SUPREME COURT OF NOVA SCOTIA

Citation: *N2 Packaging Systems, LLC v. 3277991 Nova Scotia Limited (Truro Herbal Co.),* 2020 NSSC 382

Date: 20201125
Docket: Hfx No. 499254
Registry: Halifax

Between:

N2 Packaging Systems, LLC, a body corporate

Applicant

v.

3277991 Nova Scotia Limited, carrying on business as Truro Herbal Co.

Respondent

D E C I S I O N

Judge:	The Honourable Justice M. Heather Robertson
Heard:	November 16, 2020, in Halifax, Nova Scotia
Written Release of Decision	December 24, 2020 (**November 25, 2020 - Orally**)
Counsel:	Jeff Aucoin, for the applicant Scott R. Campbell and Jennifer L. Taylor, for the respondent

Robertson, J. (Orally):

[1] N2 Packaging Systems, LLC ("N2"), an Arizona limited company, brings this application pursuant to *Civil Procedure Rule* 50.03, Part II of the *Canada Evidence Act*, RSC 1985, c C-5, and the *Evidence Act*, RSNS 1989, c 154, for an order giving effect to the request for international judicial assistance in letters rogatory issued by the United States District Court for the District of Arizona, United States of America (the "Arizona Court") on June 29, 2020 (the "letters rogatory"), compelling the respondent, 3277991 Nova Scotia Limited ("Truro"), which is a Nova Scotia cannabis producer, to produce relevant documents and witnesses for discovery in connection with ongoing proceedings in the United States.

[2] Truro is not a party to the N2 Arizona proceedings. The action commenced in Arizona by N2 is against named defendants N2 Pack Canada Inc., Chakra Cannabis Inc. ("Chakra") and three individuals, Eric Marciniak ("Marciniak"), Brendan Pogue ("Pogue"), and Alejo Abellan ("Abellan") (the "Arizona proceedings").

[3] N2 has alleged that the Arizona defendants have misappropriated N2's confidential and proprietary information for the purposes of creating a competing business venture in British Columbia (the "Competitor").

[4] N2 has alleged that Truro conspired with the Arizona defendants, Marciniak, Pogue and Abellan for the purposes of forming the Competitor, and that the Arizona defendants improperly shared confidential information with Truro for the purpose of jointly forming the Competitor as partners in an illegitimate business venture.

[5] The nature of the proprietary information involves a nitrogen-based packaging process, a hermetically sealed container with a "modified atmosphere" that N2 claims to be of a proprietary nature.

[6] Truro is, however, the plaintiff litigant against N2 in an action commenced in Nova Scotia involving the same set of facts. The defendants in that action are N2 Packaging Systems, LLC and 1079755 BC Limited, carrying on business as N2 Pack Canada Inc. The principals of the latter company are Marciniak, Pogue and Abellan.

[7] N2 launched similar letters rogatory proceeding in the provinces of Alberta and British Columbia, succeeding in Alberta, and failing in British Columbia.

[8] N2 relies on the legislative framework set out in the *Canada Evidence Act* Part II ss. 43-45, 46(1), 52(1) and (2) and the *Nova Scotia Evidence Act* ss. 70-72.

[9] N2 relies on *R. v. Zingre* [1981], 2 S.C.R. 392, where the court addressed the *Foreign Tribunals Evidence Act* and noted that s. 43 of the *Canada Evidence Act* only requires:

> 1. There be an application made to a Superior Court in Canada (s. 41 defines 'court' as the Supreme Court of Canada and any Superior court of a province);
>
> 2. There must be a civil, commercial or criminal matter 'pending' before a foreign court or tribunal;
>
> 3. It must be 'made to appear' to the Canadian court or judge that the foreign tribunal is 'desirous' of obtaining the testimony of a party or witness within Canadian jurisdiction in relation to the pending matter.
>
> If these conditions are satisfied, the Canadian court or judge "may, in its or his discretion" order the examination under oath of the party or witness concerned.

[10] Commenting on the role of international judicial comity with respect to letters rogatory the court noted:

> It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al.* [[1980] 2 S.C.R. 39]) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction. . . .
>
> In general, our courts will only order an examination for the purpose of gathering evidence to be used at a trial, but that is not to say that an order will never be made at the pre-trial stage. Section 43 does not make a distinction between pre-trial and trial proceedings. It merely speaks of the foreign court or tribunal "desiring" the testimony of an individual "in relation to" a matter pending before it. I do not think it would be wise to lay down an inflexible rule that admits of no exceptions. The granting of an order for examination, being discretionary, will depend on the facts and particular circumstances of the individual case. The Court or judge must balance the possible infringement of Canadian sovereignty with the natural desire to assist the courts of justice of a foreign land. It may well be that, depending on the circumstances, a court would be prepared to order an examination even if the evidence were to be used for pre-trial proceedings. . . .

[11] In *AstraZeneca LP v. Wolman*, 2009 CanLII 69793, [2009] O.J. No. 5344 (Ont Sup Cr J) Brown, J. commented on the role of the court at paras. 17 and 19:

> 17 Enforcement of letters rogatory rests upon the comity of nations, so that the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed: *Zingre, Wuest and Reiser v. The Queen et al*., [1981] 2 S.C.R. 392, at pp. 400-1.
>
> 19 Notwithstanding that the Ontario court is not bound by the conclusions of the requesting judge and must reach its own findings and conclusions based on the evidence filed, the observations and conclusions of the foreign court are entitled to deference and respect, and an Ontario court should give "full faith and credit" to the orders and judgments of a U.S. court unless it is of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty: *Ontario Public Service Employees Union Pension Trust Fund (Trustees of) v. Clark* (2006), 270 D.L.R. (4th) 429 (C.A.), para. 22.

[12] In *King v. KPMG and KPMG Investigation & Security Inc.* 2003 CanLII 49333 (ONSC), [2003] O.J. No. 2881, the court set out four preconditions to be satisfied before the exercise of discretion with respect to letters rogatory takes place, at para. 6:

> "(a)it must appear that a foreign court is desirous of obtaining the evidence [*Canada Evidence Act*, section 46] or that the obtaining of the evidence has been duly authorized by commission, order or other process of the foreign court [Ontario Evidence Act, subsection 60(1)];
>
> (b)the witness whose evidence is sought must be within the jurisdiction of the court which is asked to make the order;
>
> (c)the evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court [Canada Evidence Act, section 46] or in relation to an action, suit or proceeding pending before the foreign court [*Ontario Evidence Act*, subsection 60(1)]; and
>
> (d)the foreign court must be a court of competent jurisdiction."

[13] Both parties to the motion address the “appropriate circumstances” in which letters rogatory should be enforced, exploring what it is sufficient evidentiary foundation to exercise this discretion.

[14] The respondent relies on *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited*, 2018 NSSC 137, arguing that the task is not merely a rubber stamp exercise. See Gabriel, J. para. 33:

> [33] While international rules of comity are unquestionably in existence, and they stress the fundamental shared objectives of all nations with respect to the ideals of the administration and enforcement of justice (and a willingness to cooperate with those jurisdictions in their efforts to do so) they do not require an attitude of abject servility to the foreign court. I must not merely accept the letters rogatory at face value. I must look behind them to determine the soundness of their basis.

[15] The applicant relied on *Presbyterian Church of Sunday v. Rybiak*, 2006 CanLII 32746 (ONCA), [2006] O.J. No. 3822.

[16] Both *Presbyterian* and *Cytozyme* set out the six factors or criteria for the court to consider. These are the same factors first advanced in the case of *Aker Biomarine AS v. KGK Synergize Inc*. 2013 ONSC 4897. I do so now. They are:

(1) the evidence sought is relevant;

(2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;

(3) the evidence is not otherwise obtainable;

(4) the order sought is not contrary to public policy;

(5) the documents sought are identified with reasonable specificity;

(6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

[17] The applicant's counsel Jeff Aucoin, has filed an affidavit with the court, dated July 20, 2020. Attached as Tabs A-H is the documentary evidence upon which the applicant relies. The letters rogatory at Tab B set forth the claims of N2 in its litigation and detail the documents and examinations requested in significant details. Also attached at Tab H is the statement of claim of Truro which is the litigation against N2 and N2 Canada Inc. These actions are, I conclude, about the same set of facts. The evidence N2 seeks by this proceeding is relevant and relevant for trial purposes, satisfying factors 1, 2, and 5.

[18] With respect to the third factor, in considering if the evidence is not otherwise obtainable, the applicant argues that the documents requested are within

Truro's control, having originated from Truro or having been supplied to Truro. If Truro refuses to produce those documents, N2 logically has no other recourse to obtain evidence of the same value.

[19] The applicant says at issue in the Arizona proceedings is whether any of N2's proprietary documents and information is now in Truro's possession, and whether this information was provided by the Arizona defendants.

[20] The respondent argues that N2 should be expected to pursue the evidence it seeks from the alleged co-conspirators, the named defendants in the Arizona proceedings before pursuing evidence of a foreign non-party.

[21] They rely on *Cytozyme, supra*. In that case Gabriel, J. declined to grant the application because the letters rogatory did not comply with even one of the *Aker* criteria. He deemed the request to be a fishing expedition that would be too burdensome and expensive upon Acadia who was a virtual stranger to the Utah litigation.

[22] Quite clearly in the circumstances of this proceeding a common product, packaging process and business activities underpin the request for letters rogatory.

[23] The respondent, Truro, also urged this court to follow the ruling in the B.C.S.C. dismissal of N2's request for letters rogatory in that province. The court was not satisfied that N2 could not have obtained some or all of the documentation and examination testimony it sought by discoveries in the U.S. action. However, it is important to note that the respondents in that case were the defendants in the U.S. action, not yet discovered in that proceeding.

[24] Again, this case is distinguished from Truro's situation. N2 alleges Truro conspired with the Arizona defendants and then ended up taking suit against N2 and N2 Canada in the Nova Scotia action.

[25] Although the Arizona defendants Pogue and Marciniak may not have yet been discovered or discovery was postponed by agreement, I am not satisfied that the evidence is otherwise obtainable. Truro has within its own control documents and materials sought in this proceeding.

[26] Nor do I consider there to be any reasons that are contrary to public policy at issue here (factor 4). The respondent cannot argue that the Arizona defendants did not have the opportunity to respond to or to consent the letters rogatory or that

this request must fail for want of an undertaking by N2 that the information produced would only be used for the purpose of the Arizona proceedings.

[27] I do note, as argued by Mr. Aucoin, the Arizona defendants have taken no action to quash the letters rogatory since they were issued in Arizona. The Wu affidavit answers this alleged procedural problem asserted in the Peabody affidavit with respect to the issue of the opportunity to respond or contest letters rogatory and I do not intend to say more on this point other than to note, per factor 4, public policy is not a concern.

[28] With respect to the "collateral use" discussion waged between counsel, I am satisfied that a protective order has been issued in the Arizona proceedings protecting any documents or information disclosed as shown on the Aucoin affidavit, Exhibit B, p. 6. Clearly it was intended and contemplated that any information disclosed would be subject to such an order, which would be a requirement of this court, in any event.

[29] With respect to the last and remaining consideration of whether the order would be unduly burdensome, the subject matter of the request is the very information that will need to be produced shortly by Truro in the suit it has launched in Nova Scotia.

[30] In the result, this is an appropriate case, as demonstrated by the evidence before me, to use my discretion in granting an order giving effect to the Arizona Court's request for international judicial assistance. The order will compel Truro to provide the relevant documents described in the letters rogatory and require Truro to provide a competent witness for discovery in Nova Scotia. The reasonable costs in carrying out the order will be borne by the applicant, including the reasonable legal costs incurred by Truro in the discovery proceedings.

[31] Lastly, the order shall contain an undertaking respecting the limited use of any documents disclosed, being confidential, to be shielded from public access and for use in the Arizona trial only.

[32] Absent agreement of costs, I can receive submissions in writing.

Justice M. Heather Robertson