



Registry Doc. No.: 191

Date: December 17, 2020**Matter:** CT-2019-005 – *The Commissioner of Competition v Parrish & Heimbecker, Limited***Direction to Counsel (from Mr. Justice Gascon, Chairperson)****Re:** Witness protocol

Further to the Tribunal's Order on the Hearing Format dated December 9, 2020, the fact witnesses and some of the expert witnesses who will testify in this Application will do so remotely by way of video conference. In this Direction, the Tribunal sets out the protocol to be followed by witnesses and counsel with respect to the testimonies to be given remotely via the Zoom video conferencing platform to be used by the Tribunal.

Witness Preparation and Testimony

1. Counsel shall advise each person they intend to call as a witness, in advance of their testimony, of the contents of this protocol and provide them with a copy of the handout for witnesses attached as Schedule "A".
2. This protocol shall apply to the witnesses while they are giving evidence, and counsel shall specifically advise each witness of the following:
 - a. While the witness is giving evidence, they should always keep their camera and microphone on unless the presiding judicial member instructs otherwise;
 - b. While the witness is giving evidence, the camera should be positioned so that the hearing 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 examination in chief, cross-examination or re-examination as described in this protocol;

- ii. Such documents as they may ask and be permitted to review by the presiding judicial member;
 - iii. In the case of fact witnesses, their own witness statement, provided that the statement does not contain any notes or annotations made by the witness or anyone else; and
 - iv. In the case of expert witnesses, their own expert report(s) and Power Point presentation, as well as other expert reports and Power Point presentations in this Application, provided that any such reports and presentations 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 testimony.
3. The prior paragraph shall not preclude the witness from communicating with counsel while on a break during their testimony, provided that any such communication otherwise complies with counsel's professional obligations and applicable rules of the Tribunal.
4. Counsel who called the witness can be present in the room while the witness testifies, with appropriate safeguards required by the pandemic. In addition, while this should be exceptional, the parties recognize that other people such as IT support staff may also need to be in the room. This is permissible, provided that the individual(s) in the room with the witness are identified for all hearing participants prior to the witness' testimony and understand that they are not to communicate with the witness while the witness is testifying.
5. Counsel shall assure the orderly testimony of their witnesses and ensure that their witnesses comport themselves in a manner consistent with a witness testimony before the Tribunal.
6. Prior to the witness' testimony, the presiding judicial member will caution the witness in accordance with this protocol.

Documents to Be Put to Witnesses

7. With respect to documents intended to be put to a witness as part of that witness' examination in chief, cross-examination or re-examination (other than the witness' own witness statement or expert report and Power Point presentation), counsel for each party shall provide to the Tribunal Registry Officer, at least one hour prior to the commencement of that witness' testimony, the list of documents from the Agreed Books of Documents that counsel intends to use.
8. At the hearing, the Tribunal Registry Officer will be responsible for putting the documents on the Zoom video conferencing platform and for showing the documents to the witness.
9. Counsel who wish to put documents to their witnesses during their examination in chief may provide a hard copy of the 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.

10. Notwithstanding the above paragraphs, nothing in this protocol prevents counsel from putting a relevant document to a witness, whether or not the document has been identified in the Agreed Books of Documents, as long as the document has been previously disclosed in accordance with Rule 71 of the *Competition Tribunal Rules* or is otherwise permitted to be received in evidence by the Tribunal.

Objections

11. Where counsel objects to a question being asked of a witness, the objecting counsel shall signal such objection to the presiding judicial member by physically raising their hand or otherwise verbalizing the objection.
12. If Internet connection or similar 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 thereafter. In such a circumstance, the Tribunal shall consider the objection and, if the objection is ruled by the Tribunal to have been an appropriate one, the Tribunal shall disregard the answer given by the witness.
13. If a witness needs to be excluded during the debate on an objection, the Tribunal Registry Officer will take the necessary measures to put the witness in a separate break-out room on the Zoom video conferencing platform.

Internet Connection

14. Counsel will be responsible for ensuring the proper and effective functioning of the Internet connection and audio-visual technology to be used by their witnesses who will be testifying by video conference.
15. 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 hearing, the hearing shall be adjourned until all Essential Individuals have a sufficient Internet connection to be able to do so.
16. Essential Individuals are the following:
 - a. During the testimony of a witness:
 - i. The panel members;
 - ii. The stenographer;
 - iii. The Tribunal registry officer;
 - iv. The Tribunal legal counsel;

- 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 panel members;
 - ii. The stenographer;
 - iii. The Tribunal registry officer;
 - iv. The Tribunal legal counsel;
 - v. The counsel making any legal submissions or motions;
 - vi. The counsel responding to any legal submissions or motions.
17. If participants or observers to the hearing, beyond the Essential Individuals, are not able to connect or their connection is interrupted, reasonable efforts will be immediately made to provide or restore their access. It is within the Tribunal's discretion to continue or adjourn the hearing, depending on the circumstances. The guiding principle is for the hearing to continue with all participants in attendance at all times.
18. 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.

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Schedule A

INFORMATION FOR WITNESSES

A. The Virtual Hearing

1. You are going to be a witness at a hearing that will be conducted virtually over the Internet, using the Zoom video conferencing platform. This document is intended to help you understand your role and responsibilities as a witness in this virtual setting. Please read the document carefully.
2. Your counsel will provide the Competition Tribunal Registry with your phone number and e-mail address and the Tribunal Registry Officer will e-mail you a Zoom link to join the virtual hearing. You should not share this information.

B. Your Obligations as a Witness

3. You will swear or solemnly 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.
4. Your obligation as a witness is to be truthful with the Tribunal. 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 panel of the Tribunal. You must approach this task with the same degree of seriousness and solemnity as you would if you were testifying in person in a hearing room.
5. Once your testimony begins, until you have 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 video conferencing platform, you must immediately indicate that this is the case.
7. Before you begin your evidence, you will be provided with an e-mail address and a phone number to allow you to reach the Tribunal Registry Officer if there is any technical issue that arises during your testimony.
8. Once you begin testifying, if there is a technical problem, your first call should be to the Tribunal Registry Officer.
9. The Zoom video conferencing platform is used 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 presiding judicial member of the Tribunal 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 by the presiding judicial member; and
 - Your own witness statement or, if you are an expert witness, your own expert report(s) and Power Point presentation as well as other expert reports and Power Point presentations in this Application, provided that those statements or reports and presentations 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 e-mail, text, in-person discussions, etc.) with any other persons about the substance or subject-matter of your testimony, nor can you access electronic information on your computer, smartphone, or via the Internet unless permitted by the Tribunal.

D. Best Practices for Testifying Virtually

11. In order to ensure that this hearing 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, such as your mobile phone, 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 video conferencing platform.