

CANADA / JUDGMENT

N2 Packaging Systems LLC v. Nitrocin, Inc.

2020 BCSC 1719

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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2020 BCSC 1719 N2 Packaging Systems LLC v. Nitrocin, Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: N2 Packaging Systems LLC v. Nitrocin, Inc., 2020 BCSC 1719 Date: 20201113 Docket: S207304 Registry: Vancouver Between: N2 Packaging Systems LLC Petitioner And Nitrocin, Inc., Pinnacle Gaming Solutions Inc., 1079765 B.C. Limited, Chakra Cannabis Corp., Eric Marciniak, Brendan Pogue, and Alejo Abellan a.k.a. Alex Abellan Respondents Corrected Judgment: The front page of the judgment was corrected on November 19, 2020 Before: The Honourable Madam Justice Wilkinson Reasons for Judgment Counsel for the Petitioner: W. Stransky Counsel for the Respondents Nitrocin, Inc., Eric Marciniak & Brendan Pogue: M. Pierce Y. Li-Reilly No one appearing for the Respondents Pinnacle Gaming Solutions Inc., 1079765 B.C. Limited, Chakra Cannabis Corp., and Alejo Abellan Place and Date of Hearing: Vancouver, B.C. October 21, 2020 Place and Date of Judgment: Vancouver, B.C. November 13, 2020

Introduction

- [1] These are my reasons for judgment on the chambers application by the petitioner N2 Packaging Systems LLC ("N2") for an order enforcing letters rogatory issued by the United States District Court for the District of Arizona. The letters request that the respondents Nitrocin, Inc. ("Nitrocin") and Pinnacle Gaming Solutions Inc. ("Pinnacle") produce certain documents and that representatives be questioned on related issues.
- [2] The letters set out extensive document requests and lines of questioning for Nitrocin and Pinnacle representatives.
- [3] The respondents Nitrocin, Eric Marciniak and Brendan Pogue oppose the application. The other respondents were duly served with the petition and filed no responsive materials.

Background

- [4] In April 2019, N2 commenced proceedings in the District Court of Arizona (the "US Action") against 1079765 B.C. Limited, Chakra Cannabis Corp., Mr. Marciniak, Mr. Pogue and Mr. Abellan (the "US Defendants"). All of the US Defendants are residents of British Columbia or do business here.

- [5] N2's claim, generally, is that it engaged the US Defendants to promote, market and distribute its proprietary process in Canada and that the US Defendants breached their contract with N2 by misappropriating N2's confidential and proprietary information. N2 alleges this was done when the US Defendants set up businesses in Canada, including Nitrocin, using N2's intellectual property and trade secrets. Pinnacle is alleged to be a consulting company which provided services to the US Defendants to assist in forming Nitrocin.
- [6] The US Defendants deny the allegations and have filed a defence and counterclaim in the US Action.
- [7] On May 22, 2020 and May 29, 2020, N2's counsel wrote to Pinnacle and Nitrocin respectively seeking their consent to produce evidence in relation to the US Action. No response was received by N2.
- [8] On June 25, 2020, N2 applied to the Arizona District Court for the letters rogatory with respect to Nitrocin and Pinnacle and the court granted the letters on June 29, 2020. That same day counsel for the US Defendants was served with the application. The letters were granted without a hearing on June 29, 2020. No responsive materials were filed by the US Defendants. Legal principles governing letters of request
- [9] As submitted by the parties, *Monster Energy Company v. Craig*, 2016 BCCA 290 at paras. 10-13 is the leading authority setting out the factors for consideration in determining whether a BC court ought to give effect to letters rogatory: 10 The authority of the Supreme Court to enforce letters rogatory received from foreign courts is found in s. 53 of the Evidence Act, R.S.B.C. 1996, c. 124 and s. 46 of the Canada Evidence Act, R.S.C. 1985, c. C-5. 11 In responding to a letter of request, the starting point is the presumption that the request from the foreign court will be granted unless it would be contrary to Canadian public policy to do so or would otherwise be prejudicial to Canadian sovereignty or to Canadian citizens: *R. v. Zingre*, [1981] 2 S.C.R. 392; *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225. 12 *Halsbury's Laws of Canada, Extradition and Mutual Legal Assistance* (2015 Reissue) describes letters rogatory and their purpose this way: Letters rogatory are letters submitted by a court seeking the assistance of a foreign court. The enforcement of letters rogatory is a matter within the discretionary power of the courts and is based upon international comity or courtesy proceeding from international law. Inherent in the idea of international comity is a mutuality of purpose and power: *Westinghouse Electric Corp. v. Duquesne Light Co.*, [1977] O.J. No. 2287, 16 O.R. (2d) 273 at 290 (Ont. H.C.) ("[a]s a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries"). See also *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] S.C.J. No. 41, [1980] S.C.J. No. 41 (S.C.C.); *National Telefilm Associates Inc. v. United Artists' Corp.*, [1958] O.J. No. 275, 14 D.L.R. (2d) 343 (Ont. H.C.). [Emphasis added.] 13

In EchoStar at para. 38, L. Smith J. summarized the factors to be considered in determining whether to give effect to letters rogatory:

1. Relevance;
 2. Whether the evidence is necessary for trial and will be adduced at trial if admissible;
 3. Whether the evidence is otherwise obtainable;
 4. Whether the order sought is contrary to public policy;
 5. Whether the documents sought are identified with reasonable specificity; and
 6. Whether the order sought is unduly burdensome having in mind what the witness would be required to do and produce were the action to be tried locally.
- [10] The respondents' primary point of objection to enforcing the letters is they were obtained prematurely since the evidence is likely otherwise obtainable from the US Defendants within the US Action. They also object on the grounds that the orders sought are contrary to public policy due to the process followed in Arizona, the undertakings offered are insufficient, and due to the failure to provide notice of this petition to all affected parties. The respondents further submit the documents sought are not identified with reasonable specificity and the order sought would otherwise be unduly burdensome to the non-parties. Is the evidence sought not otherwise obtainable?
- [11] This factor considers whether evidence of the same value as that sought from the witness to be examined can be obtained by other means: *Aker Biomarine AS v. KGK Synergize Inc.*, 2013 ONSC 4897 at para. 29.
- [12] Mr. Marciniak and Mr. Pogue are principles of Nitrocin and are defendants in the US Action. The discovery process in the US Action is underway. The US Defendants brought applications challenging the scope of discovery based on arguments of relevance and privilege. The Arizona court dismissed those applications on May 1, 2020. There have been changes of legal counsel for parties in the US Action. The current deadline for completion of depositions is December 9, 2020, and the deadline has been a moving target.
- [13] N2 submits that even though Mr. Marciniak and Mr. Pogue are parties to the US Action, they have failed or refused to produce documents and communications concerning Nitrocin and they have failed to appear for their depositions. This, they submit, means N2 must seek the relevant documents and testimony from the non-parties, Nitrocin and Pinnacle.
- [14] Nitrocin submits there has been no obstruction or refusal by Mr. Marciniak and Mr. Pogue to attend their depositions. Dates were adjourned at N2's request. US counsel for N2 confirmed there were no dates set for those depositions as of September 9, 2020. New Arizona counsel for Mr. Marciniak and Mr. Pogue has confirmed their willingness to produce documents in accordance with the Arizona court decision and attend depositions.

- [15] The respondents are plaintiffs by counterclaim in the US Action. On the record before me, there is no evidence that they are not willing to comply with the Arizona process or are unable to provide evidence relating to Nitrocin and Pinnacle. Mr. Marciniak and Mr. Pogue are clearly engaged in the US Action, even though they are resident in Canada.
- [16] N2 submits that even in cases where representatives of the party to be examined or the witness themselves are a party to the foreign proceeding, the court may nonetheless enforce the letters rogatory where the party "acts in a manner consistent with an intention to avoid [providing evidence] or the party does not otherwise file evidence explaining how, under foreign law, a court could compel a non-resident party to appear and give evidence." In support of that proposition they refer me to *Perlmutter v. Smith*, 2020 ONCA 570 at paras. 29-36.
- [17] In that case, Mr. Smith challenged the Florida court's jurisdiction over him and did not appear to the Florida court. By his actions he "made it clear that he is unwilling to respond to the procedures of the Florida Court": at para. 31. That is not the situation in the US Action in the case before me. As I set out above, Mr. Marciniak and Mr. Pogue are engaged in the US Action and although they have raised relevancy and privilege objections with respect to the discovery requests, they have not refused to attend at a deposition. In fact, the evidence before me was that N2 has not rescheduled the deposition dates, previously adjourned by N2.
- [18] N2 submitted to the Arizona Court that the US Defendants' conduct in the US Action showed that N2 had exhausted all other venues for the evidence sought under the letters rogatory. I note as well that the evidence placed before the Arizona court was a collection of unsworn statements and submissions from counsel. It is clear that the obstacle as N2 sees it is not that the evidence sought is not within the control, possession or knowledge of the US defendants, it is that the US Defendants are obstructing their discovery and N2 must therefore obtain it from the Canadian non-parties Nitrocin and Pinnacle.
- [19] The respondents refer me to the decision in *Oticon, Inc. v. Gennum Corporation and Sound Design Technologies, Ltd.*, [2009] O.J. No. 5478 for the proposition that the absence of concrete evidence that the applicant was unable to obtain some or all of the information sought in letters rogatory is fatal (at para. 36).
- [20] N2's submission to the Arizona court was not subject to responsive submissions nor was testimonial evidence placed before that court. As set out in *Oticon*, at para. 32, this Court: is entitled to go behind mere assertions or statements found in letters rogatory, or materials filed in support of their enforcement, in order to ascertain what, if any, evidence demonstrates that the documents sought from the targeted respondents are not otherwise obtainable: *Presbyterian Church of Sudan (Re)*, [2006] O.J. No. 3822 (C.A.), paras. 33 and 41; *King v. KPMG*, [2003] O.J. No. 2881 (S.C.J.), para. 13.

- [21] On my review of the record and evidence submitted, I do not find that N2 is unable within the US Action discovery process to obtain some or all of the documentation and examination testimony it seeks from its enforcement of the letters rogatory to Nitrofin and Pinnacle. The discovery process in the US Action is ongoing. The US Defendants' applications to contest the relevancy of discovery requests and assert privilege claims are not concrete evidence of N2 not being able to obtain the evidence sought.
- [22] I find that N2 has not exhausted its avenues of obtaining the evidence, despite its submission to the Arizona court that it had. I further find that it would be unfair to impose the burden of extensive documentary and testimonial disclosure obligations on Nitrofin and Pinnacle at this stage in the foreign proceedings.

Conclusion

- [23] Because I find that the petitioner has not met its burden to prove that the information and records are otherwise not obtainable, and that to enforce the letters rogatory against Nitrofin and Pinnacle would be unduly burdensome at this time, I respectfully decline to enforce the letters rogatory with regard to the respondents.
- [24] I do not need to address the additional points of objection raised by the respondents.
- [25] I therefore dismiss the application. Costs
- [26] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the respondents Nitrofin, Eric Marciniak, and Brendan Pogue costs at Scale B. "Wilkinson J."

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Prepared on 26 October 2026 · Esheria