

Sample Virtual Hearing Protocol

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

and

Plaintiffs

Defendants

VIRTUAL HEARING PROTOCOL¹

TECHNOLOGY FOR THE TRIAL

1. This trial will proceed virtually using the Zoom platform.
2. No party nor witness shall record video or other images of the proceeding.
3. The registrar for the trial hearing will be the “host” of the Zoom sessions. 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 registrar, all other participants will be muted and will have no video feed during the examination.
4. 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).

¹ This protocol was developed by Sana Halwani, Paul-Erik Veel, Jonathan Chen, Veronica Tsou, Anna Hucman, Jessica Kras, Angela Hou, Tanya Rumo, Bruce Stratton, Alan Macek, and Michal Kasproicz.

DOCUMENT MANAGEMENT

5. The parties shall prepare and agree upon a Joint Book of Documents. The Joint Book of Documents shall contain such documents as the parties may agree, and the documents shall be identified by sequentially numbered tabs and pagination. The evidentiary value, if any, of documents in the Joint Book of Documents shall be addressed in a separate agreement. The parties are not precluded from introducing additional documents at the trial of this action that are not contained within the Joint Book of Documents.

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 intended to be used during this trial may be circulated (the "Trial Distribution List").

7. In addition, counsel to the parties shall jointly prepare a list with back-up phone numbers of the Court staff, the Court reporter, and all counsel to 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 to testify, a phone number for the witness will be provided to the registrar, and the witness will be provided with the phone number for the registrar.

8. 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.

9. 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.

10. The registrar shall maintain the exhibits and exhibits list. The parties are responsible for ensuring that all documents intended to be marked as exhibits are provided to the registrar electronically in accordance with this protocol and, in particular, that the registrar has copies of such documents when they are intended to be put to a witness and marked as an exhibit. The parties will provide all assistance requested by the registrar to ensure that the exhibits and exhibit list are complete and accurate.

11. The parties agree that the exhibits may be maintained by the registrar in electronic form only. While parties and the trial judge may use paper copies of documents as they find convenient, the parties agree that electronic documents may be marked as exhibits and that no paper copies need to be maintained of such exhibits.

12. At the end of each day of trial hearing, or otherwise at the direction of the court, the registrar shall email electronic copies of all exhibits marked that day with electronic exhibit stamps to the Trial Distribution List. When referring to a document that has been marked as an exhibit, the parties will use the marked version that has been distributed by the registrar.

COUNSEL PREPARATION

13. Counsel shall take reasonable steps to ensure that they have suitable technology, including Internet and audio-visual connections, to allow for the conduct of this trial. In the course of doing so, counsel shall consider the best practices described in the handout for witnesses attached as Schedule "A".

WITNESS PREPARATION AND TESTIMONY

14. Counsel shall advise each person they intend to call as 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".

15. 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 nor rely on a script or any notes; and
- e. While the witness is giving evidence, the witness shall not communicate in any way with any other persons about the substance of their examination.
- f. 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.

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

DOCUMENTS TO BE PUT TO WITNESSES

17. With respect to documents to be put to witnesses during their examinations in chief:
- a. For fact witnesses, insofar as it is feasible, all documents intended to be put to such a witness as part of that witness' examination in chief shall be prepared into a single PDF brief;

- b. 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;
- c. All PDF documents shall be OCR'd, such that they are text-searchable;
- d. All PDF briefs that contain multiple documents shall be bookmarked into different tabs and paginated. Other than in any expert reports delivered in this action (which may remain as previously delivered), each tab should be named;
- 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 the commencement of that witness' examination in chief;
- f. A copy of any documents intended to be put to a witness during that witness' examination in chief, other than documents contained in the Joint Book of Documents, 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 wishes 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 an 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 emailed or 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 to 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 OCR'd, such that they are text searchable.

21. In respect of expert witnesses, the email addresses of such experts shall be exchanged in advance of that expert's testimony so that any documents intended to be put to such expert in cross-examination may be emailed to them directly at the same time as they are sent to the Trial Distribution List, as described in paragraph 17. In respect of the fact witnesses, either the process described in the previous sentence may be used or, if a fact witness does not wish to share their email address, documents intended to be put to a witness on cross-examination can be sent to the Trial Distribution List, and the lawyer who called that witness can then forward that email to the witness. In the event of the latter, the lawyer who called that witness shall forward the email to the witness without any commentary or other communication.

22. Documents may be shown to a witness using Zoom's screen-sharing functionality, provided that the document is also provided to the witness in accordance with the above paragraphs so that the witness has the ability to review the full document, if they wish.

LOSS OF INTERNET CONNECTION

23. 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.

24. 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.

25. 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.

OBJECTIONS

26. Where counsel objects to a question being asked of a witness, the objecting counsel shall indicate such objection by physically raising their hand and/or verbalizing the objection.

27. In the event that Internet connection problems preclude 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).

28. Where a witness needs to be excused for the hearing of an objection or for any other reason, the registrar will place that witness in a separate "breakout room" of the Zoom session. The registrar will invite the witness to reattend the "main room" of the Zoom session upon direction from the trial judge.

TESTING PRIOR TO TRIAL

29. Counsel shall ensure that, for counsel and for 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; and
 - f. All persons can open PDFs.
30. Counsel and the Court will make best efforts to conduct appropriate testing before the recommencement of the trial hearing.

GENERAL

31. The Parties acknowledge that nothing in this Protocol displaces the inherent jurisdiction of the Court to control its own processes. This Protocol may be subject to change at a later date by direction of the Court.
32. In the event that it becomes impracticable or unfeasible to comply with any part of this Protocol, the Parties may seek such further direction and orders as may be required.

Schedule "A" – Handout for Witnesses

Court File No. CV--00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

and Plaintiffs

Defendants

INFORMATION FOR WITNESSES

THE VIRTUAL TRIAL

1. You are going to be a witness in a trial that will be conducted virtually over the Internet. This document is intended to help you understand your role and responsibilities as a witness. Please read the document carefully.

YOUR OBLIGATIONS AS A WITNESS

2. 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 in Court. You must approach this task with the same degree of seriousness and solemnity as you would if you were testifying in person in a Courthouse.
3. You will swear or affirm, prior to testifying, that your evidence will be the truth. This obligation is fundamental to your evidence.
4. 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.
5. 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.

6. 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.
7. Once you begin testifying, if there is a technical problem, your first call is to the Court official, not your lawyer.
8. 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.

RULES WHILE TESTIFYING

9. 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, you may also have 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.

BEST PRACTICES FOR TESTIFYING VIRTUALLY

10. 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 camera of sufficient quality built in).
- 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 will 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 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 the home to not use applications that might place a significant drain on available bandwidth (e.g., streaming video services) while you are being examined using the Zoom platform.