Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2788-17-U**

Labourers' International Union of North America, Local 183, Applicant v **Innovative Civil Constructors Inc., Eiffage Innovative Canada Inc. and/or Eiffage Infrastructures Canada Inc.**, Hired Resources, and The Building Union of Canada, Responding Parties

BEFORE: Lee Shouldice, Vice-Chair

APPEARANCES: Stephen Krashinsky and Josh Parsons for Labourers' International Union of North America, Local 183; Michael Sherrard, Jeremy McLeish and John Krasko for Innovative Civil Constructors Inc., Eiffage Innovative Canada Inc. and Eiffage Infrastructures Canada Inc.; J. David Watson and Tony Cordeiro for the Building Union of Canada; no one for Hired Resources

DECISION OF THE BOARD: June 22, 2020

I. Introduction

1. This is an unfair labour practice proceeding filed with the Board pursuant to section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act") in which the applicant ("Local 183") alleges that Innovative Civil Constructors Inc., Eiffage Innovative Canada Inc. and Eiffage Infrastructures Canada Inc. (collectively "Innovative"), Hired Resources, and the Building Union of Canada ("the BUC") violated sections 70, 72, and 76 of the Act. This application was filed with the Board on January 26, 2018.

2. In this proceeding Local 183 asserts, amongst other things, that the BUC and Innovative conspired to sign a province-wide voluntary recognition agreement in October, 2017 for the purpose of precluding it from pursuing an organizing drive which was underway at the time.

3. To date evidence has been called to by two parties – Hired Resources and Innovative. Seven witnesses have been called from those two entities over the course of 15 hearing dates. Thirty-six exhibits have been filed, including three large binders of emails and other related documents. The BUC and Local 183 have yet to call their witnesses. The next witness is to be called by the BUC. It proposes to call Tony Cordeiro, one of its Business Representatives. Mr. Cordeiro will be its only witness. Mr. Cordeiro's evidence is central to the case put forward by the BUC. After the evidence of Mr. Cordeiro has been completed, Local 183 will call at least one individual to testify.

4. Hearing dates previously scheduled during May, 2020 were adjourned by the Board as a result of the COVID-19 pandemic. Hearing dates remained scheduled for June 18, 19, 29 and 30, 2020. By decision dated May 25, 2020, I sought submissions from the parties on the question of whether this proceeding could continue by way of a video hearing. My decision stated the following:

> 2. I am inclined to the view that the hearing of these proceedings on the merits can properly continue by way of a video hearing. Should any party object to doing so, it is to advise the Board of its objection, and the reasons therefor, no later than June 1, 2020.
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> 3. If there are no objections filed with the Board by that date, the Board will convene a video hearing on June 18, 2020 (and, if necessary, on June 19, 2020) for the purpose of making all arrangements necessary to continue this hearing on the merits on June 29 and 30, 2020. If there is an objection filed, a video hearing will be held on June 18, 2020 for the purpose of entertaining the submissions of counsel on the question of whether the hearing on the merits of this proceeding ought to be continued by way of video.

5. Both the BUC and Innovative object to this application proceeding by way of video hearing. Local 183 desires to proceed in that fashion. Hired Resources takes no position. Full submissions were filed by both the BUC and Innovative in support of their position. Subsequently, Local 183 filed full responding submissions in support of its position.

6. In accordance with my decision dated May 25, 2020, a video hearing was convened on June 18, 2020 for the purpose of entertaining the submissions of counsel. At the end of argument, I advised counsel that I would issue a decision today on whether this proceeding will continue by way of video hearing on June 29 and 30, 2020. This is that decision.

II. Decision

7. At the risk of not doing justice to the thoughtful and comprehensive submissions provided by counsel, I set out immediately below a summary of the positions taken by the parties to this proceeding, and my decision.

8. Rule 38.5 of the Board's Rules of Procedure states as follows:

> The Board may conduct an electronic hearing in any case before it, as the Board considers advisable. Unless the only purpose of the hearing is to deal with procedural matters, the Board will not conduct an electronic hearing if a party satisfies it that holding an electronic hearing is likely to cause the party significant prejudice.

The Board has the authority under Rule 38.5 as well section 3 of Schedule 3 of the *Economic and Fiscal Update Act*, 2020, S.O. 2020, c. 5, to conduct electronic hearings on the merits of an application, unless a party satisfies it that holding such an electronic hearing is likely to cause the party significant prejudice.

9. The BUC and Innovative focused in their written and oral submissions upon a number of concerns that they assert will individually or collectively cause both of them significant prejudice should a video hearing be scheduled by the Board.

10. I consider first the nature of this proceeding. Counsel for Local 183 argued that in the context of the current COVID-19 pandemic the request made by the BUC and Innovative to adjourn the June 29 and 30, 2020 hearing dates was effectively a request to adjourn this proceeding indefinitely, and that the Board should not agree to an adjournment request. Both the BUC and Innovative disagreed with that assertion. They questioned whether it is necessary to engage in a video hearing at this time. Counsel for the BUC and counsel for Innovative both observed that this proceeding is an unfair labour practice application, not a certification proceeding, has already taken the better part of two and one-half years to litigate, and that the underlying project was completed years ago. With that in mind, counsel argued that there is a lack of specific urgency to proceeding, and questioned whether it is objectively necessary at this time to move this application along by way of a video hearing.

11. In this respect, counsel for the BUC and counsel for Innovative submitted that Toronto will be entering Stage 2 of the COVID-19 reopening protocol imminently, and that the Board could soon be scheduling in-person

hearings for September, 2020. In support of this position, counsel for Innovative observed that the Ministry of the Attorney General had announced on June 17, 2020 that a limited number of courtrooms will be reopened on July 6, 2020 for the purpose of resuming family law proceedings, criminal trials, and preliminary inquiries. With that in mind, both counsel for Innovative and counsel for the BUC asserted that there is some optimism that the Board will reopen for in-person hearings relatively soon. Given that there is no chance that this proceeding will be completed on June 29 and 30, 2020, it was submitted by both Innovative and the BUC that the Registrar should simply be asked to schedule four or five more hearing dates in September, October and November, 2020, at which time the remaining evidence can be secured by way of an in-person hearing, and argument heard.

12. With the greatest of respect, I disagree. As noted by counsel for Local 183, one of the purposes of the Act is to promote the expeditious resolution of workplace disputes. Unfair labour practice complaints filed pursuant to the Act are workplace disputes that must be resolved expeditiously. This proceeding has been ongoing for the better part of two and one-half years, and it needs to come to an end. Admittedly, this proceeding is not an application for certification, but it does involve representation rights, because the validity of the bargaining rights held by the BUC for Innovative are being challenged by Local 183. There are also assertions that individuals lost their employment because of their support for Local 183. Although I appreciate that no interim order for reinstatement was sought by Local 183 with respect to the alleged unlawful terminations from employment, it is corrosive for all of parties to this proceeding that the assertions made by Local 183 remain outstanding. They need to be determined by the Board as soon as reasonably possible.

13. As at the date of this decision, the Board has cancelled all in-person hearings through July 31, 2020. Independently of what the Ministry of the Attorney General has determined with regard to the opening of some of its courtrooms, we do not know when it will be safe to return to in-person hearings at the Board, or the number of daily hearings which will be scheduled when in-person hearings resume. At this juncture the Board is at least marginally closer to resuming in-person hearings than we were two months ago, when society was closing down, but how far away the Board is from resuming those hearings remains unknown. Whenever the Board's in-person hearings resume, it will take considerable time before the Board returns to pre-COVID-19 norms, if it ever does so. Although I appreciate the unbridled optimism of counsel for the BUC and Innovative, that optimism may not be well-founded.

14. As I reminded counsel during argument, because all in-person hearings in every ongoing Board proceeding through July 31, 2020 have been cancelled, many hundreds of hearing dates have been lost. On a day-to-day basis the Board is handling a large number of proceedings, getting them ready for hearing, but no in-person hearings are being held. When the Board announces that in-person hearings will resume, most applicants in each case that requires hearing dates will ask for a number of those dates to be scheduled by the Board, and will request that those dates be set sooner rather than later. It will take some time to accommodate all of the requests. There is no reason why this proceeding ought to be provided with early hearing dates in preference to any other proceeding. That being the case, it may be some time before the parties to this proceeding are able to secure the four or five in-person hearing dates they need to complete this case.

15. Simply put, if there is no dispute that the parties will need four or five hearing dates to complete evidence and argument in this proceeding, and timely, in-person hearing dates will be difficult to secure when the Board resumes those hearings, we should not adjourn the June 29 and 30, 2020 dates if those dates can be put to good use in a way that does not prejudice the interests of the parties. Counsel for Innovative suggested during argument that by using video technology the parties may end up spending two days to complete evidence that that might only take one day if it were an in-person hearing. He may be right. However, at least this proceeding will be moving towards completion. Even if the parties only need three or four further hearing dates after June 30, 2020, instead of four or five, the final adjudication of this proceeding will occur that much faster.

16. There are other concerns relied upon by the BUC and Innovative. Most importantly, both are troubled by the effect that hearing the evidence of the remaining witnesses by way of video hearing will have on questions of assessing credibility. There is no doubt that the credibility of the witnesses testifying for each party is an issue in this proceeding, and that I will have to assess the relative credibility of the witnesses who testify, including Mr. Cordeiro. With that in mind, counsel for the BUC and counsel for Innovative both raise the concern that my credibility assessments may be affected because some of those assessments will be made based upon viewing witnesses who gave evidence by way of video conferencing. In particular, the BUC is concerned that it will suffer significant prejudice if Mr. Cordeiro's evidence is accorded reduced weight because his testimony is offered in a virtual format.

17. Historically, the Board has been hesitant to engage in a video hearing if it is evident that the Board will have to make meaningful credibility determinations. In fact, over ten years ago I issued a decision that reflects that hesitancy. In *Hi-Tek Dev. Inc.*, 2008 CanLII 69861, at paragraph 35, I made the following observation with respect to the proposition of taking evidence by either telephone conference or video conference:

> … Furthermore, based on the evidence to date, it appears that the credibility of all witnesses will be an important consideration. In that context, it is preferable that the testimony of all witnesses be taken in person, if at all possible.

See also, for example, *G.R.M. Contracting Ltd.*, 2000 CanLII 10389, at paragraph 4, where the Board expressed a preference to hear and see witnesses giving their evidence when there are factual matters in dispute.

18. Even within the last few months, panels of the Board have relied, in part, upon this concern to support a determination that it would not be advisable to engage in a video hearing to determine the merits of a Board proceeding (see, for example, *Ministry of Community Safety and Correctional Services*, 2020 CanLII 28031, at paragraph 6). However, this view is not universal amongst current panels of the Board (see, for example, *2274838 Ontario Inc. operating as Young Drivers of Canada*, 2020 CanLII 38306, at paragraph 12, and *Axis Auto Finance*, 2020 CanLII 38280, at paragraph 9).

19. In my view, when considered critically in the context of the technological resources available to the parties and the Board in today's modern world, this concern ought not to preclude the Board from hearing evidence from witnesses by way of video hearing. Counsel for Local 183 argued strenuously that video hearings are appropriate, even when credibility is at issue. He argued that there is no basis in fact for the proposition that assessments of credibility made by a trier of fact at an in-person hearing are more reliable than assessments of credibility made by a trier of fact at a video hearing.

20. I agree. Over the years the Board has identified many different considerations that factor into the ultimate determination of the credibility of any given witness. Those considerations include the clarity and consistency of the testimony offered, having regard to contemporaneous notes or other documents; the demeanour of the witness; the ability of the witness to avoid the tug of self-interest; the firmness of the recollection of

the witness; whether the witness was well-situated and could see and hear what actually happened; the overall plausibility of the testimony when considered to that of others; and the likelihood of "bias" towards any given party or viewpoint. All of these factors are utilized by the Board to determine whether testimony offered by a witness is, as O'Halloran J.A. put it in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". None of the factors typically considered by the Board when assessing credibility is absent when evidence is adduced by way of a video hearing.

21. A scenario similar (though not identical) to the one before the Board in this proceeding was before the Board in *Islington Nurseries Limited*, 2011 CanLII 59488. In that proceeding, the union brought a motion seeking the consent of the Board to call the evidence of one of its key witnesses, Mr. Jaramillo, by way of video conference. Nine days of hearing had already occurred, during which the employer had called some of its witnesses. During this time period, Mr. Jaramillo left Canada and was not eligible to return to the country. The union asserted that Mr. Jaramillo was willing and able to give evidence from Colombia by way of video conference, and sought the Board's approval to call evidence from Mr. Jaramillo in that fashion.

22. The employer took the position that it was likely to suffer significant prejudice if Mr. Jaramillo gave evidence by way of video conference. It relied upon the Board's traditional view that electronic hearings are not appropriate in cases which involve issues of credibility, because an in-person hearing provides for the best method for determining those issues. The employer observed that the right to physically face and cross-examine Mr. Jaramillo in-person was of increased importance given the reverse onus imposed upon it pursuant to subsection 96(5) of the Act. A similar argument was made by counsel for Innovative in this proceeding.

23. The Board acknowledged at paragraph 23 of its decision that the evidence expected to be offered by Mr. Jaramillo would be "long and complex and involve a great many issues of credibility which are central to the ultimate result". The Board noted that the ability of a decision maker to reach conclusions regarding the credibility of a witness testifying by way of video conference had previously been considered by Rutherford J. in *Pack All Manufacturing Inc. and Triad Plastics Inc.*, 2001 CanLII 7655 ("*Pack All Manufacturing*"). In *Pack All Manufacturing*, Rutherford J. stated the following, at paragraph 6 of his reasons:

> In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House. The demeanor of the witness can be observed, although perhaps not the full body, but then, sitting in a witness box is not significantly better in this regard. Indeed, I often wonder whether too much isn't made of the possible ability to assess the credibility of a witness from the way a witness appears while giving evidence. Doubtless there are "body language" clues which, if properly interpreted, may add to the totality of one's human judgment as to the credibility of an account given by a witness. The danger lies in misinterpreting such "body language," taking nervousness for uncertainty or insincerity, for example, or shyness and hesitation for doubt. An apparent boldness or assertiveness may be mistaken for candour and knowledge while it may merely be a developed technique designed for persuasion. Much more important is how the substance of a witness' evidence coincides logically, or naturally, with what appears beyond dispute, either from proven facts or deduced likelihood. I am not at all certain that much weight can or should be placed on the advantage a trier of fact will derive from having a witness live and in person in the witness box as opposed to on a good quality, decent sized colour monitor in a video-conference. While perhaps a presumption of some benefit goes to the live, in person appearance, it is arguable that some witnesses may perform more capably and feel under less pressure in a local video-conference with fewer strangers present and no journeying to be done.

The Board observed that this same issue had been extensively analysed by a panel of the Human Rights Tribunal of Ontario in *Johnson v. Ekonomidis*, 2004 CanLII 18 ("*Johnson*"). In *Johnson*, the Tribunal made the following observation, at paragraph 31 of its decision:

> … It is difficult to see how, in the ordinary case, evidence taken by video conferencing (assuming that it is properly functioning) is likely to prejudice any of the parties. The technology permits all parties, including the trier of fact, to fully observe the witness while testifying. This not only facilitates the assessment of credibility, but the conduct of the examinations of the witness.

At paragraph 34 of its decision in *Johnson*, the Tribunal also commented upon the limited utility of observing the demeanour of a witness for the purpose of assessing credibility:

> The most significant indicia of credibility and reliability – namely the internal consistency of the evidence and its relationship to other evidence can be fully addressed and evaluated without seeing the witness. Indeed, it is now well recognized in the jurisprudence that the "demeanour" of a witness is often an inadequate basis upon which the trier of fact should assess credibility or reliability.

24. The Board in *Islington Nurseries* concluded that, for the reasons identified by Rutherford J. in *Pack All Manufacturing* and the Human Rights Tribunal in *Johnson*, it cannot be automatically concluded that any prejudice which may result from a witness giving evidence by way of video conference is likely to be significant, even in cases which are long, complex, or involve issues of credibility. Ultimately the Board considered all of the circumstances, and determined that it would permit Mr. Jaramillo to testify by way of video hearing.

25. 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.

26. There are other concerns identified by the BUC and Innovative. In support of their position that they will be significantly prejudiced by a video hearing to secure the evidence of Mr. Cordeiro, the BUC and Innovative both observe that this is a proceeding that involves a large number of documents that have been awkward to handle during in-person hearings. In the context of a video hearing, both parties raise the concern that dealing with those documents will be so unwieldy and awkward that their cases will be prejudiced.

27. I agree that there are many documents. However, in my view it will be possible to deal with document issues in an effective manner. Pre-hearing documentary production that satisfied all of the parties was completed years ago. Most of the documents that have been referred to the witnesses to date are found in separate tabs in three inch, three-ring binders, so they are easy to locate. The awkwardness experienced to date in dealing with documents was typically the result of counsel, the witnesses, and the Board being required to move from a tab located in one binder to a tab located in a second binder, and sometimes back, in the middle of a series of questions. Assuming that counsel, the witness, and the Board each has the same amount of desk space during the course of a video hearing, that awkwardness will not be any worse during the course of a video hearing than it has been to date. Most of the key documents have already been identified by one or more witnesses, so I do not anticipate that there are many new documents left to be made exhibits.

28. To the extent that there are documents that have not yet been entered into evidence but will be put to Mr. Cordeiro, the Board can ensure that all of those documents are identified by each party to the others, and in their possession, in advance of the next hearing dates. The Board's Rules of Procedure require any such documents be identified at least ten days before the hearing commences. That date passed years ago. If a document is produced by a party at the last minute, and the document is permitted by the Board to be put to the witness, the document can be emailed to the witness and the other parties at that time. There may be a delay in those circumstances while counsel and their clients review the document, but there would have been a similar delay if Mr. Cordeiro was providing his testimony in-person. A short delay in these circumstances is something that litigation by video hearing can easily accommodate.

29. Concern has been raised by the BUC regarding the low comfort level that the next witness, Mr. Cordeiro, has with video hearing technology. I appreciate that concern. Most witnesses who testify before the Board are not professional witnesses. They are often nervous. Mr. Cordeiro will likely be no different. Giving testimony by way of video hearing will be an unknown experience for most witnesses, and it is possible that engaging in a video hearing will cause a witness to experience an enhanced level of nervousness.

30. That said, I do not believe that the additional stress or nervousness caused by utilizing a video link to testify will be significant. The Board typically utilizes the Zoom video conferencing platform. It is not perfect by any means, but it is intuitive and relatively easy to use. Moreover, it is possible for the Board to accommodate the concerns of the BUC regarding

Mr. Cordeiro. Counsel for the BUC, or an IT specialist from his law firm, could be in a room adjacent to that from which Mr. Cordeiro testifies, so that counsel or his colleague may assist Mr. Cordeiro should there arise a technical issue that he cannot resolve. As long as the testimony of Mr. Cordeiro is not in any way compromised by an arrangement of this nature – and there has been no assertion by any party that that is a concern here - the Board can be flexible in terms of providing Mr. Cordeiro with any assistance he may need to provide his evidence.

31. Finally, during argument counsel for Innovative expressed a concern regarding what I will refer to as an unevenness in the opportunity provided to the parties to test each other's case. In particular, counsel for Innovative is troubled by the fact that Local 183 has had a full opportunity to test his client's entire case in person, but that he will not be provided with that same opportunity. Counsel for the BUC also raised this same issue. Both the BUC and Innovative relied upon the following passage from *Bruce Power LP*, 2020 CanLII 28024, in support of their position:

> 11. Furthermore, the Board agrees with the submissions of Aluma and the Carpenters on the issue of procedural fairness. The Board should accord all parties equitable treatment. In this case, the Labourers have completed their initial presentation addressing the Board in the ordinary in-person oral presentation format with no time limits. Aluma and the Carpenters argue, with merit, that not to allow them the same opportunity might prejudice their right to fully and fairly present their case and to answer any questions the Board might have. The Board agrees. This is especially so given the complex and disputed facts and arguments in play in this case. To use an analogy often employed in the development of the Canadian west in the late 19th and early 20th centuries, "you don't change horses in midstream". Therefore, the Board finds that a videoconference hearing is not appropriate at all on the particular facts of this case.

During the course of oral argument, counsel for the BUC argued that it would cause significant prejudice to the BUC if the evidence to be given by its only witness is provided in a different way than the evidence that has been provided to date by Innovative and Hired Resources. Counsel for the BUC reiterated the observation made by the Board in *Bruce Power LLP* that "you don't change horses in midstream".

32. While I appreciate the mischief that underlies the analogy used by the Board in *Bruce Power LP*, I disagree with the passage to the extent that it may suggest that it is inequitable and procedurally unfair for the Board to

require 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. For the reasons set out above, I do not agree that a video hearing inherently prejudices the right of a party to fully and fairly present its case and to answer any questions that the Board (or, for that matter, any other party) may have. Although evidence called through a video connection is not given in person, it is offered live. The party offering the evidence, and any party which tests that evidence, all have the same opportunity to offer and test the evidence, respectively, as they do should that very same evidence be offered in person. Even if there are complex and disputed facts and arguments in play, there is nothing inherent in the use of video technology which builds unfairness or inequity into a hearing which utilizes that technology.

33. The onset of the COVD-19 pandemic has caused the Board to assess how it can best continue to offer timely and effective administrative justice for the citizens of Ontario in a physically distant manner. In a perfect litigation world, the remaining evidence in this proceeding would be secured in the same way that the evidence has been secured to date, by way of an in-person oral hearing, which is considered by most to be the "gold standard" of fact-finding methodologies. That standard has served Ontario's labour relations community well for over 75 years.

34. Regrettably, we do not live in a perfect litigation world. At this time, we are not even close. In a hearing such as this one, the Board could ensure that each party has the right to the same process of examining witnesses that other parties have had to date by stopping all litigation in its tracks pending a return to pre-COVID-19 norms. However, that return may take many months or years. It may never happen. Most importantly, to do so would be inconsistent with one of the purposes of the Act. Alternatively, the Board can choose to use recent developments in video conferencing technology to provide the parties to a proceeding with an opportunity to call their evidence, and to move Board proceedings along. To do so does not create an unfairness or an inequality of opportunity. In the absence of significant prejudice, I am of the view that this is what we should be doing at this time.

35. 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.

36. In the recent decision of the Ontario Superior Court in *Arconti v. Smith*, 2020 ONSC 2782, Myers J. was faced with an objection to a request that an examination for discovery proceed by way of videoconference. In the course of granting leave to have the examination for discovery proceed, Myers J. stated the following at paragraphs 19, 20 and 33, with which I agree:

> 19. In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.
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> 20. That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs' desire to conduct an examination for discovery in person.
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> ...
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> 33. In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and the courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings. ...

37. Subject to ensuring that the health of its staff, counsel, their clients, and witnesses are not put at unreasonable risk, the Board should do everything it can to ensure that the timely administration of justice is maintained during the course of the COVID-19 pandemic. The Board has done so, to date. To continue doing so, it is necessary to utilize video hearings more broadly in cases where it is appropriate to do so.

38. Video hearings are not the gold standard, yet. But they are more than just an "experiment", as was suggested by counsel for the BUC during argument. To date video hearings have effectively moved along Board proceedings without denying the parties procedural fairness or natural justice. There have been technical issues, power failures, and dropped participants in a some of the video hearings. In each case the Board and the parties found a way to resume the hearing, just as the Board has previously done during in-person hearings when counsel or witnesses have suddenly become ill or learned of a family emergency, and have left for home on little or no notice. Problems of this nature have happened before, and they will happen in the future, whether evidence is secured by way of in-person hearings, or by way of a video hearing. The Board has always found a way to deal with these situations fairly and reasonably, and the Board will continue to do so when problems arise during a video hearing.

39. In this respect, I remind the parties of the Board's commitment to procedural fairness, which is reflected by Information Bulletin No. 37 on Video Hearings. If at any time during the video hearing in this proceeding I become concerned about the integrity or fairness of the hearing process, I may on my own motion, or on the motion of any party, end the proceeding and direct that an in-person hearing be scheduled instead.

III. Conclusion

40. In my view, neither the BUC and Innovative has established, on the balance of probabilities, that it will be significantly prejudiced should the remaining evidence in this proceeding be secured by way of a video hearing. Having regard to all of the circumstances, including the nature of the proceeding, the stage of its proceeding, and the balancing of the various interests at play, I am of the view that it is advisable that a video hearing be held on June 29 and 30, 2020 to hear the evidence of Mr. Cordeiro on behalf of the BUC.

41. A video hearing to case manage the hearing of the evidence of Mr. Cordeiro will be held on Wednesday, June 24, 2020, commencing at 2 pm.

42. I remain seized of this proceeding.

"Lee Shouldice"
for the Board