<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Carter v Manufacturers Life*, 2024 NSSC 245

Date: 20240926
Docket: 517900
Registry: Halifax

2024 NSSC 245 (CanLII)

Between:

Terrence Joseph Carter

Plaintiff

v.

The Manufacturers Life Insurance Company

Defendant

DECISION

Judge:	The Honourable Justice Mona L. Lynch
Heard:	April 29, 2024, in Halifax, Nova Scotia
Written Submissions:	May 16, 2024 – Defendant May 27, 2024 – Plaintiff
Final Written:	September 26, 2024
Counsel:	Nicolle A. Snow, for the Plaintiff Tricia L. Avery, for the Defendant

By the Court:

Background:

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[1] The Defendant in this matter, The Manufacturers Life Insurance Company (Manulife) moves for an order striking the Statement of Claim of the Plaintiff, Terrence Joseph Carter pursuant to *Civil Procedure Rule* 4.07.

[2] The Plaintiff filed a Notice of Action on September 14, 2022, against both Manulife and Bell Canada (Bell), his employer, in relation to their failure to honour their contractual obligations to the Plaintiff in relation to short-term disability benefits and long term-disability payments. Terrence Carter claimed special damages, along with punitive damages and damages for mental distress among other damages. The Notice of Action was amended on February 8, 2023, and again on November 23, 2023. Bell was removed as a Defendant. The November 23, 2023, Amended Notice of Action continues to allege breach of contract by Manulife and includes a claim for special damages for payment for any lost pension contributions. Terrence Carter no longer claims for arrears of payment for short and long-term disability payments. He claims pre and post-judgment interest, any waiver of premium benefits or other benefits arising from the policy with Manulife, costs on a solicitor and client basis, punitive damages for bad faith, aggravated damages for bad faith and damages for mental distress.

[3] Manulife filed this Notice of Motion on January 26, 2024.

[4] Terrence Carter is an employee of Bell. He started working for Bell in 1998. Bell offers a short-term disability program which is administered by Manulife. Terrence Carter is a member of the Unifor Local 2289, the union. Terrence Carter suffered an injury to his back on March 14, 2018. He received Worker's Compensation Benefits. He then started receiving short-term disability benefits in September 2021. His benefits were suspended by Manulife in April 2022 due to lack of "objective" medical evidence. Terrence Carter appealed that decision and in May 2022 the denial was upheld.

[5] Terrence Carter continued to appeal his denial of short-term benefits, and that appeal was adjudicated by Manulife. Terrence Carter then applied for long-term

disability benefits from Manulife and was denied in June 2022. Terrence Carter sought help from his union. In August 2022 he received communication from the union's legal counsel that the denial of long-term disability was a matter between Manulife and himself and was not covered by the collective agreement between the union and Bell. Therefore, the union would not involve itself in the matter. Terrence Carter commenced this action.

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[6] In July of 2023 the decision to terminate the short-term disability was reversed and arrears were paid to him as he was outside the time period for short-term disability. At the end of August 2023, Manulife approved his claim for long-term disability.

[7] Manulife has not filed a Statement of Defence in this action because it takes the position that the action should be dismissed because it involves a dispute which arises from and is governed by the terms of the collective agreement and therefore must proceed by way of arbitration under that agreement.

[8] The motion by Manulife to dismiss the action was heard on April 29, 2024, and further submissions were received from the parties on May 16 and May 27, 2024.

Issues:

1. Does the court have jurisdiction to hear the Plaintiff's claim?

    a. Does the dispute arise under the collective agreement either expressly or inferentially?

    b. Does the grievance and arbitration process afford effective redress?

2. If the dispute is arbitrable, should the court use its residual discretion to hear the dispute to grant relief outside the arbitrator's jurisdiction?

Position of the Parties:

[9] Manulife's position is that the essential character of the dispute raised in the Amended Statement of Claim arises under the collective agreement. Therefore, the

dispute must be grieved and arbitrated pursuant to the collective agreement's resolution process and the herein action must be dismissed pursuant to *Rule* 4.07.

[10] Terrence Carter's position is that the collective agreement calls on Bell to arrange coverage for long-term disability and life insurance and the collective agreement provides for some core coverage. Under the collective agreement Bell reserves the right to make changes to the coverage but there are no contractual rights conferred under the collective agreement and the policy of insurance is what governs. The collective agreement is an agreement between Bell and the union and Manulife is not a party to the collective agreement. The grievance procedure is for disputes arising between the employer, Bell, and the union in relation to the collective agreement not with Manulife an outside party.

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Analysis:

1. **Does the court have jurisdiction to hear the Plaintiff's claim?**
   a. **Does the dispute arise under the collective agreement either expressly or inferentially?**
   b. **Does the grievance and arbitration process afford effective redress?**

[11] *Rule* 4.07 reads:

> **4.07 Lack of jurisdiction**
>
> (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
>
> (3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[12] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 the court found that to determine the appropriate forum it must be determined whether the dispute arises out of the collective agreement. To do that, two elements, (a) the dispute and (b) the ambit of the collective agreement must be considered (para. 51). The court must

consider the facts surrounding the dispute and not the basis of the legal issues (para. 43). Where the dispute arises under the collective agreement then jurisdiction lies with the dispute provisions in the contract and the courts cannot try it (para. 43). The court continued at para. 52:

> … In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

The court notes that not all actions in courts between employer and employee were precluded, only disputes which expressly or inferentially arise out of collective agreement are foreclosed to the courts (para. 54).

[13] Our Court of Appeal considered this question in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38 in a summary judgment application. The essential character of the dispute must be determined and considered in relation to the ambit of the collective agreements. To determine the essential character the claims of the Plaintiff must be examined, and the ambit of the collective agreement is determined by construing the agreement (para.10). The court noted that *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes and other tribunals may possess overlapping jurisdiction, concurrent jurisdiction or be endowed with exclusive jurisdiction (para. 17). The two main questions are the ambit of the dispute resolution scheme and whether the dispute falls within it (para. 18). Does the essential character of the dispute arise implicitly from the interpretation, application, administration, or violation of the collective agreement? (para. 20). After examining the factual context of the dispute, I must determine whether its essential character concerns a subject matter that is covered by the collective agreement (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioner*s, [2000] 1 S.C.R. 360, para. 25).

[14] In *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 there are two steps to consider (para. 39):

1. Does the collective agreement and legislation grant exclusive jurisdiction to an arbitrator to decide all disputes arising from the collective agreement?

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2. If an arbitrator is granted exclusive jurisdiction the next step is to determine whether the dispute falls within the scope of that jurisdiction which requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute.

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[15] I will first consider the terms of the collective agreement in this case. The collective agreement is between the union and Bell. Article 16.01 of the Collective Agreement reads as follows:

> 16.01 If a dispute concerning interpretation, application, administration or alleged violation of this agreement is not resolved following the completion of the grievance procedure, the matter may be referred by the grieving party to binding arbitration.

The remainder of Article 16 sets out the procedure to follow for the arbitration and Article 16.06 provides that the decision of the Arbitrator or Board of Arbitrators will be final and binding on both the union and Bell.

[16] The *Canada Labour Code* (R.S.C., 1985, c.L-2) requires every collective agreement to contain a provision for final settlement without stoppage of work by arbitration or otherwise of all differences between the parties and employees concerning the interpretation, application, administration or alleged contravention. (s. 57(1)). Section 58(1) of the *Canada Labour Code* reads as follows:

> 58 (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

[17] Based on the wording of the collective agreement and the *Canada Labour Code* it is clear that disputes concerning the interpretation, application, administration or alleged violation of the collective agreement are in the exclusive jurisdiction of an arbitrator. I will go on to consider whether this dispute falls within the scope of that jurisdiction.

[18] To do that I have to consider whether the essential character of the dispute here arises from the interpretation, application, administration or alleged violation of the collective agreement.

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[19] The dispute here was originally about the denial of short and long-term disability including arrears of payments, the commencement of long-term disability as well as punitive damages and damages for mental distress. Amendments were made to the Statement of Claim after Terrence Carter's long-term disability payments were reinstated. The dispute remaining after the amendments is over the manner and alleged bad faith with which Manulife dealt with Terrence Carter's claim for long-term disability payments. It is no longer about the payments or arrears owing under the policy. I am not deciding the merits of those claims but the character of the dispute.

[20] Manulife is clearly not a party to the collective agreement between the union and Bell. However, that is not the end of the analysis. I still must determine whether the dispute arises out of the collective agreement.

[21] The collective agreement provides under Article 28.01 that Bell agrees group insurance, which includes long-term disability, summarized in Appendix P, form part of the collective agreement and Bell agreed that it would not diminish the level of benefits under the plans during the life of the collective agreement. Article 28.02 contemplated a new program of group insurance benefits. Appendix P provides that short-term disability benefits are self-insured by Bell and is integrated with long-term disability coverage. Employees are directed to refer to the collective agreement for the short-term disability benefits provisions. For long-term disability Appendix P indicates that employees automatically receive core coverage, or they can choose from one of four other options. It is noted in Appendix P that the document is intended to give the employees an overview of the benefits available and for complete plan details, they are to refer to the Benefits Site.

[22] The Group Benefits Policy effective January 1, 2016, is between Bell as the policyholder and Manulife. The policy, among other things, sets out life insurance and long-term disability insurance benefits for employees of Bell.

[23] There have been many cases in Canada where an insurance provider pursuant to a collective agreement has had action started against them by a union member.

[24] In *Pilon v. International Minerals Chemical Corp. Canada Ltd.*, 1996 CanLII 1178 (ONCA) the collective agreement between the union and the employer provided for group insurance including short and long-term disability. The long-term disability benefits were provided by an insurer through a plan administered by the employer and paid by the employees by salary deductions. The Plaintiff's action was

dismissed on the basis that the court did not have jurisdiction as it arose out of entitlements under the collective agreement. The appeal to the Ontario Court of Appeal was dismissed as the appellant's entitlement to long-term disability benefits offered by the insurer arose from the collective agreement. The grievance and arbitration mechanisms in the collective agreement were found to govern the dispute. The appellant's argument that he was an insured under a policy of insurance and the dispute with the insurance company was wholly independent from the collective agreement with his employer failed.

[25] In *Barber v. The Manufacturers Life Insurance Company (Manulife Financial),* 2017 ONCA 164 (CanLII) the employer started an action against the insurer seeking a continuation of the payment of long-term disability payments which had been terminated. The court found that the collective agreement established Barber's rights to long-term disability benefits and the fact that they were paid under a policy did not change the fact that entitlement was provided in the collective agreement (paras. 14, 15). Although not mentioned by the court in the judgment, counsel for Manulife provided the court with the Statement of Claim which claimed bad faith on behalf of Manulife and sought bad faith, aggravated, exemplary, consequential and punitive damages. The court found that jurisdiction over the dispute belonged to an arbitrator.

[26] *Morriseau v. Sun Life Assurance Company of Canada*, 2017 ONCA 567 (CanLII) was different from the above cases and from the present case as the employer was self-insured and the insurance company was merely providing administrative services with respect to long-term disability benefits. The employer had ultimate final decision-making power for the payment of the benefits. The action started by the employee was dismissed for want of jurisdiction as it arose from the interpretation, application of administration of the collective agreement.

[27] *Morris v. Manufacturers Life Assurance Co*., 2005 CanLII 4580 (ONSC) (upheld on appeal 2005 CanLII 33120 (ONCA)) involved a union member starting an action seeking a declaration that the Plaintiff was totally disabled and remained entitled to benefits, and payment of the benefits. The Plaintiff also sought aggravated, exemplary and punitive damages alleging that Manulife denied her benefits without cause. The employer was self-insured, and Manulife provided administrative services only. As in *Morriseau,* the employer had the ultimate authority to decide whether to pay or refuse payment of the benefits. The argument that the causes of action pleaded including negligence, bad faith, and punitive damages required resort to the courts failed. It was found that was the legal

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framework and not the essential character of the dispute. The court also found that arbitrators can award damages, including punitive damages. The court dismissed the action.

[28] Many of the cases including *London Life Insurance Company v. Dubreuil Brothers Employees Association*, 2000 CanLII 5757 (ONCA) and *Canadian Broadcasting Corp. v. Burkett*, 1997 CanLII 1078 (ONCA) apply the "*Brown and Beaty* categories" which are set out in *Dubreuil* as:

> …These four categories were originally identified in Brown and Beatty, Canadian Labour Arbitration, 3rd ed. (1988) and are as follows:
>
> 1. where the collective agreement does not set out the benefit sought to be enforced, the claim is inarbitrable;
>
> 2. where the collective agreement stipulates that the employer is obliged to provide certain medical or sick- pay benefits, but does not incorporate the plan into the agreement or make specific reference to it, the claim is arbitrable;
>
> 3. where the collective agreement only obliges the employer to pay the premiums associated with an insurance plan, the claim is inarbitrable; and
>
> 4. where the insurance policy is incorporated into the collective agreement, the claim in arbitrable. (para. 10)

The court found that the insurance plan fell under category 3 and differed from *Pilon* where the terms of the policy were incorporated by reference into the collective agreement and therefore became the obligation of the employer (para. 30). In *Dubreuil* the court found that arbitrator would be asked to resolve a dispute not between the parties to the collective agreement and it was not a dispute arising out of the collective agreement (para. 35).

[29] In *CBC* the insurance company rejected the claim. The arbitrator found that the CBC failed to meet its obligations under the collective agreement and ordered the CBC to pay the amount owing under the policy. The Court of Appeal overturned that decision. The arbitrator had found the dispute fell into category 3 because the premiums were paid by the CBC and standard group life insurance coverage was arranged.

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[30] Terrence Carter submits that because Manulife is not a party to the collective agreement, the matter cannot be properly before the arbitrator. In *Cherubini*, the fact that an action is brought against a non-party was considered to be relevant to the analysis in two ways: (a) in assessing whether the essential character of the dispute arises out of the collective agreement; and (b) whether the collective agreement provides effective redress, in other words, a solution to the problem (para. 46). The Court of Appeal found that who the parties are to the dispute does not give the court jurisdiction if the essential character of the dispute still arises out of the collective agreement (paras. 47, 55). In relation to effective redress, the court found that in exceptional cases courts may take jurisdiction even in cases in which a labour arbitrator otherwise has exclusive jurisdiction as the courts retain residual authority to provide remedies the arbitrator is not empowered to grant. This power allows the courts to prevent a "real deprivation of ultimate remedy" (para. 68). The court noted:

> [72] Thus, where a dispute otherwise falls within the exclusive jurisdiction of arbitrators, their remedial powers will be interpreted broadly and courts should intervene to provide additional remedies only in exceptional cases to prevent a real deprivation of an ultimate remedy.

The court noted that arbitrators have the power to apply common law, statutes, *Charter* remedies, financial penalties, and award damages (para.71). The court went on to find that a real remedy could be provided even though it would be against the employer and not all the parties to the dispute (paras. 84, 85).

[31] In *Greig v Desjardins Financial Security Life Assurance Company*, 2019 BCSC 1758 (CanLII) the court found that there was no recourse under the collective agreement for a claim over bad faith in relation to a dispute over LTD benefits (para. 60). The concern I have with following *Greig* is that it appears to do what *Weber* warns against in that it relied on the legal basis on which the issues had been framed and not whether the dispute arose out of the collective agreement.

[32] Does the essential character concern a subject matter that is covered by the collective agreement? The answer is yes it arises from entitlement to benefits which are provided for and incorporated into the collective agreement. Terrence Carter says in his response motion brief that "the denial of benefits (more particularly the claim handling) is at the root of the dispute under consideration" (para. 5).

[33] Here, Terrance Carter's entitlement to short and long-term disability payments arises out of the collective agreement between the union and Bell. The essential character of the dispute is about entitlement to benefits under the insurance

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policy which is incorporated into the collective agreement under Article 28.01(a) which reads in part:

> 28.01(a) The Company agrees that employee group insurance, dental and medical benefits, summarized in Appendix P, form part of this Agreement and that it will not diminish the level of benefits provided under theses plans during the life of this Agreement …

Article 28.02 contemplates a new program of group insurance, etc. Appendix P of the collective agreement provides that employees would receive core benefits for long-term disability and allowed the employees to choose four other options for benefits which were all non-taxable. Bell did not simply pay the premiums; they also had the ability to change insurance providers if they did not diminish the level of benefits. The insurance company who paid the benefits provided for in the collective agreement was not relevant if the level of the benefits was not diminished. The collective agreement in this case would appear to fall under category 4 of the *Brown and Beatty* categories as the agreement incorporates the insurance plan. That makes the claim arbitrable.

[34] The next question is whether the dispute resolution process in the collective agreement affords effective redress.

[35] Terrence Carter has cited cases where the court has found that the nature of the dispute is not the payment of the benefits but a claim for aggravated and punitive damages and special costs such as *Greig*.

[36] There are several cases where the court found jurisdiction to be with the arbitrator where aggravated and punitive damages were claimed. In *Barber* the claim which the court found jurisdiction belonged to the arbitrator included a claim for damages for bad faith, aggravated, exemplary, consequential damages and damages for mental distress. In *Morris* (para. 2) the claim included aggravated, exemplary and punitive damages as well as costs on a substantial indemnity basis. In *Mehta v. Acadia University Faculty Association*, 2022 NSSC 69 the court found it lacked jurisdiction for a claim that included defamation and punitive damages.

[37] In *Public Service Alliance of Canada v. Nav Canada***,** 2002 CanLII 44896 (ONCA) at paragraph 36, the court lists claims where arbitrators were found to have exclusive jurisdiction including: constructive dismissal, defamation, interference with contractual relations, intimidation and conspiracy. *Weber* found that the arbitrator could decide issues involving tort and that arbitrators could refer to both

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the common law and statutes (para. 56) as well as the *Charter*. *Horrocks* found the arbitrator had jurisdiction over a human rights complaint.

[38] I find that the arbitrator has the power and the duty to determine all the claims made by Terrence Carter.

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[39] Terrance Carter submits that the dispute resolution process does not provide effective redress because the arbitrator has no jurisdiction over Manulife to order any sort of redress. However, as found in *Barber,* the fact benefits were paid under the policy does not change the fact that entitlement is provided by the collective agreement (para. 15) and dispute arises from the collective agreement.

[40] The *Canadian Labour Code* provides that an arbitrator or arbitration board has the power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable (s. 60(1)(b)). The right to long-term disability is provided for in the collective agreement (Article 28.01). The collective agreement provides for disputes to be referred to binding arbitration (Article 16.01) and that the decision of the arbitrator are final and binding (Article 16.06). The *Canadian Labour Code* requires collective agreements to contain a provision for final settlement of all differences between the parties (s. 57). As such, the decision as to whether the within dispute is arbitrable should be made by the arbitrator.

2. If the dispute is arbitrable, should the court use its residual discretion to hear the dispute to grant relief outside the arbitrator's jurisdiction?

[41] In *Weber* the court confirmed that a court has residual inherent jurisdiction to grant remedies which the arbitrator is not empowered to grant. They provided the example of an injunction. This residual jurisdiction ensures that there is no deprivation of ultimate remedy (*Weber,* para. 57).

[42] In Gillan *v. Mount Saint Vincent University*, 2008 NSCA 55 the Court of Appeal noted:

> [43] In my view, the judge did not err when he decided that the possibility exemplary or punitive damages might not be available would not be sufficient to create jurisdiction in the court.

The court notes the limited residual jurisdiction of the courts and finds that where the appellant could have sought effective remedies under the collective agreement there was no need to exercise the residual jurisdiction (para. 46).

[43] I find that the arbitrator has the power and the duty to determine all the claims made by Terrence Carter. I decline to exercise my residual jurisdiction as the arbitrator has the authority to grant the relief sought by Terrence Carter.

[44] In *Weber,* the court notes the growing deference for the arbitration and grievance process (para. 58) and that to allow concurrent actions undermines the goal of resolving disputes quickly, economically with a minimum of disruption to the parties and the economy (para. 46). In *Cherubini,* the court reviews the policy reasons for an arbitrator's exclusive jurisdiction over disputes arising from collective agreements (paras. 40-42). They note that the objective is to minimize, if not eliminate, the involvement of courts as first instance decision-makers in workplace disputes.

[45] Terrence Carter submits that the policy between Bell and Manulife sets out a time limit to start a legal action against Manulife (page 104) and therefore the legal action should be allowed to proceed. There may be circumstances where a union member can take a legal action against Manulife but not where, as here, the dispute arises out of the collective agreement. The same principle applies to the provisions of the *Insurance Act.* R.S., c. 231, which allow actions against an insurer. While the collective agreement does not set out all the provisions regarding short and long-term disability benefits, it does provide for the entitlement to those benefits.

[46] Terrence Carter submits that because the arbitration clause is discretionary in that it provides that "the matter **may** be referred by the grieving party to binding arbitration" (Article 16.01 of the collective agreement, emphasis added) there is no explicit bar to legal action. However, the Nova Scotia Court of Appeal dealt with that argument in *Gillian* where it said:

> [30] I also reject the appellant's submission that the use of the permissive "may" in Article 8 of the Collective Agreement signals that arbitration is not the only method of dispute resolution. Article 8, which deals with arbitration, is not available unless the dispute has not been resolved to the complainant's satisfaction pursuant to the grievance procedure in Article 7, or there is no decision. That "the matter may be referred to arbitration" simply means that the complainant is not required to refer the matter on to arbitration, but may do so if the complainant wishes. See *Vaughn* at ¶ 28 (Binnie, J. for the majority) and ¶ 50 (Bastarache, J. for the minority).

The same wording is in the collective agreement in this case.

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[47] There are a few things that could deprive Terrence Carter of a remedy. The arbitrator could find that his claim is not arbitrable. The legal advice obtained by the union was that this was not a matter under the collective agreement, and it could not be arbitrated. As I stated above, under the *Canada Labour Code* the arbitrator has the power to determine whether a matter referred to them is arbitrable.

[48] Following what was done in *Nova Scotia Union of Public Employees, Local 2 v. Halifax Regional School Board*, 1998 NSCA 199 (CanLII) and L. *McInnis v. CBVRCE, Santana Contracting Ltd.*, 2023 NSSC 397 the action will be stayed pending the decision by the arbitrator as to whether the matter is arbitrable.

Conclusion

[49] The nature of the dispute is covered by the collective agreement and the grievance and arbitration process affords effective redress. Terrence Carter will not be deprived of his ultimate remedy if the matter goes to an arbitrator as the arbitrator has the power to grant the relief sought. The court will not use its residual discretion to hear the dispute unless the arbitrator decides that the matter is not arbitrable. The Notice of Action and Statement of Claim of Terrence Carter in this matter is stayed pending the decision of the arbitrator on whether the claims and matters are arbitrable.

[50] The parties will notify the court of the arbitrator’s decision on whether the claim is arbitrable.

[51] If the parties want to be heard as to costs, the party seeking costs shall file a brief on costs and the responding party will have two weeks to respond.

Lynch, J.

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