace River* provides that a non-signatory to an arbitration agreement may become bound as a party by operation of law: and that "party" under the ICAC includes "a person claiming through or under a party": at paras. 104-05. While not expressly stated, it is apparent that the motion judge found it arguable that Alstom Sweden is claiming "through or under" Alstom, a named party to the 2020 Blizzard SPA.

[44] While the motion judge ought also to have articulated his analysis of the arbitration clause set out in the 2020 Blizzard SPA, he was clearly alive to and

addressed BI's argument that Alstom Sweden, as a non-party to the 2020 Blizzard SPA, could not avail of its arbitration clause. He expressly stated that the fact that Alstom Sweden was not a named party "would not be determinative". While the arbitration clause in the 2020 Blizzard SPA states that the "parties" agree that all disputes arising out of or in connection with the 2020 Blizzard SPA are to be arbitrated, the definition of "Parties" in the agreement is tautological ("Parties" means "the parties to this agreement") and does not assist. It was open to the motion judge to find, based on his review of the 2020 Blizzard SPA, that Alstom Sweden was an "Affiliate" within the meaning of the 2020 Blizzard SPA such that it was "arguable" that it could benefit from the arbitration clause.

d. Issues Two and Three: Alleged Errors Regarding Corporate Separateness and Contract Interpretation

[45] BI submits that the motion judge made two further errors. First, it submits that the motion judge, in finding that BI must claim any amounts in issue in the Ontario Action from Alstom Sweden's parent company in ICC Arbitration, violated the principle of corporate separateness. Second, it submits that the motion judge erred in interpreting the 2017 BAHS SPA and the 2020 Blizzard SPA as a whole, failing to apply the attornment clause in the 2017 BAHS SPA and extending the arbitration clause in the 2020 Blizzard SPA to affiliates contrary to its express terms, effectively "rewriting" the terms of the two agreements.

[46] These arguments largely recast BI's first submission – that the motion judge erred in determining that Alstom Sweden, as a non-party to the 2020 Blizzard SPA, is entitled to benefit from its arbitration clause, and that the *competence-competence* principle could therefore not apply.

[47] BI's arguments also misstate the determination of the motion judge.

[48] The motion judge's reasons demonstrate that he was alive to BI's argument, in various forms, that Alstom Sweden was not a party to the 2020 Blizzard SPA and, accordingly, there was no agreement between them to arbitrate the subject of the Ontario Action. He nevertheless found that it was arguable that the four technical prerequisites were met.

[49] While it may have been preferable for the motion judge to expressly address each clause relied upon by the parties to support their respective positions, including the attornment clause in the 2017 BAHS SPA, the arbitration clause, and the entire agreement clause, he adequately articulated his findings supporting his conclusion that Alstom Sweden had established an arguable case that the prerequisites had been met. These findings were available on the record before the motion judge.

[50] The findings of the motions judge, however, are not binding determinations regarding BI's claim against Alstom Sweden, whether Alstom Sweden is an "Affiliate", or whether an "Affiliate", can avail of the arbitration clause in the 2020

Blizzard SPA. The motion judge simply found it “arguable” that BI and Alstom Sweden had agreed to submit the subject matter of the Ontario Action to arbitration, nothing more.

[51] As a final point, I note that it is clear from the extensive record before this court that the question of whether the Ontario Superior Court of Justice or the ICC has jurisdiction is one requiring much more than “superficial review” and not one where the necessary conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties. While BI argues that the reasons of the motion judge were “perfunctory,” the more fulsome review it urges on this court belong in arbitration.

V. DISPOSITION

[52] I would dismiss the appeal with costs to Alstom Sweden in the agreed-upon sum of \$45,000, inclusive of HST and disbursements.

Released: July 21, 2026 “E.E.G.”

“L. Madsen J.A.”

“I agree. E.E. Gillese J.A.”

“I agree. R. Pomerance J.A.”