

CITATION: *Cisco Systems Inc. v. N. Harris Computer Corporation*, 2024 ONSC 4454
COURT FILE NO.: CV-24-95423
DATE: 2024 08 12

SUPERIOR COURT OF JUSTICE - ONTARIO
Application under s. 60 of the *Evidence Act*, RSO 1990, c. E.23 as amended

RE: CISCO SYSTEMS, INC., Applicant

AND:

N. HARRIS COMPUTER CORPORATION, Respondent

BEFORE: C. MacLeod RSJ

COUNSEL: Nicole Boyle & Jeremy Want, for the Applicant

Timothy M. Lowman, for the Respondent

HEARD: In writing

RULING ON COSTS

[1] This Ruling deals with the costs of an application to enforce a letter rogatory or letter of request from the United States District Court for the Eastern District of Texas. After hearing argument, I declined to order the Respondent to produce documents or to submit to examination under oath. (see 2024 ONSC 3492)

[2] I made the ruling not because of any reluctance to assist the U.S. Court. Comity is an important principle. Rather, the request was refused because the Respondent had searched its records and produced an affidavit disclosing the result of those searches. Faced with that information, the request as framed by the Applicant, was broad and intrusive with no specific plan to address the methodology or cost of retrieving archival documents on a legacy computer system.

[3] The Affidavit filed by the Respondent disclosed that an important category of documents sought by the Applicant consisted of documents already in the hands of the plaintiff in the U.S. litigation. The Affidavit also disclosed that the plaintiff in the U.S. litigation was claiming privilege over a large proportion of the documents. As the deadline for production in the U.S. was fast approaching, it seemed appropriate for the Applicant to review that production and the privilege claims before seeking access to copies of the documents in Canada.¹

¹ See paras 22 – 27 of the decision, 2024 ONSC 3492, supra

[4] Another category of documents consisted of documents stored on legacy computer systems that would require involvement of a third party expert. The request by the Applicant required refinement and further investigation before it was granted.

[5] Importantly, nothing in my ruling suggests that the Letter Rogatory was in any way inappropriate or that it was unreasonable for the Applicant to pursue it. Had Cisco not brought the Application in Ontario, it would not have obtained the information ultimately provided by the Respondent. It was simply premature to order further intrusive examination or production given that the documents or many of them may now be available in the U.S.

[6] It is frequently reasonable to require a party to litigation who seeks production from a non-party to indemnify that non-party. Where a non-party Respondent successfully resists an Application for enforcement, the Court will sometimes order full recovery of legal costs. That approach is not invariable, and the Court has the discretion to award or withhold costs having regard to all of the factors normally considered.² A Respondent which inappropriately resists an Application may be ordered to pay costs notwithstanding it is a stranger to the underlying litigation.

[7] Here, the Respondent went to considerable lengths to determine what information it was in possession of and what would be required to produce it. This was not a situation in which the Respondent sought to thwart a legitimate inquiry by the Applicant. There is no basis for awarding costs to the Applicant.

[8] The Respondent was successful in resisting the Application at this stage but that may not be the end of the matter if the information provided by the Respondent proves to be inaccurate or incomplete. The Applicant may renew the Application based on updated or additional evidence.

[9] The Respondent should have costs of the Application but I am not prepared to order those costs on a full indemnity scale. Partial indemnity is appropriate. The Applicant shall pay costs fixed at \$32,053.03 as set out in the Bill of Costs.



Justice C. MacLeod

Date: August 12, 2024

² See review of the jurisprudence in this area by Leach J. in *Aker Biomarine AS v. KGK Synergize Inc.*, 2014 ONSC 1401 @ paras 20 - 27.

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BEFORE: Regional Senior Justice Calum MacLeod

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RULING ON COSTS

Regional Senior Justice C. MacLeod

Date: August 12, 2024