

Federal Court



Cour fédérale

**Date: 20200827**

**Docket: T-448-17**

**Citation: 2020 FC 860**

**Ottawa, Ontario, August 27, 2020**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**GUEST TEK INTERACTIVE  
ENTERTAINMENT LTD.**

**Plaintiff**

**and**

**NOMADIX, INC.**

**Defendant**

**ORDER AND REASONS**

I. Overview

[1] In the ordinary course, a trial is conducted with the parties, counsel, and witnesses appearing in person in the same room as the Court. It has become clear that because of the COVID-19 pandemic, this mode of trial will not be possible for most of the trial of this patent action if it is to proceed as currently scheduled on September 28, 2020. Nomadix, Inc has therefore requested adjournment of the trial so it may proceed in person at a future date.

Guest Tek Interactive Entertainment Ltd opposes the request, arguing the matter can and should proceed by videoconference.

[2] I recognize the reasonable concerns raised by Nomadix. Nomadix has much at stake in this proceeding, and trial by videoconference will not be the same as trial in person. Nonetheless, I am satisfied that a fair trial that respects the interests of the parties and allows their cases to be fully presented and argued can be conducted by videoconference. I am therefore not prepared to adjourn the trial at this time.

[3] The trial will proceed as scheduled for 14 days beginning on September 28, 2020, by videoconference. Further aspects of the manner of conducting the trial are discussed below and will be addressed at a further trial management conference (TMC).

## II. Procedural Background

[4] This patent infringement action was filed in early 2017. It has been specially managed by Case Management Judge Tabib since early 2018. In July 2019, trial was fixed to take place from June 1 to 20, 2020 in Calgary.

[5] This Court issued its first *Practice Direction and Order (COVID-19)* on March 17, 2020, cancelling most hearings scheduled during a Suspension Period that first ran to April 17, 2020. The Suspension Period was ultimately extended to June 15, 2020 in Western and Atlantic Canada, and June 29, 2020 in the rest of the country. On March 18, 2020, the Defendant promptly requested that the trial be adjourned *sine die* due to the pandemic.

[6] Justice LeBlanc, then of this Court, was scheduled to hear the trial of the matter. He held a TMC on April 20 and 24, 2020 to discuss the possible adjournment of the trial. In a Direction issued April 24, 2020, Justice LeBlanc vacated the June trial dates and tentatively adjourned the trial to September 28, 2020. The Direction also adjourned the TMC to June 12, 2020 to ascertain “whether the trial can realistically be held in open court on the Alternate Trial Dates, and if not, what other modes of conducting this trial, including a virtual mode, on the Alternate Trial Dates, can be envisaged.”

[7] Before the June 12, 2020 continuation of the TMC, Justice LeBlanc was appointed to the Federal Court of Appeal. I am currently assigned to be the trial judge in this matter.

[8] I held a TMC with the parties as scheduled on June 12, 2020 to discuss the trial dates. The main issue at that time was a potential scheduling conflict, since the Superior Court of Quebec had proposed dates for an unrelated trial involving Nomadix’s counsel that would overlap the trial dates tentatively set by Justice LeBlanc in this matter. A number of options were discussed at that TMC, including doing at least part of the trial by videoconference.

[9] On June 19, 2020, Guest Tek’s counsel wrote to the Court with the consent of the parties, advising that: (a) there was no longer a conflict with the trial in the Superior Court of Quebec so there was no scheduling obstacle to the September 28, 2020 dates; (b) Nomadix’s two witnesses would be testifying in person, and were available if travel restrictions and quarantine requirements were lifted; (c) Guest Tek wished the trial to proceed, either partially or, if need be, entirely by videoconference; and (d) owing to the uncertainties regarding how witnesses might

testify, a further TMC should be convened in August. Nomadix did not, at this time, express concern about the hearing proceeding entirely by videoconference if necessary, nor indicate that the matter should only proceed on September 28, 2020 if it could proceed in person.

[10] On June 29, 2020, I ordered that the trial of this matter would commence on September 28, 2020 for a duration of fourteen days. I further ordered that the mode of trial, whether by videoconference or in person in Calgary, would be determined by the Court at a later date depending on the status of the pandemic, travel restrictions and quarantine requirements, other related safety issues, and any Practice Direction and Order issued by the Court. I also ordered that a further TMC would be held on August 25, 2020, and asked the parties to provide a letter two days prior to the TMC, listing any issues requiring discussion or determination in addition to the mode of trial.

[11] On August 21, 2020, Nomadix sent a letter to the Court requesting adjournment of the trial. Nomadix noted that the restrictions on non-essential travel between the United States and Canada had been extended to September 21, 2020, and asked that the trial be adjourned since an in-person hearing could not be conducted. It made further arguments in support of that request at the TMC on August 25, 2020. Guest Tek responded both in writing and in oral submissions at the TMC.

[12] All of the witnesses in this proceeding live in the United States, except for one who resides in Calgary. Although the current restrictions on travel between the United States and Canada expire on September 21, 2020, the parties agree, as do I, that effectively no witness from

the United States will be able to, or should be asked to, travel to Calgary for the trial of this matter if it is to begin on September 28, 2020. As the parties expressed no real concern about conducting oral argument by videoconference, and Guest Tek is not suggesting that their one Canadian witness should appear in person while all other witnesses appear by videoconference, the sole question is whether the trial is to proceed entirely by videoconference or whether it is to be adjourned to another date in the hope that an in-person trial can be conducted.

[13] I say “in the hope” because Nomadix concedes that we cannot reliably predict when it will be possible to hold an in-person trial with witnesses attending from the United States. Nomadix proposes an adjournment to March 2021, as the earliest available date based on the schedules of counsel and the witnesses. Nomadix suggests that if an in-person trial is still not possible in March 2021, the Court could at that time order that the matter proceed by videoconference.

### III. Analysis

#### A. *Preliminary Issue: Timing of this Request*

[14] It is clear that conducting the trial of this action as a virtual trial was in contemplation as early as Justice LeBlanc’s April 24, 2020 Direction. It was discussed again at the TMC in June, where Nomadix expressed support for doing a substantial part of the hearing by videoconference. While Nomadix protests that it never contemplated doing the entire trial virtually, Justice LeBlanc’s Direction stated that the TMC was adjourned to June 12, 2020 to determine whether an open court trial could be held in September “and if not, what other modes of

conducting this trial, including a virtual mode, on the Alternate Trial Dates, can be envisaged.”

My June 29, 2020 Order fixing the date of trial for September 28, 2020, similarly indicated that the “mode of trial, whether by videoconference or in person” would be determined at a later date.

[15] However, it was not until August 21, 2020 that Nomadix sought to again adjourn the trial on the basis that it would have to be conducted virtually. In my view, if Nomadix had objections to conducting the trial virtually, it was incumbent on them to raise those objections at the earliest opportunity to allow the parties and the Court to assess the issue and act in consequence. Raising the matter five weeks before a fourteen-day trial is scheduled, when the issue has been live for at least four months, does the parties, the Court, and other litigants seeking hearing time a disservice. While Nomadix points to the recent extension of the US-Canada travel restrictions as the triggering event for its request, the potential for a virtual trial has been in contemplation long before that extension.

[16] While the adjournment request might be rejected on this basis alone, I will not do so, and will instead consider it on its merits. I do this in recognition that both the pandemic and its impacts on litigation have been evolving rapidly, and that parties and counsel have had to consider a number of options that might fairly be described as moving, or at least uncertain, targets. As set out in the Court’s *Consolidated COVID-19 Practice Direction (June 25, 2020)*, the mode of hearing for actions is to be determined after providing parties and their counsel with an opportunity to make representations. A similar approach is appropriate, in my view, for a determination as to whether a trial should proceed virtually, or should be adjourned since it cannot reasonably proceed in person.

[17] That determination must be made based on the individual facts and circumstances of the trial in question, including the length of the adjournment that would be necessary, the particular issues arising in the matter, and the concerns identified with proceeding by videoconference.

B. *Length of the Proposed Adjournment*

[18] As noted above, Nomadix requests that the trial be adjourned by almost six months, to March 2021, since this is the earliest date available to all trial participants. Everyone, including the Court, clearly hopes that the status of the COVID-19 pandemic by March 2021 will be such that travel restrictions are lifted and an in-person trial with witnesses from the United States could proceed without concern. If one could be certain that this would be the case, this might weigh more strongly in favour of the lengthy six-month adjournment proposed. However, there is a realistic possibility that such an adjournment will simply result in the parties and the Court being in the same position six months from now. In the interim, other parties with other cases will also be seeking to schedule hearing time, particularly with the delays caused by the pandemic.

[19] I endorse and would highlight Justice LeBlanc's statement in his Direction regarding the importance of considering holding virtual hearings in order to ensure the Court continues to robustly serve the public and the administration of justice:

**AND UPON** the administration of justice being an essential service of Government and that the Court must find ways, despite the extraordinary circumstances we are all facing at this time, to continue to deliver its services and to do so in a manner that ensures the just, most expeditious and least expensive determination of every proceeding before it;

[20] This is not, as Nomadix suggests, a matter of the trial proceeding to Nomadix's disadvantage simply because Guest Tek wants an early hearing date. The general principle set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, is that they be "interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." In my view, the requirement for a just determination does not mandate that parties invariably have the mode of trial they prefer, or that trial occur in person despite the exigencies of a pandemic. Indeed, Rule 282 specifies that witnesses shall be examined orally and in open court "[u]nless the Court orders otherwise," while Rule 32 provides that the Court may order that a hearing be conducted in whole or in part by videoconference: *Rovi Guides, Inc v Videotron Ltd*, 2020 FC 596 [*Rovi Guides I*] at para 18; *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1453 at paras 26–28. Where a just determination of the proceeding can be obtained by conducting a trial through other modes, the issue of expediency becomes an increasingly important factor in the delivery of justice.

[21] I therefore consider the length of the proposed adjournment, together with the fact that such an adjournment would not necessarily serve its intended function of allowing the matter to proceed in person, to weigh against the requested adjournment.

C. *Primary Issues with Videoconference Trial Raised by Nomadix*

(1) Confidentiality

[22] Nomadix is, understandably, very concerned about maintaining the confidentiality of its trade secrets, including its software source code, technical documents, and commercial secrets.



These are material concerns that the Court takes seriously. Given the importance of such trade secrets, and source code in particular, the Court recognizes the need to ensure that trial, regardless of how conducted, does not result in the inappropriate disclosure of confidential information.

[23] Justice Lafrenière recently considered the treatment of confidential information in the context of a videoconference trial in *Rovi Guides I*. Recognizing that there had been concerns identified with the security of Zoom, he noted that the vast majority of the issues had been fixed or patched by Zoom, and that this Court continues to monitor the security of this platform and others. The Court's practice to date in virtual trials that have required the co-ordination of numerous documents has been to use the eTrial Toolkit offered through FileMaker Pro: see *Rovi Guides I* at paras 13, 24. Use of this technology enhances security by ensuring that confidential materials are stored on the Court's servers, and are not conveyed via the videoconferencing platform.

[24] Nomadix has not identified any particular technological or other issue regarding confidentiality arising from the conduct of a virtual trial. It has simply stated it is very concerned about confidentiality, and is convinced that managing confidentiality is "easier and safer" in a traditional court setting. In my view, this is insufficient to justify a substantial adjournment of a fixed trial date in these circumstances. If there were confidentiality issues with videoconferencing generally, or a particular videoconferencing platform, that were sufficiently material to justify an adjournment, I would expect Nomadix to be in a position to specify what those particular issues are and point to evidence that they exist. Simply reiterating vaguely stated

concerns about confidentiality in a videoconference trial does not provide a basis to adjourn this matter.

(2) Complexity

[25] Nomadix argues that the technologies at issue in this matter, which will include IP packet processing and bandwidth management issues, and nuanced and technical elements of computer hardware and software, are not readily amenable to being conveyed by videoconference. It points to potential “technological glitches” that may affect video quality and interfere with the Court’s ability to understand the expert evidence on these complex technical issues.

[26] I am not persuaded that the complex and technical subject matter of this proceeding poses a serious impediment to proceeding by videoconference. The Court has certainly experienced issues with videoconferencing that have caused brief interruptions of hearings. However, these issues have not been of a nature or frequency that they would be likely to interfere with the ability of either the Court or a party to understand the evidence and issues being presented or assess the evidence being given by lay and expert witnesses. The Federal Court has conducted patent trials dealing with other complex subject matter by videoconference successfully and without serious impediment being caused by either technological issues or the fact that witnesses are not in the same room.

[27] The Court recognizes that conducting a trial by videoconference is a “second best” solution, and that it does not and cannot fully replicate the normal approach of having all participants in the same room. However, I do not consider the differences between an in-person

trial and one by videoconference—differences that will affect both parties—to be such that the matter should be adjourned to allow for a potential in-person trial.

[28] Both parties are familiar with technological means of communication. In the unlikely event that it becomes apparent that technology is interfering with the Court’s ability to hear the case, the matter can be reassessed at that time. However, the risk of technological problems can be reduced by adequate preparation on the part of all parties, and is not a reason to adjourn the trial to avoid having to proceed by videoconference.

(3) Nomadix’s Witness

[29] Nomadix indicates that its primary lay witness, a representative of the company, will be giving extensive evidence. That individual apparently speaks accented English, and counsel for Nomadix suggested that it may be “laborious” to have his evidence transmitted over videoconference. The Court is cognizant of potential concerns regarding those who have limitations on their ability to testify in an official language. However, such concerns arise in in-person hearings as well as videoconferences. I have not been provided a sufficient explanation for how the ability to understand this witness would be negatively affected by him giving testimony by videoconference to give it much weight.

[30] The other arguments raised by Nomadix regarding this witness’s ability to conduct a hearing by videoconference, such as the potential that he may be unable to concentrate on the case if he is not personally in the city where the trial is taking place, are even less persuasive. If

the parties are motivated to focus on the case, I see no reason that they cannot take steps to be able to do so regardless of where they are physically located.

(4) Time Zones

[31] Nomadix raises the concern that participants in the trial may be in four different time zones across North America, ranging from the Eastern Time Zone, where the Court and counsel for Nomadix would be located, to the Pacific Time Zone, three hours different, where Nomadix's representatives and witnesses would be located.

[32] This is certainly an issue to be addressed, as the usual sitting day in one time zone will not coincide with the usual sitting day in other time zones. However, the Court is used to conducting hearings by teleconference or videoconference with parties in different time zones. Accommodation is often reached by starting at a time that would be slightly later than usual in more easterly time zones and slightly earlier than usual in more westerly time zones. I see no reason that this approach cannot work in this case even though the challenge may be greater when doing so through multiple days of trial. The Court is certainly prepared to start and sit later than would be usual in order to ensure that parties in California are not being asked to testify too early in the day.

[33] Again, while I see this as an issue to be addressed in management of the trial, it is not one that individually, or in combination with the other issues raised, merits adjourning the case.

(5) Lack of Urgency or Prejudice

[34] Nomadix argues there is no urgency to this matter, given that the action began in 2017 and covers actions of Nomadix dating back to 2013. Conversely, it argues there would be no prejudice to Guest Tek arising from the adjournment. Guest Tek responds that Nomadix's allegedly infringing conduct has been continuing during the period of the original adjournment, and would continue, with customers continuing to use Nomadix's product. Guest Tek notes that injunctive relief to stop ongoing infringement is a significant part of the relief it is seeking, and that Nomadix has not offered to cease infringement or sales during the requested adjournment.

[35] It is clear that a plaintiff and a defendant may often have very different impressions of urgency and prejudice. Neither viewpoint dominates in this case. Nevertheless, as set out above in discussing Rule 3, parties are entitled to have their matters heard as reasonably expeditiously as possible while allowing for a just determination. Even where predominantly financial issues are at stake, delays in justice can result in its denial. Trial of this matter has already been adjourned for three months as a result of the pandemic. Adjournment for another six months without any guarantee that this will permit the conduct of the trial in person is not warranted.

D. *Other Issues Raised by Nomadix*

[36] Nomadix raised a number of other issues, none of which individually or cumulatively persuades me that an adjournment ought to be granted.

[37] Nomadix raised a concern about the unfairness of Guest Tek having its instructing representatives present in the same room as counsel in Calgary, while Nomadix would only be able to communicate with counsel electronically during the hearing. As Nomadix conceded, this concern of potential unfairness was resolved by Guest Tek's undertaking to have its client representatives attend by separate videoconference link rather than being physically present with counsel. While separate electronic communication by email, text, breakout room, or other means may be more cumbersome, the Court will be aware of such concerns, and will be prepared to consider reasonable requests for breaks to allow such communication.

[38] Nomadix also underscored the volume of electronic evidence in the file, pointing to the size of files (particularly video files) that have been produced and the difficulties that had been experienced in uploading them. However, such issues would have to be dealt with regardless of the mode of trial. The Court will need to have copies of any electronic evidence copied to its system whether the hearing proceeds in person or by videoconference, and this can and should be dealt with well before the commencement of trial. I do not see this as a relevant issue.

[39] Nomadix also made reference to related proceedings between the parties currently pending in Delaware and California. Nomadix noted that the California action has been postponed indefinitely owing to the COVID-19 pandemic. Again, I do not see this as a relevant issue in the circumstances. Courts in every jurisdiction are dealing with the pandemic in the best way possible to address the situation in their particular location and the constraints and concerns they are facing. Absent a scheduling conflict, how or whether matters are proceeding in

Delaware and California does not materially influence whether this matter can go to trial in Canada.

[40] Nomadix has noted that other cases in Canada, including other cases in this Court, have been adjourned in light of the pandemic. None of the cases referenced were particularly analogous to this case: Nomadix referred to a case in which the parties agreed to an adjournment on consent in light of the state of the relevant industry; one in which an expert was delayed in completing a report; and another where parties had been unable to complete necessary pre-trial steps. All cases must be assessed on their individual merits and the adjournment of other cases for issues not arising in this case is of little relevance.

[41] Finally, Nomadix referred to other steps that had occurred in this proceeding, including disclosure and discovery orders. It suggested that it had been adversely impacted by other steps in the matter, and that in such circumstances being required to proceed to trial by videoconference over its objections would be unfair. The other steps in the matter were addressed on their merits by the Case Management Judge. No appeal was taken of those orders. Nomadix's impressions of the merits of those decisions is of no consequence in assessing whether this matter can and should proceed to trial by videoconference.

E. *Conclusion*

[42] For the foregoing reasons, I am not persuaded that the trial of this matter should be adjourned because it cannot proceed in person on the current trial dates. The matter will proceed commencing on September 28, 2020 for the scheduled 14 days, by videoconference.

[43] Nomadix did not raise any issues with respect to the particular platform on which the videoconference trial is to be conducted. Subject to further arrangements that may be made or ordered, the trial will be conducted remotely using Zoom.

[44] A further TMC will be convened in the week of September 7, 2020 to address issues related to the conduct of the trial by videoconference. This will include issues of document management; the implementation of measures and practices to ensure that confidential materials are protected while maintaining the open court principle to the fullest extent possible; and witness protocols. The parties are encouraged to confer as soon as possible and to determine if agreement can be reached on such matters in advance of the TMC. In this regard, the parties are referred to the decision of Justice Lafrenière in *Rovi Guides, Inc v Videotron Ltd*, 2020 FC 637 [*Rovi Guides II*] for consideration.

#### IV. Other Pre-Trial Matters

[45] The parties agreed they would be in a position to exchange witness lists, will say statements for lay witnesses, and a schedule for testimony, by **September 16, 2020**, and I so order.

[46] The parties also suggested they could provide claims charts in advance of trial, indicating areas of agreement and disagreement on issues of construction and infringement of the relevant patent claims. I agree that such charts would be helpful to the Court and improve the efficiency of the trial. The parties agreed that such claims charts could be provided by **September 22, 2020**, and I so order.



[47] The parties are to provide an update on the status of these matters at the TMC to be scheduled in the week of September 7, 2020.

[48] The parties also raised the potential for preparing a joint technology primer. Guest Tek indicated that it had prepared a draft primer and sent it to Nomadix; Nomadix responded that the draft prepared was unacceptable. Given the time available prior to the trial, the other preparation that must be undertaken, and the availability of extensive expert reports, I do not consider that a joint technology primer is a necessity, and will not set a date for one to be provided. The parties are certainly welcome to prepare and provide such a primer if they consider it useful and can agree on its contents.

[49] With respect to a joint book of documents, the parties advised that they did not anticipate any arguments on admissibility or authenticity, and that they would likely be able to agree on the contents of a joint book of documents. I encourage them to do so, and note that any documents to be conveyed electronically will need to take into account file sizes and the time necessary for electronic transfer. That said, I do not believe that particular dates regarding agreement and filing need to be expressly set in respect of a joint book of documents.

**ORDER IN T-448-17**

**THIS COURT ORDERS that**

1. The trial of this matter shall proceed as scheduled commencing on September 28, 2020 for a period of fourteen days, excluding October 12, 2020, and concluding on October 16, 2020.
2. The trial shall be conducted remotely using Zoom, or such other platform as may be ordered by the Court.
3. The parties are to provide the Court with their availability for a further Trial Management Conference to take place during the week of **September 7, 2020**.
4. The parties shall exchange witness lists, will say statements for the lay witnesses, and a schedule for their dates of testimony, by **September 16, 2020**.
5. The parties shall provide claims charts indicating areas of agreement and disagreement on issues of construction and infringement by **September 22, 2020**.
6. Costs are in the cause.

“Nicholas McHaffie”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-448-17

**STYLE OF CAUSE:** GUEST TEK INTERACTIVE ENTERTAINMENT LTD  
v NOMADIX INC

**HEARING HELD BY TELECONFERENCE ON AUGUST 25, 2020 FROM  
OTTAWA, ONTARIO (COURT); CALGARY, ALBERTA (PLAINTIFF); AND  
MONTREAL, QUEBEC (DEFENDANT)**

**ORDER AND REASONS:** MCHAFFIE J.

**DATED:** AUGUST 27, 2020

**APPEARANCES:**

D. Doak Horne  
Kevin Unrau

FOR THE PLAINTIFF

Bob H. Sotiriadis  
Camille Aubin

FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

Gowling WLG (Canada) LLP  
Calgary, Alberta

FOR THE PLAINTIFF

Robic, LLP  
Montreal, Quebec

FOR THE DEFENDANT