

Federal Court



Cour fédérale

Date: 20200521

Docket: T-921-17

Citation: 2020 FC 637

Ottawa, Ontario, May 21, 2020

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

ROVI GUIDES, INC.

**Plaintiff/
Defendant by Counterclaim**

and

VIDEOTRON LTD.

**Defendant/
Plaintiff by Counterclaim**

DIRECTION

[1] The Court recognizes the importance of reducing the spread of COVID-19 and prioritizes the health and safety of all court participants, including members of the Court, registry staff, counsel, witnesses, stenographers and interpreters. At the same time, the Court must balance the need to maintain judicial operations. Bearing in mind these important factors, it has been ordered that the hearing of this trial continue remotely via videoconference: *Rovi Guides, Inc v Videotron Ltd*, 2020 FC 596.

[2] A trial management conference was held with counsel for the parties to agree on a protocol to govern the conduct of the remote hearing scheduled to resume on May 25, 2020. The parties were informed that, in the event that local public health restrictions are eased at some point in time, alternative arrangements may be made to conduct the balance of the hearing in person in Toronto or in some hybrid fashion that would combine a physical hearing with some participants in a safe courtroom environment and virtual participation of other participants tailored to their locations and circumstances.

I. Technology for the Resumption of the Trial

[3] The Court has mandated that the hearing will be resumed using the Zoom platform. At the start of the trial management conference, counsel for the Defendant, Videotron Inc., advised that his client no longer had any concerns with the use of this particular platform.

[4] The Zoom platform will provide real-time connection between trial hearing participants. It is not to be used for recording video or other images of the proceeding other than for the purposes of the trial judge.

II. Document Management

[5] Documents in this trial shall continue to be managed using the eTrial Tool Kit database. However, in order to facilitate the expeditious trial of this matter, documents shall also be exchanged in the manner described below.

[6] After consulting with the trial judge, Court staff, and the Court reporter, counsel to the parties shall jointly prepare an email distribution list to which documents may be circulated [Trial Distribution List].

[7] Counsel for the parties shall exchange the email addresses of persons intended to be called as witnesses in order to facilitate the implementation of this protocol.

[8] In addition, counsel for the parties shall jointly prepare a list with back-up phone numbers of the assigned registry officer, the Court reporter(s), the interpreter and all counsel for the parties, so that all stakeholders can communicate with one another in the event that the Internet connection of one or more stakeholders is interrupted. Prior to a witness being called, a phone number for the witness will be provided to the registry officer and the witness will be provided with the phone number for the registry officer.

[9] Where a document to be sent to the Trial Distribution List is smaller than 5 megabytes, that document shall be sent as an attachment to an email to the Trial Distribution List.

[10] Where a document to be sent to Trial Distribution List is 5 megabytes or larger, the document shall be sent to the Trial Distribution List using an agreed-upon file transfer system.

III. Counsel Preparation

[11] Counsel shall take reasonable steps to ensure that they have suitable technology, including Internet and audio-visual connections, to allow for the conduct of the virtual portions of this trial.

In the course of doing so, counsel shall consider the “User Guide for Participants” in virtual hearings to be posted shortly on the Federal Court’s website and the best practices described in the handout for witnesses attached as Schedule “A”.

IV. Witness Preparation and Testimony

[12] Counsel shall advise each person they intend to call as a witness in advance of their examination in chief of the contents of this protocol and provide them with a copy of the handout for witnesses attached as Schedule “A”. There will be no subpoenas required. Those witnesses who are listed on the proposed schedule of witnesses, will be treated as if under subpoena for the purposes of permitting counsel calling those witnesses to make alternate arrangements for the adducing of evidence, if the witness fails to appear on the Zoom platform at the planned time.

[13] The following protocol applies to the witnesses while they are giving evidence, and counsel shall specifically advise each witness of this protocol:

- a. While the witness is giving evidence, they should always keep their camera and microphone on unless the judge instructs otherwise.
- b. While the witness is giving evidence, the camera should be positioned so that the trial participants can clearly see the witness, particularly their whole face and their hands if possible;

- c. While the witness is giving evidence, the witness shall not review any documents or access any electronic resources (Internet or otherwise), other than:
 - i. Those documents put to them during their examinations as described in this protocol;
 - ii. Such documents as they may ask and be permitted to review; and
 - iii. In the case of expert witnesses, their own expert reports and other expert reports in this action, provided that any such reports they review during their testimony do not contain any notes or annotations made by the witness or anyone else;
- d. While the witness is giving evidence, the witness shall not refer to or rely on a script or any notes; and
- e. While the witness is giving evidence, the witness shall not communicate with any other persons about the substance of their examination.

[14] The prior paragraph shall not preclude the witness from communicating with counsel or another person while on a break prior to the commencement of their cross-examination, provided that any such communication is consistent with counsel's professional obligations and applicable rules of the Court.

[15] The parties recognize that it may be beneficial for there to be other people in the room while the witness testifies. For example, in-house counsel may wish to be in the room, or IT support staff may need to be in the room. This is permissible, provided that the individuals in the room with the witness are identified for all trial participants and understand that they are not to communicate with the witness while the witness is testifying.

[16] Prior to the witness beginning to give evidence, the trial judge may caution the witness in accordance with this protocol.

V. Documents to Be Put to Witnesses

[17] With respect to documents to be put to witnesses during their examinations in chief:

- a. For expert witnesses, insofar as it is feasible, all documents intended to be put to such a witness as part of that witness' examination in chief, other than any expert reports delivered in this action, shall be prepared into a single PDF brief;
- b. All PDF documents shall be scanned to text using Optical Character Recognition [OCR] technology;
- c. All PDF briefs that contain multiple documents shall be bookmarked into different tabs. Other than in any expert reports delivered in this action (which may remain as previously delivered), each tab should be named, and that name should include

the “FC number” used to identify the document in the trial database (for example, “Tab 1 – Email from Bob to Jane – FC00001”);

- d. Any other documents that cannot feasibly be included as part of the single PDF brief shall include as part of the name of the document the FC number used to identify the document in the trial database;
- e. A copy of any documents intended to be put to a witness during that witness’ examination in chief shall be provided to the witness prior to that witness’ examination in chief;
- f. A copy of any documents intended to be put to a witness during that witness’ examination in chief shall also be emailed to the Trial Distribution List at the outset of that witness’ examination in chief.

[18] In addition to the steps described above, counsel who wish to put documents to witnesses during their examinations in chief may send one or more hard copy documents or briefs of documents to the witness in advance of their testimony. The witness may testify with the benefit of such hard copy documents, provided that such documents do not contain any notes or annotations made by the witness or anyone else.

[19] With respect to documents to be put to witnesses during their cross-examination or re-examination, counsel conducting such examination may choose to use any one or more of the following methods to send documents to the witness:

- a. Individual documents in electronic format may be transferred, using an agreed-upon file transfer system, simultaneously to the witness and the Trial Distribution List during that witness' cross-examination immediately prior to such time as the party intends to put that document to the witness;
- b. A brief of documents or a series of individual documents may be emailed or transferred using an agreed-upon file transfer system (depending on the size of such documents) to the witness and the Trial Distribution List prior the witness' examination. If counsel so chooses, such document(s) may be password-protected, and the password(s) may be provided during the course of the examination; and
- c. One or more hard copy documents or briefs of documents may be sent to the witness in advance, with directions that such documents not be opened until an appropriate time during that witness' examination. In that case, all such documents shall also be circulated electronically to the Trial Distribution List at the outset of that witness' cross-examination.

[20] Regardless of the choice made by counsel, with respect to any documents being put to witnesses electronically on cross-examination or re-examination:

- a. Insofar as it is feasible, such documents shall be in PDF format;
- b. All PDF documents shall be in OCR format;
- c. The file name of the document should include the FC number used to identify the document in the trial database.

[21] Documents may be shown to a witness briefly using Zoom's screen-sharing functionality, including in order to orient a witness to a portion of a document or if a document is only intended to be put to a witness briefly. The trial judge has full discretion as to the form in which documents may be put to a witness using the Zoom platform and other Internet communication protocols.

[22] The parties shall ensure that all documents intended to be put to a witness are loaded into the trial database prior to such documents being put to a witness, though the document may be kept private within the trial database until such time as the document is put to the witness.

[23] Notwithstanding the above provisions, nothing in this protocol prevents counsel from putting a relevant document to a witness, whether or not the document has been previously included in the trial database.

VI. Loss of Internet Connection

[24] In the event that there is a loss of an Internet connection to such a degree that an Essential Individual (as defined below) is no longer able to meaningfully participate in the trial, the trial shall be adjourned until all Essential Individuals have a sufficient Internet connection to be able to meaningfully participate in the trial.

[25] Essential Individuals are the following:

- a. During the examination of a witness:
 - i. The trial judge;

- ii. The Court reporter(s);
 - iii. Any interpreter required for that witness;
 - iv. The Court registry officer;
 - v. The witness;
 - vi. The counsel conducting the examination in chief of that witness; and
 - vii. The counsel conducting the cross-examination of that witness.
- b. During any legal submissions or motions:
- i. The trial judge;
 - ii. The Court reporter;
 - iii. The Court registry officer;
 - iv. The counsel making or responding to any legal submissions or motions.
- c. At any other times:
- i. The trial judge;
 - ii. The Court reporter;
 - iii. The Court registry officer;
 - iv. First and second chair for the Plaintiff;
 - v. First and second chair for the Defendant.

[26] If participants or observers to the trial, beyond the Essential Individuals, are not able to connect or their connection is interrupted, reasonable efforts will be made immediately to provide or restore their access. It is within the Court's discretion as to whether to continue or adjourn the trial, depending on the circumstances. The guiding principle is for the hearing to continue with all participants in attendance at all times.

VII. Objections

[27] Where counsel objects to a question being asked of a witness, the objecting counsel shall indicate such objection by physically raising their hand or otherwise verbalizing the objection.

[28] In the event that Internet connection problems precluded counsel from objecting to a question being asked of a witness prior to the witness answering such question, counsel shall be permitted to raise the objection after the witness has already answered the question, provided that counsel objects as soon as reasonably possible. In such circumstance, the Court shall consider the objection and, if the objection is ruled by the Court to have been an appropriate one, the Court shall disregard the answer given by the witness, and the witness' answer shall form no part of the record in the case (as if the witness had never been permitted to answer the question).

VIII. Open Courts Principle and Confidentiality

[29] In order to satisfy the open courts principle, the Court will shortly be posting a "User Guide for the Public and Media", outlining the means by which members of the public can view all public portions of a remote hearing. In brief:

- a. Members of the public and the media may consult the Hearings List to find out which matters are to be heard by video conference. To obtain a link to the virtual hearing, individuals may write to HEARINGS-AUDIENCES@FCT-CF.CA two business days before the hearing.
- b. The Court will send an email invitation to register for either a Zoom meeting or webinar. The public will be able to observe the proceedings, but not participate. The judge and counsel will not hear or see the public as their microphones will be muted and cameras will be turned off.
- c. If a party wishes to seek standing to participate, they will need to take the usual steps by bringing a motion to the Court.

[30] In the event that the Court hears evidence or submissions that are covered by the Confidentiality Order dated September 17, 2018, counsel will advise the Court before they start a confidential portion so that the Court may utilize the break out rooms feature as appropriate to exclude participants who are not entitled to receive confidential information. Once the confidential portion is complete, the Court will include those individuals in the hearing as appropriate.

[31] If the above means of excluding members of the public is not practicable for any reason, the Court will identify another means to enforce the Confidentiality Order.

[32] The email addresses of in-house counsel, other client representatives, and experts permitted to see the confidential portions of the trial shall be provided to the Registry. All such individuals shall keep their microphones muted and their cameras off.

IX. Testing Prior to Trial

[33] Prior to resuming the trial hearing, counsel shall ensure that, for counsel and their witnesses:

- a. All persons have the necessary software installed or otherwise have the ability to use the necessary software;
- b. All persons can appropriately use the videoconferencing technology that will be used for the trial;
- c. All persons have the necessary hardware to allow for reliable and audible communication;
- d. All persons can send and receive emails with attachments up to 5 megabytes in size;
- e. All persons can send and receive documents larger than 5 megabytes using an agreed-upon file transfer system;
- f. All persons can open PDFs.

[34] Counsel and the Registry will make best efforts to conduct appropriate testing before the recommencement of the trial hearing.

[35] Should there be a deficiency identified with the hardware, software or physical arrangement for any counsel or witness, notice will be provided to the Court and opposing counsel and remedial steps will be taken, to the extent that is practical.

X. General

[36] It is understood that the registry officer for the trial hearing will be the “host” of the Zoom sessions and the trial judge will be “co-host”. During witness examinations, the video feed will be restricted to the trial judge, the witness, the examining lawyer and one opposing counsel. Other than those individuals, and the registry officer, all other participants will be muted and will have no video feed during the examination. At other times, second counsel may also participate by audio and video, as appropriate.

[37] Trial participants shall not use the Zoom chat functionality for any private discussions. However, with prior notice using the audio channel, trial hearing participants may use the Zoom chat functionality to share information intended to be disseminated to all parties (*e.g.*, a password to a document).

[38] Notwithstanding paragraph 40, the trial judge and registry officer shall have the ability to use the chat function to communicate between themselves.

[39] Should arguments about relevance or admissibility of evidence need to be made, which ought not to be heard by a witness, the Court may use Zoom break-out rooms to isolate the witness

during any such argument. Such step may be taken on request of the party(ies) and/or at the trial judge's discretion.

[40] During breaks, as much as is practicable, participants shall mute their microphones and turn off their cameras for the duration of the break, rather than disconnecting from the Zoom session. At the appointed time, participants shall turn on their cameras to signal that they have returned from break.

[41] In the event it becomes impractical or unfeasible to comply with the above protocol, the parties may seek such further orders and directions as may be required.

"Roger R. Lafrenière

Judge

Schedule “A” – Handout for Witnesses

FEDERAL COURT

Court File No. T-921-17

BETWEEN:

ROVI GUIDES, INC.

Plaintiff

and

VIDEOTRON LTD.

Defendant

INFORMATION FOR WITNESSES

A. The Virtual Trial

1. You are going to be a witness at a trial that will be conducted, in part, virtually over the Internet. This document is intended to help you understand your role and responsibilities as a witness. Please read the document carefully.
2. Your counsel will provide the Court with your email address and the Court will email you a Zoom link to join the virtual trial. You should not share this information.

B. Your Obligations as a Witness

3. Your obligation as a witness is to be truthful with the Court. Although you might be sitting in your home or your office while you testify, you are fulfilling the very same role that you would as if you were sitting before a judge. You must approach this task with the same degree of seriousness and solemnity as you would if you were testifying in person in a courtroom.

4. You will swear or affirm, prior to testifying, that your evidence will be the truth. This obligation is fundamental to your evidence. In the event you wish to swear an oath using an object you consider binding on your conscience, it is your responsibility to ensure the object is in your possession at the time the oath is taken.

5. Once your cross-examination begins, until you are finished all your evidence, you are not permitted to talk, text, or communicate with any person about the case.

6. If, at any time, you are unable to hear or see clearly the information that is being delivered via the Zoom platform, or the document delivery platform, you must immediately indicate that this is the case.

7. Before you begin your evidence, you will be provided with an email address and a phone number to allow you to reach the court registrar if there is any technical issue that arises during your evidence.

8. Once you begin testifying, if there is a technical problem, your first call is to the Court official, not your lawyer.

9. The Zoom platform is for use to connect you to the hearing by audio and video. You are prohibited from recording video or other images of the hearing.

C. Rules while Testifying

10. The following are important rules for you to follow:

- While you are testifying, you must always keep your camera and microphone on unless the judge instructs otherwise.
- The camera should be positioned so that everyone can clearly see you, particularly your whole face and your hands if possible. You cannot use a digital background. The actual background should be neutral.
- While you are testifying, you are not permitted to read or consult any documents, other than:
 - Those documents you are directed to by examining lawyers on the video call;
 - Such documents as you may be specifically asked and permitted to review; and
 - If you are an expert witness, your own expert reports and other expert reports in this action, provided that those reports do not contain any notes or annotations made by you or anyone else.
- You cannot refer to a script or any notes while you testify.
- While you are giving your evidence, you are not permitted to communicate (by email, text, in-person discussions, *etc.*) with any other persons about the substance or

subject-matter of your examination, nor can you access electronic information on your computer, smartphone, or via the Internet if the information relates to your evidence or the case.

D. Best Practices for Testifying Virtually

11. In order to ensure that this trial runs as fairly and efficiently as possible, it is important that you have the appropriate technology and that you are taking appropriate steps to try to minimize any disruption to your Internet connection. Here are some best practices you should consider in advance of your testimony:

- Appropriate hardware for a lengthy examination is required. If you have concerns about your hardware or software set up, please discuss this with the lawyer who is calling you as a witness immediately. Hardware that may prove useful includes a personal computer, a second (external) monitor, a headset (if your personal computer does not have speakers and a microphone of sufficient quality), and a webcam (if your computer does not have a built-in camera of sufficient quality).
- Review the environment around your computer and consider what you can do to reduce interruptions. For example, if you have family members at home, let them know that you will be testifying and should not be interrupted. Please also turn off other electronic devices that might make unwanted sounds while you are testifying.
- Ascertain the bandwidth on your Internet connection. If it is poor quality, consider whether there is anything you can do to increase your bandwidth.

- Consider connecting your computer to your modem or router by an ethernet cable, rather than by wireless connection.
- Close any unnecessary programs on your computer before you begin testifying. Refrain from being connected to the Internet through a virtual private network (VPN). This can create interruptions.
- If you are testifying from your home, consider asking others in your home to not use applications that might place a significant drain on the available bandwidth (*e.g.*, streaming video services) while you are being examined using the Zoom platform.