

COURT OF APPEAL FOR ONTARIO

CITATION: Intercity Realty Inc., Brokerage v. Salerno Realty Inc., Brokerage,
2026 ONCA 212
DATE: 20260325
DOCKET: COA-25-CV-0800

Sossin, Gomery and Osborne JJ.A.

BETWEEN

Intercity Realty Inc., Brokerage

Plaintiff (Appellant)

and

Salerno Realty Inc., Brokerage*, Steven T. Cardwell and Re/Max West Realty
Inc.

Defendants (Respondent*)

Emilio Bisceglia, for the appellant

Jonathan Piccin, for the respondent

Heard: March 10, 2026

On appeal from the order of Justice Suzan E. Fraser of the Superior Court of
Justice, dated May 23, 2025 with reasons reported at 2025 ONSC 3076.

REASONS FOR DECISION

[1] This appeal concerns a dispute between real estate brokerages over entitlement to the commission payable on a residential home purchase transaction.

FACTS AND PROCEDURAL HISTORY

[2] Steven Cardwell and his wife purchased a home in Vaughan, Ontario in February, 2021. The listing brokerage for the vendors was RE/MAX. The Cardwells were represented on the purchase by another brokerage, Salerno Realty Inc.

[3] At the time of the purchase, Mr. Cardwell was employed by Intercity Realty Inc., another real estate brokerage as a salesperson. He was registered under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Schedule C (“*REBBA*”). Intercity was not involved in the transaction for the purchase of the Cardwells’ home.

[4] When Intercity learned of the house purchase, it delivered an invoice to RE/MAX for the commission to which it argued it was entitled. Intercity took the position that as a result of Mr. Cardwell’s employment relationship, the multiple listing agreement for the home he purchased together with his wife, and the operation of *REBBA*, it was a co-operating brokerage acting for Mr. Cardwell in the purchase and was therefore entitled to share in the 2.5 percent buyer’s commission payable on the transaction.

[5] RE/MAX, which held the disputed commission in trust for Salerno, declined to pay to Intercity the portion to which it claimed it was entitled, taking the position that Salerno, the brokerage who represented the Cardwells on the transaction, was entitled to that portion of the commission as the rightful co-operating brokerage. Mr. Cardwell subsequently resigned from Intercity.

[6] On June 10, 2021, Intercity brought an action against Salerno, Mr. Cardwell and RE/MAX for breach of contract, or alternatively, *quantum meruit* and/or unjust enrichment, to recover damages equal to the amount of the co-operating broker commission.

[7] Approximately four months later, on October 26, 2021, Intercity commenced a formal complaint to the Toronto Regional Real Estate Board (“TRREB”) against RE/MAX and its salesperson who handled the transaction, alleging that they had violated the MLS Rules and Policies and Code of Conduct.

[8] In its electronic mail correspondence to TRREB under cover of which it submitted the complaint, however, Intercity stated that it wished to advance the complaint against Salerno as well as RE/MAX. Salerno subsequently sought to be added to the complaint proceeding on the basis that its commission could be affected by the outcome. TRREB rejected this request, stating that it was unable to add an additional respondent to the proceeding but advised that the existing respondent (RE/MAX) may include evidence (witnesses or statements) from Salerno if it so chose.

[9] Intercity took the position that Mr. Cardwell, Salerno and RE/MAX all breached their obligations and duties as registrants under *REBBA*. Registrants who buy or sell a property are required to make written disclosure using a Form 160 – Registrant’s Disclosure of Interest. The Form 160 here was signed by

Mr. Cardwell, who confirmed that he would “not be receiving a portion of any commission payable in connection with this transaction”. However, Intercity did not sign the Form 160.

[10] Intercity argued that its signature was required since Mr. Cardwell was employed by that brokerage. By failing to advise Intercity of the transaction or obtain its signature, Mr. Cardwell misrepresented that he was acting on behalf of Intercity and also unilaterally waived the portion of the commission otherwise payable to Intercity without its knowledge or consent. Intercity further took the position that Salerno and RE/MAX were complicit in this breach of duty by Mr. Cardwell, since they knew as registrants themselves that the signature of Intercity was required.

[11] RE/MAX took the position on behalf of itself and Salerno that since the purchase of the house was made by Mr. Cardwell in his personal capacity (together with his spouse), and since Intercity was not a party to any commission agreement and there was no involvement by Intercity in the capacity of a co-operating brokerage during the transaction, Intercity was not entitled to any portion of the commission. RE/MAX submitted that Salerno was the proper cooperating brokerage entitled to the disputed portion of the commission.

[12] On April 4, 2022, TRREB issued the decision of its arbitration panel. The arbitration panel dismissed Intercity’s complaint and determined that:

- (a) the Cardwells, and specifically Mr. Cardwell, purchased the property in his individual capacity, and not in his capacity as a salesperson of Intercity, as confirmed by the Confirmation of Cooperation and Representation, which reflected that Salerno would represent the Cardwells;
- (b) that relationship was further substantiated through the executed Buyer Representation Agreement between the Cardwells and Salerno;
- (c) it was not its role to interpret and apply the terms of any employment relationship between a salesperson and their brokerage. Any issue of a breach of Mr. Cardwell's employment agreement with Intercity related to the purchase of a property with another brokerage was outside the jurisdiction of the arbitration panel;
- (d) while consulting Intercity upon receipt of the incomplete Form 160 from Mr. Cardwell would have been a courteous gesture on the part of RE/MAX, it ultimately was not required as Mr. Cardwell submitted the offer in his personal capacity through his relationship with Salerno as co-operating brokerage on the transaction; and

- (e) there were insufficient grounds to conclude that Intercity was a party to the transaction, and therefore the commission was ordered to be retained by RE/MAX for disbursement to Salerno.

[13] Intercity appealed according to the TRREB by-laws. The arbitration appeal panel issued its decision on October 5, 2022. It dismissed the appeal, determining that the process undertaken by the arbitration panel, as well as the conclusions reached, were reasonable.

[14] On January 26, 2023, Salerno brought a motion in the Superior Court action for an order dismissing the action as against it on the basis that the court lacked jurisdiction over the subject matter of the complaint under r. 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It submitted in the alternative that the claim was frivolous, vexatious or otherwise an abuse of process under r. 25.11, as the matter had already been determined by the TRREB arbitration.

[15] RE/MAX brought a companion motion for the same relief. When the motion was heard, Intercity had settled with RE/MAX such that only Salerno's motion proceeded.

THE MOTION JUDGE'S DECISION

[16] With thorough and thoughtful reasons, the motion judge granted the motion and dismissed Intercity's action against Salerno, noting that the decision did not impact Intercity's claim against Mr. Cardwell.

[17] The motion judge reviewed the history of the matter, including the proceedings before TRREB and concluded that the allegations advanced by Intercity in the TRREB proceeding were the same as those advanced in the statement of claim in the action against Salerno, except that Mr. Cardwell and Salerno were not parties to the TRREB complaint.

[18] The motion judge noted that while Salerno attempted to be added as a party to the TRREB proceeding, the request was denied, but Salerno took the position on the motion that RE/MAX had assured it that its interests would be protected. She found that the record supported that RE/MAX represented Salerno's interests at the arbitration.

[19] The motion judge first considered whether the action should be stayed or dismissed pursuant to r. 21.01(3)(a) on the basis that the court lacked jurisdiction over the subject matter. She found that the Superior Court has jurisdiction over all claims, unless they do not disclose a reasonable cause of action or the jurisdiction has been removed by legislation or an arbitral agreement: *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, 94 O.R. (3d) 19, at para. 92, aff'd 2010 SCC 62, [2010] 3 S.C.R. 585.

[20] The motion judge found that Intercity was, like Salerno, subject to *REBBA* and the *Code of Ethics*, and that the TRREB Arbitration Guidelines required all members to submit to arbitration to resolve all commission disputes.

[21] The motion judge rejected Intercity's submission that the action should proceed since Salerno was not a party to the TRREB proceeding. She found that that this was of no consequence since the arbitration decision, upheld by the appeal panel, binds Salerno as RE/MAX was directed to hold the commission for Salerno and all issues relating to Salerno were dealt with as part of the TRREB proceeding. Accordingly, the motion judge found that the court had no jurisdiction over the dispute, since such jurisdiction was ousted by virtue of the TRREB Arbitration Guidelines.

[22] The motion judge continued, however, to consider whether the matter was an abuse of process under r. 25.11 by way of issue estoppel in the event that she was in error about the jurisdictional question. The parties agreed that the applicable test for issue estoppel was that set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paras. 24-25.

[23] Applying that test, the motion judge found that the issue as between Intercity and RE/MAX and Salerno had been fully adjudicated through the TRREB proceeding. RE/MAX represented Salerno's interest before the TRREB hearing panel and the decision, affirmed on appeal, was final.

[24] Accordingly, the motion judge concluded that Intercity was attempting to relitigate the same claim before the court, and that such conduct constituted an

abuse of process. She concluded that she would have dismissed the claim on that basis had she not found that the court was without jurisdiction.

ISSUES AND ANALYSIS

[25] Intercity appeals. While the grounds of appeal were somewhat conflated in oral argument, Intercity advanced three main grounds of appeal:

- (a) Did the motion judge fail to follow *Danyluk*?
- (b) Did the motion judge err in finding that the court lacked jurisdiction?
- (c) Did the motion judge err in finding that Intercity was estopped from advancing its claim against Salerno?

[26] We address each of these in turn.

[27] First, Intercity submitted that the motion judge erred in law and misapplied the test for issue estoppel set out in *Danyluk* since Salerno was not a party to the TRREB proceeding, and the TRREB decision was not judicial.

[28] We reject this ground of appeal.

[29] Application of the tests for issue estoppel and abuse of process by a motion judge is owed deference: *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 24, leave to appeal refused, [2019] S.C.C.A. No. 284. An appellate court should intervene only if the motion judge

misdirected herself, came to a decision that is so clearly wrong as to be an injustice, or gave no or insufficient weight to relevant considerations.

[30] The motion judge properly articulated the test in *Danyluk* and applied it to the facts before her. She considered whether: (1) the same question has been decided; (2) whether the TRREB decision was final; and (3) whether the parties to the TRREB decision or their privies were the same persons as the parties in this proceeding in which the estoppel is raised.

[31] We see no error in the analysis of the motion judge.

[32] As to the first *Danyluk* factor, the issue raised in the action is precisely the issue that was considered and determined in the TRREB proceeding: whether Intercity was entitled to a portion of the commission as a co-operating brokerage since Mr. Cardwell was its employee at the time of the transaction.

[33] The TRREB Arbitration Panel fully considered the issue and all relevant evidence and found that no commission was payable to Intercity. Before us, Intercity submitted that the questions in the action were different since it was claiming damages against Salerno for inducing breach of contract and intentional interference with contractual relations. Fatal to that submission is the fact that those causes of action are not pleaded in the statement of claim against Salerno. The claims against Salerno are limited to the payment of the disputed commission.

[34] As to the second *Danyluk* factor, Intercity appealed the decision of the arbitration panel to the appeal panel which affirmed and upheld the decision. The award of the appeal panel, and the TRREB Arbitration Guidelines to which Intercity is subject as a registrant, are clear that the award is final.

[35] We are satisfied for the purposes of this appeal that the TRREB decision is judicial since it was made by a body capable of receiving and exercising adjudicative authority, the decision was required to be made in a judicial manner, and the decision was, in fact, made in a judicial manner: *Danyluk*, at para. 35; *Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850, 113 O.R. (3d) 673, at para. 45. The object and purpose of the TRREB Arbitration Guidelines are to provide a judicial framework for the adjudication of commission disputes between brokers just like this one.

[36] As to the third *Danyluk* factor, we agree with the conclusion of the motion judge that Salerno's interests were represented in the TRREB proceeding through RE/MAX. The fact that Salerno was technically not a party to the proceeding is of no consequence in the particular circumstances of this case. As observed by the Supreme Court in *Danyluk*, at para. 60, the concept of privity is "somewhat elastic" and it is impossible to be categorical about the degree of interest which will create privity. Determinations must be made on a case-by-case basis.

[37] In the particular circumstances of this case, we are satisfied that RE/MAX was the privy of Salerno. RE/MAX held the disputed portion of the commission in trust. As the motion judge found, when TRREB denied party status to Salerno, RE/MAX represented Salerno's interests, and as a result of that direction all parties were clearly aware of this. For its part, Salerno clearly understood that it would be bound by the decision as the motion judge found.

[38] As the Supreme Court stated in *Danyluk*, the rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. There is residual discretion in the court to determine whether issue estoppel should be applied even if the technical requirements are met: *Danyluk*, at para. 33.

[39] Moreover, even if the technical requirements of any *Danyluk* factor were not met, the Supreme Court has noted that Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.

[40] This is the case here. Were the action against Salerno to proceed, there would be the potential for the decision in that action to undermine the findings of the TRREB arbitration panel, already upheld on appeal, since the underlying claims in both proceedings are the same. The motion judge's conclusion to dismiss the claim on the basis of abuse of process does not work an injustice and should not be interfered with.

[41] We note that dismissal of this ground alone is sufficient to dispose of the appeal.

[42] Second, Intercity submitted that the motion judge erred in law in finding that the court lacked jurisdiction on the basis that the inherent jurisdiction of the Superior Court had been ousted by the TRREB Arbitration Guidelines.

[43] We also reject this ground of appeal. There is no dispute that Intercity is a *REBBA* member subject to the TRREB Arbitration Guidelines. The Guidelines provide in relevant part that:

By virtue of the By-Law, all members have agreed to submit all claims to Arbitration as provided for in the By-Law, and the Hearing Panels are given exclusive jurisdiction to hear or settle all Claims, with the exception of Claims where both parties have agreed in writing to have their Claims resolved in another forum. No legal action or other proceeding shall be taken by any Member with regards [to] the subject matter of a Claim, except as previously mentioned.

[44] TRREB jurisdiction was clear, exclusive, and was not waived: *TeleZone*, at para. 92. Intercity irrevocably attorned to that jurisdiction as a registrant and in fact invoked the jurisdiction to advance its claim to the commission in this particular case, such that TRREB was the appropriate forum in which commission disputes such as this were required to be determined. That itself is sufficient.

[45] Moreover, in Intercity's TRREB Arbitration Claim Form, it confirmed that it "hereby agrees to abide by the award of the arbitrators". As observed by the motion judge, nothing in her decision ousts the jurisdiction of the court with respect to Intercity's claim, if any, against Mr. Cardwell.

[46] Third, Intercity submitted that the motion judge erred in law in finding that Intercity was estopped from advancing a claim against Salerno because the issue was fully adjudicated and determined through the TRREB proceeding such that this action constituted an abuse of process.

[47] To the extent that this ground of appeal is substantively different than the first ground, we reject it also. For the above reasons, we are satisfied that this action against Salerno is inescapably an attempt by Intercity to relitigate the very issue already determined in the TRREB proceeding with the result that it is, as found by the motion judge, an abuse of process.

DISPOSITION

[48] For all of these reasons, the appeal is dismissed.

[49] At the conclusion of argument, the parties advised the court that they had reached an agreement on costs of the appeal payable to the successful party in the amount of \$10,500 inclusive. In our view, that quantum is appropriate. Accordingly, costs are payable by the appellant to the respondent in the amount of \$10,500.

“L. Sossin J.A.”
“S. Gomery J.A.”
“P.J. Osborne J.A.”