SUPREME COURT OF NOVA SCOTIA

Citation: *IWK Health Center v. Northfield Glass Group Ltd.*, 2016 NSSC 281

Date: 20161019
Docket: *Halifax*, No. 448741
Registry: Halifax

Between:

IWK HEALTH CENTER

Applicant

v.

NORTHFIELD GLASS GROUP LTD.

Respondent

Judge: The Honourable Justice Pierre L. Muise

Heard: May 25, 2016, in Halifax, Nova Scotia

Counsel: T. Arthur Barry, Q.C., for the Applicant
Kevin Quigley and Corey Withrow, for the Respondent

INTRODUCTION

[1] Northfield, through Economy Glass, one of its divisions, performed work at the IWK Hospital pursuant to a standard CCDC-2 Stipulated Price Trade Contract (the "Trade Contract"). That included installing a curtain wall system.

[2] The Trade Contract provides for escalating alternative dispute resolution mechanisms culminating in arbitration.

[3] The project was completed in 2008. An issue arose regarding delay, with associated water infiltration and condensation complaints. It was settled July 24, 2008 through mediation. The parties exchanged mutual releases covering claims known to that date.

[4] IWK advised Northfield in September 2012 that it had discovered a major problem with leaking in the curtain wall. An investigation revealed purported defects and deficiencies. Northfield did not offer to rectify them. IWK effected repairs and, in November 2013, wrote Northfield claiming repair and future costs.

[5] Northfield's insurer, Intact Insurance, also became involved. In subsequent correspondence with Northfield and Intact, IWK continued to repeatedly request Northfield's position in relation to the claim and whether some stages the ADR process should be skipped.

[6] On September 8, 2015, Northfield finally provided its position that the 2008 settlement and release might bar the new claim. It requested disclosure. It did not agree to waive any stage of the ADR process. IWK disputed the release defence and the disclosure request. It posited that they needed to proceed directly to arbitration to avoid wasting further time and resources.

[7] As nothing was happening, on March 2, 2016, IWK filed the within application to appoint an arbitrator pursuant to the Trade Contract.

[8] The application is contested.

I**SSUES**

[9] Determining who, if anyone, should be appointed arbitrator, raises the following questions:

1. Can an arbitrator, under the terms of the Trade Contract, determine the issue of the release defence?
2. Is arbitration mandatory considering that:

    a. IWK waited until November 2013 to give written notice of its claim;
    b. IWK delayed pursuing its claim after giving notice of it; and,
    c. IWK proceeded directly to giving the Notice of Arbitration without involving the consultant and/or the project mediator in the ADR process?

3. Would the arbitration process result in manifestly unfair or unequal treatment of Northfield considering:

    a. the possible existence of third parties against which Northfield might claim contribution or indemnity, but could not be added as parties to the arbitration;

    b. the inability to compel production and/or evidence from persons not made parties to the arbitration, as well as the inability to appeal the arbitrator's decision; and,

    c. that the matter involves the determination of a defence based on a separately executed release of previous claims made under the Trade Contract.

4. Should the disclosure issues that have arisen between the parties be determined by an arbitrator?

5. If an arbitrator or arbitrators should be appointed, who should be appointed?

LAW AND ANALYSIS

GENERAL

[10] This application is made under the ***Commercial Arbitration Act***, S.N.S. 1999, c. 5 (the "***CAA***").

S. 12(1) provides that:

> "The court may appoint the arbitral tribunal, on the application of a party, if
>
> (a) the arbitration agreement provides no procedure for appointment of the arbitral tribunal; or

> (b) the person with power to appoint the arbitral tribunal has not done so within the time provided in the agreement or after a party has given the person seven days' notice to do so, whichever is later."

[11] S. 8 states:

> "No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried out in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards."

QUESTION 1: CAN AN ARBITRATOR, UNDER THE TERMS OF THE TRADE CONTRACT, DETERMINE THE ISSUE OF THE RELEASE DEFENCE?

[12] Northfield takes the position that an arbitrator cannot determine the release defence because: it involves interpreting the release itself, which is a separate agreement from the Trade Contract; and, the ADR provisions of the Trade Contract do not apply to that issue, such that an arbitrator has no jurisdiction to decide it.

[13] An arbitrator can rule on whether it has that jurisdiction, if the Court has not already made that ruling.

[14] This point is made clear, by subsections 19(1) and (2) of the ***CAA***, and by Rule 10.2 of the Rules for Arbitration established for use with the Trade Contract.

[15] Subsections 19(1) and (2) of the ***CAA*** state:

> **"(1)** An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may, in that connection, rule on objections with respect to the existence or validity of the arbitration agreement.
>
> **(2)** The arbitral tribunal may determine any question of law that arises during the arbitration."

[16] Rule 10.2 states: "The arbitrator may rule on the arbitrator's jurisdiction."

[17] Subsection 19(2) was interpreted in ***Jurlink v. Municipality of East Hants***, 2001 NSSC 159. It concluded that the power of an arbitral tribunal under Subsection 19(2) of the ***CAA*** to determine questions of law, authorizes it to make a determination regarding whether a matter is arbitrable.

[18] Northfield submits that I should depart from the general rule set out in ***Union des consommateurs v. Dell Computer Corp.***, 2007 SCC 34, at paragraph 84, that "a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator". ***Dell Computer***, at paragraphs 84 and 85, states that I "should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law", or is based on a question of mixed law and fact where "the questions of fact require only superficial consideration of the documentary evidence in the record". As noted at paragraph 86, even if one of these exceptions applies, I may still refer the jurisdictional

question to arbitration if it "would be best for the arbitration process", such as to circumvent delay tactics and prevent undue impairment of the arbitration process.

[19] I agree with Northfield that, in the case at hand, I can and should determine whether the release defence removes the claim from arbitration. Northfield argues that it is because the determination is solely a question of law. In my view, it is a question of mixed law and fact, where the questions of fact require only superficial consideration of the documentary evidence.

[20] In my view, it only requires a superficial review of the Trade Contract, the letter confirming settlement and the Release.

[21] If the Trade Contract expressly excluded arbitration of claims in relation to which a potential release defence applied, then, the arbitrator would likely lack jurisdiction. Similarly, if, by agreement of the parties, a condition of the settlement and Release was that the ADR provisions of the Trade Contract would not apply to future claims in which the Release was raised as a defence, then, again, the arbitrator would likely lack jurisdiction. However, all documents are silent on that issue. I must consider that factual circumstance in determining the question of jurisdiction. I must also consider what would have been in the reasonable contemplation of the parties when they entered into the Trade Contract.

[22] Whether the current claim has been released or not is a question that must ultimately be determined. Irrespective of whether it is a question of fact, law or mixed fact and law, in my view, an arbitral tribunal has jurisdiction to determine that question.

[23] In ***Beadle v. Pictou Landing Micmac***, 2013 NSSC 25, at paragraph 100, I concluded that the arbitrator did have the power to determine whether releases of claims made under the agreement containing the ADR provisions were valid.

[24] In that case, the agreement in question containing the arbitration provisions specifically discussed the issue of releases. The Trade Contract in the case at hand does not. However, in both cases, the releases in question are separate agreements. In addition, the parties herein would have entered into the Trade Contract knowing that settlement of disputes through the mediation process would likely entail the signing of releases. It would be anticipated as a normal part of such a process. I respectfully disagree with Northfield's contention that, since releases are not mentioned in the Trade Contract, they were not contemplated by the parties such that issues involving releases are not arbitrable under the ADR provisions of the Trade Contract.

[25] Consequently, in my view, there is no reason to distinguish ***Beadle*** from the case at hand, on that basis.

[26] In the case at hand, the 2008 release was in relation to a claim made under the Trade Contract. The current claim is also made under the Trade Contract. Determining whether the current claim has merit, and is not the same claim that was released in 2008, involves, in my view, an interpretation and application of the Trade Contract. Paragraph 8.1.1 of the Trade Contract states that the ADR provisions apply to disputes in relation to its interpretation or application.

[27] That was also the situation in ***Beadle***, where, at paragraph 97, I highlighted the fact that the claim itself was of the type meant to be heard by an arbitrator under the agreement, and was therefore arbitrable. I concluded the claim and the release defence were arbitrable.

[28] Also, the release defence is not such as to warrant removing the issue from the arbitrator on the basis that it is an issue that should be dealt with by summary judgment. There is support for the position that the current claim was not released. It includes the following.

[29] The release signed by IWK in 2008 notes, in the preamble, that it is in relation to claims made for "compensation as a result of delays". Clause 4 provides

that “except with respect to the Released Claims and any delay-related claims, the terms of the Settlement and this Release do not affect the Releasee’s warranty obligations nor any other obligations of the Releasor under the Trade Contract”.

[30] GC 12.2.1.4 of the Trade Contract permits claims made in writing for damages resulting from “substantial defects or deficiencies” brought within six years of substantial performance of the work. In the case at hand, substantial performance was effected as of January 2008. The six year deadline expired January 2014. The claim was made in writing before then.

[31] Northfield notes that there were complaints of leakage up to and including July 21, 2008, only a few days before the settlement date. For instance, an email dated June 2, 2008, from Roger Porter, for the construction manager, to Dan Everson, for Northfield, states that they “cannot go into another fall with the building still leaking”. It adds that removal of the scaffolding is “continually delayed due to leaks”. Later, on July 21, 2008, Luke Johnson, again for the construction manager, sent an email to Dan Everson indicating that there were several more leaks that morning following the rain the previous evening, and that the leaks needed to be addressed right away. Further, the pre-mediation brief filed

on behalf of IWK , dated July 21, 2008, at page 16, states that leaks still continue as of the date of that brief.

[32] These points support an argument that the current claim would have been released by the 2008 release on the basis that the claim was known to IWK as of the settlement date.

[33] However, when one reads the pre-mediation brief as a whole, it appears that the leakage complained of was the result of "failure to complete areas and render them watertight". Some details of that alleged failure were provided at page 11 of the brief. They included: the failure to seal or caulk the back pans to render them weathertight, which in turn resulted in insulation falling off, removal of pins and creation of pinholes allowing water entry; and, failure to have the required materials on-site to install angled aluminum at the bay windows and caulk them. It appears that the "deficiencies" referred to at page 16 of the brief were references to missing materials. In addition, it is clear that the main focus of the brief is that of damages resulting from delay. The leakage appears to be referred to merely as the result of delay in supplying materials and workmanship.

[34] Therefore, in my view, there is a genuine issue for determination in relation to whether or not the 2008 Release bars the current claim. That issue can be determined by an arbitrator.

[35] **QUESTION 2(a): IS ARBITRATION MANDATORY CONSIDERING THAT IWK WAITED UNTIL NOVEMBER 2013 TO GIVE WRITTEN NOTICE OF ITS CLAIM?**

[36] Northfield argues that, in the circumstances of the case at hand, the ADR provisions of the Trade Contract are not mandatory because IWK has failed to comply with the procedures and conditions required to trigger mandatory arbitration.

[37] In support it points to Clause 8.2.7 of the Trade Contract and a case interpreting it, ***Millennial Construction Ltd. v. 1021120 Alberta Ltd.***, 2005 ABQB 533.

[38] Clause 8.2.7 states:

> "On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a notice is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use."

[39] Clause 8.2.6 makes it clear that the 10 *Working Days* referred to in clause 8.2.7 is the 10 *Working Days* following termination of mediated negotiations.

[40] In the case interpreting this clause, Millenial had commenced a builder's lien action in court. Seven months later, the Defendant Numbered Company obtained

an order for security for costs against Millennial. Two months after that, which was a few days before the deadline for posting security for costs, Millennial brought an application for an order staying its own action and directing that the matter be referred to arbitration pursuant to the construction contract. By then, other lien claimants had also joined the action.

[41] The Court in ***Millennial*** refused to stay the action and refer to arbitration. At paragraph 13, it explained:

> "In this case, the contractual language used does not make arbitration mandatory. Section 8.2.6 of the contract provides that either party may refer a dispute to arbitration under certain conditions of timing that have not been met under the contract, and are now impossible to meet. Section 8.2.7 provides that if a notice to arbitrate is not given under section 8.2.6 within the required time, the dispute may be deferred to the courts. That is what has occurred, and as the Master pointed out, the parties are well down the litigation trail, and cannot now invoke arbitration in the face of an unpalatable security for costs ruling. I agree with the Master that the legislative policy encourages parties to be bound by their agreement to arbitrate does not allow a party to avoid an order of the forum it has chosen by jumping to another. It may well be that arbitration would have been expeditious and effective for the lien claimants in this case, but Millennial has gone far beyond the mere protection of its lien before this court." [Emphasis by underlining added.]

[42] At paragraph 10, the Court distinguished *Babcock & Wilcox Canada Ltd. v. Agrium Inc.*, 2003 ABQB 1004, stating:

> "At paragraph 30, the court found that as long as arbitration remains alive as a contractual right, the parties can invoke it and apply for a stay. However, the commencement of litigation ends that right for the party commencing litigation, and, if the other party responds through a Statement of Defence, it also loses its right to call for arbitration."

[43] The circumstances of the case at hand are different from those in ***Millennial***. In the case at hand, neither party has started an action. IWK has been requesting that the dispute be resolved through the ADR process from the beginning. None of the three ADR stages have been completed. Therefore, the 10 *Working Days* provided for in Clause 8.2.7 have not yet started to run. As a result, it is still possible to meet that deadline (assuming the consultant and/or mediation stages of ADR are not passed over). Consequently, the *ratio* in ***Millennial*** does not apply in the case at hand so as to remove IWK's right to arbitration under the Trade Contract.

[44] Clause 8.2.6 states that "either party may refer the dispute to be finally resolved by arbitration" by giving the requisite notice in writing to the other party, not later than the 10 working day deadline. In my view, as I concluded at paragraph 32 of ***Beadle***, the use of the permissive word "may" renders arbitration mandatory if either party chooses to submit the dispute to arbitration, subject to other factors which may remove such right to mandatory arbitration, such as: delay; failure to comply with preconditions that have not been waived or dispensed with; and, the arbitration process resulting in manifestly unfair or unequal treatment of the other party.

[45] One of the specific failures to comply with procedures and conditions of ADR alleged relates to IWK giving written notice of its claim for the first time in November 2013. I will address that specific allegation at this point. The comments I have made up to now are equally applicable to the other allegations of failure to comply discussed in Questions 2 (b) and (c).

[46] Clause 9.2.2 of the Trade Contract provides that a claim for damages suffered because of any wrongful act or neglect of the other party "shall be made in writing to the party liable within reasonable time after the first observance of such damage". It adds that disputed claims shall be resolved as set out in Part 8 Dispute Resolution. Part 8 contains the ADR process.

[47] There is some dispute in relation to when that first observance occurred. Northfield argues that there is evidence that it was observed prior to July 24, 2008. As I previously noted, that leakage appears to have been associated with complaints that Northfield had not yet completed its work.

[48] IWK alleges that it discovered the leakage problems which form the basis of the current claim in September 2012. That is supported by the affidavit and telephone log of Ian Williams, Manager of Plant Maintenance and the Operations Department at the IWK Health Centre, indicating that the first call he received in relation to the problem was on September 11, 2012.

[49] Jonathan Mullin, on behalf of the construction manager, sent a letter dated September 27, 2012 to Dan Everson, representative of Northfield. The letter states:

> "We were notified of water infiltration on the 5th Floor Link area behind the curtainwall installed by Economy Glass in 2006. The IWK asked us to investigate the source of the leaks and removals were done that revealed blocked weep holes, deteriorated caulking, and saturated insulation within the backpans.
>
> This letter is to notify you that the IWK has retained an independent curtainwall consultant to inspect the remainder of the curtainwall and to recommend repairs to the system. Pending further investigation and inspection the IWK may be seeking compensation for repairs from Economy Glass."

[50] I agree with Northfield that this letter did not constitute a claim for damages made in writing as required by Paragraph 9.2.2, even though it warns that IWK may be seeking compensation.

[51] However, paragraph 9.2.2 deals with notice of claims under Paragraph 9.2.1, which provides for reimbursement of damage suffered because of any wrongful act or neglect of the other party. In my view, based upon the evidence before me, IWK would not yet have known, in September 2012, whether the damage resulted from a wrongful act or neglect of Northfield in the original installation of the curtainwall system. As the letter indicates, they had retained an independent consultant to look into the matter.

[52] There is a BRK Engineering report dated October 10, 2012, addressed to IWK. It was prepared following inspection of a sampling of assembly areas on the

afternoon of September 25 and the morning of September 28. It concludes that the failure of the system was due to substandard workmanship. However, it does not clearly attach responsibility for that faulty workmanship to Northfield. The issues observed at that time appear to relate to faulty sealing and caulking. There was evidence that at least a portion of the sealing and caulking was conducted by a third-party following the July 2008 settlement. The Report recommended extensive repair work, with further inspection while the curtainwall system assembly was opened up.

[53] In addition, at that point, even if the leakage was due to faulty workmanship by Northfield, IWK would not yet have known whether or not Northfield would pay for any necessary repairs, thus avoiding IWK suffering resulting damages.

[54] Nevertheless, the September 27 letter from Mr. Mullin warned Northfield of a potential claim for damages. Then, IWK, in a letter dated November 2, 2012 to Dan Everson, informed Northfield: of the indications that arose from the preliminary inspection by BRK; that it would be proceeding with the necessary repairs; and, that it was offering Northfield the opportunity to inspect the faulty workmanship.

[55] These letters gave Northfield the opportunity to look into the matter and respond appropriately to any faulty workmanship that it may have been responsible

for. At that point, that is all that could be reasonably expected of IWK, in terms of providing notice. It did not yet have sufficient information to conclude that it had a valid claim against Northfield.

[56] IWK obtained a further report dated August 7, 2013 from BRK Engineering. It was prepared following extensive inspection while the curtainwall system was opened up for repairs. That report concluded that water infiltration problems were caused by faulty workmanship during the initial installation by Northfield.

[57] By then, IWK had already effected some repairs and knew the cost of those repairs. It also knew that Northfield had done nothing to offer to effect the repairs, nor to reimburse IWK for the cost of those repairs.

[58] At that point, IWK had sufficient information to conclude that it could appropriately advance a claim for damage suffered because of the wrongful act or neglect by Northfield.

[59] IWK's lawyer, Robert Grant, QC, then wrote a letter dated November 15, 2013 to Northfield advising that IWK had instructed their firm to present a written "demand for reimbursement for extensive damages incurred to date and which continue to be incurred in the repair of substantial defects and deficiencies and

resulting damage arising from the faulty workmanship and negligence of Northfield … in the performance of its work on the Link Building". It specifies the costs incurred to that point and estimated future costs. It provides excerpts from the August 7, 2013 BRK Report, and indicates that a copy is attached.

[60] In my view, that November 15 letter does provide the written notice required by Paragraph 9.2.2 of the Trade Contract. In addition, it was provided within a reasonable time after IWK became aware of having suffered damage because of a wrongful act or neglect of Northfield. It would have become aware of that after reading the August 7 BRK Report. Thus the delay was only approximately 3 months. After receiving the report, IWK had to contact their lawyer. Their lawyer had to study the matter and assemble a three page letter providing notice of IWK's claim, along with details of past and estimated future expenses. Considering those points, in my view, three months is not an unreasonable delay. Further, Northfield had already received notice more than one year prior that there were concerns regarding its workmanship for which IWK may claim reimbursement, and had been given the opportunity to inspect that workmanship.

[61] Based upon the evidence before me, I cannot find that it has been established that there was a sufficient delay to remove IWK's right to have its current claim referred to arbitration.

QUESTION 2(b): IS ARBITRATION MANDATORY CONSIDERING THAT IWK DELAYED PURSUING ITS CLAIM AFTER GIVING NOTICE OF IT?

[62] IWK first provided formal Notice of Arbitration as an enclosure with the letter of Robert Grant, QC to Northfield dated June 15, 2015.

[63] Northfield argues that this long delay precludes IWK from being able to insist upon the matter being dealt with through the ADR process.

[64] The initial delay following the November 2013 notice of claim resulted from IWK giving Northfield time to respond. A letter dated November 28, 2013, from Eric Ledrew, then lawyer for Northfield, indicated he would need time to respond. Then, on December 13, Genevieve McEachern, representative of Intact, advised they were involved in the matter and requested information from IWK's lawyers. The information was sent the same day.

[65] IWK made it clear at the latest in December 2013 that it expected the dispute to be dealt with through the ADR process. Mr. Grant's letter of December 27, 2013 to Mr. Ledrew, confirms that IWK is proceeding under that process and proposes skipping the Consultant stage and going straight to the Mediation stage. The letter adds that IWK wishes to "move this matter forward to mediation, and failing

resolution, to arbitration without delay". The same day, Christa Brothers, also acting for IWK, sent an email to Mr. Ledrew and Ms. McEachern proposing proceeding directly to mediation.

[66] In my view, the ensuing delay also resulted mainly from IWK accommodating the needs and requests of Northfield's lawyers and insurers. The events which follow demonstrate that.

[67] By email dated January 31, 2014, to Ms. Brothers, Ms. McEachern requested that IWK provide a "damages brief".

[68] By voicemail left on February 3, 2014, Mr. LeDrew advised Ms. brothers that, though he was not at that point in a position to waive the consultation stage, he "could really see the sensibility in doing so". However, he indicated that they should let the process of discussing damages with the insurer proceed first.

[69] Sadly, Mr. LeDrew passed away on March 28, 2014. No lawyer was selected to replace him on the file. Thereafter, IWK's lawyers continued to correspond with Intact.

[70] By letter dated September 22, 2014, from Mr. Grant, Intact was provided a detailed damages report, attaching materials, including photographs, to support the damage amounts.

[71] Ms. Brothers followed up with Ms. McEachern on November 21, 2014 to confirm the damages brief had been received and to request a response. She left a voicemail message which was not replied to.

[72] She again followed up with Ms. McEachern on January 12, 2015, to find out how long it would take Intact to respond. Ms. McEachern's voicemail indicated she would be out of the office until February 4, 2015, and referred callers to Natalia Richardson. Ms. Brothers spoke with Ms. Richardson about the issue.

[73] Ms. Richardson called her back on January 17 and advised her that the damages brief had been misplaced and could not yet be located. They spoke again on January 19 and on January 21. On the latter date, Ms. Richardson indicated that the brief had been located, but had not been reviewed. She indicated that they wanted to wait until Ms. McEachern's return to review the matter because she was familiar with it.

[74] Ms. Brothers again followed up with Ms. Richardson by email on February 1, 2015, and was advised that intact should provide a response towards the end of February. She also requested further documentation from IWK.

[75] Mr. Grant sent a letter dated March 6, 2015 updating the current amount of damages and enclosing significant additional information. It also politely requested "Intact's urgent attention to this matter"; and, advised that IWK would be proceeding formally if it had not received a satisfactory offer by April 15, 2015.

[76] On April 15, Intact had still not responded to the damages brief. Thereafter, on instructions from IWK, Mr. Grant delivered the Notice to Arbitrate with his letter of June 15, 2015. That letter was sent to Northfield, and copied to Ms. McEachern, as an enclosure to a letter to her also dated June 15.

[77] By letter dated June 26, 2015, Chris Keirstead informed Mr. Grant that they had been retained by Northfield but needed time to become familiar with the file and conduct any necessary inquiries.

[78] By letter dated July 16, 2015, Kevin Quigley, the current lawyer for Intact, informed Mr. Grant that they had just been retained and needed time to become familiar with the matter. On July 22, Mr. Grant wrote Mr. Quigley expressing understanding that he needed time to familiarize himself with the file, while emphasizing the "excessive and inordinate delays by Intact in dealing with this claim" and asking how much time Mr. Quigley would need to determine whether they would waive the consultant stage and whether they wished to proceed with the mediation stage of the ADR process.

[79] Mr. Quigley wrote back on July 24 advising that he: had received a significant amount of material; and, would make efforts to review it and obtain instructions regarding proceeding to arbitration. He also requested copies of documentation from Mr. Grant relating to the 2008 settlement.

[80] Mr. Quigley wrote again on August 13, 2015 advising that he was still in the process of reviewing the significant volumes of documents he had received and, once again, requesting documentation and submissions relating to the 2008 mediation process.

[81] On September 8, 2015, Mr. Quigley wrote Bruce Outhouse, QC, who mediated the 2008 settlement, requesting that he preserve all records of the mediation as the settlement may provide his client a complete defence to IWK's current claim. That letter was copied to Mr. Grant. On the same day, and on the following day, he wrote Mr. Grant asking for production of documents relating to the entire construction project, stating that after reviewing them they would be in a better position to respond to the Notice to Arbitrate.

[82] On September 24, 2015, Mr. Grant wrote to Mr. Quigley outlining why he was of the view that the 2008 release did not bar the current claim. On that same day, he wrote another letter to Mr. Quigley proposing that the dispute be mediated

at the end of October, stating that if Northfield was of the view that it was not bound by the ADR provisions in the Trade Contract, IWK would bring a chambers application seeking a declaration that it was. He also stated that it was IWK's position that the production requested was not relevant to whether the ADR provisions were mandatory and that the question of production could be dealt with within the arbitration process.

[83] On October 14, 2015, Mr. Quigley wrote two letters to Mr. Grant. One indicated that if there was any hope of Northfield agreeing to mediation they would require disclosure of the requested documents and reiterated the position that IWK's current claim was barred by the 2008 release. The other disputed IWK's assertion that the problems forming the basis of the current claim were not known to it at the time of the 2008 settlement.

[84] On November 16, 2015, Mr. Grant wrote Mr. Quigley. In that correspondence he outlined the substantial delays caused by Northfield and/or its insurer. He noted that the release defence, which had not previously been raised, indicated a lack of good faith in the negotiation process. He pointed out that: the nonbinding mediation stage was not meant to be used to delay resolution of disputes; and, given Northfield's position, an arbitrator was required to control the process and resolve the dispute. He gave Northfield until November 20, 2015, to

agree to the appointment of an arbitrator, failing which IWK would apply to the Court for an order to appoint one.

[85] The within application was filed March 2, 2016.

[86] It did take some time for IWK to prepare the damages brief after it was requested. However, it appears that extensive information had to be gathered in order to prepare that brief. In addition, the bulk of the delay, in my view, was created as a result of Northfield and/or Intact needing time to review and respond. The delay was exacerbated by Intact misplacing the damages brief and by changes in lawyers.

[87] IWK was patient and accommodating in allowing Northfield and Intact time to respond, even after failures to meet deadlines. IWK even allowed significant time following the November 15, 2015 deadline for agreeing to the appointment of an arbitrator before filing the within application, despite it being two years after it gave Northfield notice of its claim.

[88] IWK's lawyers conducted themselves in a professional manner, understanding and respecting the situation the lawyers for Northfield and Intact found themselves in. As a result, they, in my view, were appropriately flexible and

cooperative in their dealings with those lawyers. They did all they could to attempt to resolve outstanding issues without having to resort to the courts. In my view, that is an approach that ought to be commended and encouraged.

[89] It is also consistent with the direction in Paragraph 8.2.3 of the Trade Contract that "[t]he parties shall make all reasonable efforts to resolve their dispute by amicable negotiations". Paragraph 8.2.3 is placed between the consultant and mediation provisions. That suggests that it envisioned much tighter timelines than occurred in this case. However, in my view, IWK's approach complied with the spirit of the requirement to attempt to resolve disputes amicably.

[90] If such accommodation related delay were to result in IWK losing its right to mandatory ADR it would cause lawyers in the future to take an inflexible and uncooperative approach. In addition, it would reward Northfield, which was responsible for the bulk of the delay and received the benefit of IWK's accommodating approach. In my view, both of those would be undesirable results and contrary to public policy.

[91] In addition, the dispute in the case at hand arose several years after construction was completed. A dispute that arises in the course of construction requires immediate resolution in order to avoid unnecessary construction delays. That concern does not arise the case at hand.

[92] For these reasons, in my view, the delay following the Notice of Claim in the case at hand does not preclude IWK from having the dispute handled through the ADR process in the Trade Contract.

QUESTION 2(c): IS ARBITRATION MANDATORY CONSIDERING THAT IWK PROCEEDED DIRECTLY TO GIVING THE NOTICE OF ARBITRATION WITHOUT INVOLVING THE CONSULTANT AND/OR THE PROJECT MEDIATOR IN THE ADR PROCESS?

[93] I have already stated my view that the current claim being advanced by IWK is arbitrable because it is for damages resulting from substantial defects or deficiencies brought within the six year limitation period, and relates to the interpretation or application of the Trade Contract. I also note that the Trade Contract does not impose any deadline for the institution of the ADR process. For instance, it does not make the ADR process inapplicable after completion of the construction project.

[94] The Trade Contract provides for a three-stage ADR process. The first two stages, being the consultant and mediation stages, are nonbinding. The arbitration stage is binding.

[95] The paragraphs of the Trade Contract which follow cover the ADR process. The underlining is mine.

> "2.2.13 Claims, disputes, and other matters in question relating to the performance of the *Work* or the interpretation of the *Contract Documents*, except for GC 5.1 - FINANCING INFORMATION REQUIRED OF THE OWNER, shall be referred initially to the *Consultant* by notice in writing and to the other party for the *Consultant*'s interpretation and finding which will be given by notice in writing to the parties within a reasonable time.
>
> ….
>
> 8.1.1 Differences between the parties to the *Contract* as to the interpretation, application or administration of the *Contract* or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the *Consultant* as provided in GC 2.2 …, shall be settled in accordance with the requirements of Part 8 of the General Conditions - DISPUTE RESOLUTION.
>
> 8.1.2 If a dispute arises under the *Contract* in respect of the matter in which the *Consultant* has no authority under the *Contract* to make a finding, the procedures set out in paragraph 8.1.3 and paragraphs 8.2.3 to 8.2.8 of GC 8.2 - NEGOTIATION, MEDIATION, AND ARBITRATION, and in GC 8.3 - RETENTION OF RIGHTS apply to that dispute with the necessary changes to detail as may be required."
>
> ….
>
> 8.2.4 After a period of 10 *Working Days* following receipt of a responding party's notice in writing of reply under paragraph 8.2.2, the parties shall request the Project Mediator to assist the parties to reach agreement on any unresolved dispute. The mediated negotiations shall be conducted in accordance with the latest edition of the Rules for Mediation of CCDC 2 Construction Disputes.
>
> 8.2.5 If the dispute has not been resolved within 10 *Working Days* after the Project Mediator was requested under paragraph 8.2.4 or within such further period agreed by the parties, the Project Mediator shall terminate the mediated negotiations by giving notice in writing to both parties.
>
> 8.2.6 By giving the notice in writing to the other party, not later than 10 *Working Days* after the date of termination of the mediated

> negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration in the latest edition of the Rules for Arbitration of CCDC 2 Construction Disputes. The arbitration shall be conducted in the jurisdiction of the *Place of the Project*.
>
> 8.2.7 On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a notice is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use."

[96] I agree with Northfield that the Trade Contract language clearly indicates the consultation and mediation stages are intended to be mandatory preconditions to the right to arbitration, except that the consultation stage is not mandatory if the claim is one the consultant is not authorized to deal with. The claim in the case at hand relates to the performance of the work and the interpretation of the contract documents. It is not related to the financing information required of the owner. Therefore, the consultant is authorized to deal with the current claim.

[97] As previously noted, paragraph 8.2.6 makes arbitration mandatory if either party chooses to refer the dispute to arbitration, provided the preconditions are complied, or dispensed, with.

[98] The trade contract does not provide a deadline for referring a dispute to the consultant. Paragraph 8.1.3 does provide that the Construction Manager can give instructions to prevent delays if a dispute is not resolved promptly. In addition, the

timelines in the ADR provisions are relatively short. That supports an implied provision that referrals to the Consultant are meant to be made within a reasonable time. When in the middle of construction, that reasonable time would be relatively short. Otherwise, it would result in unacceptable delays in the completion of the project. However, in the case at hand, the construction project has long been completed. Also, the purportedly defective work has already been rectified. Consequently, there is no risk of delayed construction or further deterioration. As such, in my view, what constitutes referral to consultation within a reasonable time is substantially different now, as compared to mid-project. For the reasons already given in determining questions 2(a) and (b), dealing with delay, the circumstances of the case at hand are such that the delay was not unreasonable. The IWK could still have referred its current claim to a consultant at any time.

[99] If that had been done, then the matter had gone to mediation, and the notice deadlines had been respected, arbitration would clearly be mandatory if chosen by either party. If that three stage process was started now, and unfolded the same way, arbitration would still, in my view, be mandatory.

[100] Therefore, determining whether arbitration is mandatory without IWK having involved the consultant and/or the project mediator depends upon whether I can, in the circumstances of this case, dispense with the first two stages.

[101] IWK argues the consultant and mediation stages are clearly futile. Is that the case? If so, does it justify and permit a direct referral to arbitration?

[102] There is some authority supporting a conclusion that nonbinding stages of the ADR process can be dispensed with. ***Cityscape Richmond Corp. v. Vanbots Construction Corp.***, [2001] O.J. No. 638, dealt with a standard construction contract containing the same dispute resolution provisions as the Trade Contract in the case at hand. In ***Cityscape***, the consultant had refused to provide a certificate of substantial performance. There were discussions between Cityscape and Vanbots regarding submitting their disputes to mediation. At one point, it appeared that they had reached agreement to do so. However, Vanbots changed its position. It refused to participate in mediation and only agreed to proceed to arbitration on some issues. The mediation stage was not invoked in relation to any of the issues. Approximately 25 consolidated lien actions were before the Court. Cityscape brought an application before the Court for an order requiring all of the issues in dispute between it and Vanbots to be referred to arbitration. The Court granted that application despite the mediation stage provisions not having been fully complied with.

[103] At paragraph 19, it stated the principles upon which its decision was founded. Paragraph 19, with case references omitted, reads as follows:

> "In determining the arbitration application, it is helpful to begin with a brief statement of its essential principles. The Act entrenches the primacy of arbitration proceedings over judicial proceedings once the parties have entered into an arbitration agreement. This legislation provides a forceful statement signalling a shift in public policy and attitude towards the resolution of disputes in civil matters through consensual dispute resolution mechanisms. … The Act is designed to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters and to require them to hold to that course once they have agreed to do so. … Section 8(2) of the Act empowers the arbitral tribunal to determine any questions of law that arise during the arbitration. Section 17(1) of the Act empowers the tribunal to decide questions of its own jurisdiction including questions respecting the existence or validity of the arbitration agreement itself. Section 31 gives the tribunal broad powers to decide disputes in accordance with law and equity and makes reference to the power to order specific performance, injunctions and other equitable remedies. Arbitration clauses are to be given a large, liberal and remedial interpretation to effectuate the dispute resolution goals of the parties. They survive the completion of the contract as well as a fundamental breach. … ."

[104] The ***CCA*** and the Rules for Arbitration, which apply in the case at hand, contain similar powers for arbitrators. Therefore, in my view, these comments are applicable to the case at hand; and, the arbitration clause in the case at hand should also be given a large, liberal and remedial interpretation.

[105] I agree with the submission of Northfield that ***A.G. Clark Holdings Ltd. v. HOOPP Realty Inc.***, 2013 ABCA 101, is distinguishable on the basis that the parties had, by agreement, altered the standard form construction contract to remove the reference to the parties being able to refer unresolved disputes to the Courts if a notice of arbitration was not given within the specified timeframe.

Instead, they agreed to an arbitration clause which required all unresolved disputes to be referred to arbitration. Therefore, ***Clark Holdings*** is of little assistance.

[106] Either party may reject the finding of the Consultant simply by giving notice in writing that it disputes that finding. IWK's claim exceeds $1,700,000. Northfield strongly advances the argument that the claim is barred by the 2008 Release. Therefore, more likely than not, the findings of the consultant would be rejected by one of the parties.

[107] The Rules for Mediation and Arbitration of Construction Disputes apply to disputes under the Trade Contract. Pursuant to Clause 11.1 of those Rules, "[e]ither party may withdraw from the mediation at any time without reason". The parties' positions are at polar opposites, and each party holds strong to its position. They cannot even agree on disclosure requirements. Therefore, more likely than not, at least one party will choose to withdraw from the mediation without a resolution being reached.

[108] As such, I my view, the first two stages of the ADR process are futile.

[109] It is important to consider the long history of the communications and interactions between the parties, through the lawyers and insurer, relating to the

resolution of the current claim. Those were described in answering Question 2(b). My comments in relation to those communications and interactions also apply to the current question.

[110] I also highlight that Northfield did not, at any point, indicate that it wished to proceed expeditiously to any part of the ADR process. It delayed advising whether it agreed to waive the Consultant stage. It did not agree to mediation. It is clear that it does not want the matter to be referred to the consultant or mediator. Yet, it raises the failure to engage those non-binding stages as being fatal to a mandatory ADR process. More likely than not, it does so only because it no longer wishes to be bound by the agreement to refer disputes to arbitration, not because it has been prejudiced by the skipping of the consultant and mediation stages.

[111] I make this finding despite Northfield's submission regarding the benefits and purposes of the first two stages. It argues that they allow for incremental steps and investigation. In my view, Northfield appeared content throughout to proceed in the incremental manner which resulted from IWK's accommodation of Northfield's multiple requests for more time. In addition, Northfield has had the opportunity to engage in investigation since it was given notice of a potential claim in September 2012.

[112] ***CAA*** s. 8 provides that a court may intervene "in matters governed by this Act" to, among other things, "assist the arbitration process" and "prevent the manifestly unfair treatment ... of a party to an arbitration agreement". The express authority to intervene "in matters governed by this Act", in my view, indicates that the intervention referred to includes intervention prior to any arbitrator having been appointed, and includes the ability to appoint, or to refuse to appoint, an arbitrator to prevent such unfair treatment.

[113] I have found that Northfield has no desire to participate in either of the consultant or mediation stages, and that those stages would be futile. However, if the parties change their views on the utility of mediation, they can always agree to adjourn arbitration and refer the matter to mediation, without prejudice to their right to continue the arbitration should mediation fail, by virtue of s. 39 of the ***CAA***.

[114] Northfield kept IWK in the dark about its position on the value of the first two ADR stages until it raised the release defence. Northfield advised IWK, in Mr. Quigley's letter to Bruce Outhouse, QC dated September 8, 2015, which was copied to Mr. Grant, that it was of the view that the 2008 Release may bar IWK's current claim. That is the first time they raised the release defence. It was almost

two years after the written notice of claim, and almost three years after IWK gave Northfield notice of a potential claim.

[115] By then the ADR process had already been delayed by at least two years.

[116] In addition, Northfield did not raise any issue in relation to the ADR provisions applying to the current claim until the within Application was filed. Its comments up until that point regarding whether or not the nonbinding stages should be waived indicated that it was of the view that the ADR provisions did apply. That added to the reasonableness of IWK holding off on giving formal notice of arbitration.

[117] In my view, in these circumstances, it would constitute manifestly unfair treatment of IWK to insist upon it going through the processes of the consultant and mediation stages, before appointing an arbitrator, simply to satisfy the formalities of the ADR process provided for in the Trade Contract. It would only serve to increase costs and further delay IWK's access to arbitration, the dispute resolution mechanism which the parties agreed could be selected by either of them.

[118] In my view, in the circumstances of the case at hand, it would be interpreting the arbitration clause too narrowly to conclude that IWK has lost its right to choose arbitration to resolve its current claim simply because it did not institute the

preliminary ADR stages which the late communicated position of Northfield has rendered futile, particularly when it has been accommodating Northfield's preferred approach to attempting an amicable resolution of the dispute.

[119] Consequently, in my view, in the circumstances of the case at hand, IWK's failure to invoke the first two stages does not eliminate its contractual right to choose to have its claim determined through arbitration.

QUESTION 3(a): WOULD THE ARBITRATION PROCESS RESULT IN MANIFESTLY UNFAIR OR UNEQUAL TREATMENT OF NORTHFIELD CONSIDERING THE POSSIBLE EXISTENCE OF THIRD PARTIES AGAINST WHICH NORTHFIELD MIGHT CLAIM CONTRIBUTION OR INDEMNITY, BUT COULD NOT BE ADDED AS PARTIES TO THE ARBITRATION?

[120] Northfield points to third parties which may bear some liability in relation to IWK's current claim, including the construction manager, the designer, the manufacturer and supplier of the curtainwall system, and other trades involved in the construction. It points out that it does not have the ability to commence arbitration proceedings against any of these third parties, and they cannot be included in the arbitration between it and IWK.

[121] It argues that, because of this, it would be manifestly unfair to it to be forced to proceed to arbitration, and that the most proper and fair forum to determine IWK's claim would be the courts, where these third parties could be added.

[122] In support, it provided the case of ***Carillion Construction Inc. v. Imara (Wynford Drive) Ltd.***, 2015 ONSC 3658. That case included consideration of construction contracts in relation to four components of the project with the same dispute resolution provisions as the Trade Contract in the case at hand. The Court refused an application to stay court proceedings and refer to arbitration.

[123] The circumstances of the case were as follows. The company who was the construction manager/general contractor, under five different contracts with the owner/developer, brought five court actions on its five liens. The owner/developer brought an action against it for breach of contract and negligence. Then, more than 50 liens were registered against the property and more than 35 separate lien actions were commenced and consolidated. The owner/developer sought to stay the five actions of the construction manager/general contractor, and to refer those to arbitration.

[124] The owner/developer had not given notice to refer to these dispute to arbitration. It starting its own action was inconsistent with any election to arbitrate. It had waited seven months following commencement of litigation in court to bring

its motion to stay and refer to arbitration. It is in the interim that the multiple lien claims were issued.

[125] The Court refused to stay the proceedings before it for the following reasons. The owner/developer waiting seven months after the action was started before applying for a stay resulted in the large quantity of the lien claimants being added. Having started its own action, the owner/developer had waived arbitration and was estopped from invoking it. If the stay was granted, there would still be over 50 liens claims left in court, which the general contractor/construction manager would have to respond to. In those circumstances, being forced to participate in the arbitration and, also litigate the same issues in court with the subcontractors would constitute unfair treatment of the general contractor/construction manager.

[126] In my view, the situation in the case at hand is far different. IWK has not started any action. No one else has started any action connected to IWK's claim. IWK has made it clear from the start that it wished to proceed by way of the ADR process. There are no additional claims filed which Northfield has to deal with involving the same issues. Therefore, in my view, ***Carillion*** is easily distinguishable, and, the same result need not obtain in the case at hand.

[127] Northfield knew, when it agreed to the arbitration clause, that arbitration of a claim advanced by IWK would not include third parties who potentially shared liability, unless all were in agreement. It can still occur by agreement of all parties.

[128] It would not be uncommon for the third parties mentioned by Northfield to potentially bear some liability in relation to claims made against it.

[129] Paragraph 9.2.1 of the Trade Contract provides that a party reimbursing another for wrongful acts or neglect "shall be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party". In my view, that clause addresses such prejudice that may arise as a result of being unable to insist upon inclusion of third parties in the arbitration process.

[130] For these reasons, in my view, referring this matter to arbitration would not result in manifestly unfair or unequal treatment of Northfield as a result of the possible existence of third parties against which it might claim contribution or indemnity, but which could not be added as parties to the arbitration.

QUESTION 3 (b): WOULD THE ARBITRATION PROCESS RESULT IN MANIFESTLY UNFAIR OR UNEQUAL TREATMENT OF NORTHFIELD CONSIDERING THE INABILITY TO COMPEL PRODUCTION AND/OR EVIDENCE FROM PERSONS NOT MADE PARTIES TO THE ARBITRATION, AS WELL AS THE INABILITY TO APPEAL THE ARBITRATOR'S DECISION?

[131] Similarly, Northfield knew, when it agreed to the arbitration clause, that the arbitrator may not be able to compel production and/or evidence from persons who are not parties to the arbitration.

[132] Although, there are limitations on the ability of an arbitrator to compel the attendance of a witness, he or she may, pursuant to Clause 14.7 of the Rules for Arbitration, "order witness to appear and give evidence". In addition, section 30 of Schedule A to the ***CAA*** provides that the arbitrator may call a witness on its own motion.

[133] Pursuant to Clause 12.1 of the Rules for Arbitration, the arbitrator may order a party to produce documents. The documents in the possession of IWK would be likely to provide Northfield with information regarding potential liability of third parties. That information would provide a springboard for Northfield to bring its

own claims against third parties and obtain the disclosure required to pursue such claims.

[134] These alternate avenues do not completely relieve difficulties arising from the limitations on compelling production and evidence in arbitration. However, these limitations are part of the ADR process the parties agreed to.

[135] The inability to appeal the arbitrator's decision was also known to the parties when they agreed to the arbitration clause. They had the option of altering that provision if they were of the view that it would be unfair or amount to unequal treatment.

[136] Consequently, in my view, none of these limitations constitute manifestly unfair or unequal treatment of Northfield.

QUESTION 3 (c): WOULD THE ARBITRATION PROCESS RESULT IN MANIFESTLY UNFAIR OR UNEQUAL TREATMENT OF NORTHFIELD CONSIDERING THAT THE MATTER INVOLVES THE DETERMINATION OF A DEFENCE BASED ON A SEPARATELY EXECUTED RELEASE OF PREVIOUS CLAIMS MADE UNDER THE TRADE CONTRACT?

[137] I have already ruled that the arbitrator will be able to make a determination on the release defence. Consequently, Northfield will be able to advance the defence in arbitration, and no unfair or unequal treatment will arise.

QUESTION 4: SHOULD THE DISCLOSURE ISSUES THAT HAVE ARISEN BETWEEN THE PARTIES BE DETERMINED BY AN ARBITRATOR?

[138] Northfield has requested, from IWK, production of information which it considered relevant, including: contracts between IWK and other trades and consultants; the construction manager's complete file; the architect's complete file; plans, photos, drawings, project invoicing, manuals, and work progress schedules; and, information regarding work done and complaints made prior to the July 2008 mediation.

[139] IWK took the position that the requested information was irrelevant to the question of whether or not the matter should be referred to arbitration. It pointed

out to Northfield that an arbitrator had the authority to direct such disclosure. It emphasized that the ADR process had been delayed long enough and there was no need to further delay it to allow for receipt and review of the volumes of information requested, prior to referring the matter to arbitration.

[140] I agree that the information requested by Northfield is not required to determine whether or not the matter should be referred to arbitration. In my view, the issue of further production is properly to be dealt with by an arbitrator.

QUESTION 5: IF AN ARBITRATOR OR ARBITRATORS SHOULD BE APPOINTED, WHO SHOULD BE APPOINTED?

[141] In light of my conclusions in relation to the previous questions, and for the reasons I arrived at those conclusions, in my view, this matter should, and is to, be referred to arbitration.

[142] IWK had previously suggested the appointment of the single arbitrator it had selected. However, in the course of the hearing of this Application it consented to Northfield's request that, if the matter was to be referred to arbitration, it should proceed before a three-member panel, not a single arbitrator.

[143] Clause 8.2 of the Rules for Arbitration provides that: "The arbitration shall be conducted before 3 arbitrators … if the amount in dispute exceeds $250,000,

and one of the parties gives written notice of a request for 3 arbitrators within 15 days after the arbitration commences." Even though that written notice was not given, in my view, given that the claim exceeds $1,700,000, it is most appropriate that it be determined by a panel of three arbitrators.

[144] The procedure for appointment of the three arbitrators is contained in Clause 8.4 of the Rules for Arbitration. Each party is to appoint one arbitrator within 30 days after the arbitration commences. Those two appointed arbitrators are to make reasonable effort to reach agreement on a third arbitrator within 45 days of the commencement of arbitration. That third arbitrator is to be the chairperson.

[145] Clause 7.1 deems the arbitration to have commenced on the date Northfield would have received notice of arbitration. However, in the case at hand, the fact that the first two stages of the ADR process were not invoked has created dispute and/or confusion in relation to whether or not the Notice of Arbitration was valid. Therefore, in my view, the time limits for appointment of arbitrators should start running from the date this decision is delivered to the parties, through their lawyers.

[146] Subject to a party being unavailable to receive an electronic copy of this decision, it is expected that it will have been delivered electronically to the parties on October ___, 2016.

CONCLUSION

[147] Based upon the principles and points noted, and for the reasons given in answering the questions in issue, I grant IWK's application to appoint arbitrators to determine its claim against Northfield.

[148] The arbitration is to be conducted by 3 arbitrators.

[149] Each party shall appoint one arbitrator within 30 days after delivery of this decision, which delivery is expected to be effected October 19, 2016.

[150] The 2 appointed arbitrators shall make every reasonable effort to reach agreement on, and select, a third arbitrator within 45 days after delivery of this decision. The third arbitrator shall be chairperson.

COSTS

[151] Both parties agreed that the successful party in this application should receive costs in accordance with Tariff C in the range of $1,000 to $1,500.

[152] Both parties submitted substantial briefs. IWK in particular provided relatively voluminous affidavits. Therefore, in my view, costs approaching the higher end of the range are warranted.

[153] I, therefore, order that Northfield pay costs to IWK in the amount of $1,400 forthwith.

ORDER

[154] I ask counsel for IWK to prepare the order.

Pierre L. Muise, J