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COURT OF APPEAL FOR ONTARIO

GOUDGE, SHARPE AND GILLESE JJ.A.

IN THE MATTER OF THE *Evidence Act*, R.S.O. 1990, c. E.23, s. 60 **AND IN THE MATTER OF THE *Canada Evidence Act*, R.S.C., 1985, c. C-5,** **AND IN THE MATTER OF an action now pending in the United States District Court for the Southern District of New York** **B E T W E E N :**	
THE PRESBYTARIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN THE U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband Joseph Thiet Makuac, STEPHEN HOTH, STEPHEN KUINA, TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI and CHIEF GATLUAK CHIEF JANG, on behalf of themselves and all others similarly situated **Applicants (Respondents in appeal)** **- and -**	**Burt Tait, Q.C. and Sara J. Erskine for the appellant Richard Rybiak** **Joel P. Rochon and Sakie Tambakos for the respondents Presbytarian Church et al.** **Robert Frank and Erik Penz for the intervener Talisman Energy Inc.**

RICHARD RYBIAK	)	
Respondent (Appellant)	)	
- and -	)	
TALISMAN ENERGY INC.	)	
Intervener	)	
	)	**Heard: April 19, 2006**

On appeal from the judgment of Justice Romain W. M. Pitt of the Superior Court of Justice dated July 29, 2005, reported at [2005] O.J. No. 3212 (S.C.J.).

GOUDGE J.A.:

[1] The question in this case is whether Ontario courts should give effect to a request for international judicial assistance[1] from the United States District Court.

[2] At first instance, Pitt J. granted the request, deciding that neither the Canadian government's policy concerns with the underlying American litigation nor the burden placed on the appellant by the request were sufficient to warrant its rejection.

[3] For the reasons that follow, I would allow the appeal. I agree that Canadian public policy does not bar the request. However, the request is framed in terms so broad and general that the record cannot sustain a finding that what is sought could reasonably be relevant or necessary to the issues in the litigation or could not otherwise be obtained. The request as framed should therefore be rejected.

THE BACKGROUND

[4] The request for international judicial assistance arises out of a civil action in the United States District Court for the Southern District of New York brought by the respondents against a Canadian company, Talisman Energy Inc. ("Talisman"). Although the respondents sought to turn it into a class action, certification has been denied. It continues to be pursued as an action brought by the named respondents.

[5] The respondents are all residents or former residents of Sudan who claim to have been seriously harmed by acts of genocide, enslavement, torture, rape and other human

[1] This is the name used by the American court for what is often referred to in the case law as letters rogatory.

rights violations by the government of Sudan, aided and abetted by Talisman because of its interest in Sudanese oil. While Talisman has defended, the government of Sudan has not appeared in the action.

[6] The action is brought pursuant to the *Alien Tort Claims Act* (28 U.S.C. §1350 (2000)), American legislation passed in 1789 by the first Congress of the United States. It is a single sentence and reads as follows:

> The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

[7] The litigation was commenced on November 8, 2001. Talisman made two challenges to the jurisdiction of the US District Court, both of which were denied in orders dated March 2003 and August 2004. The plaintiffs' request for certification as a class action was refused in March 2005.

[8] In January 2005 Canada delivered a diplomatic note to the United States in respect of the action. The note expressed two fundamental concerns: first, Canada's opposition in principle to broad assertions of extra territorial jurisdiction over Canadian individuals and entities arising out of activities that take place entirely outside of the state asserting jurisdiction; and second, Canada's concern that its efforts to use trade incentives for Canadian exporters to encourage peaceful solutions in Sudan will be rendered impotent by the litigation, because Canadian firms will likely absent themselves from Sudan altogether, out of fear of proceedings in American courts.

[9] The discovery process in the American action has been ongoing since December 2002, and has been managed by Cote J. of the Southern District Court of New York. The respondents have examined a number of employees or contractors of Talisman and received production of thousands of documents, numbering some 837,477 pages. A number of the individuals who have been deposed were at one stage employed by or through Talisman (Greater Nile) B.V., the Dutch subsidiary of Talisman through which it owned its interest in the actual operating company in Sudan. Except for several foreign discoveries, including the one in issue here, the discovery process has been concluded.

[10] It is the respondents' desire to examine the appellant as part of this discovery process that lead to the request for international judicial assistance. Mr. Rybiak is the former manager of Human Resources and Administration for Talisman (Greater Nile) B.V. in Sudan.

[11] On notice to Talisman, but not to Mr. Rybiak, the respondents moved to have Cote J. issue the request to the Ontario Superior Court for international judicial

assistance. They sought both oral and documentary evidence from Mr. Rybiak regarding subjects which they specified as follows:

- Talisman's operations in Sudan;
- Talisman's security strategy in Sudan;
- Talisman's complicity in the human rights violations in Sudan;
- Talisman's co-operation and co-ordination with the government of Sudan; and
- Talisman's knowledge of statements concerning human rights violations in Sudan.

While there was no affidavit evidence before Cote J. the respondents represented to her that the evidence sought is relevant to matters in issue in the pending litigation, that the documents are likely to be in Mr. Rybiak's possession, that the evidence sought is necessary for trial and not otherwise obtainable, that it is not contrary to public policy and is not unduly burdensome to the witness. The motion was unopposed. Judge Cote accepted the representations and issued the request on January 19, 2005.

[12] Pursuant to s. 60 of the *Ontario Evidence Act*, R.S.O. 1990, c. E 26 and ss. 46 and 47 of the *Canada Evidence Act*, R.S.C. 1985, c. C.5., the respondents applied to the Ontario Superior Court for an order granting the request and ordering Mr. Rybiak to produce documents and attend to be examined. He opposed the application. Talisman, pursuant to a direction from Cote J., appeared as interveners but took no position as to whether the request should be enforced, a position they maintained in this court.

[13] The only affidavit filed in the Superior Court in support of the application is that of New York counsel stating his belief that the evidence sought is relevant, necessary for trial, and not otherwise obtainable. The only basis for these assertions is the following:

> Richard Rybiak is the former Manager of Human Resources and Administration for Talisman (Greater Nile) B.V., in the Republic of the Sudan. At all material times, Talisman (Greater Nile) B.V. was a subsidiary of Talisman. In this capacity, Richard Rybiak was uniquely positioned to observe Talisman's interaction with the [Government of Sudan], as well as operations in the Sudan. The area in which Mr. Rybiak has knowledge, include, but is not limited to, the following (a) Talisman (Greater Nile) B.V. management meetings which involved discussions concerning oil

> exploration in the class area; (b) discussions relating to security and the use of the Military in Sudan in connection with oil exploration; (c) corporate decisions relating to responsibility reports concerning Sudan; (d) community development in Sudan and (e) retention and recovery of corporate records and documents from Sudan and (f) specific knowledge of persons who worked in Sudan for Talisman (Greater Nile) B.V. or Talisman. We have obtained through discovery thousands of documents which names or refers to Mr. Rybiak and demonstrates his knowledge of the above subjects, all of which are of direct relevance to the claims in this U.S. action.
>
> …
>
> Moreover, I believe that the evidence sought through the Commission is not otherwise obtainable. Respondent's possession and participation in events provided him with unique knowledge of Talisman's interaction with the [Government of Sudan], as well as Talisman's operations in the Sudan.

[14] The application judge granted the request on July 29, 2005. He concluded that the request was not contrary to Canadian public policy. At para. 43 of his reasons he said this:

> It is my view that, while the Canadian government's concern as to the American court's jurisdiction is well-founded and an important consideration, it is not sufficient, and was likely not intended to override the principles of comity, and the applicants' right to the evidence to conduct a fair trial. The compliance with the request for documents and answers to questions that are useful for the case is not contrary to the public policy of Canada.

[15] He then turned to the prejudicial impact of the request on the appellant. His reasons for concluding that this consideration should not bar the request are as follows:

> [45] I do not share the view of the respondent that the request is so overly broad as to unduly burden Rybiak such that it is an affront to Canadian sovereignty.
>
> [46] The main action is extraordinary. In many respects, it breaks new ground. The process will likely present difficulties to Mr. Rybiak. He will perhaps not be in a position to provide all the information required, whether oral or documentary. Nevertheless, I believe the factors set out by Osborne J. in *Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722 (H.C.J.) and under rule 30.10 of the *Rules of Civil Procedure* as set out by Blair J. in *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 (Gen. Div.) aff'd (1997) 32 O.R. (3d) 417 (C.A.) support a granting of the request.
>
> [47] It does not appear from the materials before me that, for example, the applicants have deposed any other persons from the Sudanese subsidiary, Talisman (Greater Nile) B.V. In contrast to *Fecht*, *supra*, the documents requested are relevant and sufficiently connected to the issues in the main action. The production of documents may be inconvenient, but is not so burdensome as to outweigh the compelling reasons for permitting the examination and production to proceed. The respondent, Rybiak, had counsel for these proceedings and will undoubtedly have counsel present at the time of the discoveries.

ANALYSIS

[16] The jurisprudential principles that must inform the analysis in this matter are well known and not in dispute. It is their application that is in issue.

[17] The basic principle is set out in the oft-quoted words of Dickson J. (as he then was) speaking for the court in *R. v. Zingre*, [1981] 2 S.C.R. 392 at p. 401:

> 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 Ltd. et al.*, [1980] 2 S.C.R. 39) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.

[18] In the same case, Dickson J. signalled that a foreign request should not be rejected solely because it relates to a pre-trial proceeding. However, that fact can be considered where, for example, the foreign discovery process is much broader than in Canada as is the case in the United States (see *Zingre, supra*, at p. 402).

[19] The provisions of both the federal and provincial evidence acts make clear that the decision to grant or refuse a foreign request is a matter of judicial discretion. That decision must therefore be accorded the deference in this court given to all such exercises of discretion.

[20] To grant the order sought, the court of first instance must be satisfied by the applicants that the criteria for enforcing a foreign request are met. In *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 at 194, aff'd (1997) 32 O.R. (3d) 417 (C.A.), Blair J. (now Blair J.A.) borrowed the articulation of the criteria by Osborne J. in *Re Friction Division Products Inc. v. E. I. Du Pont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722:

> Before an order giving effect to letters rogatory will be made, the evidence (including the letters rogatory) must establish that:
>
> (1) the evidence sought is relevant;
>
> (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
>
> (3) the evidence is not otherwise obtainable;
>
> (4) the order sought is not contrary to public policy;

> (5) the documents sought are identified with reasonable specificity;
>
> (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

[21] With these principles in mind, I turn to the three ways in which the appellant argues that the application judge erred.

[22] First, he argues that giving effect to the foreign request would be contrary to the public policy of Canada as expressed in the diplomatic note of January 2005.

[23] I disagree. The question is whether granting the request to obtain evidence for the foreign trial contravenes Canada's public policy. The focus on the request, rather than the underlying foreign litigation, is made clear in the passage in *Zingre* quoted above. *Re Westinghouse Electric Corporation and Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (H.C.) reflects this approach as well. There it was the disclosure of the information sought, not the underlying nature of the foreign litigation, that constituted the fatal violation of Canadian public policy. In this case, Canada's diplomatic note says nothing about the request for judicial assistance. The concerns it expresses are with respect to the underlying litigation. Those concerns will remain whether or not the request is enforced because the litigation appears to be proceeding regardless of whether the request is granted. In short, the diplomatic note expresses no concerns about the request for international judicial assistance, but does express concerns that remain undiminished whatever the fate of the request.

[24] Moreover, the diplomatic note does not go so far as to say that if the American court determines that it has jurisdiction it would nonetheless contravene Canada's public policy for Canadian courts to accept that jurisdiction for the purposes of deciding upon the request for judicial assistance. To do so, the note would have to go beyond the concerns expressed about the litigation itself and consider as well the important principle of international comity. In this case that would include the facts relevant to that principle, such as the fact that Talisman has appeared in the American litigation and is defending it. The diplomatic note simply does address these issues.

[25] I therefore agree with the application judge that enforcing the foreign request does not contravene the public policy of Canada. The diplomatic note cannot be read as a statement of public policy requiring its dismissal.

[26] Second, the appellant argues that the application judge erred in failing to consider that the American court refused to certify the action as a class action.

[27] Again, I disagree. While the action was commenced as a putative class action, it remained an action brought by named parties that required certification before it could be treated as a class action. That did not happen, and the action continues as one brought by named individuals. The application judge properly considered the request on that basis, not as one emanating from a class action. Moreover, none of the materials supporting the request depend upon certification for their relevance. Matters such as the appellant's former position, the alleged uniqueness of his knowledge, the relevance of the evidence sought and its necessity for litigation and whether it was otherwise obtainable are not affected by whether the action has been certified or is continuing as one brought by named individuals. I would not give effect to this ground of appeal.

[28] The appellant's third argument is that there is not enough in the record to meet the criteria set out in *Fecht, supra,* for such a broadly framed request. In particular, the appellant says that the criteria of relevance, necessity and the evidence not being otherwise obtainable are not established.

[29] I agree with this submission. The application judge's consideration of the *Fecht* criteria focuses very largely on whether the order sought would be unduly burdensome for the appellant. While he found the relevance criterion to be satisfied for the documents requested, he did so without explanation. And he did not address at all whether, apart from the documents, the evidence requested can be said to be relevant to the issues in the litigation. Moreover, there is no assessment whatsoever of whether the evidence sought from the appellant is necessary or otherwise obtainable.

[30] In my view, the failure to meaningfully address these criteria constitutes an error in principle. In these circumstances it is fatal to the exercise of his discretion and leaves to this court the determination of whether the respondents have established that these criteria are met.

[31] The importance of these criteria is perhaps obvious. Without some showing of relevance, the court may be sanctioning a fishing expedition and requiring one of its citizens to participate in a process that may be of no assistance to the foreign litigation. The need to establish necessity serves much the same purpose, but is also closely related to the requirement that the evidence sought not be otherwise obtainable. Blair J. described the importance of the latter this way in *Fecht, supra,* at pp. 204-05:

> The requirement that the evidence not be otherwise obtainable is to protect the target examinee from having to assume an unfair burden in the process, by identifying more precisely, and narrowing, what it is necessary to pursue in the

> letters rogatory exercise. In this way the non-party which is sought to be examined is shielded to the extent possible from what the Court of Appeal referred to in *Ontario (Attorney General) v. Starvo* (1995), 26 O.R.(3d) 39 at pp. 47-48, as "the potentially intrusive, costly and time-consuming process of discovery and production".

[32] What then does the record disclose? The request was issued following an unopposed motion in which the American court was provided only with the representations of counsel. The request simply recites that the American court accepts these representations. It is clear that an Ontario court is not bound to accept the language of the foreign request as the final say, but is entitled to go behind it to examine precisely what it is the foreign court is seeking to do. The Ontario court is to give effect to the request only if the requirements of Ontario law are met. See *Fecht, supra*, at p. 195.

[33] Beyond the request itself, the only additional material is the affidavit of New York counsel. It is also quite unhelpful. Counsel states his belief that the evidence sought from the appellant is relevant to the matters in issue in litigation, that it is necessary and not otherwise obtainable. All that is offered in support of these bald assertions is the management position occupied by the appellant, his participation in unspecified events and certain particular areas of knowledge that are attributed to him and those areas clearly fall short of the full range of evidence sought herein.

[34] In assessing whether the respondents have met the relevance consideration, it is helpful to reiterate the broad issue in the American litigation: whether Talisman aided and abetted the government of Sudan to commit acts of genocide, war crimes, forced displacements and other human rights violations in order to enhance its oil activities.

[35] The request seeks the appellant's evidence in terms so wide that they go well beyond this. The most extreme example is the request for the appellant's information regarding "Talisman's operations in Sudan". Granting a request in these broad and general terms would risk requiring the appellant to answer questions that extend to aspects of Talisman's operations that have nothing to do with the issues in the litigation. While the appellant undoubtedly has information about Talisman's operations in Sudan, there is nothing to show that any of that information is relevant to the issues in the American litigation.

[36] That makes this case quite different from the recent decision of this court in *Ontario Service Employees Union Pension Trust Fund and Clark* released June 21, 2006. While the request was framed broadly there, it was conceded that the targeted deponent had some information within the broadly framed request that was relevant to the issues in the foreign litigation. Here that is neither conceded nor established.

[37] I recognize that the foreign request is made at the pre-trial stage of the litigation by litigants who are on the outside of Talisman's operations looking in. Nonetheless, I do not think that this request can meet the relevance requirement simply by employing such sweeping language, in the hope that within the range of information described the deponent may be discovered to know something of relevance for the litigation. I think the request must be more targeted than that.

[38] In *Presbyterian Church of Sudan v. Talisman Energy Inc.*, [2005] A.J. No.1808 (Q.B.) LoVecchio J. reached essentially the same conclusion in circumstances almost identical to these. In that case, the plaintiffs (the respondents in our case), requested the Alberta court to give effect to a request for international judicial assistance issued by Cote J. in the same American litigation.

[39] The request to the Alberta court sought to obtain the evidence of Edward Bogle and two other senior officers of Talisman. Mr. Bogle is the former executive vice president of exploration for Talisman. The evidence sought from him was described in precisely the same general terms as are used in the request in this case.

[40] Justice LoVecchio concluded that the request was essentially an open-ended one for the purposes of discovery. Since it was without any limits on the scope of examination, he found, at para. 13 that it was really a "fishing expedition", and indicated that if the request was not made more specific he would likely dismiss the application. As a result, a revised request was obtained from Cote J. that sought evidence from Mr. Bogle in considerably more specific terms, on fifteen discrete specific topics. Even with a more targeted request, LoVecchio J. ordered that only four of these topics could be put to Mr. Bogle as the material before him did not demonstrate that the information sought on the other eleven was relevant or necessary for trial.

[41] Turning to whether the evidence sought from the appellant is otherwise obtainable or necessary (in the sense that he alone possesses it), here too the respondents fall short. The request itself does no more than recite the American court's acceptance of counsels' representations to that effect. The only other material the respondents can look to is the affidavit of New York counsel. While it sets out six areas of knowledge that the appellant has, it does not claim that he alone has that information. Indeed, that would seem unlikely given the nature of the areas specified, which include, for example, knowledge of Talisman (Greater Nile) G.V. management meetings involving discussions concerning oil exploration in areas of Sudan. The appellant would not have been the only one to attend those meetings.

[42] The only other assertion in the affidavit of possible help to the respondents is that the appellant's position and "participation in events" provided him with unique knowledge of Talisman's interaction with the Government of Sudan as well as Talisman's operations in Sudan. No events are specified nor is there anything to suggest

why the appellant might be the only participant available to give evidence about them. There is no suggestion of how his position gave him unique knowledge of Talisman's interaction with the Government of Sudan and its operations in Sudan. The position itself, Manager of Human Resources and Administration for the Talisman subsidiary, would seem to make that unlikely. It is not as if he were the Manager of Government Affairs for the subsidiary, or, even better, for Talisman itself.

[43] The record discloses that by the date of the application the respondents had already deposed twenty-one executives of Talisman including one who was the Manager of Corporate Responsibility and Government Affairs for Talisman itself. While the record before the application judge did not indicate one way or the other, there is now no dispute that several of those twenty-one executives worked for Talisman (Greater Nile) B.V., as did Mr. Rybiak. There is nothing to suggest why it might be that the appellant has information about the issues in the American litigation and these other executives do not. Nor does the affidavit suggest that there are any aspects of those issues about which that might be said.

[44] In summary, reading the request and the application material together, I do not think that the respondents can establish that the evidence sought from the appellant is relevant, necessary, or otherwise not obtainable.

[45] As this court said in *Fecht, supra*, at p. 419 it is open to the Ontario court to narrow a request for international judicial assistance if the supporting material sustains only a more circumscribed request. However, we have been offered no guidance as to how that might be done in this case and the record does not suggest a way to do so.

[46] I therefore see no course but to dismiss the application to enforce the request. Only time will tell whether a revised request supported by a better record would be more successful.

[47] The appeal is therefore allowed and the application is dismissed. No costs are sought and none are ordered.

RELEASED: September 26, 2006 "STG"

"S.T. Goudge J.A."
"I agree Robert J. Sharpe J.A."
"I agree E.E. Gillese J.A."