

SUPREME COURT OF NOVA SCOTIA

Citation: *Integrum Painting v. BANC Investments Limited*, 2026 NSSC 96

Date: 20260401

Docket: Hfx No. 546399

Registry: Halifax

Between:

Shaun Graham operating as Integrum Painting

Applicant

v.

BANC Investments Limited

Respondent

Decision

Judge: The Honourable Justice D. Timothy Gabriel

Heard: February 2, 2026, in Halifax, Nova Scotia

Final Post-Hearing Submissions: March 9, 2026

Counsel: Dillon Trider, for the Applicant
Joseph Herschorn, for the Respondent

By the Court:

[1] In this Application in Chambers, the Applicant seeks an order declaring that its right to claim for delay under the terms of a contract between the parties remains valid, “requiring the Respondent to comply with the terms of the contract”. There is little to no disagreement on most of the pertinent facts. Additionally, there is little to no disagreement as to the applicable law. Each of the parties, nonetheless, seeks a diametrically opposed result.

Background

[2] The Applicant is Shaun Graham, who carries on business under the name and style Integrum Painting (“Integrum” or “the Applicant”). The Respondent is BANC Investments Limited (“BANC”). The latter’s principal is Alex Halef.

[3] 5858 Macara Street Limited (“5858 Limited”) is a company that amalgamated with BANC in January 2024. It hired the Applicant for interior painting of its (then) new building. Its principal was also Mr. Halef.

[4] Before that amalgamation, however, Integrum and 5858 Limited entered into a standard form CCDC 17 Stipulated Price Contract (“the contract”) on April 25, 2023 (*Graham Affidavit*, Exhibit A) . Pursuant to that contract, the Applicant agreed to provide painting services for an Elevation building located, predictably, at 5858 Macara Street, in Halifax Nova Scotia (“the building”). There has been no dispute raised by either party respecting the fact that BANC is now the owner of the building, and is the successor to 5858 Limited with respect to all of the rights and obligations conferred and/or imposed upon the latter by virtue of the contract, and/or that BANC is thus the proper responding party to this Application.

[5] Among other things, the contract designated 5858 Limited as the “construction manager”, and provided Mr. Halef’s contact information as the means through which the contract manager was to be contacted (*Graham Affidavit*, Exhibit A, p. 6).

[6] The Applicant alleges that work on the building began on November 13, 2023, and that “significant delays on the project” were encountered (*Graham Affidavit*, para. 6). As a result of those delays, on November 26, 2024, counsel for Integrum sent correspondence to Mr. Halef evidencing an intention to make a claim for delay costs in accordance with the provisions of the contract. The

correspondence was marked “without prejudice” and culminated with the following:

Based on these calculations, it is estimated that Integrum could have completed an additional 68.5 units on other projects, had it not been delayed on the Elevation. Assuming similar contract values, these units would have carried a value of \$137,000 plus HST of gross revenue. For ease of calculation, and to account for out of pocket expenses and contingencies, Integrum is prepared to accept payment of \$68,750 plus HST in return for a full and final release.

Please advise by no later than Friday, December 6, 2024, if this offer is acceptable. I would be happy to speak with your counsel regarding the content of this letter.

(Graham Affidavit, Exhibit B, p. 56)

[7] Counsel for the Respondent says that “after receiving the letter, BANC did not engage in any negotiation of the delay claim. At no point did it make a counteroffer or entertain any aspect of the claim (*Respondent’s Brief*, para 12).

[8] On December 6, 2024, however, Mr. Herschorn did contact Applicant’s counsel. He identified himself as counsel for BANC, and said the following:

Hello Dillon,

I act for BANC Investments Limited and have reviewed your letter of November 26 to Mr. Halef. I am getting up to speed and am unable at this point to comment on your references to the contract, the alleged costs mentioned in your letter, or the assertions about delay. Please provide any documentation (apart from the contract) supporting the allegations in your letter.

Joe

(Graham Affidavit, Exhibit C, p. 57)

[9] The particulars that had been requested were provided by the Applicant, through counsel, on January 3, 2025 (*Graham Affidavit*, Exhibit D, enclosures excluded).

[10] In the meantime, it is alleged that:

12. Through the winter of 2025, Integrum’s work on the Elevation began drawing to a close. Discussions between Integrum and Banc turned to the release of holdback funds. (see *Graham Affidavit*, Exhibit “E”, pages 61-62)
13. In February, Mr. Halef met with Mr. Graham’s partner, Glenda Mercer, a former Banc employee, and requested that Integrum drop the delay claim,

indicating that Banc would drop claims for deficiencies if Integrum did so.
(Mercer Affidavit)

(*Applicant's Brief*, p. 3)

[11] On March 4, 2025, Mr. Halef, bypassing his counsel, sent a letter directly to Integrum's counsel which said the following:

WITHOUT PREJUDICE

Hi Dillon,

A few things here. And to save time I figured I'd copy my lawyer, Joe, as well.

- 1) The holdback monies are not owed. My counsel made it clear that the invoice was not due as it was billed prematurely. The percentage complete on the invoice itself shows that substantial completion wasn't met when the bill was issued.
- 2) I would like to know how we are going to deal with the hundreds of hours of deficiency work that has been undertaken to fix the work not completed by Integrum Paint but that was required. We have the pictures and notes and can compile it all. Please let me know how you want to deal with this as it has been an ongoing issue and continues to be. Furthermore, there are invoices that have been submitted by Integrum, but the concern is that there is not enough monies left on the contract to deal with the deficiency work undertaken by others.
- 3) As you know from several past cases where you were on the other side, I have no issue litigating. I'm happy to consider a comprehensive resolution of all issues now including an orderly payment of the holdback at the appropriate time. But if your client insists that the outstanding issues are to be handled separately, I'm more than happy to vigorously defend any delay or holdback claims and separately or simultaneously pursue recovery for the deficiencies and substantial rework we've been forced to undertake.

(*Graham Affidavit*, Exhibit E, p. 60, emphasis added)

[12] The very next day, March 5, 2025, Mr. Halef again sent an email, this time to Mr. Graham personally, bypassing both counsel. Because of its centrality to the arguments with which the Court must deal in this matter, it is reproduced in its entirety below:

Shaun,

I have left everyone else off this chain in an effort to resolve all this. I see you have sent your next set of invoices in for the project yesterday. I don't like having to hold payments as a result of rework, and I also don't like not paying invoices when I know you probably could use the funds. It's bothering me personally. But with

that said, these are real deficiencies with pictures, etc. But, I am willing to be reasonable about all of this. You and I both know that your delay claim is baseless and has absolutely no merit from a contractual perspective. We never agreed on a schedule in writing and I am the only signing authority in the company in any contract and all your documents are subjective at best. Whereas on the rework, I have pictures and a spreadsheet and people who can attest to the re-work done.

Shaun, you and I are both owners. Everyone else is an employee. I would like to know if you want to discuss this and resolve this amicably and put this all behind us. Because that is truly what I want. The only winners here are going to be the lawyers man. No one else was going to win. I've just gone through something similar with Dover Masonry and my initial offer to him to drop his case and I drop mine didn't get accepted. When I made him my offer, I told him that whether he wins or I win, it's the cost to get to the end whether it will all be worth it. He still didn't agree with me. So, we went to discoveries and by the time he was done being discovered, he had spent \$14,000.00 in legal fees and I had spent a bunch too, and he ended up accepting my initial offer of everyone going their separate ways. I get it, no two issues are the same. But the premise of the legal costs and the headache of it all is what I am appealing to you about. I've been down this road before man. Again, no one wins but the lawyers.

Please let me know. I can also meet if you like.

(Graham Affidavit, Exhibit F, pp. 65-66, emphasis added)

[13] Counsel for the Applicant wrote to the Respondent's counsel on March 11, 2025. That letter was headed "without prejudice" and expressly stated that he was writing "further to Mr. Halef's email to me last week". Mr. Trider continued:

I wrote on behalf of my client on November 26, 2024 on a confidential and without prejudice basis, and pursuant to the signed contract between my client and yours, to address the question of delay on the project. After you made contact with me on behalf of Banc, I provided further particulars and the rationale for the calculation provided by my client ...

My client was very disappointed when his partner was called into a meeting with Mr. Halef, under the auspices of discussing potential contract work, only to be confronted about the delay claim being brought by Integrum and alleged deficiencies that had not been raised with Integrum previously.

...

I have indeed dealt with Mr. Halef in the past, as he indicates, and performed sufficient work both for and against developers to know that what is being telegraphed by Mr. Halef is that he intends to hold the holdback and final invoices hostage until Integrum drops its delay claim. This could not be more transparent.

What I will say at this juncture is that my client, as previously indicated, is prepared to negotiate in an amicable manner to address the delay claim. A reasonable settlement ought to include payment of the holdback, final invoices, and a contribution to the losses caused by delay on the project. You have my client's starting position in that negotiation as of November of last year. We are still waiting on a response. Happy to consider any allegations of deficient work, understanding that Banc has very specific contractual obligations that limit its ability to make such claims against Integrum and take instructions from my client.

...

I simply ask that Banc provide its position on the offer and I will take instructions on the next step and whether to issue a notice of arbitration pursuant to the contract.

(*Graham Affidavit*, Exhibit G, emphasis added)

[14] After Integrum sent a request for payment once again to the Respondent, on April 7, 2025, Mr. Halef emailed a number of people, including Mr. Graham and Integrum's counsel (*Graham Affidavit*, Exhibit H). The substance of that email merely repeated (verbatim) the communication to Mr. Graham contained in his letter of March 5, 2025.

[15] On May 15, 2025, the Applicant's counsel sent a "notice of arbitration" to BANC's counsel. On May 21, 2025, the latter responded, taking the position that the notice of arbitration was invalid as it did not comply with the contract. Specifically, counsel for the Respondent indicated that the Applicant's claim for delay was deemed released and waived owing to the failure to provide notice in writing of dispute within 15 working days of receiving the construction manager's "finding" with respect to the delay claim (*Graham Affidavit*, Exhibit K).

[16] The following day, counsel for the Applicant wrote indicating that "[your] letter of yesterday constitutes the first formal notice with respect to the rejection of the delay claim on behalf of the construction manager" (*Graham Affidavit*, Exhibit L).

[17] The Respondent's position in this proceeding is that his email of March 5, 2025 to Mr. Graham constitutes notice in writing to the Applicant that the construction manager had made a "finding" with respect to the Applicant's delay claim, and rejected it. It is the Respondent's position that, because the notice in writing of dispute was not delivered within 15 days of that finding, the Applicant's delay claim is deemed waived and released by the provisions of the contract. In fact, BANC has advanced the position that at no point since March 5, 2025 has the Applicant sent BANC a Notice in Writing of Dispute (*Halef Affidavit*, para. 26).

[18] **Issues:**

- A. (i) Does the March 5, 2025, letter sent directly by Mr. Halef on behalf of BANC to Mr. Graham constitute a “finding” within the meaning of the contract with respect to Integrum’s asserted delay claim?
- (ii) Alternatively, is the Respondent estopped from asserting that the March 5, 2025, letter constitutes a “finding” within the meaning of the contract?
- B. Having regard to the Court’s determination with respect to issue A, what is the present status of the Applicant’s claim for alleged delay?

Analysis

- A. (i) *Does the March 5, 2025 letter sent directly by Mr. Halef on behalf of BANC to Mr. Graham constitute a “finding” within the meaning of the contract with respect to Integrum’s asserted delay claim?*

[19] Primarily, there are three discrete stipulations in the contract which are engaged in the analysis. First, General Condition (“GC”) 2.2 outlines some of the construction manager’s responsibilities. The most pertinent of these describes the duties of this person/entity. These responsibilities include the duty to:

...

- .3 in the first instance, give interpretations and make findings on matters in question relating to the performance of the *Work* or the requirements of the *Contract Documents*, except with respect to any and all architectural and engineering aspects of the *Work* or GC 5.1 – FINANCING INFORMATION REQUIRED OF THE OWNER ...

(Graham Affidavit, Exhibit A, p. 12)

[20] Second, GC 8.1.1 provides:

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 *Construction Manager* or the *Consultant* as provided in GC 2.2 – ROLE OF THE CONSTRUCTION MANAGER AND THE CONSULTANT, shall be settled in accordance with the requirements of Part 8 of the General Conditions – DISPUTE RESOLUTION.

(*Graham Affidavit*, Exhibit A, p. 25)

[21] Next, we have GC 8.2.2:

A party shall be conclusively deemed to have accepted a finding of the Construction Manager or the Consultant under GC 2.2 ... and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 Working Days after receipt of that finding, the party sends a Notice in Writing of dispute to the other party, the Construction Manager and the Consultant, which contains the particulars of the matter in dispute and the relevant provisions of the Contract Documents. The responding party shall send a Notice in Writing of reply to the dispute within 10 Working Days after receipt of such Notice in Writing setting out particulars of this response and any relevant provisions of the Contract Documents.

(*Graham Affidavit*, Exhibit A, p. 26, emphasis added)

[22] With these definitions in mind, and to paraphrase the Applicant's position, the March 5, 2025, letter from Mr. Halef cannot be characterized as a "finding" within the meaning of GC 8.2.2. This is because it was, in pith and substance, an attempt on the part of BANC to negotiate or, as Mr. Halef himself had expressed it, it was in furtherance of "an effort to resolve all this" (*Graham Affidavit*, Exhibit F). On the other hand, the Respondent says that at no time after receiving the Applicant's counsel's letter of November 2024 did BANC ever engage in any negotiation of the delay claim. Specifically, "at no point did it make a counteroffer or entertain any prospect of the [delay] claim" (*Respondent's Brief*, para. 12; *Halef Affidavit*, para. 14).

[23] "Notice in Writing" is a defined term. The contract provides:

A *Notice in Writing*, where identified in the *Contract Documents*, is a written communication between the parties or between them and the *Construction Manager* or the *Consultant* that is transmitted in accordance with the provisions of Article A-7 of the Agreement – RECEIPT OF AND ADDRESSES FOR NOTICES IN WRITING.

(*Graham Affidavit*, Exhibit A, p. 9)

[24] Article A-7 is incorporated by reference in the above defined term. It provides as follows:

7.1 *Notices in Writing* will be addressed to the recipient at the address set out below.

- 7.2 The delivery of a *Notice in Writing* will be by hand, by courier, by prepaid first class mail, or by facsimile or other form of electronic communication during the transmission of which no indication of failure of receipt is communicated to the sender.
- 7.3 A *Notice in Writing* delivered by one party in accordance with this *Contract* will be deemed to have been received by the other party on the date of delivery by hand or courier, or if sent by mail it shall be deemed to have been received five calendar days after the date on which it was mailed, provided that if either such day is not a *Working Day*, then the *Notice in Writing* shall be deemed to have been received on the *Working Day* next following such day.
- 7.4 A *Notice in Writing* sent by facsimile or other form of electronic communication shall be deemed to have been received on the date of its transmission provided that if such day is not a *Working Day* or if it is received after the end of normal business hours on the date of its transmission at the place of receipt, then it shall be deemed to have been received at the opening of business at the place of receipt on the first *Working Day* next following the transmission thereof.
- 7.5 An address for a party may be changed by *Notice in Writing* to the other party setting out the new address in accordance with this Article.

Owner

5858 Macara St.
Ltd.

*name of Owner**

201-1 Craigmore
Drive

Halifax, NS
B3N0C6

address

(902) 465-8640

facsimile number

ahalef@bedfordcommons.ca;
gmercerc@bancgroup.ca

email address

Trade Contractor

Integrum Painting

*name of Trade
Contractor**

24 McQuillan Lane

Bedford, NS

B4A4L3

address

integrumpaint@gmail.com

facsimile number

email address

**Construction
Manager**

5858 Macara St.
Ltd.

*name of Construction
Manager**

201-1 Craigmore
Drive

Halifax, NS
B3N0C6

address

(902) 465-8640

ahalef@bedfordcommons.ca

facsimile number

email address

(Graham Affidavit, Exhibit A, p. 6)

[25] It is clear that the contract does not identify Mr. Halef as acting in any capacity whatsoever, either on behalf of 5858 Limited, or the Respondent BANC. The corporate predecessor of the Respondent is identified both as the “Owner” and as the “Construction Manager”. The email address for contact purposes in its capacity as Owner is “ahalef@bedfordcommons.ca; gmercerc@bancgroup.ca”. The email address when in the capacity of Construction Manager is simply “ahalef@bedfordcommons.ca”. The rest of the contact information for 5858 Limited is identical regardless of whether in the capacity of Owner or Construction Manager. There is no “Consultant” designated for the purposes of the contract (*Graham Affidavit, Exhibit A, p. 6*).

[26] With the above contractual provisions in mind, the Court turns next to consider a number of the authorities that have been referenced. One of those cited

by the Respondent is *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, which arose within the context of a summary judgement motion.

[27] In *Arguson*, Gil-Son was an electrical and mechanical subcontractor, and it submitted delay invoices to Arguson. The latter had been appointed in the contract between the parties to deal with such issues at first instance. After reviewing the invoices, Arguson's project manager emailed Gil-Son to say that Arguson did not accept responsibility for the delay claim.

[28] After receipt of this communication, Gil-Son did not send written notice of dispute within the time provided in the contract. It later sued and Arguson moved for summary judgement on evidence, contending that the failure to give notice of dispute in writing operated, contractually, as a waiver and thereby released Gil-Son's delay claim.

[29] In the course of its reasons, our Court of Appeal had this to say:

[59] ... its [Gil-Son's] witness confirmed he understood the appellant [Arguson] had, on July 6, 2022, decided it would not be paying the delay claim. The respondent's assertion the appellant's email advising it was not responsible for the delay claim is not a "decision" as contemplated in SCC 8.1.1, has no real chance of success. In reaching this conclusion I note:

- The provisions in question are not specific to particular types of disputes, but are rather an agreed mechanism for all questions that arise between the parties under the subcontract to be resolved. The contractor, here the appellant, makes a decision in the first instance, which is communicated in writing to the subcontractor. The question in the present instance was whether the delay claims were payable under the terms of the contract. That question was answered, in writing, in the negative by the appellant; and
- The provisions in question do not mandate that a contractor is required to specify a decision is being made pursuant to SCC 8.1.1. The case authority relied on by the respondent that suggests otherwise, *W.A. Stephenson Construction (Western) Limited v. Metro Canada Limited*, [1987] B.C.J. No. 2075, is easily distinguishable in the present case. In any event, given that SCC 8.1.1 governs the resolution of all questions that arise between the parties, it is obvious any "decision" made by the contractor is made pursuant thereto.

(emphasis added)

[30] That Court went on to conclude:

... by virtue of SCC 8.2.1, the respondent was deemed to accept the decision, and to release its claim in relation thereto. Subject to the other questions of law raised herein, the respondent's failure to abide by the contractual notice provision is fatal to its ability to seek payment from the appellant of the delay claim.

(*Arguson*, para 60)

[31] *Urban Mechanical v. University of Western Ontario*, 2018 ONSC 1888, is another case arising within the context of an application for summary judgment on evidence involving (substantially) the same contractual language. Urban had invoiced for "extra" labour costs which were said to have arisen as a result of a direction given by a project consultant. The Respondent rejected the claim, stating in response that "no extra will be considered". Although the parties continued to communicate, Urban did not send a notice of dispute in writing as required by condition 8.2.1 of the contract.

[32] In its decision, the Court observed that:

[115] In this case, the notice provision is also mandatory. The period within which notice is to be given is stipulated in days, not a potentially nebulous period. Furthermore section 8.2.1 delineates the consequences. Absent timely notice the "Subcontractor shall be conclusively deemed to have accepted a decision of the Contractor under paragraph 8.1.1 . . . and to have expressly waived and released the Contractor from any claims in respect of the particular matter dealt with in that decision". The language is clear. Urban was bound. It did not serve the required notice within the applicable period. The subcontractor is deemed to have accepted Norlon's decision concerning the Victaulic Claim.

(emphasis added, footnote removed)

[33] *Campbell Construction Limited v. Abstract Construction Inc.* ("ACI"), 2019 BCSC 113, was a case in which Campbell claimed a builders' lien. Its claim was said to be secured by a claim it had advanced for breach of good faith contractual performance and unjust enrichment. ACI sought a stay on the basis of an arbitration clause in the contract, which required that a notice of dispute be delivered by Campbell. Since it had not done so, the arbitration agreement contained in the contract was inoperative.

[34] After a discussion of the contextual milieu, the Court in *Campbell* explained:

[10] Article 7 of the subcontract defined Notices in Writing and how they were to be delivered. The email address of Stephen Toth was the designated email for Notices in Writing to ACI. The email of Kevin Bisgrove was the designated email address for Campbell.

[11] The subcontract included a dispute resolution clause, 8.1, which I have appended to these reasons. The first step, 8.1.1, gave ACI as contractor the power to decide on questions arising under the subcontract and to interpret the requirements therein. The decisions were to be given in writing.

[35] In addition, the Court went on to observe that:

[51] On a superficial consideration of the subcontract and the correspondence between the parties in this case, I conclude that there is not an arguable case that the parties are bound to arbitrate and it serves no purpose deferring the question of jurisdiction to an arbitrator. ACI failed to give notice in writing as required under 8.2 and, more significantly, 12.2.6 of the subcontract. Mr. Toth's emails to Mr. Bisgrove amounted to mere "grumbles" and work proceeded on an agreed schedule. A certificate of substantial completion was issued and it was only when Campbell sought payment of the holdback amount that ACI "pushed back" and some sort of dispute manifested. By that time, Campbell had the right to litigate, by virtue of the waiver clause in 12.2 of the subcontract, and specifically 12.2.6.

(emphasis added)

[36] The Court also found that the failure to provide notice to the contractually designated recipient also acted as a bar to ACI's ability to arbitrate its claim (*Campbell*, para. 54).

[37] As has been noted above, the Applicant has relied principally upon two arguments, the first being that the March 5, 2025 email from Mr. Halef cannot operate as a "finding" within the meaning of the contract. The second is that, even if it did constitute a "finding", the Applicant's letter to BANC counsel on March 11, 2025, disputing the basis of Mr. Halef's argument constitutes sufficient compliance with the contractual requirements of GC 8.2.2. In any event, the argument continues, "there is clear authority from this Court that such failure to strictly follow the timelines is not fatal and public policy dictates that the matter ought to be submitted to arbitration" (*Applicant's Brief*, para. 24).

[38] In support of its secondary position, the Applicant cites a number of cases. One of these is *IWK Health Center v. Northfield Glass Group Limited*, 2016 NSSC 281. In *IWK*, issues were raised in 2008 regarding delays and water infiltration.

The parties were able to resolve their issues through mediation, and exchanged mutual releases covering claims known to that date.

[39] However, a number of years later, major issues with respect to water leakage and other defects were discovered by IWK. The latter made repairs and subsequently demanded reimbursement from the defendant. When it responded, the defendant claimed that the 2008 release barred IWK's claim. IWK then applied for the appointment of an arbitrator when negotiations stalled in March 2016. The CCDC stipulated price contract contained a clause 8.2.7, and it stated:

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.

[40] Northfield asserted that arbitration was not mandatory, because of IWK's failure to properly comply with the notice requirements. In his determination, Muise, J. canvassed the entirety of the contract, including provision 9.2.2 which indicated that damages claims were to be "made in writing to the party liable within reasonable time after the first observance of such damage" and that such claim "shall be resolved as set out in Part 8 Dispute Resolution. Part 8 contains the ADR process" (*para 46*).

[41] As to the delay in filing their claim after giving notice in 2013, the Court also concluded that most of it arose due to IWK having been accommodating toward the defendant, whose original counsel had passed away in 2014, and in relation to whom some other misfortunes had occurred.

[42] As the Court in *IWK* went on to explain:

[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.

[43] *IWK* was applied in *Lorneville Mechanical Contractors Ltd. v. Clyde Bergemann Canada Ltd.*, 2017 NSSC 119, where the Court observed:

[52] As was the case in *IWK Health Centre*, the Subcontract contained a clause (8.2.2) that provided that “the parties shall make all responsible efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations.” I agree with counsel for Lorneville that it would be perverse for the Court to fail to give primacy to the arbitration clause in favour of litigation on the basis that the parties did not adhere to the timelines set out in the dispute resolution provisions.

[44] The Applicant points out that both *IWK* and *Lorneville* were applied by the Court in *Install-A-Floor Limited v. The Roy Building Limited*, 2022 NSSC 67, in which it was noted:

[46] Floors Plus argues that the Roy should not, by their own failure to follow the Contract requirements, now claim that they are not bound by the dispute resolution provisions of the Contract. Strict compliance was prevented by the Roy’s conduct, and both the CAA and *Lorneville Mechanical Contractors Ltd. v. Clyde Bergemann Canada Ltd.*, 2017 NSSC 119, support the position that the Roy cannot now rely on compliance issues to object to the agreed upon process. Strict compliance is not necessarily required to be able to proceed with arbitration.

[45] Then, after referencing the above-quoted excerpt from *Lorneville*, the Court in *Install-A-Floor* continued:

[50] In *IWK Health Centre, supra*, the contract at issue had a similar dispute resolution process to the Contract before me. Northfield (as The Roy does here) argued that the dispute resolution process was no longer binding because the IWK failed to comply with the technical procedures and conditions required to trigger mandatory arbitration. Northfield attempted to rely on the Alberta Queens Bench decision in *Millennial Construction v. 1021120 Alberta Ltd.*, 2005 ABQB 533, to support their argument that where a party fails to provide Notice of Arbitration within 10 days of the termination of mediation under s. 8.2.6 the arbitration agreement is no longer binding under s. 8.2.7. However, Justice Muise concluded that *Millennial* was distinguishable:

[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.

[51] This case is similar to the facts in *IWK*: as mandatory mediation under the applicable contracts was never commenced, let alone terminated by the project mediator under s. 8.2.6, the 10 working days provided for in s. 8.2.7 has not yet commenced.

[52] Like the IWK, Floors Plus did not consent to the mandatory mediation stage of the ADR process being "passed over". Although the Roy eventually communicated that it was unwilling to proceed with the mandatory mediation, the Roy has not offered any authority to support their position that the 10-working day period commenced upon this unwillingness being communicated to Floors Plus. Paragraph 8.2.6 is clear that the 10-working day period only commences upon termination of the mandatory mediation by the project mediator appointed under the Contract. As the mandatory mediation was never commenced, let alone terminated by the project mediator, and Floors Plus did not consent to dispensing with this requirement, paragraph 8.2.7 does not apply to remove the right of Floors Plus to arbitration under the Contract.

[53] On the basis of *IWK*, the Roy asserts that Floors Plus should be prevented from proceeding with arbitration due to general delay in advancing the claim to arbitration, and the prejudice the Roy alleges it will suffer if the arbitration proceeds despite this delay. The prejudice argument is based on the deterioration of the relationship between the Roy and EllisDon.

[54] The deterioration of the relationship between the Roy and EllisDon occurred prior to the addition of EllisDon to an Action in January 2020. Up until and subsequent to that point, Floors Plus was pursuing the prerequisite *Notice in Writing* from the Roy in order to allow them to move the dispute resolution process forward, as required under the Contract.

[55] The Roy has failed to demonstrate that it has suffered any actual prejudice in relation to the deterioration of the relationship with EllisDon. The Affidavit of Simon Wilbee characterizes the prejudice as being,

The Roy can no longer obtain consultation and advice from its project consultant, witnesses and documents will likely be difficult to obtain and additional cost will be incurred due to the various legal proceedings each time EllisDon is required to participate in this matter if it is allowed to proceed.

[56] The Roy has not provided any evidence to support the claim of alleged prejudice. There is no evidence to indicate what specifically the Roy requires from EllisDon that they will have trouble acquiring, or that EllisDon has communicated an unwillingness to provide information or documentation related to this matter.

[46] Interestingly, the issue in cases like *IWK, Lorneville*, and *Install-A-Floor* was not whether a particular claim was void or barred because of failure to follow (to the letter) the contractually specified process for invoking arbitration. It was simply whether arbitration (the ADR process) could be invoked (because of the irregularities encountered in these cases) or whether the claim would have to be litigated in the usual fashion.

[47] In the case at bar, on the issue of whether the March 5, 2025, letter from Mr. Halef constitutes a “finding” within the meaning of GC 8.2.2 in respect of the delay claim, I (of course) acknowledge the comments in *Arguson*, which refer to the equivalent section in that contract (SCC 8.1.1) constituting “an agreed mechanism for all questions that arise between the parties under the subcontract to be resolved”. I also consider the further comments in *Arguson* to the effect that the contract does not “mandate that a contractor is required to specify a decision is being made pursuant to SCC 8.1.1”, because “it is obvious any ‘decision’ made by the contractor is made pursuant thereto” (*Arguson*, para. 59, emphasis added). I also acknowledge that the March 5, 2025, correspondence was not marked to be “without prejudice”.

[48] However, it must also be clear that a “decision” is what is being communicated. Indeed, it is fair to observe that, in *Arguson*, our Court of Appeal (at para. 51) was dealing with a situation in which:

- The parties entered into subcontracts that govern their relationship with each other;
- The subcontracts contain the terms relied upon by the parties;
- The respondent submitted invoices for delay claims under the subcontract via email;
- The appellant did not pay the invoices;
- The appellant communicated in writing to the respondent on July 6, 2022, indicating it accepted no responsibility for payment of the delay claim;
- The respondent's affiant, Mr. Bonang, in his cross-examination testified he understood based on the July 6th email, that the appellant had made a decision not to pay the delay claims; and
- The respondent has never provided a "Notice in Writing" of dispute in relation to the delay claims.

(emphasis added)

[49] There is no prescribed form in which a "finding" must be made stipulated in the contract, but again, basic fairness requires that it must nonetheless be clear, regardless of the "form" chosen, that the Respondent is making a "finding" or decision with respect to the "dispute" in question. That is not what happened here.

[50] What happened here is that the Respondent (BANC), through the actions of Mr. Halef, its operating mind, even though represented by counsel, took it upon itself to write directly to counsel for the Applicant a "without prejudice" letter, with the stated intention of "resolving all issues" outstanding between the parties. Although it was not specifically mentioned in that correspondence, he was certainly aware that one of the outstanding issues, from the point of view of the Applicant (who had raised it as early as September of the previous year) was that of "delay". In relation to that issue, Mr. Halef had earlier instructed the Respondent's counsel to request particulars. These particulars were duly requested by Mr. Herschorn (counsel for the Respondent) on December 6, 2024, as we have seen. There has been no suggestion that the particulars provided (in Mr. Trider's correspondence of January 3, 2025) were insufficient or lacking in any way.

[51] The very next day, Mr. Halef personally authored another letter, this one directly to Mr. Graham. This letter did not bear the words "without prejudice". It bypassed the latter's legal representative and (perhaps) his own. In the course of that letter, he reiterates his intention to attempt to "resolve all outstanding issues". Mr. Halef goes on to remind Mr. Graham that he is not afraid to litigate and incur the expenses associated with such litigation in the event that they cannot resolve

“all outstanding issues” by agreement. He raises the issue of outstanding deficiencies and also includes the phrase “you and I both know that your delay claim is without merit”, on the basis that no specific schedule had been agreed to.

[52] There is a clear difference between adopting a posture for the purpose of settlement negotiations, and making a “finding” for the purposes of triggering the contractual provisions (and consequences) stipulated in GC 8.2.2. This is particularly so where such consequences are so prejudicial (the delay claim, in this case, is rendered void).

[53] These concerns are heightened when the contents of the Affidavit of Glenda Mercer, sworn August 1, 2025, and filed August 29, 2025 (“Mercer Affidavit”), are considered. As indicated at the outset of these reasons, none of the deponents of any of the affidavits were cross-examined. However, Mr. Graham’s partner Ms. Mercer indicates that she met with Mr. Halef on February 18, 2025 at his offices on Craigmore Drive in Halifax. Although the ostensible basis for the meeting was another purpose, the meeting ended up being predominantly about the claim of delay that the Applicant had made against the Respondent. Prior to meeting with him in his office, their phones were left at the reception desk due to concerns that the conversation would be recorded. Ms. Mercer and Mr. Halef differ as to whose idea it was to place the phones in the basket at reception (*Mercer Affidavit*, para. 6; *Halef Affidavit*, para. 18). Ms. Mercer continues:

8. Mr. Halef began to discuss deficiencies with Integrum’s work and discussed lack of quality control on Integrum’s behalf.
9. I indicated to him that I was not there to discuss the delay claim, rather, that I would be prepared to continue to perform consulting for him for him [sic] if he resolved the outstanding contractual payments and holdback to Integrum, which were separate and apart from the delay claim.
10. Mr. Halef did not indicate that he would not pay the bills and holdback, except, he claimed he would be asking for repayment of costs to rectify the deficiencies. He also indicated the costs of rectifying the deficiencies would total all the money owed to Integrum as well as any delay claim.
11. In response I indicated that Integrum’s team had quality control and rectified any deficiencies brought to their attention by the project manager or lead labourer on the project. Mr. Halef then proceeded to say he is the only one who can say if it was completed or not to his standards, not his project manager.
12. Mr. Halef then asked me to ask Shaun to drop the delay claim, saying that we both know that the project wasn’t delayed, this happens in construction,

and there is no start and end date in his contract so how was he delayed with no end date written.

13. Mr. Halef then said if Shaun would have come to him man to man about the delays, he could have thrown him a bone and worked with him. We discussed the logistics of how that conversation would have played out and I disagreed that it would have led to a positive resolution of the claim.
14. Mr. Halef then said to me, Glenda, can you just please, for me, ask Shaun to drop the delay claim. I replied that I would ask him, but said I knew his answer would be no.
15. I asked what would happen to the deficiency claim if Shaun dropped the delay claim and Mr. Halef replied that the claim would go away. I confirmed if Shaun dropped the delay claim, all deficiencies would go away, and BANC would pay all of Integrum's bills and holdback and Mr. Halef said yes and nodded his head as he leaned back in his chair.

(Mercer Affidavit)

[54] Mr. Halef counters with:

19. As for paragraphs 10 and 11 of Ms. Mercer's affidavit, the only thing I said to her about Mr. Graham's deficiencies was that we did not yet know the cost of correcting them. I did not say anything about the holdback or other amounts, and I did not say anything about the cost of the deficiencies exceeding what Mr. Graham claimed. I also explained that I was the construction manager and ultimately responsible for verifying that the work complied with the contract.
20. With respect to paragraph 12 of Ms. Mercer's affidavit, I did tell her that there was no merit to the delay claim. I told her that there was no contractual basis for it, including because there was no contractual schedule with a required completion date.
21. As to paragraph 13 of Ms. Mercer's affidavit, I said that if Mr. Graham had come to me in person about problems he perceived on the project, we could have discussed them during the project.
22. Regarding paragraph 14 of Ms. Mercer's affidavit, I told her my conclusion that the delay claim lacked merit. I said that it was not worth it for Mr. Graham to pursue because there was no contractual justification for it and the only winners would be the lawyers.
23. As for paragraph 15 of Ms. Mercer's affidavit, it was Ms. Mercer who raised a hypothetical about what would happen to the deficiency claim if Mr. Graham let go of his delay claim. I said I did not know and would have to think about it. I did not say anything about paying Mr. Graham's bills and holdback.

24. At the time of my discussion with Ms. Mercer, I had not yet confirmed the Construction Manager's determination about the delay claim in writing to Mr. Graham.

(Halef Affidavit)

[55] Mr. Halef appears to have been very careful as to how both he and his lawyer communicated with Mr. Graham and/or his counsel. This includes the manner in which he personally worded the two sentences in his correspondence with Mr. Graham on March 5, 2024, which actually address the delay.

[56] This process of waiting until long after he had been notified of the alleged delay claim (merely requesting particulars with respect to that claim) and then writing the letters which he did, first to the Applicant's counsel on March 4, 2025, and then to Mr. Graham personally on March 5, 2025, appeared to signal an intention to attempt to resolve all outstanding issues, which he knew included the delay claim, as far as the Applicant was concerned. This effectively disguised any purported "finding" within the meaning of the contract.

[57] If Mr. Halef really intended that his letter of March 5, 2024, should constitute a "finding", the manner in which he couched his comments served to obscure that fact. The Applicant (and his counsel) interpreted that letter (in conjunction with the letter Mr. Halef had sent to Mr. Trider one day earlier) exactly as Mr. Halef appears to have intended. This was to the effect that the Respondent had simply thrown out an "opening gambit" with respect to comprehensive settlement negotiations. This was a very reasonable interpretation of what Mr. Halef had said, holistically, in his March 4, 2024, letter to Mr. Trider, and in his March 5, 2025, letter to Mr. Graham, and given all of the surrounding circumstances, including Mr. Halef's meeting the previous month with Ms. Mercer.

[58] As noted earlier, given the draconian consequences, specified in the contract, with respect to a failure to comply with the strict timelines after a "finding" has been made, it was incumbent upon the Respondent to at least communicate in a manner which would convey (to a reasonable person) that, substantively, that is what he was doing. As has been noted earlier, while no specific form is specified in the contract as to how a "finding" must be expressed, or how that communication must be "dressed", basic fairness requires clarity that, in substance, a "finding", as opposed to a "settlement position" (mingled with threats of litigation and the cost of thereof), is what is being communicated.

[59] In *Arguson*, it was apparent that the appellant had indicated that it would not be paying the delay claim. Moreover, the recipient testified that he had understood the appellant to have said just that (*Arguson*, paras. 51, 59). This feature distinguishes a number of the authorities which the parties have referenced. Here, what was communicated was not equivalent to “the Respondent will not be paying your [the Applicant’s] delay claim”. In paraphrase, what was being communicated in the March 4, 2025, letter to Mr. Trider, and the March 5, 2025, letter to Mr. Graham, was the equivalent of, “you say you have a delay claim. We disagree. We say we have a deficiency claim. You disagree. But let’s try to be reasonable and settle all of these outstanding issues and save the cost of litigation, because then only the lawyers win.”

[60] The essential feature of a “finding” is that it clearly communicates that the Respondent is not prepared to consider the specific claim being advanced. The March 4 and 5, 2024 letters instead, advocate on behalf of a negotiated resolution of “all issues”, which include both the delay and deficiency claims. This obfuscation appears to have been deliberate on the part of Mr. Halef. Mr. Halef’s letter of March 5, 2024, cannot be considered to be a “finding” for the purposes of the contract.

- A. (ii) *Is the Respondent estopped from asserting that the March 5, 2025, letter constitutes a “finding” within the meaning of the contract?*

[61] Alternatively, I have concluded that the Respondent is estopped from asserting that his comments in his correspondence of March 5, 2024, to Mr. Graham constitutes a finding for the purposes of the contract. Neither of the parties had addressed the concept of estoppel in their prehearing submissions, and as a consequence, the Court raised it and provided counsel with an opportunity to address it.

[62] I will now explain why I have concluded that it is applicable, in the alternative, in the circumstances of this case.

What is estoppel?

[63] “*Estop*” is a verb of Anglo-Norman origin meaning “to seal up”. The noun “estoppel”, in turn, is based upon an Old French word *estoupail* (stopper). When a Court finds that a party has done something warranting a form of estoppel, that

party is said to be estopped from making certain related arguments or asserting certain related rights.

[64] In *Kings (County) v. Berwick (Town)*, 2010 NSSC 128, this Court observed:

[60] The proper approach to the estoppel issue is that explained by Chiasson, J.A. for the British Columbia Court of Appeal in *Dunn v. Vicars*. He adopts the broad approach consistent with the English case law, primarily enunciated by Lord Denning. Lord Denning's conclusion in *Amalgamated Investment v. Texas Commerce* at p. 584 is the modern law of equitable estoppel. He wrote:

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. ... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: ... All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands.

(emphasis added)

[65] A useful canvas of the use and objectives of the concept of estoppel is found in *Gulston v. Aldred*, 2010 BCSC 241:

[52] Where a party unequivocally affirms a contract, whether by words or conduct, or circumstances would make it unjust, inequitable, or unfair for that party to resile from the contract, he or she will be estopped from doing so. In *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.) (*sub nom. Litwin Construction (1973) Ltd. v. Kiss*), at 97-98, the Court of Appeal approved of the following statement on the law of estoppel from the English Court of Appeal in *Re Eaves*, [1940] Ch. 109 (C.A.):

It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal. The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error.

[Citations omitted.]

[53] The Court approved the following statement of principle on the law of waiver and estoppel (at 99):

... [H]as the party...affirmed the contract unequivocally by his words or conduct in circumstances making it unfair or unjust for him now to resile from that contract?

...“Unfair or unjust” means “producing a result contrary to a sound sense of the equities, rights and conduct of the parties”.

Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.

[54] In *Revell v. Litwin Construction (1973) Ltd.* (1991), 62 B.C.L.R. (2d) 328 (C.A.) (*sub nom. Bowen v. O'Brian Financial Corp.*), the Court of Appeal reaffirmed its approach to the law on waiver and estoppel. At paras. 26-27, Mr. Justice Wood (writing for the Court) said the following:

[26] As I read the authorities, and in particular those relied upon by this Court when formulating the modern doctrine in *Litwin v. Kiss*, there is no requirement that the conduct, which was relied upon by the person who seeks to raise an estoppel, have been intentionally designed to induce that reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen. The conduct relied upon may, in fact, be a failure to act in circumstances which gave rise to an inference upon which the reliance is founded.

[27] As to the requirement that the reliance be based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the person who seeks to rely on it. The issue is not so much whether the reliance was based on unequivocal conduct, as it is whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it.

At para. 30, he continued as follows:

[30] ...[T]he modern doctrine of estoppel was adopted by this Court in *Litwin v. Kiss*. The hallmark of that doctrine is its flexibility. It defies a single definition and resists imprisonment in any specific formulation. ...[I]ntention was not essential to the trial judge's conclusions in that case, nor to this court's endorsement of those conclusions. Nor, in my view, was it essential to those conclusions that the affirmation of the contracts in those

cases resulted from the positive acts described by the trial judge, although the fact that there were such positive acts undoubtedly made the result in those cases all the more obvious.

(emphasis added)

[66] *Gillis v. New Glasgow (Town)*, 2009 NSCA 66 provides an example of the flexibility of the doctrine of estoppel. Therein, Roscoe, J.A. said:

[15] The relevant portions of the decision under appeal regarding estoppel are as follows:

[31] ... The principle of estoppel was set out in **Cumberland County (Municipality) v. Cumberland District Planning Commission** (1997), 163 N.S.R. (2d) 16 (S.C.), where J.M. MacDonald J. (as he then was) said:

[54] The basic principles of the concept of estoppel are enunciated in S.M. Waddams' text *The Law of Contracts* (2nd Ed.), 1984 (Toronto-Canada Law Book) wherein the following analysis can be found at p. 143:

The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. A definition that has been judicially approved is as follows:

Where one person ("the representor") has made a representation to another person ("the representee") in words, or by acts and conduct or (being under a duty to the representee to speak or act) by silence or in action, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

And further at p. 145 Waddams notes:

One of the clearest instances of the injustice that would be caused by absolute refusal to recognize gratuitous promises arises in modifications of existing relationships. No difficulty arises where changes are made that might possibly be beneficial to both sides. The problem of absence of consideration arises, however, where a change is agreed that can only benefit one party.

[32] The authors of The Law Relating to Estoppel by Representation make the following comments about parties to negotiations:

Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts⁶

[33] By continuing to deal with the Defendant, to the point where a final agreement was concluded in 2005, the Plaintiffs induced the Defendant to believe that the ongoing negotiations were not leading the parties toward legal action; in other words, it appears that the Plaintiffs allowed discussions to continue with the Defendant under the misapprehension that there would not be litigation arising out of the original Development Agreement. It does not appear to be disputed that both parties proceeded as if a final agreement were intended; that they may have proceeded in a haphazard way does not change that fact. By proceeding to the end of negotiations, it appears, the Plaintiffs misled the Defendant to believe that the parties were *ad idem*. Any estoppel does not arise from specific discussions in the course of negotiating, but from the very act of continuing to negotiate.

[16] The appellants submit that the chambers judge erred in finding estoppel on the undisputed facts before him. They say there was no representation by the appellants that they would not rely on the earlier development agreement and that there was no detrimental reliance by the Town.

[17] In my view the judge was correct to conclude that the appellants were estopped from claiming that the original development agreement was breached by the Town. I agree with the Town's submissions in its factum that, in coming to that conclusion, the chambers judge drew the following inferences from the undisputed facts:

- By continuing to deal with the Defendant, to the point where a final agreement was concluded, the Plaintiff induced the Defendant to believe that the ongoing negotiations were not leading the parties toward legal action
- The Plaintiffs allowed discussions to continue with the Defendant under the misapprehension that there would not be litigation arising out of the original Development Agreement
- Both parties proceeded as if a final agreement was intended

- By proceeding to the end of negotiations, the Plaintiffs misled the Defendant to believe that the parties were *ad idem*.

[18] On a summary judgment application the chambers judge is entitled to draw inferences based on undisputed facts. See: **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at ¶ 30; **Canada (Attorney General) v. Lameman**, 2008 SCC 14 at ¶ 11; **Teleflex Inc. v. I.M.P. Group Ltd.**, [1996] N.S.J. No. 136 at ¶ 29 - 32.

[19] It is true that estoppel requires findings of fact that there was both a representation and detrimental reliance. Had there been varying evidence on those material facts, then the factual disputes would be for trial. But here there was no variation in the evidence underlying these material facts. The evidence of the events was documentary, principally written exchanges between the parties through counsel leading to the execution of closing documents in July and August, 2005. Those documents were not disputed, and the chambers judge was well poised to draw inferences from those documents.

(emphasis added)

[67] So too, in *Canadian Union of Postal Workers v. Canada Post Corporation*, 2010 NSSC 331, this Court, after canvassing the authorities, distilled the three prerequisites necessary for the application of estoppel:

[36] Estoppel by representation has roots in both law and equity; the only distinction being that equitable estoppel by representation was applied only to situations where the Plaintiff had entered into a contract on the faith of the representations made by the Defendant (*Halsbury's Laws of England* 16(2), para. 1052). Common law estoppel by representation is defined as follows by *Halsbury's Laws of England* at 16(2), para. 1076:

Common law estoppel by representative arises where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

[37] Three essential factors for estoppel by representation were set out by Lord Tomlin in *Greenwood v. Martins Bank, Limited* [1933] A.C. 51 at 57:

(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission.

(emphasis added)

[68] In *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, the majority said:

[15] Promissory estoppel is an equitable defence whose elements were stated by Sopinka J. for this Court in *Maracle*, at p. 57:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position. [Emphasis added by SCC]

The equitable defence therefore requires that (1) the parties be *in a legal relationship* at the time of the promise or assurance; (2) the promise or assurance be *intended* to affect that relationship and to be acted on; and (3) the other party in fact *relied* on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee’s detriment. [Emphasis added by SCC]

[69] The Applicant cites the following as examples of representations made by Mr. Halef that the process which he was outlining, and advocating in his letters of March 4 and 5, 2025, was intended to lead to and/or form part of settlement negotiations regarding both the delay and holdback issues, while not communicating a refusal to consider the delay claim:

“I’m happy to consider a comprehensive resolution of all issues now including an orderly payment of the holdback at an appropriate time” – March 4 Email

“I have left everyone else off this chain in an effort to resolve all this.” – March 5 Email

“But, I am willing to be reasonable about all of this” – March 5 Email

“I would like to know if you want to discuss this and resolve this amicably and put this all behind us. Because that is truly what I want...Please [1]et me know. I can also meet if you like.” – March 5 Email

(Applicant’s Supplementary Brief, para. 19)

[70] To the above, I would add, first, that it was coupled with Mr. Halef’s meeting with Ms. Mercer (of Integrum) earlier in February, a meeting at which,

regardless of whose version of facts is accepted, it is clear that the delay claim was discussed.

[71] Second, I observe that by virtue of Integrum’s counsel’s letter to counsel for BANC dated March 11, 2025, it was clear that Mr. Halef’s March 4 and March 5, 2025, correspondence had been interpreted as a prelude to good-faith negotiations of all of the issues.

[72] Clearly, the Respondent and his counsel did not disabuse the Applicant of that impression until they considered it to be too late for them to do anything about it. For example, on April 7, 2025, after Mr. Graham sent BANC another request for payment, the response received from the latter, via Mr. Halef, consisted substantively of a mere repetition of what he had said in his letter of March 5, 2025, to Mr. Graham.

[73] BANC’s counsel argues:

23. Moreover, and in any event, BANC was under no obligation to disabuse the Applicant of any misapprehension about the contract. As the Supreme Court of Canada wrote in *Scotsburn*, “silence or inaction will only constitute a representation where the representor owes a legal duty to the representee to make the disclosure in question.” There was no duty on BANC to tell the Applicant to submit a Notice on Writing of dispute. ...

(Respondent’s Supplementary Brief, March 9, 2026)

[74] In the circumstances of this case, however, surely it is clear that what is in issue is not a “misapprehension about the contract” on the part of the Applicant. It was a misapprehension as to what Mr. Halef’s March 5, 2025 letter signified, a misapprehension induced by the way Mr. Halef worded it, when taken in conjunction with his March 4, 2025 letter, and the manner in which he conducted himself. Objectively speaking, the Applicant interpreted all of this the way a reasonable person would, and this appears to have been what Mr. Halef intended.

[75] Consider, once again, that Mr. Halef’s letters of March 4 and 5, 2025 directed, first, to Mr. Graham’s counsel and, second, to Mr. Graham himself, were carefully worded. The pretext which he cites refers to “an effort to resolve all this”; “I would like to know if you want to discuss this and resolve this amicably and put this all behind us” (May 5, 2025). In fact, only two sentences in the March 5, 2025, correspondence addressed the delay claim, at all, and those two sentences were preceded by the words “but I am willing to be reasonable about all of this”.

[76] I couple all of this with the observation that, in the first letter, he had said to Mr. Graham's lawyer, "I'm happy to consider a comprehensive resolution of all issues now ...". Mr. Halef and his counsel unequivocally knew that, from the Applicant's perspective, the Applicant considered the delay claim to be one of those "issues" requiring resolution.

[77] I infer that Mr. Halef (and through him, BANC) intended at the very least, to obscure the fact that he was purporting to make a "finding". Such a finding, contractually, has important consequences for the Applicant, because it triggers the need for a "notice in writing" of dispute to be prepared by the Applicant. It sets the "clock ticking" with respect to the timeframe within which the contract had specified that this must happen.

[78] Moreover, it was clear by the manner in which Applicant's counsel worded his March 11, 2025 letter to Mr. Herschorn, that the Applicant had interpreted BANC's communications in exactly the manner Mr. Halef had intended, i.e. as a prelude to good-faith negotiations intended to resolve all of the outstanding issues between the parties.

[79] As Mr. Trider stated in that March 11, 2025, letter:

Now, it appears that Banc intends to withhold both the holdback as well as the final invoice amounts from Integrum on the basis of "hundreds of hours of deficiency work". None of these alleged deficiencies were raised with Integrum as required by Article 7.1 of the contract, any, in any event, my client disputes the fact that there were deficiencies in its work which required rework by others.

I have indeed dealt with Mr. Halef in the past, as he indicates, and performed sufficient work both for an against developers to know that what is being telegraphed by Mr. Halef is that he intends to hold the holdback and final invoices hostage until Integrum agrees to drop its delay claim. This could not be more transparent.

What I will say at this juncture is that my client, as previously indicated, is prepared to negotiate in an amicable manner to address the delay claim. A reasonable settlement ought to include payment of the holdback, final invoices, and a contribution to the losses caused by delay on the project. You have my client's starting position in that negotiation as of November of last year. We are still waiting on a response. Happy to consider any allegations of deficient work, understanding that Banc has very specific contractual obligations that limit its ability to make such claims against Integrum and take instructions from my client.

(Graham Affidavit, Exhibit G, p. 72)

[80] Neither the Respondent nor its counsel did anything to correct the Applicant's impression of where matters stood (as noted above) until they felt it was "safe" to do so, and until they felt that the Applicant's position was irredeemably prejudiced.

[81] It was not until Mr. Trider sent a Notice of Arbitration on behalf of Integrum seeking to dispute unpaid contractual amounts and the delay claim (*Graham Affidavit*, Exhibit J) that Mr. Herschorn wrote (for the first time) advising counsel for the Applicant that clause 8.2.2, in his view, applied, and alleging that the Applicant's entire delay claim was void by operation of the contract. This occurred on May 21, 2025.

[82] Mr. Halef, and through him, the Respondent BANC, is estopped from asserting that the two sentences which actually refer to the delay issue in his correspondence of March 5, 2025 to Mr. Graham, constitute a "finding" for the purposes of invoking the timeline and consequences stipulated in clause 8.2.2 of the contract.

B. Having regard to the Court's determination with respect to Issue A, what is the present status of the Applicant's claim for alleged delay?

[83] If Mr. Halef's March 5, 2024, correspondence cannot constitute a "finding" as of that date, the fact that it was intended to be a "finding" was only conveyed by the Respondent's counsel on May 21, 2025, after Integrum's counsel had sent a Notice of Arbitration to him under correspondence of May 15, 2025.

[84] On May 21, 2025, Mr. Herschorn wrote on behalf of BANC saying:

This follows your correspondence of May 15. The Notice of Arbitration is invalid and does not comply with the contract. One of the claims is not arbitrable, having already been waived; and the other is not yet arbitrable. [footnote removed]

First, the delay claim is barred under GC 8.2.2 of the contract. On March 5, 2025 my client, which is the Construction Manager as defined by the contract, stated its finding that the delay claim is baseless and has no merit. My client reiterated this in an email to Integrum on April 7 on which counsel for both parties were copied. Integrum did not provide notice in writing of dispute within 15 working days of March 5 as required. Accordingly, under GC 8.2.2, Integrum "expressly waived and released [my client] from any claims in respect of the particular matter... ." My client has therefore been released from any claim related to alleged delay.

(Graham Affidavit, Exhibit K, p. 93, emphasis added)

[85] This was the earliest date (May 21, 2025) upon which the Applicant was made aware that the Respondent had purported to make a “finding”, and that BANC was not prepared to consider the delay claim. This is the date which triggers the requirement that the Applicant provide Notice in Writing of dispute within 15 business days (clause 8.2.2).

[86] But the Applicant had already provided a Notice in Writing of dispute. Certainly, provision of the Notice of Arbitration was sufficient to accomplish that on May 15, 2025. The Notice of Arbitration, although Mr. Herschorn took the position it was defective, nonetheless contained all of the prerequisites required of written notice. Moreover, the letter from Mr. Trider dated May 26, 2025 (*Graham Affidavit*, Exhibit L) would also operate as a Notice in Writing of dispute, and was easily within the contractually specified timelines.

[87] Consider that a “notice in writing of dispute” is said to be “... a written communication between the parties or between them and the *Construction Manager* or the *Consultant* ...” (*Graham Affidavit*, Exhibit A, p. 9). It must be “addressed to the recipient at the address set out below” (Article A-7.1), and delivery may be by electronic transmission (Article A-7.2). It was deemed to have been received by BANC the day it was sent (Article A-7.4) and the address for a party could be changed by Notice in Writing (i.e. the letter from BANC’s lawyer December 6, 2024, requiring contact through Mr. Herschorn).

[88] We also know that the notice in writing of dispute must further contain “particulars of the matter in dispute and the relevant provisions of the *Contract Documents*” (clause 8.2.2).

[89] The first two pages of the notice of arbitration are reproduced below (the excepted portion is the Statutory Declaration of Owner):

2025

In the Matter of an Arbitration Under Section 10 of the ESA and the
Commercial Arbitration Act, SNS 1999, c 5

BETWEEN:

INTEGRUM PAINTING

Claimant

- and -

BANC INVESTMENTS LIMITED

Respondent

Notice of Arbitration

To: **BANC Investments Limited**
c/o Joseph Herschorn
Cox & Palmer
Nova Centre – South Tower
1500 – 1625 Grafton Street
Halifax, NS B3J 0E8

TAKE NOTICE that the Claimant hereby serves the Respondent with this Notice of Arbitration pursuant to the arbitration clause contained in Section GC 8.2 of the CCDC 17 Stipulated Price Contract (the "Contract") entered between the parties on or about April 25, 2023. If the parties cannot agree on an arbitrator within 7 days of service of this Notice of Arbitration, application will be made for the appointment of an arbitrator.

AND TAKE NOTICE THAT on this arbitration, the Claimant seeks a decision and judgment that the Defendant is liable for:

1. Unpaid contractual amounts owed under the Contract for work performed and holdback (currently totalling \$85,827 HST Included);
2. Costs and damages related to unreasonably long delays on the project caused by the Respondent or other contractors for whom the Respondent is responsible at law; and

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3. Costs and interest as determined by the Arbitrator.

AND TAKE FURTHER NOTICE THAT the Claimant reserves the right to submit such further and other issues for arbitration as may appear. This matter shall be arbitrated in Halifax, Nova Scotia, in the English language, by a single arbitrator.

Signature
Signed this 15th day of May, 2025.



INTEGRUM PAINTING
By its counsel: Dillon Trider
Burchell Wickwire Bryson LLP
1900 – 1801 Hollis Street
Halifax, NS B3J 3N4
Tel: (902) 481-7002
Fax: (902) 420-9326

[90] While Mr. Halef is not specified in the contract as either the Owner or the Construction manager, his email address is provided as the means through which the Corporate Construction Manager may be reached. In any event, the notice that the Applicant received when first contacted by Mr. Herschorn, in which the latter identified himself as counsel for BANC, constituted a notice in writing of a change in the contact information. The Applicant was now required to deal with the Respondent through its lawyer.

[91] Mr. Herschorn, in his letter of May 21, 2025, after taking the position that one of the claims (i.e., the delay claim) was invalid, and had been waived, went on to state that the other “one” (i.e., unpaid holdback amount/deficiencies - see letter accompanying notice of arbitration, *Graham Affidavit*, Exhibit J, p. 87) was premature because, as he stated:

... with respect to the claim for alleged “unpaid contractual amounts”, under the GC 8 the arbitration provision is only engaged if the parties have first attempted to resolve a validly subsisting dispute by amicable negotiations and, if such negotiations have failed, attempted a mediated resolution in accordance with the CCDC 40 rules. If mediation does not result in a resolution, either party may refer the dispute to arbitration if the requirements for referral are met. No such condition has been met here.

Any discussion of the allegedly unpaid contractual amounts must account for the deficiencies that my client is in the process of correcting, and the costs that it has been forced to incur as a result. I have asked my client to assemble the particulars so that, consistent with the contract, the parties can engage in amicable discussion to potentially resolve the properly outstanding issues (the alleged unpaid contractual amounts and my client’s deficiency claim) and move on.

(*Graham Affidavit*, Exhibit K, pp. 93-94)

[92] Mr. Herschorn’s point refers back to the language of the contract itself, particularly GC 8.2. Before considering that particular clause, it is important to recall what GC 8.1 says:

GC 8.1 AUTHORITY OF THE CONSTRUCTION MANAGER AND THE CONSULTANT

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 *Construction Manager* or the *Consultant* as provided in GC 2.2 – ROLE OF THE CONSTRUCTION MANAGER AND THE CONSULTANT,

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 a matter in which neither the *Construction Manager* nor the *Consultant* have 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.
- 8.1.3 If a dispute is not resolved promptly, the *Construction Manager* will give such instructions as in the *Construction Manager's* opinion are necessary for the proper performance of the *Work* and to prevent delays pending settlement of the dispute. The parties shall act immediately according to such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have. If it is subsequently determined that such instructions were in error or at variance with the *Contract* which the *Trade Contractor* was required to do beyond what the *Contract Documents* correctly understood and interpreted would have required, including costs resulting from interruption of the *Work*.

(*Graham Affidavit*, Exhibit A, p. 25)

[93] Next, GC 8.2 is considered, portions of which were earlier noted. It is now reproduced in its entirety:

GC 8.2 NEGOTIATION, MEDIATION AND ARBITRATION

- 8.2.1 In accordance with the Rules for Mediation and Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing, the parties shall appoint a Project Mediator
- .1 within 20 *Working Days* after the *Contract* was awarded, or
 - .2 if the parties neglected to make an appointment within the 20 *Working Days*, within 10 *Working Days* after either party by *Notice in Writing* requests that the Project Mediator be appointed.
- 8.2.2 A party shall be conclusively deemed to have accepted a finding of the *Construction Manager* or the *Consultant* under GC 2.2 – ROLES OF THE CONSTRUCTION MANAGER AND THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 *Working Days* after receipt of that finding, the party sends a *Notice in Writing* of dispute to the other party, the *Construction Manager* and the *Consultant*, which contains the particulars of the matter in dispute and the relevant provisions of the *Contract Documents*. The responding party shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after

receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Contract Documents*.

- 8.2.3 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations.
- 8.2.4 After a period of 10 *Working Days* following receipt of a responding party's *Notice of 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 Rules for Mediation and Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing.
- 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 the Owner, the Trade Contractor and the Construction Manager.

...

(*Graham Affidavit*, Exhibit A, p. 26, emphasis added)

[94] After receipt of Mr. Herschorn's letter of May 21, 2025, in effect, Mr. Trider, on behalf of the Applicant, communicated a willingness to proceed to mediation and provided a suggestion as to who might be acceptable to Integrum in the role of mediator. He stipulated that the process must apply to "both the delay issue as well as the deficiency issues" (*Graham Affidavit*, Exhibit L, p. 95). This was on May 26, 2025.

[95] Mr. Herschorn responded on May 28, 2025, "[w]e disagree that the delay issue can be dealt with along with the others [in the mediation] ... our position is that the claim has been waived and released" (*Graham Affidavit*, Exhibit L, p. 95).

[96] This Court has determined that the delay issue had not been "waived and released" by May 28, 2025.

[97] What occurred, therefore, was an agreement by the Applicant to participate in a mediation process as contemplated by the contract provisions 8.24 and 8.25, and the refusal by the Respondent to proceed with the mediation with respect to all of the issues that ought to have been included in that process.

[98] Put at its mildest, what the Applicant and his lawyer received was the antithesis of "amicable negotiations and ... frank, candid and timely disclosure of

relevant facts, information and documents to facilitate those negotiations”
(*Graham Affidavit*, Exhibit A, p. 26, clause 8.2.3).

[99] The Respondent has effectively deprived Mr. Graham of his ability to proceed to mediation in accordance with the terms of the contract.

[100] What follows after mediation? The contract provides:

- 8.2.6 By giving a *Notice in Writing* to the other party and the *Construction Manager*, 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 under the latest edition of the Rules for Mediation and Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing. 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 in Writing* 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.
- 8.2.8 If neither party, by *Notice in Writing*, given 10 *Working Days* of the date of *Notice in Writing* requesting arbitration in paragraph 8.2.6, requires that dispute be arbitrated immediately, all disputes referred to arbitration as provided in paragraph 8.2.6 shall be
- .1 held in abeyance until
 - (1) *Substantial Performance of the Work*,
 - (2) the *Contract* has been terminated, or
 - (3) the *Trade Contractor* has abandoned the *Work*,
 Whichever is earlier, and
 - .2 consolidated into a single arbitration under the rules governing the arbitration under 8.2.6.

GC 8.3 RETENTION OF RIGHTS

- 8.3.1 It is agreed that no act by either party shall be construed as a renunciation or waiver of any rights or recourses, provided the party has given the *Notice in Writing* required under Part 8 of the General Conditions – DISPUTE RESOLUTION and has carried out the instructions as provided in paragraph 8.1.3 of GC 8.1 – AUTHORITY OF THE CONSTRUCTION MANAGER AND THE CONSULTANT.

- 8.3.2 Nothing in Part 8 of the General Conditions – DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the *Place of the Project* and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.6 of GC 8.2 – NEGOTIATION, MEDIATION AND ARBITRATION to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.

Conclusion

[101] The Court has concluded that the claim of the Applicant with respect to the delay issue remains extant. In practical terms, the parties are in a situation identical to that contemplated by clause 8.2.7. The combined effect of that clause, and 8.3.1, in particular, means that there has been no “renunciation or waiver of any rights or recourses ...”. The parties are free to “refer the unresolved dispute[s] to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use” (*Graham Affidavit*, Exhibit A, p. 26, clause 8.2.7).

Costs

[102] The Applicant is entitled to his costs. The parties have 15 business days to quantify these costs by agreement, failing which I will accept short written submissions.

Gabriel, J.