SUPREME COURT OF NOVA SCOTIA

Citation: *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited,* 2018 NSSC 137

Date: 20180608
Docket: Hfx No. 474369
Registry: Halifax

Between:

Cytozyme Laboratories Inc.

Applicant

v.

Acadian Seaplants Limited, a body corporate, Jean-Paul Deveau, Ian Flinn, Ken MacDonald, and Jung Woo

Respondents

Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated June 11, 2018.
Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 17, 2018, in Halifax, Nova Scotia
Counsel:	Victoria Crosbie, for the Applicant Carl Holm. Q.C. and Marc Dunning, for the Respondents

By the Court:

Introduction

[1] This is an application brought by Cytozyme Laboratories Inc. (hereinafter "Cytozyme") pursuant to *Civil Procedure Rule* 50.03, part II of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and the *Evidence Act*, R.S.N.S., 1989, c. 154. The order sought is one giving effect to the request for international judicial assistance in letters rogatory ("letters rogatory") issued by the Third District Court of Salt Lake City, Utah on February 27, 2018.

[2] In a nutshell, Cytozyme seeks an order directing that the relief granted to it by the foreign court be granted. This would compel the Respondents to produce documents and/or to attend discoveries (in Nova Scotia) connected with the ongoing proceedings in the United States.

Background

[3] The letters rogatory themselves have been appended to affidavits filed by Robert Mroz in this matter on March 16, 2018, and March 22, 2018. They are contained in the first affidavit (Exhibit B). Within the exhibits to the second affidavit are found the supplementary documentation which was inadvertently omitted from Exhibit B to the first.

[4] Exhibit A to the second affidavit contains a copy of the *subpoena duces tecum* directed to Acadian, and Exhibits B, C, D, E and F are deposition subpoenas directed to Acadian, Jean-Paul Deveau, Ian Flinn, Ken MacDonald, and Jung Woo. Taken together, these documents also comprise exhibits 1 to 6 of the letters rogatory themselves.

[5] All of this relates to a civil lawsuit in which Cytozyme is engaged in Utah (case #160905593) against one Rajiv K. Tripathi ("Mr. Tripathi"). Counsel have referred to these as "the Utah proceedings" and I will continue to do in these reasons. The allegation is that Mr. Tripathi breached a non-competition agreement, a confidentiality and non-disclosure agreement, and an assignment of intellectual property agreement when he left his employment with Cytozyme and begin working for the Respondent, Acadian. Neither Acadian, nor any of the other Respondents noted in this application, are parties to the Utah proceedings.

[6] Cytozyme also alleges that Mr. Tripathi misappropriated trade secrets belonging to them and used them to benefit himself and his employer Acadian. It further alleges that Mr. Tripathi solicited customers and employees (including Woo) away from Cytozyme to Acadian.

[7] Mr. Tripathi had been employed as Cytozyme's Managing Director of Marketing and Sales from May, 2012 until February 16, 2016. He became employed by Acadian as President of its plant health division on April 1, 2016. He worked with Acadian until August 31, 2017.

[8] Mr. Woo is no longer employed by Acadian. Cytozyme concedes that he is no longer a resident of Nova Scotia. As such, it has withdrawn its request for enforcement of the deposition subpoena (Exhibit 6 to the letters rogatory) which relates to him.

[9] The letters rogatory were issued in the Utah proceedings on February 27, 2018. Although Cytozyme had been in communication with Acadian before that date seeking voluntary compliance with respect to the information that it is seeking, it did not provide notice to Acadian or to any of the other Respondents in this proceeding of the application it brought in the Utah District Court for the issuance of letters rogatory. As such, none of the Respondents had opportunity to participate.

[10] Cytozyme states that Mr. Tripathi has identified the Respondents Jean-Paul Deveau, Ian Flinn, Ken MacDonald, and Jung Woo (all of whom are or were associated with Acadian) as potential witnesses in possession of discoverable information relevant to the subject matter of the Utah proceedings. It appears that this arises from Mr. Tripathi having disclosed his "witness list" to the court in the Utah proceedings.

[11] The contents of the letters rogatory have been appropriately summarized by the Applicant in its brief as follows:

> 11. In particular, the Letters Rogatory request production of the following documents from Acadian (as defined in the Letters Rogatory), as follows:
>
> i. All communications and documents related thereto that discuss or are between Acadian (excluding Mr. Woo and Mr. Tripathi) and Mr. Tripathi prior to his hire date at Acadian;
>
> ii. All communications and documents related thereto that discuss Mr. Jung Woo or are between Acadian and Mr. Jung Woo prior to his hire date at Acadian;

iii. All contracts or agreements, and documents related thereto, between Acadian and Mr. Tripathi;

iv. All contract or agreements, and documents related thereto, between Acadian and Mr. Woo;

v. All customer lists compiled or provided to Acadian by Mr. Tripathi and/or Mr. Woo;

vi. All invoices, orders, and summaries of each for orders placed by customers that (1) were identified on any customer list compiled or provided to Acadian by Mr. Tripathi and/or Mr. Woo and (2) did not place an Order with Acadian in the 12 months prior to Mr. Tripathi's hire date at Acadian;

vii. All documents containing pricing information for any product manufactured or sold by Cytozyme compiled or provided to Acadian by Mr. Tripathi and/or Mr. Woo;

viii. All documents:

a. Authored, compiled, or provided by Mr. Tripathi and/or Mr. Woo that discuss or mention Cytozyme's manufacturing and development processes, product formulations, or products, including those currently or formerly developed, manufactured, or sold by Cytozyme ("Cytozyme Information");

b. Discussing or incorporating Cytozyme Information provided by Mr. Tripathi and/or Mr. Woo: or,

c. Reflecting sales of any products that incorporate(d) Cytozyme Information;

ix. All correspondence sent by Mr. Tripathi and/or Mr. Woo, while employed by Acadian, to any individual(s) employed by Cytozyme; and,

x. All correspondence sent by Mr. Tripathi and/or Mr. Woo, while employed by Acadian, to other entities or individuals that references Cytozyme or any Cytozyme product.

12. In addition to the request for documents outlined above: the Utah Court and Cytozyme also request an Order compelling Acadian, through its most knowledgeable person, and each of the individual Respondents to attend discovery

> examinations in Nova Scotia, in connection with the subject matter of the Utah Proceedings.

[12] When the matter was argued before this Court, counsel for Cytozyme was unaware whether Mr. Tripathi himself had been discovered or deposed within the context of the Utah proceedings, whether he admits that he was or is in possession of any confidential information of Cytozyme, if so, whether he disclosed it or any other information to Acadian or any of the other Respondents, and if so, what it is he admits that he has disclosed and when he did so. Finally, no transcript of the February 27, 2018 proceedings (pursuant to which the Utah District Court issued the subject letters rogatory) has been provided to this court.

Issue

[13] The issue, of course, is whether this Court should order the Respondents' compliance with the letters rogatory contained in the request for international judicial assistance issued in the Utah proceedings on February 27, 2018.

The Law

i. Does this Court have the power to grant the relief requested?

[14] I begin with a consideration of s. 46 of the *Canada Evidence Act* ("*CEA"*) which states as follows:

> 46 (1). If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

[15] Section 51 of the *CEA* goes on to say:

> (1) The court may frame rules and orders in relation to procedure and to the evidence to be produced in support of the application for an order for examination

> of parties and witnesses under this Part, and generally for carrying this Part into effect.
>
> (2) In the absence of any order in relation to the evidence to be produced in support of the application referred to in subsection (1), letters rogatory from a court or tribunal outside Canada in which the civil, commercial or criminal matter is pending, are deemed and taken to be sufficient evidence in support of the application.

[16] This authority is bolstered by the Nova Scotia *Evidence Act*, R.S.N.S., 1989, c. 155 ("*NSEA"*) which clothes the court with a discretionary power to require production of documents and also to direct that commission evidence may be taken in relation to foreign proceeding upon the request of a foreign court. This is set out in s. 70 *NSEA*.

[17] Supplementing these powers are sections 71 and 72 of the *NSEA*, which provide:

> 71. (1) Where under the *Foreign Tribunals Evidence Act*, 1856 (England), any civil or commercial matter is pending before a court or tribunal of a foreign country, and it is made to appear to the Supreme Court or a judge thereof by commission rogatoire, or letters of request, or other evidence as hereinafter provided, that such court or tribunal is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the Province, such Court or judge may, on the *ex parte* application of any person shown to be duly authorized to make the application on behalf of such foreign court or tribunal, and upon production of the commission rogatoire, or letter of request, or of a certificate signed in the manner and certifying to the effect mentioned in Section 2 of the *Foreign Tribunals Evidence Act*, 1856 (England), or such other evidence as such Court or judge may require, make such order or orders as may be necessary to give effect to the intention of the *Act* above mentioned, in conformity with Section 1 of the *Foreign Tribunals Evidence Act*, 1856 (England), and such order shall be in the Form A in the Schedule to this *Act*.
>
> (2) The examination may be ordered to be taken before any fit and proper person nominated by the person applying, or before such other qualified person as to the said Court or judge may seem fit.
>
> (3) Unless otherwise provided by the order for examination, the examiner before whom the examination is taken, shall, on its completion, forward the same to the Prothonotary of the Supreme Court at Halifax, and on receipt thereof the Prothonotary shall append thereto a certificate in the Form B in the Schedule to this *Act* with such variation as circumstances may require, duly sealed with the seal of the Supreme Court, and shall forward the depositions, so certified, and the

> commission rogatoire or letter of request, if any, to the Provincial Secretary for transmission to the foreign court or tribunal requiring the same.
>
> 72. An order made under Section 71 may, if the Court or judge shall think fit, direct the examination to be taken in such manner as may be requested by the commission rogatoire or letter of request from the foreign court or tribunal or therein signified to be in accordance with the practice or requirements of such court or tribunal or which may, for some reason, be requested by the applicant for such order, but in the absence of any such special directions being given in the order for examination, the same shall be taken in the manner prescribed in the rules of the Supreme Court respecting the examination of witnesses under an order or commission.

[18] *Civil Procedure Rule* 50.03 also provides a complimentary power to this court to direct a witness to produce documents and/or attend before a commissioner for discovery:

> (1) A judge may order a witness to attend before the court, a judge, a referee, or a commissioner and to bring documents or other evidence.
>
> (2) A judge may order a witness in Nova Scotia, or direct the prothonotary to issue a subpoena compelling the witness, to attend before a commissioner in Nova Scotia appointed by a court outside Nova Scotia and authorized under Section 70 of the *Evidence Act*.

[19] Pursuant to the foregoing, I am satisfied that I have the discretion to grant the type of relief sought by the Applicant in appropriate circumstances.

ii. Should this Court exercise its discretion?

[20] While there is a dearth of case law in Nova Scotia on the issue, there is relevant Supreme Court of Canada authority. For example, in *Zingre v. The Queen, et al.*, [1981] 2 S.C.R. 392, the question to be decided was whether the court would issue commission authorizing Swiss Judges to take testimony in Canada with respect to ongoing prosecutions in Switzerland as they pertained to crimes allegedly committed in Manitoba. In so doing, the Supreme Court was being asked to give effect to provisions already contained in the *Foreign Tribunals Evidence Act* and an Anglo-Swiss Treaty of 1880.

[21] At p. 405 of *Zingre*, the court stated:

> Section 43 [now s. 46] of the *Canada Evidence Act* has its origin in s. 1 of the *English Foreign Tribunals Evidence Act*, 1856 (U.K.), c. 113, s. 1, which applies

to civil proceedings. This section was made to apply to evidence for foreign criminal proceedings by s. 24 of *The Extradition Act*, 1870, 1870 (U.K.), c. 52.

In Canada, legislation was enacted duplicating the English legislation: 1868 (Can.), c. 76, s. 1; 1870 (U.K.), c. 52, s. 24; 1877 (Can.), c. 25, s. 4; 1883 (Can.), c. 35, s. 1. The criminal and civil provisions were amalgamated in R.S.C. 1886, c. 140, in An *Act* respecting the taking of Evidence relating to proceedings in Courts out of Canada which subsequently in 1906 was incorporated in the *Canada Evidence Act*, R.S.C. 1906, c. 145, ss. 38-46. Section 41 of the 1906 *Canada Evidence Act* is virtually identical with the present s. 43.

Section 43 is framed in extremely broad terms. It provides, as far as relevant:

> Where, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, ... in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of a ... witness within the jurisdiction of such first mentioned court, ... the court or judge may, in its or his discretion, order the examination upon oath ... of such party or witness accordingly ...
>
> The section merely requires that:
>
> 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.

[22] The court had earlier noted at pp. 401 – 403 of *Zingre*:

> 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.

[Emphasis added]

[23] A more recent discussion of the applicable considerations was set forth in *Aker Biomarine AS v. KGK Synergize Inc.*, 2013 ONSC 4897. Therein, at para. 26, Justice Leach distilled the case authorities and extracted the following principles:

Relevant general principles and considerations relating to recognition and enforcement of letters rogatory include the following:

- Enforcement of letters rogatory rests upon the comity of nations. Courts of one jurisdiction 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 generally is given full force and effect unless doing so would be contrary to the public policy of the jurisdiction to which the request is directed. However, such relief is discretionary, and will depend on the facts and circumstances of each case. Comity and the natural desire to assist foreign courts in the pursuit of justice must be balanced against the possible infringement of Canadian sovereignty. This requires consideration of other more specific factors, (e.g., relating to the nature and basis of the request and possible impacts of its enforcement), that may impact on the assessment. See *R. v. Zingre*, [1981] 2 S.C.R. 392, at paragraphs 17-19, 22 and 30; *Fecht v. Deloitte & Touche* (1997), 32 O.R. (3d) 417 (C.A.), at paragraph 5; and *Optimight Communications Inc. v. Innovance Inc.*, [2002] O.J. No. 577 (C.A.), at paragraph 22.
- Requests by foreign courts for assistance should be looked at without rigidity, and enumerations of factors to be considered therefore are non-exhaustive. However, before an Ontario court will grant an order giving effect to letters rogatory, the applicant for such relief has the burden of demonstrating, at a minimum, the satisfaction of certain criteria which to some extent are inter-related. In particular, the evidence on the application must establish that:

  i. the evidence sought is relevant;

  ii. the evidence sought is necessary for trial and will be adduced at trial, if admissible;

  iii. the evidence sought is not otherwise obtainable;

iv. the order sought is not contrary to public policy;

v. the documents sought are identified with reasonable specificity; and vi. the order sought will not be unduly burdensome on the targeted witness, having in mind what the relevant witness would be required to do and produce, were the action to be tried here.

See, for example: *Friction Division Products Inc. v. E.I. du Pont de Nemours & Co.* (1986), 56 O.R. (2d) 722 (H.C.J.), at paragraphs 25 and 30; *Optimight Communications Inc. v. Innovance Inc.*, *supra*, at paragraph 22; *Presbyterian Church of Sudan v. Rybiak*, [2006] O.J. No. 3822 (C.A.); *Connecticut Retirement Plans and Trust Funds v. Buchan*, [2007] O.J. No. 2492 (C.A.), at paragraph 7; *AstraZeneca LP v. Wolman*, [2009] O.J. No. 5344 (S.C.J.), at paragraph 22; and *Oticon Inc. v. Gennum Corp*., *supra*, at paragraph 19.

- If the record cannot sustain a finding that each of the criteria for enforcement of letters rogatory has been met, the application for enforcement should be dismissed. See *Presbyterian Church of Sudan v. Rybiak*, *supra*, at paragraphs 3, 20, 44 and 46.

- Although the Ontario court considering enforcement of the letters rogatory does not function as an appellate court in respect of the foreign "requesting court", it is not bound to accept the language or stated conclusions of the letters rogatory as the "final say" on matters relating to their enforcement. To the contrary, the Ontario court must reach its own findings and conclusions based on the evidence filed. Observations and conclusions of the foreign court generally are entitled to deference and respect, especially if they are reached after a thorough review of the matter and full and contested argument. However, it is also possible that the court issuing the letters rogatory may have done so in a perfunctory manner, without consideration of the matters at issue and without testing the evidence relied on in support of the request. The Ontario court therefore is entitled and obliged to go behind the text and terms of the request to examine precisely what it is the foreign court is seeking to do, and give effect to the request only if the Ontario court is independently satisfied that the requirements of the law in this jurisdiction have been met. See: *Westinghouse Electric Corp. v. Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (H.C.J.), at paragraph 26; *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 (Gen.Div.), at paragraph 18, aff'd *supra*; *Connecticut Retirement Plans & Trust Funds v. Buchan*, *supra*, at paragraph 13; *Presbyterian Church of Sudan v. Rybiak, supra*, at paragraph 32; *O.P.S.E.U. Pension Trust Fund v. Clark* (2006), 270 D.L.R. (4th) 429 (C.A.); *AstraZeneca LP v. Wolman*, *supra*, at paragraphs 18-19; *Oticon Inc. v. Gennum Corp*., *supra*, at paragraphs 31-32 and 33; and *Treat America Ltd. v. Nestlé Canada Inc.*, [2011] O.J. No. 3802 (C.A.), at paragraphs 13-16 and 19-20. See also The Sedona Conference, "*Sedona Canada Commentary on Enforcing Letters Rogatory Issued by an American Court in Canada*", June 2011, at p.3.

[Emphasis added]

[24] The Respondents object to compliance with and/or production of the documents requested in the letters rogatory on each of the six bases cited in *Aker*. I will consider them sequentially.

1. The Evidence Sought is Relevant

[25] The Applicant takes the position that it has put forth a "measured request for documents likely to be in the Respondents' possession" and that it is not bent on a "fishing expedition".

[26] It seeks to establish this, in part, by virtue of what it says it has not asked for. Cytozyme points out it is not looking to see a list of all Acadian's customers, or general information with respect to its finances, sales or trade secrets.

[27] It contends, *inter alia*, that the documents sought are "relevant on their face" to the Utah proceedings (*Brief, para. 32*). As an example of this, Cytozyme argues that its request for documents is limited to matters related to the agreements at the heart of these proceedings, as it strictly relates to customer lists disclosed to Acadian by Mr. Tripathi and trade secrets disclosed by Mr. Tripathi to Acadian. Document related solicitation of Cytozyme's customers and employees (Mr. Woo) and disclosure of confidential information to Acadian by Mr. Tripathi are also sought.

[28] With respect, I disagree. There appears to be an overall broad assumption (on the Applicant's part) that:

a. because Mr. Tripathi disclosed the names of the Respondents on his "potential witness list" in the Utah proceedings, these witnesses must be in possession of some evidence which will be of assistance to Cytozyme in making its case; and

b. because Mr. Tripathi worked for a period of time for the Respondent, Acadian, he must have divulged to them confidential information and trade secrets, customer lists, and actively solicited customers and/or employees of Cytozyme; and

c. Mr. Tripathi will not provide any useful information with respect to the above, if asked.

[29] I observe that it is rather ironic that the Applicant would seek to undertake discovery examination of non-parties in this jurisdiction, when their counsel cannot advise this court that it has conducted discoveries of Mr. Tripathi, the one named Defendant in the Utah proceeding, to this point. Upon what, therefore, is the

"information and belief" based that is referenced in the supporting documents filed by the Applicant that he did any of the things alleged against him?

[30] It must be borne in mind that a transcript of the deliberations of the Utah District Court on February 26, 2018, which led to the issue of the issuance of the letters rogatory the next day, has not been provided to this court either. As such, this court is unable to determine the extent of the consideration which was given to this matter before the "request for assistance" and letters rogatory were issued which have led to the subject application.

[31] Absent an assurance that the foundational work in Utah has been completed (i.e. discovery and/or deposition of Mr. Tripathi and other witnesses within that jurisdiction, and an indication of how that evidence leads to the necessity to obtain information from the Respondents in this jurisdiction) what we are left with is simply an assertion by the Applicant that the Respondents are in possession of relevant documents and/or information which would be of assistance to the Applicant at the trial of the matter in Utah.

[32] On the basis of the above, the Applicant would have the Respondents incur the monumental task of undertaking extensive record searches in an attempt to comply with the requested disclosure, and also the production of some of its personnel for discovery examinations (more on which will be said when the "unduly burdensome" criterion is addressed).

[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.

[34] I am unable to conclude that the necessary criterion of relevance has been established merely by requests which purport to proceed in the absence of the necessary foundational work having been done in the jurisdiction in which the requests originated.

[35] In *Aker*, the court indicated that a failure on the part of the Applicant to establish even one of the six criteria would be fatal to the application. For the sake of completeness, and in the event that I am in error with respect to the above, I will go on to consider the other five.

2. The evidence sought is necessary for trial and will be adduced at trial if admissible.

[36] It is certainly the case that the request for international judicial assistance asserts that "this court requests the assistance described herein as necessary in the interests of justice". I note that the Applicant argues that "the necessity of the desired evidence to the Utah proceedings can be inferred from the nature of the request and the subject matter of those proceedings".

[37] With respect, this inference cannot be drawn based simply upon the nature of the request, particularly in the absence of a transcript of the proceedings which resulted in the issuance of the letter rogatory and request for assistance to this court.

[38] Rather, the recital in the request for assistance appears to be one which is *pro forma*. If it were to be the case that this mere recital would be sufficient to establish necessity, there would be no need for Canadian courts to insist upon such a criterion.

[39] It is, at best, a conclusionary statement. Some basis for that conclusion must be shown by the Applicants.

3. The evidence sought is not otherwise obtainable.

[40] The Applicants point out that cases such as *Treat America Limited v. Nestle Canada Inc.*, 2011 ONCA 560, establish that this criterion has been held to mean that it is a question of whether evidence of the same value may be otherwise obtained.

[41] At the risk of becoming repetitive, the "evidence" sought by the Applicants is described largely in an omnibus fashion. There has not been any demonstrated questioning of Mr. Tripathi (who is in the Utah jurisdiction) to determine whether he admits or does not admit that such evidence even exists.

[42] For example, it would be one thing if he were to be discovered and his evidence was to the effect of, "I provided document x to individual y on this date. It contained information as follows... I take the position that such a disclosure does not violate in any way my obligations to Cytozyme". Then, if Cytozyme were to take a different view on the basis of that general description, it could make a specified, targeted request for a copy of that document.

[43] It would also be another thing if Cytozyme were in possession itself of documents or other concrete evidence suggesting that Mr. Tripathi did some or all

of the things that he is alleged to have done. This evidence could then be put to Mr. Tripathi and/or this Court, and may assist the Applicants in making a much more targeted approach to the Respondents with respect to production, and the breadth of the topics for potential discoveries.

[44] The mere fact that Mr. Tripathi has offered the names of some of the Respondents, as potential witnesses in the Utah proceedings, and the fact that Acadian is his former employer, do not provide an adequate basis for an inference that they possess information which may assist the Applicant in the Utah proceedings. Rather, it is much more likely that they were disclosed because Mr. Tripathi believes that they will be helpful to him with his defence. His defence is (presumably) that he did nothing wrong. His pleadings in the Utah proceedings have not been provided to this Court either.

[45] Nor has anything been provided to suggest that Mr. Tripathi will be uncooperative with a discovery or deposition process if one were to be initiated within the Utah proceedings. If it should turn out that he is, it may be confidently assumed that there are provisions within Utah's equivalent of our *Civil Procedure Rules* sufficient to deal with such an issue.

[46] The pleadings filed by the Applicant, Cytozyme, in the Utah proceedings assert what is referred to as "factual allegations" in paras. 34 to 37. These follow:

> 34. Upon information and belief, defendant retains in his possession, in physical form or otherwise, some of Cytozyme's Proprietary Information or materials, including, computer files, contact lists, files, and any other tangible items belonging to Cytozyme and "all documents that existed in electronic forms on [his] personal computer, as well as any other information stored by any means, including documents stored in any email account maintained or used by [him] or through any other means of physical, magnetic, electronic, virtual, or cloud storage".
>
> 35. Upon information and belief, defendant has used Cytozyme's Proprietary Information for financial gain or advancement at Acadian.
>
> 36. Upon information and belief, defendant has used Cytozyme's Proprietary Information to contact Cytozyme's clients and customers.
>
> 37. Defendant's continued possession of Cytozyme's Proprietary Information is for the purpose of using such information for his own benefit and/or harm Cytozyme and its future viability.

[47] Since no basis is provided for the "information and belief" we can only speculate whether the evidence sought even exists, let alone whether it is otherwise obtainable. Much more than this is needed from the Applicant.

4. The order sought is not contrary to public policy.

[48] Without repeating the foregoing, it is also the case that it would be, in my view, contrary to public policy to require the Respondents to undertake the herculean task required of them by the disclosure being sought by the Applicant (see, infra, para. 11). This is particularly so when (to repeat) the Applicant itself has not demonstrated that it has even lifted a finger to do some of the things that one would have expected of it before an application such as this is initiated.

[49] Moreover, in Nova Scotia we have *Civil Procedure Rule* 14.03 which states as follows:

> (1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.
>
> (2) The implied undertaking extends to each of the following, unless a judge orders otherwise:
>
> > (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
> >
> > (b) all notes and other records of an expert;
> >
> > (c) anything disclosed or produced for a settlement conference.

[50] I have not been provided with an undertaking or representation by the Applicant that a process equivalent to what is considered to be the "implied undertaking rule" in this jurisdiction, would be observed in the Utah proceedings with respect to any information obtained either via document discovery or deposition.

[51] The lack of some safeguard of this type is particularly of concern in this case, given that it has been represented by both sides that Cytozyme and Acadian are competitors in the industry and there is ample scope (so ample that it is not even necessary for me to itemize the components thereof) for disclosure of manufacturing processes, customer lists and other sensitive information by Acadian to Cytozyme

in the event that the former was required to comply with the letters rogatory in their present form.

5. *Documents identified with reasonable specificity*

[52] In para. 37 of its brief, the Applicant states that its only knowledge of the allegations made against Mr. Tripathi is as set out in paras. 3 to 4 of the request for international judicial assistance. Cytozyme states that it:

> … is informed and believes that the Defendant disclosed proprietary information to his new employer, Acadian; employed the proprietary information for his own benefit and perhaps that of Acadian; and solicited customers and employees of Cytozyme – all in patent disregard for and in breach of his agreements with Cytozyme (*Affidavit of Robert Mroz, March 16, 2018, Exhibit B, p. 4*).

[53] Therefore, and as previously noted, the structure upon which this application rests is a series of unsubstantiated allegations or assumptions.

[54] Indeed, the following facts are the most which may be gleaned with any measure of confidence from this very slender foundation:

a. Mr. Tripathi worked for Cytozyme from May 13, 2013, to February 16, 2016.

b. In February 2016 his employment with Cytozyme ended and he began to work for Acadian "in approximately March or April 2016" (subsequently clarified in Respondent's brief as April 1, 2016) to August 31, 2017.

c. Cytozyme and Acadian are business competitors.

d. In July of 2016, the Respondent, Acadian, hired Jung Woo, a former Cytozyme employee.

[55] Upon such a basis (and to select a random example), the Court is asked to assist by requiring the Respondents *inter alia*, to disclose "<u>all</u> communications and documents":

a. Between Acadian and Tripathi before his hire date;

b. That discuss Mr. Woo or between Acadian and Mr. Woo prior to his hire date;

c. All contracts/agreements and documents related thereto between Acadian and Tripathi;

d. All contracts/agreements and documents related thereto between Acadian and Mr. Woo; and

e. All customer lists compiled or provided to Acadian by Tripathi or Woo.

[56] It is not possible to conclude on the basis of the evidence presented by the Applicant that the evidence sought has been specified with reasonable certainty. In the examples cited above, "a" and "b" are broad enough to encompass even Christmas cards if any were exchanged. Items "c" and "d" would require disclosure of documents containing very personal and sensitive information with respect to Acadian, Tripathi, and Woo. Item "e" would appear to extend to lists compiled by Tripathi and Woo which contained the names of customers that they recruited for Acadian even if they were not formerly customers of Cytozyme.

6. The order sought is not unduly burdensome.

[57] With respect to the evidence sought by the Applicant (*supra*, para. 11) the Applicant contends that the requested evidence is "limited in scope, both temporally and in terms of subject matter". Cytozyme goes on to point out that the Utah court is not requesting this Honourable Court to compel Acadian to produce an unreasonable quantum of documents; rather the request is limited only to those documents that are "necessary in the interest of justice".

[58] The Applicant goes on to indicate that Cytozyme is willing to provide a reasonable amount of time for Acadian to produce the documents "and will cover the reasonable costs associated with production as would otherwise be required under a motion for production from non-parties under *Civil Procedure Rule* 14. (*Applicant's brief, paras. 45 and 36)*

[59] The Respondents counter with the facts that Acadian has between 300 – 500 employees, operates in 80 countries, and has myriad distributors and agents in each. They continue:

> … Acadian has no in-house staff capable of searching for documents. A third-party information technology firm specializing in computer network file searching will be needed. We have no idea of what that will cost or how long it will take and while Cytozyme has said in its brief that it "will provide a reasonable amount of time for Acadian to produce the documents and will cover the reasonable costs associated with production" it has provided no assurance that it will provide full indemnity for reasonable legal and other costs the Respondents will incur to review

> and prepare document production, prepare witnesses for discovery and attend discovery.
>
> *(Brief, p. 10*)

[60] The Respondents' point is valid. If the Respondents were directed to respond to the letters rogatory in anything even remotely approaching the form in which they are currently configured, there would be, among other things, a significant amount of time incurred producing the required documentation. Acadian's evidence is that it has no inhouse staff dedicated to or capable of searching for such documents, so a technology firm would have to be hired for the purpose. It also it is very foreseeable that legal advice would be required in many different jurisdictions to interpret and assist Acadian with respect to what is required of it.

[61] In response to a question from the court during argument, counsel for Cytozyme indicated that it was not prepared to reimburse the Respondents for any legal costs associated with what is being requested of them. Moreover, the Applicant's professed willingness to pay for the "reasonable costs associated with production" is a somewhat lukewarm assurance given the scope of what Acadian would have to do in order to comply. It also says nothing about any assistance which may be required by Acadian or its personnel in preparing for and attending the discovery/depositions which are also sought by the Applicant.

[62] The order sought is clearly "unduly burdensome", within the meaning of the case authorities.

Conclusion

[63] I acknowledge that some authorities have conceded that it may be possible for the court receiving letters rogatory from a foreign jurisdiction to adapt and/or modify them in such a manner as would render them compliant with what could be reasonably sought from the Respondents, having regard to our *Civil Procedure Rules*, our rules of evidence, our implied undertaking rule, and the like. If I were to conclude that I was possessed of such a discretion, I would have also concluded that it was only to be exercised in circumstances in which the information and documentation could, by this means, be brought into compliance with the rules set out in *Aker*.

[64] In the instant case, the letters rogatory do not comply with even one of the criteria set out in *Aker*. No amount of "surgery" can save and/or rehabilitate them.

The scope of such a task would be well beyond any discretion which this court could or should exercise in these circumstances.

[65] The sweeping nature of the lists embodied in the letters rogatory, predicated as they are upon such a slender factual foundation, is an example of what has been dubbed in various case authorities as a “fishing expedition”. The demands which would be placed upon Acadian, if I were to grant the application , are expensive, excessive and, quite frankly, unfair.

[66] The application is dismissed with costs to the Respondents. If the parties cannot agree as to costs, I will receive written submissions within 20 days.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited,* 2018 NSSC 137

Date: 20180608
Docket: Hfx No. 474369
Registry: Halifax

Between:

Cytozyme Laboratories Inc.

Applicant

v.

Acadian Seaplants Limited, a body corporate, Jean-Paul Deveau, Ian Flinn, Ken MacDonald, and Jung Woo

Respondents

ERRATUM

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 17, 2018, in Halifax, Nova Scotia
Counsel:	Victoria Crosbie, for the Applicant Carl Holm. Q.C. and Marc Dunning, for the Respondents
Erratum Date:	June 11, 2018

Para. 28 – Bracket should be after the word "part"

Para. 55(b) – Should read "Mr. Woo" not Mr. Wood.