CITATION: Orion Travel Insurance Co. v. CMN Global Inc., 2023 ONSC 1527
COURT FILE NO.: CV-CV-22-00683374-0000
DATE: 20230306

2023 ONSC 1527 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ORION TRAVEL INSURANCE COMPANY, Applicant

– and –

CMN GLOBAL INC., Respondent

BEFORE: Justice E.M. Morgan

COUNSEL: *Graeme Hamilton, Glenn Gibson, and Emily Paslawski*, for the Applicant

Samuel Robinson and Alexandra Heine, for the Respondent

HEARD: March 2, 2023

APPLICATION TO SET ASIDE ARBITRAL AWARD

[1] The Applicant applies under sections 45 and 46(1)6 of the *Arbitration Act, 1991*, SO 1991, c. 17 (the "Act") for leave to appeal and for an order to set aside an arbitral award dated May 31, 2022 and a costs award dated November 24, 2022, both issued by the Honourable Stephen T. Goudge, K.C. (the "Arbitrator").

I. Background

[2] The Applicant is in the business of selling and underwriting travel insurance. The Respondent was the Applicant's claims administrator for roughly three and a half years, between September 1, 2013 and April 30, 2016. In the underlying action, Court File No. CV-17-569878, the Respondent claimed against the Applicant for payment of unpaid invoices and the Applicant counterclaimed against the Respondent for breach of contract for mishandling over 8,000 individual insurance claim files.

[3] A mandatory mediation session was conducted by the Arbitrator on September 10, 2019. When that session did not conclude with a settlement, the Arbitrator offered his services to the parties as a mediator-arbitrator. A written arbitration agreement was never entered into, but after preliminary discussions between the parties and the Arbitrator, both parties agreed to engage the Arbitrator in a mediation-arbitration process. That agreement was confirmed in a letter to the parties from the Arbitrator dated January 24, 2020.

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[4] The process conducted by the Arbitrator unfolded in stages. In a series of preliminary meetings, submissions, and interim rulings, the Arbitrator issued procedural directions which set the process, guided the parties, and to which both parties agreed and participated in without objection.

[5] The Arbitrator bifurcated the submissions and decision-making into a liability stage and a quantification of damages state. After completing the liability stages in writing and receiving two rulings thereon, the parties made written submissions on damages in August 2021. An arbitration hearing was then held over two days starting on October 29, 2021, with each party calling one witness. The witnesses each testified in chief and were cross-examined by the opposing side's counsel. Each side's counsel also delivered opening and closing submissions. The transcript of the hearing shows that neither party resiled from or sought to compromise the positions taken in their written submissions on quantum of damages.

II. The arbitral procedure

[6] In a mutually agreed approach, the parties' joint expert, PriceWaterhouseCooper, reviewed the 8,502 claims files in issue and created a representative sample of 718 cases. On July 13, 2020, the Applicant delivered to the Respondent a spreadsheet containing data for each of the 718 cases that included any information that could point to the availability of recovery from government health insurance plans or other insurers.

[7] It was agreed between the parties that this database would form the basis of the analysis of the disputed accounts. Once the magnitude of the dispute became apparent, the parties realized that a mediated settlement would be unlikely. After a case conference with the Arbitrator held on August 27, 2020, the parties submitted briefs defining the issues that needed to be resolved and proposing a process for their resolution. The Arbitrator then met with the parties on September 21, 2020 to discuss their views as to the most appropriate procedure to follow.

[8] On September 23, 2020, the Arbitrator wrote to the parties with his view of the best process to determine the liability issues. These issues are identified as: (i) the circumstances in which the Respondent may be liable to the Applicant in respect of specific case files; and (ii) the categories of damages that the Applicant may claim from the Respondent. Counsel for the parties agree that this latter determination required the Arbitrator to interpret a limitation of liability clause in the Administrative Service Agreement between them, and, in addition, to decide wither the Respondent had a valid limitation defense.

[9] In this same correspondence, the Arbitrator stated: "I will then determine if liability and categories of damages can be determined on that basis or if further information is required. If nothing is required, I will proceed to render my decision on these two matters. That will leave to be decided the process for and the determination of the quantum of any damages that Orion may be entitled to."

[10] The parties proceeded to make written submissions on these issues. Based on the written submissions, the Arbitrator made two interim rulings. In the first ruling, he identified six scenarios which would justify a finding that the Respondent had mis-handled a particular file and was liable for breach of contract. He labelled these scenarios “pathways to liability”, and made it clear that the Respondent was only liable to the Applicant if a given case or file fell within one of the identified pathways.

[11] In his second interim ruling, the Arbitrator interpreted the limitation of liability clause in the Administrative Service Agreement. He held that the Respondent is not liable for indirect losses and loss of profit suffered by the Applicant. The Arbitrator reasoned that all damages found payable by the Respondent must be calculated as a reimbursement of fees paid or an abatement of fees payable by the Applicant to the Respondent under their governing agreement. At the same time, the Arbitrator rejected the Respondent’s limitations defence.

[12] Following issuance of his second interim ruling, the Arbitrator invited submissions from each of the parties explaining their views on “how best to determine the quantum, if any, which Orion is entitled to recover” in relation to the pathways to liability. In this respect, he identified the questions to be decided as being: (i) how many cases fall within a pathway to liability, and (ii) what damages (i.e. how much reimbursement or abatement of fees) should be assessed for each case that falls within a pathway. He then invited the parties to provide further written briefs setting out their respective views of the remaining issues and the appropriate procedure for resolving them.

[13] On July 16, 2021, the Arbitrator issued another procedural direction setting out the procedure and timetable to be followed in bringing the dispute to a final conclusion, He directed the Applicant to identify the cases in the PriceWaterhouseCooper sample database for which it claimed reimbursement or an abatement. He further asked the Applicant to state which of the pathways to liability it viewed each of those cases falling within, and to submit its view of the amount of the reimbursement or fee abatement each of those cases requires. The Respondent was then directed to provide its response to the Applicant’s damages submissions three weeks later.

[14] The Applicant’s written submissions on damages were delivered on August 6, 2021. In those submissions it incorporated into the PriceWaterhouseCooper data certain changes that reflected the Arbitrator’s interim rulings. It then used the database to argue that 93.04% of cases in the data sample fell within one or the other of the pathways to liability, and put forward a claim for 100% reimbursement or abatement of fees in respect of those cases. This method of quantification brought the Applicant’s damages claim to $2,948,569.96 for all of the 8,502 claims in issue.

[15] Additionally, in its submissions the Applicant argued that there were another 849 claims that are disputed, representing a claim for an additional $486,761.20 in damages. In total, the Applicant quantified its damages claim as $3,435,331.16, plus pre-judgment interest and costs.

[16] On September 3, 2021, the Respondent delivered its responding submissions on damages. In those submissions it, too, relied on the PriceWaterhouseCooper database as submitted by the

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Applicant, but it disagreed with the Applicant's assessment that 93.04% of the sample cases fell within a pathway to liability. Rather, according to the analysis submitted by the Respondent, only 13.78% of the sample cases fell within one of the pathways to liability.

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[17] It was also the Respondent's view that, given the work done for the fees in each case, the appropriate reimbursement or abatement for any case demonstrating a pathway was $50 each. The Respondent also objected to the inclusion of the Applicant's newly identified 849 cases. In total, the Respondent put its liability to the Applicant at $58,578.78. The Respondent submitted that this amount should be set off against $1,289,232.00 still owed to it by the Applicant for as yet unpaid invoices. It then added pre-judgment interest and costs to its claim.

[18] Having confirmed receipt of each side's written submissions, the Arbitrator invited counsel for the parties to a meeting on October 19, 2021 to discuss the procedure for an ensuing hearing. Following this meeting, the Arbitrator summarized the procedure in a memo to the parties. He indicated that the hearing would entail opening submissions, presentation of evidence by each side, and closing submissions. In this correspondence, the Arbitrator made it clear that the parties were engaged in a contested arbitration, stating that he would "engage in mediation only if it appears as the case unfolds that at an appropriate point that might be successful."

[19] The hearing took place over two days on October 29 and 30, 2021. In addition to their respective opening and closing submissions, each party called one witness and cross-examined the other side's witness. Neither party indicated that the Arbitrator should convert the procedure to a mediation, as there were no compromise proposals put forward with respect to quantification. Each party proceeded to provide evidence and arguments in support of the positions they had taken in their written submissions.

[20] As indicated, the Arbitrator issued his final decision on quantification on May 31, 2022. He then issued his decision on costs on November 24, 2022.

III. The Application issues

[21] With this procedural background in mind, the Applicant has broadly identified three issues to be considered:

a) Should the Arbitrator's award be set aside under section 46(1)6 of the *Arbitration Act* on the grounds that he did not treat the Applicant fairly and equally and did not provide it with an opportunity to present its case?

b) Should the Arbitrator's award be set aside under section 46(1)3 of the *Arbitration Act* on the grounds that he exceeded the scope of his jurisdiction? and

c) Should the Arbitrator's award be set aside under section 45(5) of the *Arbitration Act* on the grounds that his reasons for decision were insufficient or non-independent?

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[22] Before addressing these specific concerns, it is worth noting the most recent observations by the Court of Appeal on applications of this nature seeking to review an arbitral decision. In *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861, at para 3, Harvison-Young JA advised courts to take a cautious approach to such review requests, and to keep in focus the policy objectives of the *Arbitration Act* in preserving the very advantages that arbitration of disputes offers to parties:

> [T]he Supreme Court of Canada has stated repeatedly, judges exercising their appellate powers under s. 45 of the *Arbitration Act* should be cautious about extricating questions of law from the interpretation process: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 54-55; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 45-47. Failing to exercise such caution will result in the very inefficiencies, delays and added expense that choosing an arbitral process seeks to avoid.

a) Insufficient/unequal opportunity to present the case

[23] The Applicant submits that the Arbitrator breached its right to procedural fairness by failing to provide it with an opportunity to make submissions regarding the final quantification of damages. The Applicant also contents that it was required to make submissions without knowing he case it had to meet.

[24] The record of the proceedings that is before me does not support any of these submissions. With all due respect to the Applicant's efforts here, it is hard to see how these challenges to the arbitration process can be levelled with any real credibility. Respondent's counsel in their factum characterize the procedure designed and followed by the Arbitrator as "textbook", and I would have to agree.

[25] Both in writing and at the two-day arbitration hearing, the Applicant and the Respondent were given equal opportunities to address the quantification of damages. Indeed, given that the liability issues were resolved in the interim rulings, the hearing was entirely devoted to the issue of damages. They both agreed on the methodology to be employed in calculating damages, and they both worked from the agreed-upon database of sample cases. The transcripts of the arbitration hearing demonstrate that the Applicant and the Respondent were treated equally and that each was entirely aware of the procedure that they had together devised with the Arbitrator.

[26] Counsel for the Applicant introduced his submissions by indicating that "the assessment of damages in this case involves multiplying the number of cases in which [the Respondent] has breached its contractual obligations to [the Applicant] by the fee abatement per case, and that the parties agree would get you to a damages figure." He went on to say that this formula provides a "very helpful framework, Mr. Goudge, for the specific factual issues that you need to resolve today." To say that the Applicant was somehow unaware of the damages case it had to make or that it did not have the opportunity to make that case is simply not plausible given the record before me.

[27] Likewise, to say that the parties were treated unequally when they both employed the identical formulation of pathways and applied it to the identical data set makes no sense. What the Applicant seems to dislike about the hearing is the result, not the process. The Arbitrator accepted the Respondent's figures over the Applicant's, but he applied an entirely even-handed process in arriving at that conclusion.

[28] Additionally, the Applicant makes two specific points about the way the final judgment proceeded from the hearing. The first is that the Arbitrator's reliance on the data in the updated PriceWaterhouseCooper analysis was a denial of the Applicant's right to be heard because that updated analysis was not included in the joint book of documents or marked as an exhibit at the hearing. Counsel for the Respondent calls this an elevation of form over substance, which is the kindest description one can think of for this argument. The updated claims analysis was provided to the Arbitrator by the Applicant's own counsel and formed a part of the Applicant's written submissions. Having been produced by the Applicant, it was also relied on by the Respondent in its submissions. It was referred to by counsel for both parties in their oral submissions.

[29] In rejecting the Applicant's argument on this point, I am mindful of the nature of arbitrations generally as being less formality-driven than the trial process. This court has pointed that out on any number of occasions, perhaps most pointedly in *Nasjjec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978, at para 40:

> While the requirements of natural justice extend beyond the basic principles set out in the Act, it is important to remember that an arbitration is a more informal process than a court proceeding. Furthermore, it is usually final. In such circumstances, the issue of fairness and equality must be considered having regard to the context of the proceeding.

[30] In the context of the hearing conducted by the Arbitrator, the fairness and equality involved in relying on the updated database – the very material that both the Applicant and the Respondent relied upon in making their submissions – is not in doubt. If that updated analysis was introduced by the Applicant and relied on by the Applicant, but did not get marked as a hearing exhibit, it can only be because Applicant's counsel neglected to ask for it to be so marked. There is no merit to the argument that proceeding as if it was a part of the record was unfair to the Applicant or undermined due process.

[31] The Applicant also contends that it was denied the right to be heard because the evidence it submitted to the Arbitrator was not all of the evidence it could have presented on the damages issue. The point seems to be that the 'right to be heard' entails not only the opportunity to make one's case, but the opportunity to re-make one's case after the fact and one has thought about the shortcomings of one's argument a little more. With respect, that is not how the right to be heard operates. The parties here are sophisticated businesses with experienced and well-resourced counsel.

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[32] The Applicant had the same opportunity to construct its arguments and to put them forward in writing and orally at the hearing as the Respondent did. Applicant's counsel never requested more time to prepare its argument, and the transcript shows that the one time he asked for more time to make his oral argument on damages he got the time he asked for. The transcript of his submissions does not suggest that he ran out of time to make points that he otherwise would have made. The Arbitrator, an experienced jurist, provided both sides with advance notice of the issues and the lead time that they needed to marshal all of their evidence and construct their arguments.

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[33] If, after realizing the frailties of his case, Applicant's counsel has now thought of an approach that could have been taken but was not, that does not amount to a failure of natural justice and a denial of the right to be heard. Otherwise, arbitral process would be endless as arbitrators could never with certainty draw it to a close.

b) Failure to conduct a mediation

[34] Turning to the Applicant's arguments regarding the mediation component of the process, Applicant's counsel observes that the Arbitrator was first appointed as mediator, and that even after the matter was identified as a contentious one in need of some adjudication he still fashioned himself a mediator-arbitrator. It is the Applicant's position that in failing to engage in any mediation the process undermined the Applicant's rights. It is the Applicant's further position that it was, as Applicant's counsel puts it in his factum, "unclear during the hearing whether the arbitrator was acting as a mediator or an arbitrator."

[35] Respondent's counsel submits that the parties engaged the Arbitrator to act as mediator-arbitrator in the sense of engaging in mediation *or* arbitration as the case called for, but not both. That only makes sense. In a series of correspondence and rulings, the Arbitrator set out for the parties and their counsel precisely the procedure he would be following at every stage. These were adjudicative procedures, as the parties evidenced no desire to engage in compromise.

[36] The Arbitrator expressly stated in his direction of August 31, 2020 that he was not proceeding as a mediator. He reiterated in the memo that followed the October 19, 2020 meeting with the parties that he would only mediate the claims if it transpired that there was the possibility of a compromise resolution. Neither of the parties ever suggested that such a possibility had materialized, and neither complained during the course of the process that the arbitral procedures were unsatisfactory.

[37] Mediation is not an obligatory step in the arbitral process if the agreement on which the arbitration is based does not make it so: *PQ Licensing SA v LPQ Central Canada Inc*., 2018 ONCA 331. Courts have, of course, held that the failure to mediate and proceeding straight to a contentious arbitral process is a procedural defect, but that is when the parties' agreement shows that "they intended all issues to be mediated": *Hercus v Hercus*, [2001] OJ No 534, at paras 85, 88, 100 (SCJ). That is clearly not the case here. The record of correspondence and rulings from the Arbitrator, with full participation and input from both parties and their counsel, shows the opposite.

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[38] The parties intended the issues to be adjudicated by the Arbitrator, having given up on mediation relatively early in the process. It was neither undecided nor unclear how the Arbitrator was going to proceed.

[39] Applicant's counsel started his final submissions at the arbitral hearing by saying: "So, Mr. Goudge, there are four issues for you to decide as part of the assessment of damages in this matter…" There is no sense that Applicant's counsel did not know, and did not agree, that what the Arbitrator set out to do was to adjudicate the dispute, not to mediate a compromise between the parties. It is an arbitrator, and not a mediator, who confronts "issues…to decide as part of the assessment of damages". The arbitration process was laid out clearly and concisely by the Arbitrator, the parties and their counsel were fully aware of the process, and both sides agreed to it.

c) Inadequate and non-independent reasons for decision

[40] Finally, the Applicant submits that the final reasons for decision issued by the Arbitrator are "woefully inadequate" and "manifestly deficient". While the adjectives deployed in this bit of advocacy may be overstated, it is legitimate to at least ask if the Arbitrator's reasons are adequate to the task. The question is whether, in the context of the evidentiary record, the Arbitrator's two interim decisions, his procedural orders and directions, the issues in dispute, and the submissions of the parties, the reasons for decision were sufficient to show that he understood the substance of the matter and addressed the key issues: *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, at para 101.

[41] The courts have said that the applicable test is a functional one – i.e. do the reasons express enough to inform the parties of why the decision was made: *R. v. Sheppard*, [2002] 1 SCR 869, at para 55. The question is one of intelligibility, not exhaustiveness or eloquence of expression: *Ibid.*, at para 26.

[42] Reading the Arbitrator's reasons as a whole, I do not find them unintelligible. They are relatively short, but when it comes to legal writing that is more of a blessing than a curse.

[43] One often hears that judges (whether in a public judicial or private arbitral setting) should write for the parties and not for the lawyers or the legal community; see, e.g. Cheryl Stephens, "Plain Language Legal Writing" (2004) Canadian Bar Association, online: <Canadian Bar Association - Plain Language Legal Writing: Part I – Writing as a Process (cba.org)>. That is what the Arbitrator did, keeping in mind that the parties themselves are not unsophisticated business people. To his credit, the Arbitrator kept his reasons "clear, coherent and concise", ensuring that the parties would not lose their focus the way parties often do in trying to make their way through voluminous judicial tomes: see Lord Burrows, "Judgment Writing: A Personal Perspective", [2021] *Annual Conference of the Superior Courts in Ireland*, p. 2.

[44] In his factum, Respondent's counsel has summarized in one paragraph the content and trajectory of the Arbitrator's reasons. It is an impressively precise, single paragraph rendition:

> He started his reasons by summarizing the interim decisions (paras 2-4 of his final decision); summarizing the process that led to the arbitration hearing and what occurred at the arbitration hearing (paras 5-7); setting out the remaining issue being the “determination of the total fee abatement to which [the Applicant] is entitled for breach by [the Respondent] of [the Respondent’s] contractual obligations” (paras 9-10); and setting out his methodology that determination (paras 11-15). He then set out his reasons for finding that the appropriate fee abatement for the cases that [the Respondent] failed to fulfil its obligations was $50 (paras 17- 26). Finally, he identified each pathway to liability and, based on the data contained in the Updated Claims Analysis, explained the number of cases that fell within that pathway and how he arrived at that determination (paras 27-47). He concluded that 99 cases in the [PriceWaterhouseCooper] sample fell within one of the pathways to liability, which constituted 13.79% of the sample (paras 47-48). Applying the formula that both parties had endorsed in their submissions, he calculated that [the Applicant] was entitled to a total of $58,621 to be set off against the unpaid invoices it owed to [the Respondent] para 49). He held that in the end, [the Applicant] owed [the Respondent] $1,230,611 (para 50).

[45] While one could spend many more pages elaborating on any given point, in my view nothing more need be said to explain the Arbitrator’s conclusion and how he got there. What the Supreme Court of Canada has stated of trial judges is equally applicable to an arbitrator: “There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel”: *R. v. Dinardo*, [2008] 1 SCR 788, at para 30. All that is required is that “the reasons show that the judge has seized the substance of the issue”: *R. v. R.E.M.*, [2008] 3 SCR 3, at para 50.

[46] Although the Arbitrator’s reasons for decision borrow from and track the submissions made to him by the Respondent, they do not reproduce those submissions verbatim as in *Cojocaru v British Columbia Women’s Hospital and Health Centre*, [2013] 2 SCR 357. Rather, the Arbitrator took the submissions of the successful side and integrated them into his own thinking on the subject.

[47] Like many judgments, the Arbitrator’s reasons read much like the written brief he favored. They are a “collaborative [product] that reflect[s] a wide range of imitative writing practices, including quotation, paraphrase, and pastiche” taken from that which it effectively imitates: *Ibid.*, at para 33, quoting Simon Stern, “Copyright Originality and Judicial Originality” (2013), 63 *U.T.L.J.* 1, 2. In what was essentially a detailed accounting dispute pertaining to thousands of insurance files, one cannot fault the Arbitrator for preferring clarity of logic over novelty of expression. Excavating the untapped poetics of data in a PriceWaterhouseCooper spreadsheet could challenge even the most creative among us.

[48] At the hearing before me, Applicant’s counsel clarified that what perturbs him and his client is not so much that the Arbitrator followed the submissions of the Respondent; he conceded that if that were the sole issue it would not be grounds for review or appeal. Rather, Applicant’s

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counsel submitted that in at least one instance the Arbitrator appears to have borrowed language from the Respondent's mediation brief submitted at an early stage in the process, and in doing so recited facts which later turned out to be erroneous.

[49] If that is the case, it is an unfortunate drafting error and a potential mistake of fact built into the reasons for judgment. But the Applicant does not challenge the supposedly erroneous fact; it challenges the source of the error. That is, the mistake, such as it is, is apparently a factual one that is not crucial to the judgment's ultimate conclusion. Instead, Applicant's counsel frames this argument as one of draftsmanship, or insufficiency of independent reasons. The fact that the Arbitrator recites a 'fact' that must have come directly out of the Respondent's early mediation brief is presented in support of the argument about the lack of independence in formulating the reasons.

[50] An adjudicator's copying from other judgments, external sources, or the parties' written briefs, is not in and of itself problematic. As the Supreme Court observed in *Cojocaru*, at para 33, "Whether acknowledged or not, they are an accepted part of the judgment-writing process and do not, without more, render the proceeding unfair."

[51] The "without more" that the Court refers to is some indicator or sign that the judgment itself has been rendered without the adjudicator actively turning their mind to the issues. If the copying of someone else's writing is a drafting shortcut, it is innocuous; but if it amounts to "evidence that the reasons for judgment do not reflect the judge's thinking", there is a problem of the decision-maker's independence: *Ibid*., at para 35.

[52] Under the circumstances, a lack of independent thought does not appear to me to be what characterizes the Arbitrator's reasons. The fact that the identified copying occurs in a factually minor part of the reasons, and does not amount to mistake of fact that grounds an appeal in its own right, is revealing. The chain of reasoning leading to the final conclusion, as outlined in paragraph 44 above, is the Arbitrator's own and remains intact.

[53] The reasons for judgment as a whole reflect the process the Arbitrator embraced and the logic that that process led him through. The context was designed by the Arbitrator, the facts and law were analyzed by the Arbitrator, and there is insufficient indication of non-independence to interfere with the conclusion reached by the Arbitrator.

IV. Disposition

[54] There are no grounds for setting aside the award granted by the Arbitrator or for granting leave to appeal the Arbitrator's decision. The Application is dismissed.

[55] At the end of the hearing, counsel for both sides indicated that they were optimistic that they could reach a mutually agreeable amount of costs for whichever side is successful in the Application. I strongly encourage counsel to seek an agreed-upon arrangement for costs. In the event that they cannot reach a costs agreement within three weeks of today, they are to advise my assistant of that so that written submissions can be made.

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Date: March 6, 2023

Morgan J.

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