IN THE MATTER OF:

A COMPLAINT OF ALLEGED UNJUST DISMISSAL UNDER DIVISION XIV - PART III, SECTION 240 OF THE *CANADA LABOUR CODE*, R.S.C. 1985, c. L-2

BETWEEN:

Murray Bird,

RESPONDENT (COMPLAINANT),

- and -

White Bear First Nation,

APPLICANT (RESPONDENT).

APPEARANCES:

For the Applicant (Respondent),
White Bear First Nation: Katherine S. Melnychuk

For the Respondent (Complainant),
Murray Bird: Dwayne Stonechild

BEFORE:

T. F. (Ted) Koskie, B.Sc., J.D., Adjudicator

INTERIM DECISION DATE:

February 22, 2023

DECISION

I. INTRODUCTION

[1] Murray Bird ("Bird") lodged a complaint[1] (the "Complaint") pursuant to section 240

[1]Complaint dated December 16, 2014

of the *Canada Labour Code*, Part III (the "*Code*") alleging that White Bear First Nation ("WBFN") unjustly dismissed him from his employment effective December 4, 2014.

[2] WBFN took issue with the Complaint.

[3] Bird asked that the Complaint be referred to an adjudicator.

[4] The Minister of Labour (Canada) appointed an adjudicator to hear and determine the Complaint.

[5] On August 26, 2016, that adjudicator dismissed the Complaint.

[6] Bird brought an application[2] to the Federal Court for judicial review of that decision.

[7] On May 10, 2017, the Federal Court granted the application for judicial review and directed the matter to be returned for readjudication by a different decision-maker.

[8] WBFN appealed the Federal Court's decision.

[9] On March 9, 2021, the Federal Court of Appeal dismissed the appeal.

[10] The Minister of Labour (Canada) appointed me as the adjudicator to rehear and determine the Complaint.

2. FACTS

[11] I convened a conference call with the parties on January 21, 2022, to not only

[2]Under the *Federal Courts Act*, RSC 1985, c. F-7, s. 18.1

schedule the rehearing of the Complaint, but to address any preliminary matters relating thereto. I scheduled the rehearing for June 6 to 10, 2022. The parties had agreed there was ample time prior to those dates to discuss, resolve and reach agreement on, *inter alia*, whether:

a) some evidence from the first hearing of the Complaint could be read into the record of the rehearing;

b) some witnesses could appear by video conference; and

c) a joint book of documents could be submitted to the rehearing.

[12] In its brief, Counsel for WBFN submitted:

> 4. Between January 21, 2022 and May 13, 2022, WBFN's counsel reached out to Mr. Bird's counsel on multiple occasions by e-mail and telephone to discuss the issues raised during the January 2022 call. WBFN's counsel did not receive any response from Mr. Bird's counsel at all during that time.
>
> 5. On May 13, 2022, Mr. Bird's counsel advised that correspondence relating to the Re-Hearing would be forthcoming. This correspondence was not received before the next conference call with the Adjudicator.

Counsel for Bird admitted this to be the case and said his tardiness was entirely "his fault" and not that of Bird.

[13] At the request of Counsel for WBFN, I convened a conference call with the parties on May 20, 2022. Counsel for WBFN complained of the lack of responsiveness from Counsel for Bird and asked for an adjournment. I granted the adjournment and, upon agreement of the parties, rescheduled the rehearing for August 15 to 19, 2022. Further, I ordered that by July 15, 2022, the parties:

a) disclose documentation to be relied upon at the rehearing;

b) exchange their witness lists; and

c) advise each other of their position on what evidence, if any, from the first hearing of the Complaint could be read into the record of the rehearing.

The parties had agreed this was a reasonable time to do so. I warned the parties that a failure to comply with my direction for disclosure could well result in an award of costs against the offending party.

[14] On or about July 20, 2022, WBFN applied to, *inter alia*, adjourn the rehearing of the Complaint.

[15] In its brief, Counsel for WBFN submitted:

> 8. Following the May 2022 Call, WBFN ordered the transcript (the "Transcript") of the First Hearing from Adjudicator Cameron and advised Mr. Bird's counsel that the Transcript would be shared if 50% of the total cost was provided to WBFN. To date, WBFN has not received the $150 requested from Mr. Bird for his share of the Transcript.
>
> 9. On July 11, 2022, WBFN's counsel sent Mr. Bird's counsel a list of WBFN's proposed read-ins for his consideration. No response was received.
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> 10. On July 15, 2022, WBFN's counsel sent Mr. Bird's counsel a copy of the sections of the Transcript containing the proposed read-ins, recognizing that he would have to review those portions despite not paying for his share of the costs for the Transcript.
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> 11. To date, WBFN has not received Mr. Bird's witness list, disclosure, or his share of the Transcript costs, nor has Mr. Bird responded to WBFN's Application or proposed read-ins in any way.

Counsel for Bird admitted this to be the case and said his tardiness was entirely "his fault" and not that of Bird.

[16] I granted the adjournment and scheduled August 15, 2022, to hear the balance of WBFN's application.

3. APPLICATION

[17] Beyond adjournment, WBFN applied for an Order:

a) granting leave to WBFN to enter as evidence the testimony of Laura Whiteman, Kris Stevenson, Leslie King, Stephanie Brown, and Ken Lonechild (the "Unavailable Witnesses") from the transcript of the first hearing of the Complaint;

b) granting leave to WBFN witnesses to testify remotely at the rehearing of the Complaint;

c) mandating disclosure by Bird of "his Witness List, List of Disclosure, and any Proposed Read-ins by a specific deadline, failing which a further award of costs will be ordered"; and

d) for Costs totalling $5,000.00 payable by Bird to WBFN.

4. DECISION

[18] I hereby:

a) grant leave to WBFN to enter as evidence the testimony of its Unavailable Witnesses from the record of the first hearing of the Complaint;

b) grant leave for WBFN witnesses to testify virtually at the rehearing of the Complaint; and

c) direct that Bird disclose to WBFN his witness list, his list of documents intended to be used at the rehearing of the Complaint, and any proposed read-ins from the transcript of the first hearing of the Complaint by March 31, 2023.

[19] I advise the parties I am contemplating an order that Counsel for Bird personally pay WBFN costs of $5,000.00. Before making such an order, I grant leave to Counsel for Bird to advise me by March 31, 2023, that he wishes to make representations to me concerning same.

5. REASONS

5.1 *CODE*

[20] The relevant provisions of the *Code* are:

> ***Powers of Board***
> 16 The Board has, in relation to any proceeding before it, power
>
> (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;
>
> (a.1) to order pre-hearing procedures, including pre-hearing conferences that are held in private, and direct the times, dates and places of the hearings for those procedures;
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> (a.2) to order that a hearing or a pre-hearing conference be conducted using a means of telecommunication that permits the parties and the Board to communicate with each other simultaneously;
>
> (b) to administer oaths and solemn affirmations;
>
> (c) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;
>
> . . .
>
> ***Complaint to inspector for unjust dismissal***
> 240(1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time
(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

. . .

Reference to adjudicator
242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator
(2) An adjudicator to whom a complaint has been referred under subsection (1)

(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

(b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator
(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect

of a person where

(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

5.2 ANALYSIS

5.2.1 READ-IN EVIDENCE

[21] WBFN advised:

a) one of its witnesses–Ken Lonechild–has passed away; and

b) four of its other witnesses–Laura Whiteman, Kris Stevenson, Stephanie Brown and Leslie King–cannot be located or are otherwise unavailable to attend the rehearing of the Complaint;

collectively called the "Unavailable Witnesses."

[22] WBFN seeks to:

a) read into evidence the testimony of the Unavailable Witnesses from the record of the first hearing of the Complaint taken by the first Adjudicator; and

b) tender in evidence the exhibits referred to in the read-in testimony.

Though Bird does not dispute the Unavailable Witnesses are unavailable, he takes the position such evidence (after this called the "Record Evidence") should be inadmissible.

[23] At the outset, WBFN argues in its brief:

> 15. Hearsay evidence, such as transcripts of prior witness testimony, is presumptively inadmissible (*R.* v *Khelawon*, 2006 SCC 57 [*Khelawon*] at para 34). However, case law has established that two avenues exist through which prior witness testimony can be admitted.
> . . . .

[24] Before addressing the ensuing arguments, it is important to note that WBFN did not tender a verbatim transcript from the first hearing of the Complaint–one does not exist. Rather, WBFN provided the evidentiary notes (the "Notes") taken by the Adjudicator that conducted the first hearing of the Complaint.

[25] The first exception ("the "Traditional Exception") WBFN submitted was articulated in *Walkerton (Town)* v *Erdman*.[3] The Court held same was established where the:

a) person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when examined as a witness;

b) the questions in issue were substantially the same in the first as in the second proceeding; and

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[3](1894), 23 SCR 352

c) the proceeding was between the same parties, or their representatives in interest.

[26] WBFN argues:

> In relation to the traditional exception, each of its three criteria are met. Mr. Bird's former counsel was present during the testimony of each of the Unavailable Witnesses and cross-examined each one, the questions in issue are identical, and the parties are identical.

Bird did not disagree.

[27] As WBFN has argued, I am satisfied:

a) Bird's former counsel was present during the testimony of each of the Unavailable Witnesses and cross-examined each one;

b) the questions in issue are identical; and

c) the parties are identical.

I am satisfied the first exception is established.

[28] Relying upon *R.* v *Mapara*,[4] WBFN submitted the second exception ("the "Principled Exception") was established where:

a) the party seeking to adduce the hearsay evidence shows that it is both necessary and reliable; and

b) the evidence's exclusion would impede accurate fact finding.

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[4] 2005 SCC 23

[29] On the issue of necessity, WBFN argues:

> 18. Hearsay evidence is considered to be necessary where the party seeking to introduce it can show that it is not possible for the evidence to be admitted in the traditional manner, meaning the witness will not be providing live testimony and subjected to cross-examination, and the party is unable to obtain evidence of a similar quality from another source (*R* v *Hawkins*, [1996] 3 SCR 1043 (SCC) [*Hawkins*] at para 71). Courts have found that hearsay evidence satisfies the necessity requirement where the witness was deceased (*R* v *Smith*, [1992] 2 SCR 915 (SCC) [*Smith*] at para 30), refused to testify (*R* v *Bradshaw*, 2017 SCC 35 [*Bradshaw*] at para 25) or was unavailable (*R* v *Hankey*, [2008] OJ No 5269 (ONSCJ) [*Hankey*] at para 24).
>
> 19. Issues rarely arise where the prospective witness is deceased as there is no way for them to testify at the current proceedings (*R* v *Wilder*, 2002 BCSC 1333 at para 173). Where the would-be witness is unavailable because they are out of jurisdiction or otherwise unavailable, necessity has been found where reasonable efforts have failed to locate the witness (*Hankey* at para 24).

[30] On the issue of reliability, WBFN argues:

> 20. Reliability, on the other hand, can be established through substantive reliability, procedural reliability, or both (*R* v *Bradshaw*, 2017 SCC 35 [*Bradshaw*] at para 27; *Khelawon* at paras 61-63). Procedural reliability can be established where the evidence is shown to be reliable due to the manner in which it was collected (*Bradshaw* at para 28; *Khelawon* at para 63).
>
> 21. In *Khelawon*, the Supreme Court of Canada cited *Hawkins* for the proposition that prior civil testimony has been admitted in subsequent proceedings where the testimony was made under oath and could have been subjected to cross-examination (*Khelawon* at para 91) . . . .
>
> 22. The Supreme Court of Canada in *Khelawon* and *Hawkins* established that, where there is witness testimony from a prior proceeding, it will likely be admissible and any concerns regarding the trier of fact's inability to observe the witness' demeanour will affect the weight rather than the admissibility of the evidence at the new proceeding (*Khelawon* at para 91; *Hawkins* at para 79; *Wilder* at para 195).

[31] WBFN argues:

> 24. In relation to the principled exception set out in *Khelawon*, Ken Lonechild is deceased and the remaining Unavailable Witnesses either cannot be located by WBFN despite its efforts or are otherwise unable to testify. Jurisprudence from *Khelawon*, *Bradshaw*, *Smith*, *Wilder*, and *Hankey* support the conclusion that the Unavailable Witnesses' prior testimony satisfies the principled exception's necessity requirement.

> 25. The Unavailable Witnesses' prior testimony is also similar in substance to the evidence at issue in *Hawkins*. Each of the Unavailable Witnesses gave their testimony under oath or solemn affirmation, and each was subject to contemporaneous cross-examination. The presence of these two factors provides sufficient guarantees of the evidence's trustworthiness and, accordingly, satisfies the principled exception's threshold reliability requirement.
>
> 26. Finally, WBFN will suffer substantial prejudice if the Unavailable Witnesses' prior testimony is not admitted in the Re-Hearing. To the extent that the Adjudicator finds the Unavailable Witnesses' prior testimony to be unreliable or unnecessary, WBFN submits that these concerns ought to affect the evidence's weight rather than admissibility.

[32] Bird did not take issue with WBFN's argument that the read-in evidence was necessary and its exclusion would impede accurate fact finding. He focussed solely upon the issue of reliability. He argued the Federal Court and Federal Court of Appeal "said the first arbitrator had made errors." As a consequence his notes could not be relied upon to accurately reflect the evidence given by the witnesses in question.

[33] Counsel for Bird did not point me to any specifics within the decisions of the Federal Court and Federal Court of Appeal that would reflect upon the reliability of the first Arbitrator's notes of the evidence. As I read the decisions, they focussed upon the first adjudicator failing to:

a) apply the correct legal test in assessing whether WBFN had just cause to terminate Bird's employment;

b) consider the principle of progressive discipline; and

c) find Bird had been denied an opportunity to complaints made against him prior to termination.

I see nothing in the decisions that supports the arguments of Bird's counsel.

[34] I am satisfied the read-in evidence is:

a) necessary–it is not possible for the evidence of the Unavailable Witnesses to be admitted in the traditional manner, they are either deceased or unable to be found; and

b) reliable–both substantively and procedurally–it was made under oath and subjected to cross-examination.

To exclude the evidence would impede accurate fact finding.

[35] It bears noting the Notes are detailed and I am satisfied the bear the degree of reliability to be treated as transcripts.

[36] I find the second exception is established.

[37] I grant leave to WBFN to enter as evidence the testimony of its Unavailable Witnesses from the record of the first hearing of the Complaint;

5.2.2 VIRTUAL TESTIMONY

[38] On this point, WBFN submitted:

> 30. Recent case law also favours allowing the witnesses the option of testifying remotely. In *Unifor, Local 594 and Consumers' Cooperative Refineries Ltd (Gauthier), Re*, 2020 CarswellSask 375 [*Gauthier*], Arbitrator Wallace, after finding that she had the jurisdiction to order the Grievance to be heard by video conference, considered whether she should make an Order to that effect.
>
> 31. After reviewing the relevant authorities, Arbitrator Wallace concluded that an arbitrator must balance the interests of the parties on a case by case basis in determining whether a video hearing is a reasonable and appropriate option. At paragraph 78, Arbitrator Wallace outlined the following non-exhaustive set of factors (and several comments) that are relevant to the balancing of interests:
>
> i. Is it legally possible for an in-person hearing to take place? Government restrictions to address COVID-19 are an example of this.

ii. Even if an in-person hearing is legally possible, are there health and/or safety reasons why an in-person hearing is not advisable? The current uncertain and volatile climate because of COVID-19 is an example of this.

iii. Is there anything unique about the case to suggest a video hearing would not be suitable?

iv. Is there anything unique about the case to suggest a video hearing would be suitable?

v. Are the circumstances, including circumstances of the witnesses and other participants such that video conferencing would permit the hearing to take place at an earlier date? This could include, for example, situations where witnesses, parties, and counsel are separated geographically.

vi. Is an adjournment going to be necessary considering:

1. The nature of the proceeding?

2. The time of the request for the adjournment?

3. The reasons for the adjournment being sought?

4. The length of the adjournment being sought?

5. The balance of convenience in granting or not granting the adjournment, which includes determining what, if any, prejudice either party may suffer?

vii. Is there any special reason why the arbitrator may not be able to adequately assess the credibility of a witness? The mere fact there may be differences in the evidence of witnesses, or that the evidence may be very different, is not a sufficient reason to reject a video hearing. To the extent demeanor is a factor in assessing credibility the arbitrator should be able to assess demeanor when the witness appears by video.

viii. Is the proposed video technology adequate to ensure a fair hearing?

ix. Are there factors of cost and efficiency that would suggest a video hearing is the preferable option?

x. Is there any other circumstance to suggest one option is preferable over the other?

32. While the factors listed in *Gauthier* are in the context of whether a hearing should take place entirely remotely, it is submitted that these factors are also relevant to allowing some witnesses to testify remotely.

33. In *Labourers' International Union of North America, Local 183* v *Innovative Civil Constructors Inc.*, 2020 CanLII 42431 (ON LRB) [*Labourers' International*], the adjudicator of the Ontario Labour Relations Board considered whether a hearing should proceed by way of video hearing.

34. The decision in Labourers' International occurred in the context of an unfair labour practice proceeding whereby there were many parties, many witnesses, and a substantial amount of documents. The majority of the hearing occurred before the COVID-19 pandemic

occurred. However, portions of the hearing were still incomplete. The parties did not agree whether the hearing should proceed by way of video hearing or wait until it could proceed in-person.

35. The Ontario Labour Relations Board considered the arguments for and against proceeding by way of video hearing. One of the issues that the Labour Relations Board considered was whether they could make appropriate credibility assessments by video. In concluding that they could, the Labour Relations Board stated:

> In my view, it is time to put an end to the assumption that a video hearing negatively affects the ability of a decision-maker to make credibility assessments. For the reasons identified above by Rutherford J. in *Pack All Manufacturing*, the Tribunal in Johnson, and the Board in *Islington Nurseries*, I am of the view that holding a video hearing to secure the evidence of Mr. Cordeiro would not have any effect upon my ability to assess the credibility of the testimony he offers. Ultimately, the demeanour of Mr. Cordeiro will be of little significance. What will matter is whether his evidence is consistent with the other credible evidence called by the parties, including the myriad documents filed as exhibits. If Mr. Cordeiro testifies by video hearing, the fact that he has done so will not have an effect on his credibility.

36. The Ontario Labour Relations Board also considered whether it was procedurally fair for one party to call evidence by way of an in-person hearing and to allow another to call evidence by way of a video hearing. In concluding that it was not procedurally unfair, the Labour Relations Board stated:

> There is nothing before the Board in this proceeding to suggest that Innovative will be prejudiced in any meaningful way because the witnesses called by Innovative were cross-examined in person, and counsel for Innovative will only be able to cross-examine Mr. Cordeiro and the witness or witnesses offered by Local 183 by way of video conferencing technology.

37. At paragraph 37 of *Labourers' International*, *supra*, the Ontario Labour Relations Board stressed that, in order to ensure the timely administration of justice, it is necessary to use video hearings more broadly in cases where it is appropriate to do so. It is respectfully submitted that allowing the WBFN witnesses the option of testifying remotely at the hearing meets this objective.

[39] In its application, WBFN submitted:

14. The witnesses included on WBFN's Witness List who are expected to appear in-person or virtually all reside outside of Regina, with Mr. Howe residing in Abbotsford, British Columbia. While some of these witnesses may be able to travel to the Adjudication to appear in-person, this is certainly not guaranteed especially considering the ongoing risks of the pandemic and the current disruption of air travel. Allowing the option to appear virtually will ensure that the Adjudication proceeds smoothly and without disruption caused by travel delays or otherwise.

> 15. WBFN emphasizes that it is not seeking that the entire hearing be held virtually. WBFN seeks leave for witnesses to be provided the option of testifying virtually. . . . .

[40] In its brief, WBFN argues:

> 38. The majority of the factors listed in Gauthier favour the granting of an Order that the WBFN witnesses be able to testify remotely. There is still a substantial amount of uncertainty surrounding COVID-19 and it tends to have a volatile nature. Many of the witnesses associated with this matter live outside of Regina, with Mr. Howe residing in Abbotsford, British Columbia. If witnesses choose to testify remotely, the Adjudicator will be able to adequately assess credibility and ensure a fair hearing results. Ultimately, it would be appropriate for the WBFN witnesses to have the option to testify remotely at the Re-Hearing.

[41] Bird did not point me to any authority on this point. Without more, he simply submits personal attendance is necessary to permit adequate cross examination and my assessment of credibility. I am not persuaded by Bird's argument.

[42] I am satisfied:

a) while it is legally possible for an in-person evidence to take place, there are practical reasons–such as cost, inability to travel and potential COVID health and safety matters–that warrant virtual attendance;

b) there is nothing unique about this case to suggest a virtual attendance would not be suitable;

c) the circumstances–including the geographic location of the witnesses–are such that virtual attendance will permit the hearing to take place at an earlier date;

d) there is no special reason why I may not be able to adequately assess the credibility of a witness testifying virtually;

e) I possess video technology adequate to ensure a fair hearing;

f) factors of cost and efficiency suggest taking evidence virtually is a preferable option in the circumstances; and

g) on a balance of convenience, there is not other circumstance to suggest one option is preferable over the other.

[43] I accept WBFN's argument. I find, on a balancing of the interests of the parties, that allowing witnesses to testify virtually is reasonable and appropriate.

5.2.3 DISCLOSURE

[44] Bird did not object to WBFN's application for disclosure and, indeed, offered to comply with same within one week.

[45] I am satisfied WBFN's request in this regard is reasonable. I therefore direct that Bird disclose to WBFN his witness list, his list of documents intended to be used at the rehearing of the Complaint, and any proposed read-ins from the transcript of the first hearing of the Complaint by March 31, 2023.

5.2.4 COSTS

[46] WBFN asks me to order Bird pay it $5,000.00 in costs–not only in conjunction with its application, but for failure to comply with my previous directions. In its application, it submits:

> 17. On May 20, 2022, the Adjudicator ordered that the parties must disclose their Witness List, List of Documents, and List of Proposed Read-ins by July 15, 2022. WBFN complied with this Order (July 15, 2022 letter attached). Mr. Bird did not. To date, none of the

> above-listed pleadings/information have been provided to WBFN. No excuse or timeline has been provided.
>
> 18. Mr. Bird's failure to comply with the procedural Order again resulted in delays and uncertainty in these proceedings. To date, WBFN has not received a Witness List, List of Documents, or List of Proposed Read-ins. WBFN has not received a response to its proposed read-ins. Without this information and disclosure, Mr. Bird has again caused this Adjudication to sit at a standstill.

[47] WBFN argues:

> 19. Mr. Bird's inaction and delays have put WBFN at a serious disadvantage going into the Adjudication, which is scheduled to begin in less than one month. WBFN does not have any resolution as to what read-ins will be permitted, thereby putting it at a disadvantage as to what witnesses and evidence it must prepare and present at the Adjudication. Mr. Bird has received all of the required disclosure on behalf of WBFN, which includes new disclosure, giving him an obvious advantage going into Adjudication. This failure to comply with the Adjudicator's Order prejudices WBFN and puts at risk the Adjudication date of August 15, 2022 as there is no guarantee that WBFN will receive this information anytime soon. Additionally, WBFN has now had to waste time, money, and resources to bring this very Application. Br. Bird's breach of the Order cannot be tolerated, and WBFN should be compensated by way of costs.

[48] Counsel for Bird does not dispute WBFN's allegations. He submits that Bird is not responsible for the failure to disclose. He says that failure is solely attributable to him. In explanation, he said he has been "suffering from some health issues" that have prevented him from complying with my directions. He did not give any particulars of his health issues. He did not give any explanation as to why he did not advise WBFN or me that such issues were causing him to be unable to give any attention to this matter.

[49] In normal circumstances, I would be inclined to grant the award of costs sought by WBFN. However, in light of Counsel for Bird's admission, my sense is that would not fair and equitable. However, this does appear to be a case where it would be appropriate to make an award of costs against Counsel for Bird personally.

[50] The Federal Court Rules do not give specific consideration to a cost award being made against a lawyer. The general provision is section 400(1), which states that "[t]he

Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." This would appear to allow a cost award being made against a lawyer. The next relevant section is 400(3), which lists over a dozen factors to be considered when awarding costs. Among these factors are section 400(3)(l)–"any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding"–and section 400(3)(o)–"any other matter that it considers relevant."

[51] Since in a matter such as this, the Federal Court Rules would seem to allow a cost order to be made against counsel, the next thing to do is to look to the case law to see what sorts of circumstances warrant such an award.

[52] One of the foremost cases on this point is *Young* v *Young*.[5] It is the source of the principle of "extreme caution" to be used when ordering costs against counsel. The following is a substantial quote taken from the case often used to illustrate that principle:

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensation order for costs if it is shown that repetitive and irrelevant material, excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court...[C]ourts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

[53] The case of *Galgonov* v *Russell (Township)*, 2012 ONCA 410, built upon the principle espoused in *Young* by building a two-part test based largely on the Ontario Rules of Court. The first part of the test is to determine whether the conduct of the lawyer falls under section 57.07(1) of those *Rules*. The Court there says:

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[5][1993] 4 SCR 3

a) bad faith of the part of the lawyer is not required;

b) the entire course of litigation must be considered so as to understand the context of the situation and to produce an "accurate tempered assessment"; and

c) the legal test "is not concerned with a lawyer's professional conduct generally, but whether such conduct . . . caused unreasonable costs to be incurred."

[54] This is a situation in which counsel, by his own admission, is solely to blame for the delay and added costs. It is a situation where costs are warranted, but also a situation in which it would be unjust to order Bird to pay the costs personally. As such, I am of the view the reasonable route is to order costs against Counsel for Bird.

[55] I am supported in my view by *1985 Sawridge Trust* v *Alberta (Public Trustee)*.[6] This case recognizes that it is an exceptional step to order costs against a lawyer, but states that delay, which "is an increasing issue in both civil and criminal proceedings," "may be a basis to order [that] costs are paid by the lawyer." This case references *Pacific Mobile Corporation* v *Hunter Douglas Canada*,[7] where "unnecessary repeated adjournments" were one of the bases that Pigeon, J. identified for the award of costs against lawyers." Avoiding delay ought to be a major priority for increasing access to justice and cost minimization, and in general.

[56] This brings me to the question of whether I, as an adjudicator, have the ability to order costs against Counsel for Bird.

[57] It is established law that adjudicators may award costs. We see the following

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[6]2017 ABQB 530

[7][1979] 1 SCR 842

comments in *Re: Polchies and Woodstock First Nation*:[8]

> Since the decision of the Federal Court of Appeal in *Banca Nazionale del Lavoro of Canada Ltd.*, ... the jurisdiction of an adjudicator to award costs is beyond question. There, Justice Stone found that jurisdiction to be grounded in section 242(4)(c) inasmuch as "legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal."

[58] The only question would be whether this power to award costs extends to the power to award costs against counsel. I conclude that, because there is power to order costs against a party, there is the corollary power to do so against counsel.

[59] This is a particularly extreme instance of neglect and delay. This is an instance where a cost award should be made. However, to make it against Bird would be unjust. This is particularly true where Counsel for Bird has stated himself that he is solely to blame.

[60] It is appropriate to give Counsel for Bird notice a cost award is being contemplated and to give him an opportunity to make representations in connection therewith.

[61] I advise the parties I am contemplating an order that Counsel for Bird personally pay WBFN costs of $5,000.00. Before making such an order, I grant leave to Counsel for Bird to advise me by March 31, 2023, that he wishes to make representations to me concerning same.

Dated at Saskatoon, Saskatchewan, on February 22, 2023.

T. F. (TED)KOSKIE, B.Sc., J.D.,
ADJUDICATOR

[8] [2002] CLAD No. 441 at para. 23