NOVA SCOTIA COURT OF APPEAL

Citation: *327991 Nova Scotia Limited v. N2 Packaging Systems, LLC,* 2021 NSCA 2

Date: 20210104
Docket: CA 502738
Registry: Halifax

Between:

3277991 Nova Scotia Limited, carrying on business as Truro Cannabis Inc.

Appellant

v.

N2 Packaging Systems, LLC, a body corporate

Respondent

Judge:	Derrick, J.A.
Motion Heard:	December 31, 2020, in Halifax, Nova Scotia in Chambers
Written Decision:	January 4, 2021
Held:	Motion granted
Counsel:	Scott R. Campbell, for the appellant Michael Richards and Jeff Aucoin, for the respondent

Decision:

Introduction

[1] 327791 Nova Scotia Limited, carrying on business as Truro Cannabis Inc. ("Truro") has filed a Notice of Appeal from an Order of Justice Heather Robertson of the Nova Scotia Supreme Court, issued December 8, 2020 in favour of N2 Packaging Systems, LLC ("N2"). Truro is alleging Justice Robertson ("the Application Judge") made material errors in her decision giving effect to a request by the United States District Court for the District of Arizona for judicial assistance as set out in Letters Rogatory.

[2] Justice Robertson's Order requires Truro to "produce the documents and examinations requested" in the Letters Rogatory and to provide "a competent representative with direct knowledge of the facts in issue to appear for deposition under oath" in a proceeding commenced in Arizona by N2 ("the Arizona Proceeding") against N2 Pack Canada, Eric Marciniak, Brendan Pogue, Alejo Abellan, and others ("the Arizona defendants"). The compliance dates for production and deposition are imminent - January 8 and January 15, respectively.

[3] Truro is not a party to the Arizona Proceeding.

[4] N2, the plaintiff in the Arizona Proceeding, alleges misappropriation of intellectual property and trade secrets related to its system of packaging cannabis products. N2's request of the Arizona Court for Letters Rogatory says the production and evidence sought from Truro will be relevant to the issues in the Arizona Proceeding because, according to N2, Truro wrongfully conspired with Marciniak and Pogue and others to jointly form a copycat packaging company, Nitrotin, incorporated in the Province of British Columbia.

[5] Truro is seeking a stay of the Order pursuant to *Civil Procedure Rule* 90.41(2) which provides that a judge of the Court of Appeal "may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just".

[6] On December 31, 2020, I heard two motions – Truro's stay motion and its motion for date and directions in relation to its appeal. I scheduled Truro's appeal for a half-day on April 7.

[7] Following submissions on the stay motion, I reserved my decision and advised written reasons would be forthcoming in short order. I have decided to grant a stay. These are my reasons for doing so.

Roadmap to these Reasons

[8] My reasons cover the following: a thumbnail sketch of the Arizona Proceeding with details of the Letter of Request and Letters Rogatory; Truro's arguments before the Application Judge; the Application Judge's decision and the compliance dates she imposed; Truro's Notice of Appeal; the legal principles governing stay motions; my application of the principles; and my conclusions.

[9] Also of relevance is an action filed by Truro in March 2019 in the Nova Scotia Supreme Court against N2 and another defendant, 1079765 BC Limited, carrying on business as N2 Pack Canada, Inc. ("the Nova Scotia Action"). The Nova Scotia Action factored in the Application Judge's decision to order Truro to comply with the Letters Rogatory sought by N2. To the limited extent I will be mentioning this litigation, I will refer to the defendant in the Truro action, N2 Pack Canada, Inc., as N2 Canada. Marciniak, Pogue and Abellan are the principals of N2 Canada.

[10] I will be referring to the Letter of Request from the Arizona Court to "the appropriate judicial authority of Nova Scotia". This document is attached as an exhibit to an Affidavit filed by Truro on the motion for a stay. It was considered by the Application Judge in granting N2's application for the enforcement of Letters Rogatory against Truro.

The Arizona Proceeding, the Letter of Request, and the Letters Rogatory

[11] In the Arizona Proceeding, N2 alleges the Arizona defendants misappropriated its confidential and proprietary information, patents, contracts, vendors, client leads, trade secrets, equipment information, and other related information owned by N2. For the purpose of expanding its business in North America, "N2 Packaging contractually engaged new business partners to promote, market, and distribute its Proprietary Process in Canada (collectively, the "Agreements")…". These business partners are the named defendants in the Arizona Proceeding.

[12] On June 29, 2020, the Arizona Court granted N2's application for Letters Rogatory for Truro and other non-parties to the Arizona Proceeding, including the British Columbia company, Nitrotin. The Court's Letter of Request for International Judicial Assistance (Letters Rogatory) sets out what is being sought from Truro, and indicates N2's allegation that Truro was a recipient of N2's confidential information and conspired with the Arizona defendants and others to form Nitrotin, described as "an illegitimate business venture". The Letter of Request refers to N2 as N2 Packaging.

[13] N2's application for Letters Rogatory from the Arizona Court proceeded without a hearing. N2's application asserted that the evidence it was seeking from Truro and the other "Foreign Witnesses" was "not available from any source within the jurisdiction of the District of Arizona, and cannot be obtained by any means other than pursuant to an order of the appropriate judicial authorities in Canada…". N2 said the evidence was "highly relevant to N2 Packaging's claims and damages, and necessary for the fair determination of issues at trial". N2 submitted that "justice cannot be done in this case without the testimony and documents requested from the Foreign Witnesses…".

[14] N2 advised the Arizona Court that Truro was one of the main conspirators that colluded with the Arizona defendants to misappropriate N2's proprietary and confidential information for the purposes of establishing Nitrotin. It sought production from and examination of Truro on the basis that: evidence in Truro's possession or control is relevant and material to whether Defendants (a) shared N2 Packaging's confidential business information and client leads with Truro in breach of the agreements at issue for the benefit of Nitrotin; (b) misappropriated N2 Packaging's proprietary process related to the nitrogen packaging of controlled substances; (c) tortiously interfered with N2 Packaging's business expectations; (d) breached other contractual obligations under the agreements in issue; and (e) engaged in fraudulent conduct against N2 Packaging.

[15] The Letter of Request from the Arizona Court recognizes that Truro is a non-party to the Arizona Proceeding. It states that Truro is "anticipated to be in possession of testimony and documents upon which N2 Packaging and its experts may rely on to establish its claims and damages" in the Arizona litigation. The Letter of Request proceeded on the basis that the evidence sought from Truro:

> …cannot be obtained by any means other than pursuant to an order of appropriate judicial authority of Nova Scotia, Canada, compelling Truro to appear for examination and provide relevant documents that are in its possession.

[16] The Letter of Request describes why production and deposition from Truro is required and what is being sought:

> …Such evidence is necessary for pre-trial discovery and ultimately trial in this litigation. N2 Packaging seeks three categories of documents and information that lie at the heart of the issues in dispute:
>
> **Sharing of Confidential or Proprietary Information**. Evidence concerning the types of information that Defendants share with Truro are relevant and material towards proving N2 Packaging's breach of contract claims, including whether Defendants improperly shared N2 Packaging's confidential business leads, proprietary information, and trade secrets in breach of their confidentiality obligations under the Agreements.
>
> **Formation of Nitrotin**. Evidence concerning the formation of Nitrotin are material and indicative of whether Defendants misappropriated, infringed upon, or otherwise misused N2 Packaging's confidential or proprietary information for the benefit of Nitrotin in breach of the Agreements.
>
> **Development of the Nitrotin Packaging System**. Evidence concerning the conception, design, and development of the accused Nitrotin Packaging Systems will be critical towards establishing the existence of any infringement upon or misappropriation of N2 Packaging's Proprietary Process by Defendants.

[17] The Letter of Request states that "justice cannot be completely done between the parties" without Truro's testimony and document production. The Arizona Court indicated:

- Truro's testimony and the documents in its possession or control are relevant to and necessary for the fair determination of this proceeding and are intended for use at trial.
- N2 exhausted all other venues for obtaining the sought-after evidence. Truro did not respond to a request from N2 for voluntary production of the evidence.
- Truro is "likely the sole source of much of the documentation and information" being requested.
- The documents and testimony sought is "reasonably" specific and "tailored in time and scope". Responding with the evidence will not be "unduly burdensome on Truro".

[18] The Arizona Court stated its understanding that providing the documents and information sought was "not contrary to Canadian public policy". The Letter of Request specifies that the Court entered a "protective order" in the Arizona Proceeding "pursuant to which Truro may designate documents and information provided under this request as confidential to be shielded from public access".

[19] The Letter of Request attached a "Schedule A" (the Letters Rogatory) which organized the request for evidence under three sections: Definitions and Instructions, Documents and Examinations Requested, and Deposition Topics. The evidence requested includes: representative samples in Truro's possession of Nitrotin products and N2's products; all communications and documents concerning N2's and Nitrotin's packaging process; submissions to Health Canada that N2 and Nitrotin prepared or helped prepare; a broad range of communications between Truro and Nitrotin, including in relation to what Nitrotin provided to Truro concerning Nitrotin products and training manuals for the Nitrotin packaging process; all communications and documents between Truro and N2 Canada concerning licensed producers who applied to N2 regarding its packaging proprietary process; all communications and documents sent to or from certain identified email addresses concerning N2's proprietary process and Nitrotin's packaging process; and all communications and documents concerning the formation of Nitrotin.

[20] I have referred to the above as the evidence being sought from Truro. The language used for the documents requested is actually much more expansive – "You" and "Your" as in, "provided to You", "between You and", and "in Your possession or control", etc. Truro has noted the broad ambit of these pronouns. In the "Definitions and Instructions" section of Schedule A, "You" and "Your" throws a wide net beyond the numbered company, 3277991 Nova Scotia Limited, to include:

> …its directors, principal officers, owners, shareholders, employees, agents, and/or representatives, including Brent MacNeil, Lenard Walser, Matt Casey, Eric Marciniak, and/or Brendan Pogue.

[21] The listed areas for examination (Deposition Topics) of "a competent representative with direct knowledge of the facts in issue" include: authentication and subject matter of all produced documents and communications and communications and documents concerning certain meetings and events, N2 and Nitrotin packaging products and equipment in Truro's possession, Truro's

relationship with N2 Canada, and Nitrotin, and concerning the formation of Nitrotin.

[22] Again, the reference in the description of the topics for deposition from Truro is to “You” and “Your”.

The Proceedings before the Nova Scotia Supreme Court

[23] On July 21, 2020, N2 filed an application in the Nova Scotia Supreme Court for enforcement of the Letters Rogatory against Truro, pursuant to Part II of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, sections 46 and 51, the Nova Scotia *Evidence Act*, RSS.N.S. 1989, c. 154, sections 70-72, and Rule 50.03 of the *Civil Procedure Rules*. Truro filed a Notice of Contest on August 21, 2020. The grounds asserted that the Letters Rogatory were not enforceable in Nova Scotia because they did not satisfy the legal criteria described in *Aker Biomarine AS v. KGK Synergize Inc.*, 2013 ONSC 4897. Referring to these criteria, Truro said the evidence being sought:

(a) Was not relevant to the Arizona Proceeding.

(b) Was not necessary for trial in the Arizona Proceeding.

(c) Was otherwise obtainable.

(d) Was not identified with reasonable specificity.

[24] Truro also said enforcement of the Letters Rogatory would be unduly burdensome for it and was contrary to public policy.

[25] N2’s application was heard in Special Chambers on November 16, 2020.

[26] Truro’s submissions before the Application Judge included affidavits that contained evidence about the status of the Arizona Proceedings. In short, document production and depositions were ongoing. The Arizona Court had issued several discovery-related orders in the spring and summer of 2020. They included an order on September 14, 2020 granting N2’s motion to further extend certain case management deadlines into late 2020 and early 2021. This included deadlines for fact discovery and expert disclosures and discovery.

[27] Truro provided information about the status of the Nova Scotia action, advising the Application Judge that document production and discoveries had not been scheduled yet.

[28] One of the Affidavits filed by Truro in response to N2's application in the Supreme Court of Nova Scotia explained the applicable rules of civil procedure in the Arizona Proceeding as they related to N2's Letters Rogatory application. The party served with a motion for Letters Rogatory would be entitled to file a response within 14 days. The Arizona Court received N2's motion on June 25, 2020 and granted it on June 29, without any response from the four affected parties, including Truro.

[29] Truro's brief to the Application Judge argued the following points:

- The Letter of Request was not to be simply "rubber-stamped" by the Nova Scotia Court. Deeper scrutiny was required.
- N2 had the burden of satisfying the *Aker Biomarine* criteria for enforcement of Letters Rogatory (reviewed by Justice Gabriel in *Cytozyme Laboratories Inc. v. Acadian Seaplants Limited*, 2018 NSSC 137). Having failed to provide sufficient, admissible evidence, N2 had not met its burden.
- The evidence offered by N2 in support of its application for enforcement was hearsay and "presumptively inadmissible on that basis in an Application", and purported opinion evidence, also inadmissible, about N2 having followed the proper procedure for obtaining the Letters Rogatory.
- Even aside from the evidentiary issues, N2 had satisfied none of the six criteria for enforcement, reviewed in *Cytozyme*. These criteria require the evidence sought to be: relevant; necessary for trial and, if admissible, intended for use at trial; not otherwise obtainable; not contrary to public policy; and identified with reasonable specificity. The order for enforcement was not to be unduly burdensome to the party against whom it had been made.

[30] Truro argued there was insufficient evidence about the Arizona Proceeding to satisfy the relevance requirement and prevent N2 from engaging in a "fishing expedition". Truro relied on *AstraZeneca LP v. Wolman*, [2009] O.J. No. 5344, at

para. 24 which states: “Any assessment of relevance must centre on the issues raised in the foreign litigation”. Truro noted that N2 had not provided the Application Judge with a copy of the pleadings in the Arizona Proceeding.

[31] Truro said N2 had failed to provide the evidence required for the Application Judge to assess whether the evidence being sought was necessary for the Arizona Proceeding. In Truro’s submission it was not enough to merely say as the Letter of Request does, that the evidence was “necessary for pre-trial discovery and ultimately trial in this litigation”. Truro noted the statement in *Aker Biomarine* that:

> [35] …Repeated assertions of necessity in the letters rogatory are not binding or persuasive, for reasons similar to those set out above in relation to relevance. Again, the requesting court apparently has simply relied on the unopposed and untested assertions of the Applicants.

[32] Truro emphasized the reference in the *Aker Biomarine* quote to the assertions of the applicants for the Letters Rogatory in that case having been unopposed and untested, a parallel to what Truro said had happened in Arizona.

[33] Truro noted that Arizona defendants Marciniak and Pogue had not been deposed in the Arizona Proceeding. Truro’s brief to the Application Judge makes the following point:

> 49. The Applicant alleges in the Arizona Action that Mr. Marciniak and Mr. Pogue – who again, are parties to the Arizona Action – conspired with Truro Cannabis “to misappropriate N2’s “proprietary and confidential information for purposes of starting the copycat business Nitrotin.” According to the Applicant’s Brief, N2 wants to know “what documents or other proprietary information the Arizona Defendants may have improperly disclosed or provided to Truro in forming the Competitor”.
>
> 50. To be clear, Mr. Marciniak and Mr. Pogue (two of the “Arizona Defendants”) are required to disclose documents in the Arizona Action and are subject to pending deposition as well. As the Applicant acknowledges: “Whether the Arizona Defendants did in fact provide any of N2’s proprietary documents or information to Truro is necessarily central to N2’s allegations in the Arizona Proceedings, as is therefore a key issue that will need to be addressed in pre-trial discovery…”
>
> 51. The Applicant should be expected to pursue the evidence it seeks from the alleged co-conspirators who are actually named as parties in the Arizona Action, before pursuing evidence from a foreign non-party.

[34] Truro's argument about the Marciniak and Pogue depositions having yet to occur also supported its point that the Application Judge had an insufficient basis for accepting the evidence was not otherwise obtainable. All the Application Judge had were the bare assertions of the Arizona Court which had simply relied on the assertions of Arizona counsel for N2.

[35] Truro noted this had been an issue in *Aker Biomarine* where the applicant there had failed to satisfy the "not otherwise obtainable" criteria:

> [36] …this assertion by the requesting court suffers from the same frailties as other assertions in the letters rogatory, i.e., in terms of the indications, noted above, that the court simply relied on the assertions of counsel without any meaningful review or testing of such representations.

[36] Truro referred the Application Judge to *Oticon, Inc. v. Gennum Corporation*, [2009] O.J. No. 5478 where the court held:

> [36] …Before imposing on Ontario residents a requirement to search for and produce documents relevant to issues in a foreign proceeding, the applicant must adduce some evidence, not mere assertion, that it has been unable to obtain the documents from a party to the foreign litigation or from some other reasonably accessible source, such as publicly-accessible information repositories. In the present case, Oticon has not adduced any such evidence. I conclude that it would be unfair to impose the burden of documentary disclosure obligations on the respondents when Oticon has not shown that it has sought to secure some or all of such documents from a party which it is entitled to discover in the U.S. Proceeding.

[37] The court in *Oticon* found the absence of "concrete evidence" from Oticon that it was unable to obtain the documents being sought from another source was fatal to its application seeking enforcement of Letters Rogatory.

[38] Truro also raised public policy concerns in the nature of an undertaking from N2 limiting the use of the evidence obtained under the Letter of Request to the Arizona Proceeding. The Applications Judge dealt with that issue in her Order of December 8, 2020.

[39] The other public policy issue identified by Truro related to natural justice: the defendants to the Arizona Proceeding had not been given the opportunity to respond to N2's application for Letters Rogatory. In its brief to the Application Judge, Truro said this was a violation of natural justice, "at least according to Canadian standards". In Truro's submission, it weakened the Letter of Request

"because it means the Arizona Court's conclusions were not properly tested in any adversarial fashion".

[40] Truro also complained that the document production was not identified with reasonable specificity, was overly broad and that enforcement would place it under an undue burden. Truro noted the Letter of Request stated that providing the evidence "will not be unduly burdensome on Truro" without the Arizona Court having the benefit of any argument or evidence "regarding the mechanics of compliance for Truro Cannabis". Truro argued it could be inferred that a "significant amount of time" would be required for it, a non-party, to comply with the Letters Rogatory.

[41] Truro asked the Application Judge to be mindful of the fact that in Nova Scotia, non-party disclosure is "exceptional" (*Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, at para. 78). In Truro's submission this was a further reason to deny N2's application for enforcement even before party discoveries had been completed.

The Application Judge's Decision and Order

[42] The Application Judge identified the six *Aker Biomarine* criteria that must be met by the party seeking enforcement of Letters Rogatory. I reviewed this criteria earlier, at paragraphs 23 and 24. She found the Arizona Proceeding and the Nova Scotia Action concern "the same set of facts". She based this finding on a review of the Letter of Request and Truro's Statement of Claim in the Nova Scotia Action. This satisfied her that the evidence being sought was relevant, necessary for trial and, if admissible, would be adduced at trial, and identified with reasonable specificity.

[43] The Application Judge then considered three remaining issues: the "not otherwise obtainable" requirement, whether there were public policy obstacles to enforcing the Letters Rogatory, and whether enforcement would unduly burden Truro. She had no concern in relation to any of these factors.

[44] The Application Judge was not persuaded that Marciniak and Pogue had to have been discovered before N2 could establish compliance with the "not otherwise obtainable" criteria. She found:

> [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.

[45] On the public policy issue, the Application Judge rejected Truro's argument that the Arizona defendants had not had the opportunity to respond to N2's motion to the Arizona Court for the Letters Rogatory. She noted that the Arizona defendants had "taken no action to quash the letters rogatory since they were issued in Arizona". She referred to Affidavit evidence I do not have before me which she said "answers" the "alleged procedural problem…with respect to the issue of the opportunity to respond or contest letters rogatory" and concluded by saying: "…I do not intend to say more on this point other than to note…public policy is not a concern" (para. 27).

[46] As for the "unduly burdensome" criteria, the Application Judge found there was no such burden for Truro as "…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".

[47] The Application Judge concluded by finding:

> [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…

[48] The Application Judge indicated her order would contain an undertaking that limited N2's use of the produced documents to the Arizona Proceeding and shielded them from public access.

The Compliance Dates

[49] The Application Judge's Order of December 8 did not specify compliance dates for Truro. She offered counsel for the parties the opportunity to come to an agreement on dates but they were unable to do so. After Truro filed its Notice of Appeal on December 15, its counsel, Mr. Campbell, suggested to the Application Judge that "a reasonable buffer of time be incorporated [into the Order] so to allow the appellate process to unfold in a fair and efficient manner". N2's counsel responded with a request for deadlines of January 8, 2021 for production and January 15, 2021 for the oral deposition.

[50] The Application Judge responded to counsel on December 18 by stating:

> Thank you both for your correspondence dated December 17, 2020.
>
> I indicated on December 3, 2020, that I would be prepared to set dates for disclosure and fact dispositions, in the absence of your agreement.
>
> Having failed to agree, Mr. Campbell asks that the Court allow a reasonable buffer time for the appellate process to unfold, as he pursues an appeal of my decision rendered November 25, 2020 and the subsequent order dated December 8, 2020.
>
> However, I find myself in agreement with Mr. Aucoin. Having recognized the law of comity in granting the order enforcing the letters rogatory, I am mindful of the order of the Arizona Court requiring that discovery and fact disposition be completed by January 24, 2021 [*sic*].
>
> I therefore set dates for production of documents and examinations pursuant to the letters rogatory by January 8, 2021 and deadline for oral disposition to take place by January 15, 2021.

[51] I will later address whether, as argued by N2, Mr. Campbell's proposal amounted to a *de facto* application for a stay.

Truro's Notice of Appeal

[52] In its Notice of Appeal, Truro alleges the Application Judge made reviewable errors by:

- Misapplying the governing legal criteria for the enforcement of Letters Rogatory in Nova Scotia.
- Concluding that enforcement of the Letters Rogatory was not premature.
- Concluding that the evidence sought by the Letters Rogatory was not otherwise obtainable.
- Misunderstanding the applicable evidentiary burden and by making findings in the absence of sufficient or any evidence.

[53] Truro adds that, "Individually and in combination, the above errors result in an injustice to the Appellant, such that appellate intervention is necessary in the circumstances". Truro is seeking to have the Application Judge's Order reversed and dismissal of N2's application for enforcement of the Letters Rogatory.

The Legal Principles Governing Motions for a Stay

[54] A stay is a discretionary remedy. It is intended "to achieve justice as between the parties in the particular circumstances of their case" (*Hendrickson v. Hendrickson*, 2004 NSCA 98, at para. 11, per Saunders, J.A. quoting *Widrig et al. v. R. Baker Fisheries Limited et al.* (1998), 168 N.S.R. (2d) 378).

[55] As Beveridge, J.A. noted in *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45, the filing of a Notice of Appeal does not freeze the enforcement of the order being appealed. A stay may be the appropriate mechanism to "ensure that the statutory right to challenge the correctness of a lower court's decision is not rendered illusory…" (at para. 19).

[56] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23). Under the *Fulton* test, the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience criterion concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.

[57] In the event the applicant for a stay cannot satisfy the three criteria of the primary test, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so. This is known as the secondary test for a stay (*Fulton; Colpitts*, at para. 23).

[58] I am reminded by *Fulton* that the "fairly heavy burden" borne by the appellant is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal".

[59] Truro submits it has satisfied both the primary and the secondary tests for a stay.

Applying the Legal Principles

Arguable Issue for Appeal

[60] To qualify for a stay, an appellant must clear the "arguable issue" threshold requirement. This is a low threshold. Beveridge, J.A. in *Colpitts* identified what must be shown:

> [26] …realistic grounds which, if established, appear to be of ~~have~~ sufficient substance to be capable of convincing a panel of the Court to allow the appeal.

[61] If I am satisfied Truro has established an arguable issue, my "working assumption" is that the outcome of the appeal is uncertain: "either side could be successful" (*Colpitts*, at para. 26; *Amirault et al.* v. *Westminer Canada Ltd.*, [1993] N.S.J. No. 329, at para. 11).

[62] While it is not my role to engage in a searching examination of the merits of Truro's appeal, I have found it necessary to review the Application Judge's analysis and Truro's grounds of appeal. Doing so is not unprecedented (see, *Colpitts*, at paras. 30-46).

[63] Truro has identified in its Notice of Appeal the reviewable errors it says were committed by the Application Judge in ordering enforcement of the Letters Rogatory. I set out these grounds in paragraphs 52 and 53. The errors alleged by Truro include the Application Judge's findings that: enforcement was not premature despite N2 having yet to discover Marciniak and Pogue; the evidence was otherwise unobtainable where N2's party-discovery remains incomplete; and the evidence sought was relevant to the Arizona Proceeding in the absence of having the pleadings of the Arizona Proceeding before her. Truro has emphasized such errors have heightened significance where non-party discovery is "exceptional" as it is in Nova Scotia (*Homburg*, at para. 78).

[64] Relevant to my assessment whether Truro has made out an "arguable issue" is the context for the proceedings before the Application Judge. That context was the doctrine of comity. It is instructive to review it.

[65] Gabriel, J., in *Cytozyme Laboratories*, referenced earlier in these reasons, and the only reported Nova Scotia case on letters rogatory, drew on well-settled law to explain the doctrine of comity. He identified *Zingre v. The Queen* and *Aker Biomarine*. I referred to *Aker Biomarine* previously and the six criteria to be applied by a court being asked to enforce letters rogatory.

[66] *Aker Biomarine* described the doctrine of comity:

> [26] … 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…such relief is discretionary, and will depend on the facts and circumstances of each case…

[67] However, as *Aker Biomarine* confirms, although the receiving court "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 related to their enforcement" (at para. 26).

[68] The court considering enforcement of the letters rogatory does not simply "rubber-stamp" the request, a point made by Truro to the Applications Judge. *Aker Biomarine* was explicit that this means the receiving court "must reach its own findings and conclusions based on the evidence filed":

> [26] …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". (*cites omitted*)

[69] Gabriel, J. in *Cytozyme* followed the path laid out in *Aker Biomarine* and, in doing so, held the doctrine of comity does not require,

> [33] …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.

[70] The Applications Judge recited these principles. In her review of the six *Aker* factors, she quickly concluded the evidence being sought by N2 was relevant, necessary for trial and identified with reasonable specificity. She made her determination on the basis of her examination of the Letters Rogatory and Truro's Statement of Claim in the Nova Scotia Action which satisfied her that the Arizona and Nova Scotia proceedings concerned "the same set of facts". She did not have

the Arizona pleadings and does not mention reviewing any other pleadings in the Nova Scotia Action, such as N2's Defence, Counterclaim and Crossclaim.

[71] The Applications Judge gave little explanation for her conclusion that the evidence sought by N2 was otherwise unobtainable. Her statement, "Truro had within its own control documents and materials sought in this proceeding" (para. 25) does not appear to be responsive to the issue of whether N2 had satisfied the "otherwise unobtainable" requirement for enforcement of the Letters Rogatory.

[72] Prior to asking for the assistance of Nova Scotia, N2 had not asked Marciniak and Pogue, parties to the Arizona Proceeding, if they had handed over proprietary information to Truro. The enforcement of letters rogatory requires the requesting party to establish the evidence being sought can only be obtained by enlisting the assistance of the receiving court.

[73] The exceptional nature of non-party discovery in our jurisdiction and the fact that N2 has still to discover parties to the Arizona Proceeding – Marciniak and Pogue – is a relevant issue for appeal. It is an issue with possible implications for Canadian sovereignty and public policy (*Zingre v. The Queen*, [1981] 2 S.C.R. 392, at p. 401).

[74] I find Truro has raised arguable issues in relation to the enforcement of the Letters Rogatory and whether the Applications Judge sufficiently scrutinized the Letter of Request in the circumstances. Pre-trial discovery had not been completed in the Arizona Proceeding, the pleadings for that Proceeding were not before her, and she resorted to the Nova Scotia Action to satisfy herself that N2 should receive production of all the evidence it was seeking.

[75] The Applications Judge was entitled to "go behind" letters rogatory and only give them effect if "they satisfy the requirements of the law" of Nova Scotia (*AstraZeneca*, at para. 18). Truro says this required N2 to present direct evidence, not hearsay evidence that was inadmissible on an originating application. N2's application was advanced on the basis of hearsay evidence in an Affidavit from N2's Nova Scotia counsel. Truro submits the Application Judge erred in law by relying on this evidence. There was no evidence from N2's Arizona counsel to ground assertions purporting to justify its application seeking the assistance of Nova Scotia. This raises the question of whether the Application Judge had the necessary evidentiary foundation for ordering enforcement of the Letters Rogatory.

[76] The nature of the Application Judge's authority – that she was exercising discretionary power – does not set a higher bar for Truro. It simply means Truro's grounds of appeal will be examined in accordance with the standard of review for discretionary decisions.

[77] I find Truro has made it over the "arguable issue" threshold with its grounds of appeal. There are legitimate questions here capable of persuading a panel on appeal. Whether they will persuade is not a question I am deciding. Nothing I have said should be taken to suggest otherwise.

Irreparable Harm

[78] Truro says it will experience irreparable harm if a stay is not granted.

[79] Irreparable harm is established where the harm "cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*National Bank Financial Ltd. v. Barthe Estate*, 2013 NSCA 127, at para. 16). What constitutes irreparable harm depends on the context (*Colpitts*, at para. 48).

[80] Truro submits the contextual factors that inform its motion for a stay are: (1) its appeal will be rendered moot if a stay is denied; and (2) it will be forced to produce more than would be required under the *Civil Procedure Rules* for discovery in Nova Scotia. Furthermore, Truro raises the potential that enforcement of the Letters Rogatory could oblige it to disclose potentially privileged information. Only a stay would safeguard that from happening.

[81] N2 notes the issue of privilege was not raised before the Application Judge. N2 says there is nothing to prevent Truro complying with the Letters Rogatory and withholding any documents or evidence over which it wished to assert privilege.

[82] Without an order for a stay, Truro will have to comply with the order enforcing the Letters Rogatory, producing the documentary and testamentary evidence being sought. By the time Truro's appeal is heard on April 7, the evidence will have been produced. If there have been any errors in the Order enforcing the Letters Rogatory, there will be no opportunity for correction, no appellate clarification of what is required in such applications.

[83] Mootness as an issue in motions for a stay has been discussed in the context of both irreparable harm (see, e.g., *Y. v. Swinemar*, 2020 NSCA 56, at para. 17;

Colpitts, at para. 50) and the balance of convenience (see, e.g., *G.W. Holmes Trucking (1990) Ltd. (Re)*, 2005 NSCA 132, at para. 15; *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 37, at para. 19).

[84] Whether addressed under irreparable harm as in *Colpitts* or in relation to the balance of convenience as in *Maxwell*, preserving a party's right to appeal, while not necessarily dispositive, can be a very significant consideration (*Maxwell*, at para. 19).

[85] I find it to be a very significant consideration here. There is no repair for the harm that will be done to Truro if it is obliged to produce evidence that a successful appeal would have found should not have been produced at this time or at all. Truro has arguable issues for its appeal. The denial of a stay would be a denial of Truro's right to have these issues considered.

[86] Once the enforcement of the Letters Rogatory proceeds, Truro's right of appeal becomes purely academic. Only a stay can prevent the irreparable harm that follows from compelled production and the loss of the right of appeal (*O'Connor v. Nova Scotia*, [2001] N.S.J. No. 90, at para. 20).

[87] And while I am not strongly persuaded by Truro's concerns about potentially privileged information, primarily because this has only now been raised as an issue, there could be confidential documents caught by the broad swath of documents and testimony sought by the Letters Rogatory. Truro, of course, cannot assert it would have any confidentiality claim over N2's proprietary information should it have any in its possession.

[88] In *O.P.S.E.U. Pension Trust Fund (Trustee of) v. Clark*, 2005 CarswellOnt 10467, Goudge, J.A., commenting on the effect of a successful appeal of an order enforcing letters rogatory where confidential information is implicated, observed that absent a stay, "the privacy cat will be out of the bag…" (at para. 4). And while the undertaking in the Application Judge's Order confines N2's use of the documentary and oral evidence obtained from Truro to the Arizona Proceeding, if Truro succeeds in its appeal, N2 cannot "unknow" what it will have learned about any confidential information.

[89] In N2's submission the production that has been ordered is inevitable due to the Nova Scotia Action.

[90] N2 says Truro will have to produce the sought-after evidence in the Nova Scotia Action and therefore cannot claim enforcement of the Letters Rogatory will cause it irreparable harm. N2 adds the exceptional nature of non-party discovery in Nova Scotia should hold no sway in this case as Truro, although strictly speaking a non-party, is no stranger to the Arizona Proceedings.

[91] I am not persuaded by either argument. I find it is speculative to assume all the evidence that would be caught by the net of the Letters Rogatory will be produced in the course of the Nova Scotia Action. Truro indicates the Nova Scotia Action is in its infancy. There has been no document production or discoveries. The contours of what production and discovery may look like in that litigation are unknown.

[92] I reject the argument that production is inevitable in the Nova Scotia Action thereby eviscerating Truro's case for irreparable harm.

[93] As for the characterization of Truro as not a true stranger to the Arizona Proceeding and therefore something more than a non-party, it is profitable to compare Truro to Nestlé Canada in *Treat America Limited v. Nestlé Canada Inc.*, 2011 ONCA 560. In *Treat America*, letters rogatory were enforced against Nestlé Canada even though it was no longer a party to the U.S. proceedings. Its parent company and U.S. counterpart were still parties, and the pleadings detailed Nestlé Canada's interconnected role in the alleged price fixing that occurred in the United States. The fact that Nestlé had been required to produce similar documentation in a Canadian Competition Bureau investigation was a relevant factor in the decision to grant enforcement of the letters rogatory.

[94] Nestlé Canada can fairly be described as not a true stranger to the U.S. litigation in that case. Describing Truro in such terms is an overstatement. However, it may be that Truro engaging N2 in litigation in Nova Scotia will have some relevance to the issues under appeal.

[95] I find for the reasons I have just given that Truro will experience irreparable harm if a stay is not granted.

Balance of Convenience

[96] Assessing the balance of convenience factor requires me to determine whether Truro will suffer more without a stay than N2 will suffer if a stay is granted.

[97] As I have mentioned, absent a stay, Truro's right to appeal will be meaningless. This was significant in *O.P.S.E.U. Pension Trust Fund* where Goudge, J.A. held:

> [5] The third requirement, balance of convenience, clearly favours a stay. The delay suffered by the respondent – from now until the appeal is decided by this court – is measured in a few months. Since the proceedings were started, considerably more time than that has passed due to choices made by the respondent. For the appellant on the other hand, the burden of compliance is heavy (and unnecessary if the appeal succeeds) and compliance may well under [*sic*] [render] the appeal be [*sic*] moot in a practical sense.

[98] Truro has raised concerns about the breadth of the production and testimony sought by the Letters Rogatory and the demands compliance will place on it, all before Marciniak and Pogue have been subject to discovery by N2 as parties to the Arizona Proceeding. I already noted Truro's concerns about the scope of the "You" and "Your" in the Letters Rogatory (see, paragraph 20 of these reasons). These pronouns are defined as including Marciniak and Pogue. An Affidavit filed by Truro in support of its motion for a stay was deposed by the Human Resources Manager for Truro. She states that Marciniak and Pogue are not, nor have they ever been, "an employee, director, officer, shareholder or agent" of Truro. Neither of them have ever held "any official role at Truro in any capacity".

[99] Truro has also noted that N2 is seeking over three years' worth of evidence, starting on December 1, 2017 through to the present. The onerous nature of the production and the compressed time-frame for compliance constitutes a heavy burden for Truro and is relevant to the balance of convenience analysis.

[100] Truro's appeal will be heard in three months. Pre-trial discovery has not been completed in the Arizona Proceedings. There are no trial dates set in Arizona yet. N2 has produced no evidence it will suffer prejudice as a result of the delay associated with Truro's appeal.

[101] N2 says a stay imperils its ability to continue its litigation in Arizona. It rests this argument on two pillars: the statement in the Letter of Request that Truro's evidence "is necessary for pre-trial discovery and ultimately trial" in the Arizona Proceeding, and the likelihood, so N2 claims, that the Arizona Court will not approve any further extensions to the litigation timetable established through case management.

[102] N2 anchors this latter argument to an Extension Order issued by the Arizona Court on December 2, 2020. Truro brought that Extension Order to the Application Judge's attention during the email exchanges dealing with the Compliance Dates issue. The Application Judge took it into account in imposing the dates of January 8 for document production and January 15 for discovery (see, paragraph 50 of these reasons).

[103] The Arizona Court's December 2 Extension Order states the deadline for the completion of fact discovery shall be January 25, 2021. It deals with other deadlines, including for "expert deposition" of April 23, 2021. It concludes with this statement: "The extensions granted in this order are generous. No further extension will be granted. The parties should plan accordingly".

[104] N2 submits that the Arizona Court's stern admonition that "No further extensions will be granted" tips the balance of convenience in its favour and defeats Truro's motion for a stay. However, I am not persuaded the Arizona Court would prejudice N2 where a further delay emerges from circumstances beyond its control.

[105] The doctrine of comity surely flows in both directions. It is rooted in a spirit of "mutual respect and deference". The Letter of Request from the Arizona Court reflects the reciprocal nature of comity. The last paragraph of the Letter, under a heading "Reciprocity" states: "Your assistance in this matter is appreciated and this Court stands ready to provide similar judicial assistance to judicial authorities in Canada". While I am not suggesting this would be the source of any further Extension Order in the Arizona Proceedings, it speaks to the cooperation that lies at the heart of the doctrine of comity. Such cooperation, mutual respect and deference has to include respect for and deference to the processes of the receiving jurisdiction, including any appeal process.

[106] As I have already discussed, comity does not demand that courts automatically or reflexively grant orders enforcing letters rogatory. The Arizona Court would understand that. Such requests for international assistance have been respectfully but firmly declined (see, for example, *Cytozyme*; *Oticon, Inc.*; *N2 Packaging Systems LLC v. Nitrotin, Inc.*, 2020 BCSC 1719). The Arizona Court would appreciate that once N2 sought the assistance of the Nova Scotia Supreme Court, it would necessarily be caught up in the legal processes that apply, including the process of appeal. It is beyond my comprehension that the Arizona Court

would penalize N2 for delay that emerges organically from the Letters Rogatory proceedings.

[107] The appeal process represents no disrespect to the Arizona Court. It is a natural feature of the sovereignty of the receiving jurisdiction. Sovereignty will be a familiar concept to the Arizona Court.

[108] The Arizona Court's request for assistance from Nova Scotia has not been thwarted. It has been dealt with at first instance. The rendered assistance, the Order enforcing the Letters Rogatory, will now be scrutinized on appeal. If Truro is unsuccessful in its appeal, the Letters Rogatory will be enforced pursuant to the Application Judge's Order.

[109] I will conclude by addressing *Cavanaugh Estate v. Midland Walwyn Capital, Inc.*, [1994] B.C.W.L.D. 2253, relied on by N2. In *Cavanaugh Estate*, Legg, J.A. of the British Columbia Court of Appeal declined to grant a stay of an order enforcing Letters Rogatory. The Letters Rogatory were issued by a Florida court requesting the British Columbia Supreme Court order document production from various corporations, including Yorkton Securities, Yorkton Continental Securities Ltd. and Haywood Securities Ltd.. The order issued and Yorkton *et al* appealed. Despite finding that absent a stay, the appeal would be rendered academic, and stating that the appeal could not be said to have no prospect of success, Justice Legg was not persuaded the balance of convenience tilted in the appellants' favour for a stay. Yorkton *et al* had provided no evidence of prejudice if production was enforced. In contrast, the respondents produced an affidavit from trial counsel in Florida who described the ripened state of the Florida litigation. Trial counsel explained that if a stay was granted the Florida trial would likely proceed before the Yorkton documents were produced. The Yorkton evidence was described as "critical to the outcome of the Florida action" (at para. 6). The alternative was a significant delay of the trial causing inconvenience and "great expense to the parties" (at para. 7).

[110] The stay application in *Cavanaugh* was heard in July 1994. The Florida action was proceeding to trial in the fall.

[111] N2 does not face a comparable situation. The Arizona Proceeding is not trial-ready. There are no trial dates set. There is no evidence from Arizona trial counsel of prejudice to N2 if a stay is granted while Truro's appeal proceeds.

Exceptional Circumstances

[112] As I am satisfied Truro has met its burden under the primary "*Fulton*" test for a stay, I do not need to consider the secondary test.

A Final Issue

[113] N2 raised a preliminary issue in response to Truro's motion for a stay. N2 argued that Truro should be disqualified from consideration for a stay as it had already sought to stay the Application Judge's Order by proposing in email correspondence that the Order incorporate "a reasonable buffer of time…so as to allow the appellate process to unfold in a fair and efficient manner". This suggestion was made by Truro in the "Compliance Dates" exchanges which I described in paragraphs 49 and 50 of these reasons. In N2's submission, Truro's stay motion is a re-litigation of the Application Judge's decision of December 18, 2020 imposing hard compliance dates. N2 says Truro's stay motion amounts to a collateral attack of this decision.

[114] I find this argument has no traction. Counsel for Truro and N2 were invited by the Application Judge to see if they could agree on compliance dates. This involved an exchange of email correspondence. When no agreement was achieved, the Application Judge set dates. There is nothing about the informal participation by Truro in the effort to settle on mutually acceptable compliance dates that can be said to constitute a failed application for a stay. This argument is a non-starter.

Disposition

[115] I am satisfied Truro has established arguable issues in its appeal, shown it will experience irreparable harm without a stay, and will bear a greater burden if the stay is denied than N2 will if the stay is granted. Therefore, I am granting a stay of the Application Judge's Order of December 8, 2020 for enforcement of Letters Rogatory from the Arizona Court, and her subsequent direction setting Compliance Dates, pending the disposition of Truro's appeal of that Order.

[116] In conclusion, I want to thank counsel for their assistance on this motion and the excellence of their written submissions and oral advocacy. I have been served very well by both.

Costs

[117] Costs were not raised in Truro's Notice of Motion or the parties' briefs. Costs shall be in the discretion of the panel hearing the appeal.