

Federal Court



Cour fédérale

Date: 20200506

Docket: T-921-17

Citation: 2020 FC 596

Ottawa, Ontario, May 6, 2020

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

ROVI GUIDES, INC.

**Plaintiff/
Defendant by Counterclaim**

and

VIDEOTRON LTD.

**Defendant/
Plaintiff by Counterclaim**

ORDER AND REASONS

[1] The trial of the patent infringement action brought by the Plaintiff, Rovi Guides, Inc. [Rovi], against the Defendant, Videotron Ltd. [Videotron], and Videotron's counterclaim, commenced at the Federal Court in Toronto, Ontario on March 9, 2020.

[2] The hearing proceeded as an electronic trial with virtually all of the documents relied on by the parties stored in a database managed by the registry officer and capable of being displayed on monitors in the courtroom.

[3] Twenty days were set aside for the evidentiary portion of the trial, and two days were set aside for argument. However, after four days of evidence, the parties requested on an urgent basis that the trial be adjourned given the measures being put in place by public health officials to curb the spread of the novel coronavirus [COVID-19] and resulting witness availability issues.

[4] The trial was adjourned and tentatively scheduled to reconvene on April 6, 2020. This plan was superseded almost immediately by the Practice Direction and Order issued by the Chief Justice on March 13, 2020 adjourning all scheduled hearings and trials indefinitely.

[5] Over the course of the following weeks, the parties were canvassed regarding the possibility of resuming the trial either in person or remotely by videoconference. While the parties now advise that counsel and witnesses are available for trial, Videotron objects to the trial being held without its fact witnesses appearing in person before the trial judge, as was done with Rovi's witnesses. Videotron also expresses concern about the security of the proposed Zoom platform.

[6] The issues to be determined are whether trial dates should be fixed at this time given the objection raised by Videotron and whether Videotron's concern about the security of Zoom has any merit.

I. Background

[7] By Order dated November 7, 2018, the trial was originally fixed to take place in Toronto on February 3, 2020.

[8] On January 7, 2019, Prothonotary Mandy Ayles held a case management conference to consider a request to schedule new trial dates, as well as a joint trial in two other proceedings brought by Rovi and TiVo Solutions Inc. against Bell Canada, Telus Corporation and others (T-113-18 and T-206-18). The parties proposed that the hearings be held in tandem and the same judge preside. The parties also asked that the trial judge not release a decision in the first case until the second trial is completed.

[9] By Orders dated January 11, 2019, Prothonotary Ayles rescheduled the trial in the present case to commence on March 9, 2020 and the joint trial in T-113-18 and T-206-18 to start on May 25, 2020.

[10] The trial in the present case commenced as planned on March 9, 2020 in Toronto. That first week, the Court heard three of Rovi's fact witnesses.

[11] At the end of the first week, counsel for Rovi advised that certain witnesses residing in the United States were either unwilling or unable to attend given the travel restrictions imposed by the governments of Canada and the United States and/or their employers. Counsel for Videotron also indicated that they were experiencing difficulties setting-up videoconferencing

facilities for one witness and that there was uncertainty regarding the ability of Videotron's witnesses to be present at trial.

[12] After a trial management conference on April 2, 2020 with counsel for the parties, counsel for Videotron submitted a letter dated April 15, 2020 regarding their proposal and preferences for the resumption of the trial, stating as follows:

- Videotron remains committed to having the hearing in this Action and the Bell/Telus hearing heard back to back. Any timing or procedural decisions should, it is submitted, be made with that objective in mind.
- Videotron has a strong preference for the hearing to be conducted with personal appearances of witnesses and counsel, as opposed to by way of remote witnesses being examined using video-conferencing technology.
- However, Videotron acknowledges that for certain witnesses there may be a significant delay before it is possible for these witnesses to appear in the Federal Court.
- Because the Trial hearing was adjourned after several fact witnesses of the plaintiff had testified in person, Videotron believes it appropriate, and necessary for procedural fairness, that its fact witnesses appear in person as well.
- Videotron proposes that the Trial hearing be resumed June 29, 2020 but with the proviso that it be a "hybrid" hearing with Videotron fact witnesses being able to appear in person before the Trial Judge.
- If, by the end of May 2020, it becomes apparent that the ability of Videotron fact witnesses to appear in person is likely not possible, Videotron respectfully requests that the Trial be rescheduled until such time as such personal attendance is possible.
- Videotron is agreeable to other aspects of the case, such as appearance of expert witnesses, particularly foreign witnesses, proceeding by video examination (although wherever possible witnesses ought to attend at the offices

of court reporters or other law firms to ensure neutrality and to provide technical support which might be required).

[13] A further trial management conference was held on April 22, 2020. Counsel for the parties indicated that 15 days would be required to complete the evidence. The Court proposed that the trial would proceed in person, if possible, or otherwise resume using Zoom, with documents continuing to be shared with the Court, counsel and witnesses using the eTrial Tool Kit (through FileMaker Pro).

[14] Counsel agreed that, subject to rejigging their schedules and confirming the availability of witnesses, they would be prepared to proceed with the trial according to the Court's proposal: May 25-29, June 8-12 and June 15-19, 2020. Counsel for Videotron reiterated that his client did not consent to the scheduling of the trial on a virtual or hybrid format if the public health situation would not allow its fact witnesses from Montreal to attend in person.

[15] On April 29, 2020, counsel for Rovi wrote to confirm its witnesses were available for a trial starting on May 25, 2020 and that counsel were working on a proposed trial schedule for the remaining witnesses. That same day, counsel for Videotron submitted a letter once again voicing that it did not agree to proceed with the trial if its fact witnesses could not attend in person.

As stated in our letter of April 15 and reiterated on the conference call last week, Videotron objects to the trial proceeding without at least its fact witnesses appearing in person before the trial judge, as was done with the Plaintiff's witnesses. Therefore, Videotron does not consent to the scheduling of the trial on a virtual or hybrid format if the public health situation does not allow its fact witnesses from Montreal to attend in person.

Videotron's agreement to the proposed trial calendar is therefore on the basis that the Court is ordering that the matter proceed on

those dates even if the states of emergency and the pandemic restrictions prohibit or render impractical the attendance of Videotron fact witnesses in person.

A further issue raised by Videotron Ltd. is that the Zoom platform is known to be unsecure. As the Court appreciates, sensitive commercial and financial documents will be tendered as exhibits and referred to in the hearing. As was discussed last week, it is possible that MS Teams will be an acceptable alternative to Zoom.

II. Analysis

[16] It is important to note from the start that Videotron has only raised two concerns regarding the resumption of the trial. Videotron does not question that the traditional way of conducting hearings is simply not possible at this time. Nor does it suggest that the examination of witnesses remotely is unacceptable or that document management in a virtual courtroom is impractical.

A. *Whether the Court should delay the trial until Videotron's witnesses are able to attend in person*

[17] The first objection relates to what Videotron perceives as unequal treatment. Videotron submits that it would be procedurally unfair to deny it the right to call its witnesses in the same way afforded to Rovi during the first week of trial. It takes the position that the trial should not resume unless and until its fact witnesses are able to testify in person before the trial judge. For the following reasons, I disagree.

[18] Rule 32 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] provides discretion to the Court to order that a hearing “be conducted in whole or in part by means of a telephone

conference call, video-conference or any other form of electronic communication.” The appropriateness of proceeding by videoconference will depend on the specific circumstances of each case. The Court must weigh the relative prejudice that may accrue to any of the parties if a remote hearing is ordered against the general principle in Rule 3 of the *Rules* requiring that matters be determined in the most expeditious manner on their merits.

[19] In the present case, it has now been two months since Rovi’s witnesses testified. As a result, their testimony will certainly not be fresh in the Court’s mind by the time the trial resumes. In the circumstances, to the extent Rovi may have had an advantage by having three of its witnesses testify in person, such benefit has been lost by the passage of time.

[20] Although oral testimony should generally be provided in open court and attendance in person is the rule and generally preferable, it does not necessarily follow that the ability of the Court to assess the credibility of a witness or that the effectiveness of counsel in examining the witness will or may be impaired as a result of videoconferencing.

[21] Until a vaccine to prevent COVID-19 is widely available in Canada, or until public health officials lift stay-at-home orders and relax restrictions so as to allow people to travel safely, assemble and return to work, hearings of the Federal Court will have to be conducted remotely using the appropriate, available technology. Given that Court facilities will remain closed for the foreseeable future, Videotron’s objection must be rejected since it would result in delaying the trial indefinitely.

B. *Whether the trial should resume using Zoom or Microsoft Teams*

[22] Videotron has also expressed concern about the choice of Zoom for the remote hearing since the platform is known to be unsecure. Videotron advises that if the trial should resume remotely, Microsoft Teams may be an acceptable alternative.

[23] The Court has yet to settle on the platform that will be used at trial. Ensuring that the platform to be used is secure is particularly important in this case since sensitive commercial and financial documents have and will be tendered as exhibits and referred to in the hearing. In the past few months, a myriad of issues have been identified with the use of Zoom, especially from a privacy and security perspective. While Zoom is anything but a perfect platform, the vast majority of the issues have been fixed or patched by Zoom. The Federal Court Technology Committee continues to monitor the security of this platform and others to ensure that best technology will be used for remote hearings in the future.

[24] The parties have already efficiently used the eTrial Tool Kit during the first week of trial, and the Court is satisfied it is practical to continue using this technology. This program ensures the confidentiality of the parties' most sensitive materials, as documents are saved on and retrieved from the Court's servers.

[25] During the first week of trial, which was open to the public, the parties also agreed on certain protocols to further protect confidential information. At times, reference would be made to the page number and the information in the document without displaying or expressly

mentioning the details in open court. At other times, the Court ordered that the confidential information be canvassed in camera. Those protocols can continue to be applied using features offered by online platforms, such as Zoom “breakout rooms” in which the Court, counsel and witnesses can adjourn to a virtual in camera hearing.

III. Conclusion

[26] The Court remains open to revisiting this Order should the relevant public health authorities accept that the risk of contracting and spreading COVID-19 has passed or been minimized to an acceptable degree.

[27] Until then, I can do no better than repeat the words of Mr. Justice Nye Perram of the Federal Court of Australia in *Capic v Ford Motor Company of Australia Limited* (Adjournment)

[2020] FCA 486 at paragraph 25:

[...] we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.

[28] Finally, Rovi recently raised an issue regarding the scheduling of oral arguments in this matter. The parties had agreed at the trial management conference held on April 22, 2020 that closing arguments would be scheduled for the fall to permit more time for preparing written materials and to coordinate the hearing schedule with counsel on the Bell/Telus proceedings. Upon reviewing the parties’ submissions, I am not satisfied that Rovi has presented any valid reason to cause the Court to revisit the issue. The Court will hear oral arguments after

completion of the evidentiary portion of the trial in T-113-18 and T-206-18 on dates to be fixed by the Court.

ORDER IN T-921-17

THIS COURT ORDERS that:

1. The trial shall resume, commencing on May 25, 2020 at 9:30 a.m. (EDT), for a maximum duration of 15 days during the weeks of May 25, June 8 and June 15, 2020.
2. The trial shall be conducted remotely using the eTrial Tool Kit and Zoom, or such other platform as may be directed by the Court.
3. Dates shall be fixed for the oral arguments of counsel following completion of the evidentiary portion of the trial in T-113-18 and T-206-18.

“Roger R. Lafrenière”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-921-17

STYLE OF CAUSE: ROVI GUIDES, INC. v VIDEOTRON LTD.

**TRIAL MANAGEMENT CONFERENCES HELD VIA VIDEOCONFERENCE ON
APRIL 2 AND 22, 2020 FROM OTTAWA AND TORONTO**

ORDER AND REASONS: LAFRENIÈRE J.

DATED: May 6, 2020

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