

## **Guidelines for Videoconference Labour Mediation and Adjudication in Ontario**

**These guidelines have been collaboratively developed by and are jointly supported by representatives of a wide cross-section of both union and management labour law firms, and by the Ontario Labour-Management Arbitrators' Association.**

**April 8, 2020**

In light of the current public health crisis, and in order to facilitate, to the extent possible, labour relations continuing to be mediated and adjudicated remotely with the aid of technology, the following are intended as working “Guidelines” for the conduct of remote mediations and hearings.

These Guidelines are intended to serve as a prompt to counsel and the parties, and to mediators/adjudicators, of the various procedural matters that may need to be addressed in the videoconference mediation or hearing process.

These Guidelines are also not intended as a “one size fits all”, nor are they intended to be comprehensive or directory. Parties, adjudicators and mediators may wish to modify these Guidelines to suit the specific matter they are dealing with.

While the Guidelines contemplate adjudications or mediations that have not yet commenced, they can readily be adapted to the continuation of cases that began pre-pandemic.

These Guidelines do not address the issue of whether a matter should proceed by way of videoconference over the objection of another party, which would ultimately be determined by third-party adjudicators.

These Guidelines have been developed at a relatively early stage in response to the pandemic, and it is recognized that they should be reviewed as the community gains more experience with videoconference proceedings.

Finally, the fact that any particular law firm or lawyer supports these guidelines cannot be relied on in any dispute over whether a particular case should proceed by videoconference, nor are these guidelines intended to be binding or presumptive should a dispute arise over the particular practices and procedures to be adopted in any particular videoconference proceeding.

## **General**

1. Where these guidelines have been adopted, the mediator or adjudicator may, after consulting the parties, make orders modifying any of these Guidelines.
2. Nothing in these Guidelines affects any powers the adjudicator has under legislation or any applicable collective agreement.
3. It is important to recognize that, at the present time hearing participants will generally be working from home and dealing with a myriad of ever evolving issues associated with COVID-19. Those issues include child and elder care, as well as the need to contribute to those in our communities who need assistance. These issues will require flexibility both in advance of and in the course of the hearing. It may be appropriate for a modification the structure of the normal hearing day to be put in place. All usual accommodations will also need to be addressed as in the normal course.
4. Even in the context of these Guidelines that have been developed in compliance with the compelling need for social distancing, it is of fundamental importance for all of those involved in any aspect of this process to be sensitive to and to respect all public health directives in relation to all participants and administrators of the process.

## **Mediator/Adjudicators' Obligations**

5. The adjudicator conducting a videoconference proceeding must provide a hearing, consistent with the principles of natural justice, ensuring that the parties have a sufficient opportunity to present evidence and argument. It is understood that expedited systems developed by or agreed to by the parties will continue to be respected.
6. The mediator/adjudicator must ensure that she or he has the necessary technical expertise to conduct the proceeding by way of videoconference, or

that the necessary technical assistance is made available by a neutral third party or service provider.

7. It is expected that the mediator/adjudicator will not charge additional costs for conducting hearings electronically, beyond those which the mediator/adjudicator reasonably incurs.
8. Upon request of the parties, the adjudicator/mediator should convene a videoconference call, without fee, in order to ensure that the technology will work at the key locations it is being employed, and to familiarize counsel, and where appropriate, the parties or potential witnesses, with the use and operation of the technology, and to review and assess the capabilities of the platform.

### **Notice of Proceeding/Hearing**

9. The mediator/adjudicator should send a hearing/mediation notice as soon as practicable. The notice should include, among other things, the following:
  - a. The start time of the hearing;
  - b. The meeting ID for the hearing;
  - c. A functioning link to signing into the meeting;
  - d. General Information on how to join the videoconference meeting; and
  - e. A prohibition against sharing the sign-in link/information with any individuals who are not legitimately expected to attend the hearing
10. Any summons or subpoena issued by the adjudicator will include the information required in the notice of proceeding. Any issues relating to the enforceability of the summons will be determined by the adjudicator.

### **Pre-Hearing Matters**

11. It is recognized that matters may be addressed through mediation at the outset of a hearing, and that in the event that a matter is not resolved in mediation, it may proceed by arbitration in accordance with these Guidelines.

12. Prior to (or as appropriate on the first day of hearing), the parties, with the assistance and direction of the adjudicator/mediator if necessary, should discuss and resolve pre-hearing matters, which may include but are not limited to:

- a. review of these Electronic Hearing Guidelines;
- b. the videoconferencing platform to be utilized (e.g. Zoom or something else);
- c. identification of preliminary issues;
- d. production and exchange of particulars and any associated timelines;
- e. manner of adducing evidence and any associated timelines, including the production of any agreed statement of facts, or the use of witness “will-say” statements (where will-says are to be utilized, opposing counsel should advise in advance whether they intend to cross-examine)
- f. production and exchange of documents and any associated timelines;
- g. compilation and pagination of each party’s or a joint book of documents, if agreed to, to be circulated to all parties and the adjudicator/mediator before the proceeding;
- h. how to deal with video or other physical evidence;
- i. how many virtual rooms are needed for the mediation or hearing;
- j. virtual room assignments prior to the commencement of the hearing, or otherwise;
- k. any other matters raised by the parties, including notice to affected parties.

### **Videoconference Platform**

13. A platform agreed to by the parties, or directed by the adjudicator/mediator, will be used as the online platform to conduct this hearing remotely. Given its predominant use, these Guidelines are based on “Zoom” as the platform, but may be modified to suit any other platform.

14. Each Party should ensure that their respective participants (including their witnesses and any individual appearing under summons or subpoena) are given advance notice of the need to have access to the videoconferencing platform, and to an internet connection with sufficient capacity to connect to the hearing.

15. The participants will need to have access to a camera on their device, and either a microphone on their device or telephone access where permitted by the platform. They will also need to be directed to ensure that they will be situated in a quiet room with the ability to limit sunlight to avoid glare.
16. In general, while laptops or equivalent are preferable to cell phones for purposes of being able to see counsel or witnesses, it is recognized that in some cases laptops or equivalent may not be available. Parties are responsible for using best efforts to make satisfactory arrangements with respect to their witnesses and any individual appearing under summons or subpoena.
17. Participants should be instructed to remain on “mute” unless otherwise directed.
18. Each party should review with their witnesses and any individual appearing under summons or subpoena the obligation to provide their evidence without resort to any outside information or contact, other than that specifically prescribed by the adjudicator, including documents put to a witness by counsel during the hearing.
19. Each party will need to address the mechanisms for internal communication (cell phone, text, what’s app, Zoom chat) among members of their participant group.

### **The Mediation/Hearing Process**

20. The adjudicator/mediator, or a neutral designate appointed by them or agreed to by the parties, will convene and host the proceeding and operate the platform.
21. The representatives of the parties and the adjudicator/mediator should make their cell phone numbers available to each other in order to facilitate contact during the proceeding, in order that a 3-way conference call can be convened.
22. Appearance notices, which include email and phone number contacts of all attendees, should be provided to the mediator/adjudicator in advance of the hearing in order that the appropriate room assignments can be made.

23. The Host will establish at least four Rooms for a hearing, and as many rooms as are necessary for a mediation. In the case of a hearing, the four rooms should consist of at least the following (recognizing that additional or alternative rooms may be established):
- a. Hearing room (in which anyone can be present at any time);
  - b. Union break out room;
  - c. Employer break out room;
  - d. Sidebar room or rooms; and
  - e. Any additional rooms agreed by the parties or determined by the mediator/adjudicator
24. The Host or adjudicator/mediator will not enter any room other than the hearing room without first providing notice to the Parties in the Room.
25. The adjudicator/mediator should ensure that precautions are put in place in order to ensure the privacy and integrity of the proceeding. Absent agreement of the parties, the recording option on the platform will be disabled. The hearing will not otherwise be recorded by the adjudicator, nor will any of the participants record any part of the proceeding.
26. Any issues of connectivity will be addressed as they arise, with the adjudicator/mediator ensuring that proceedings are put in abeyance while connectivity problems are resolved.

### **Documents**

27. Where documents have been exchanged in advance of the hearing (subject to proof where not agreed), a party seeking to rely on another document not included in a joint or in a party's digital or physical book of documents must ensure the following:
- a) the document must be in a format that can be shared with the other Parties electronically;
  - b) the document must be produced to the adjudicator and the other Parties.

28. The other Parties will be provided an opportunity to make submissions regarding the admissibility of the document. The adjudicator will have the authority to determine if the document should be admitted based on the submissions of the Parties.

### **Witnesses**

29. Affirmations will be administered by the adjudicator as in the usual course, however the adjudicator should also caution the witness regarding all measures necessary to ensure the integrity of the testimony and the proceedings.

30. Witnesses should be instructed to not make any recording (audio, video, or otherwise) of the proceedings and that they shall not take photos or screen captures of the videoconference.

31. Unless otherwise agreed to by the parties, directed by the arbitrator, or as appropriate in response to any accommodation or related issues, a witness should be alone in the room while giving evidence. The witness should also be directed not to look at or make reference to notes or any other documents or material (electronic, physical or other), unless directed to do so by a representative of one of the parties or the adjudicator/mediator.

32. The adjudicator will also ensure that the room set up allows for an optimal view of the witness, and may direct utilization of appropriate technology such as “Pin” or “Spotlight” on the Zoom platform.

33. The adjudicator/mediator will ensure that the necessary measures are taken to ensure that confidential discussions can take place, and that rules and procedures regarding the exclusion of witnesses are put into effect.

### **Closing Arguments**

34. It is recommended that the parties compile and circulate a Digital Case Book to each other and to the adjudicator prior to closing arguments. All authorities should be filed electronically.

35. The parties may agree to file written arguments with the adjudicator, on such terms as they agree, or as directed by the adjudicator.

36. No less than 1 day before closing arguments, the Parties should provide the adjudicator with a list of participants attending the closing arguments

**Proposed Interveners or Parties**

37. The adjudicator will determine whether and on what terms to permit third party interveners to participate, including making such orders appropriate to reflect the videoconference nature of the hearing.