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Strategies on moving to enforce and responding to letters rogatory in Ontario

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Introduction

Letters rogatory (also known as 'letters of request') provide a mechanism to request assistance from Canadian courts to compel oral or documentary evidence from Canadian non-party witnesses for the purpose of a foreign litigation. If the Ontario witness is uncooperative, the assistance of an Ontario court is required, because a foreign court has no jurisdiction – and foreign procedural law has no application – in Ontario. However, the Ontario courts have made clear that they will not tolerate fishing expeditions; nor will they rubberstamp letters rogatory applications. Rather, the court must exercise its discretion and reach its own conclusions with respect to the necessity and relevance of the information sought by the foreign party. To that extent, local counsel play a critical role in satisfying the court in Ontario that the letter rogatory should be enforced or resisted, as the case may be.

This update sets out practical strategies on moving to enforce, and responding to, letters rogatory in Ontario. First, it addresses the basic legal requirements to recognise and enforce letters rogatory in Ontario. Second, it explores how relevance and proportionality concepts under Ontario's Rules of Civil Procedure(1) affect the analysis in a letter rogatory application, especially in contradistinction to how these concepts are understood in the United States. Finally, it provides Ontario counsel with strategic and practical advice to enforce, or respond to, letters rogatory applications. Foreign counsel may also benefit from a review of these strategies, as they will necessarily inform the original drafting of the letter rogatory.

Comity of nations and preconditions for examination

The central concept guiding the enforcement of letters rogatory is the principle of comity of nations – the understanding that the courts of one jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of mutual deference and respect. As a general rule, the Ontario courts will aim to give full force and credit to a foreign court's request, subject to concerns that the request will infringe upon Canadian sovereignty, is contrary to public policy or is otherwise inconsistent with the laws of Ontario.

In the interests of international comity, an Ontario court may give effect to a foreign court's letters of request only if certain statutory prerequisites are met under Section 46 (1) of the Canada Evidence Act,(2) or under the parallel provision of the Ontario Evidence Act:(3)

- The obtaining of the evidence has been duly authorised by the foreign court;
- The witness whose evidence is sought is within the jurisdiction of the enforcing court;
- The evidence sought is in relation to a proceeding pending before the foreign court; and
- The foreign court is a court of competent jurisdiction.(4)

If these preconditions are satisfied, the Ontario court has the discretion to grant or deny a request from the foreign court.

Exercise of discretion: the *Friction* factors

Re Friction Division Products, Inc v EI Du Pont de Nemours & Co Inc(5) outlines six non-exhaustive and inter-related factors for consideration in exercising the discretion to grant or deny the enforcement of a letter rogatory application:

- The evidence sought is relevant;
- The evidence sought is necessary for trial and will be adduced at trial, if admissible;
- The evidence is not otherwise obtainable;
- The order sought is not contrary to public policy;
- The documents sought are identified with reasonable specificity; and
- 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 in Ontario.

The applicant bears the burden of satisfying these factors. However, the factors are not rigid preconditions to the exercise of a judge's discretion, but are intended to be useful "guideposts".(6) In other words, a failure to meet all six will not necessarily foreclose the success of an enforcement application.

Guiding principles of relevance and proportionality

The scope of what is discoverable in Ontario is narrowly construed due to the interpretation of the term 'relevant', especially in contradistinction to the broader discovery processes available in the United States. In the United States, if there is "any possibility the information sought may be relevant to the case, it is discoverable; information is not discoverable only if it is clear that 'the information sought can have no possible bearing on the claims or defence of a party'".(7)

Ontario's Rules of Civil Procedure were amended in 2010 to limit the scope of 'relevance' to evidence that is "relevant to any matter" in the proceeding, from the previously broader requirement that evidence have a "semblance of relevancy". This narrower scope of discovery means that evidence must be relevant to matters actually in issue; this does not include evidence sought only because it may be relevant or relates to matters that could be in issue. Foreign counsel should keep this important distinction in mind when drafting the letter rogatory in the issuing jurisdiction with respect to evidence from an Ontario witness. While overly broad requests may be narrowed by the Ontario courts, counsel seeking to enforce the letter rogatory risk the application being dismissed outright on the basis that the information requested would not ordinarily be discoverable in Canadian litigation.

In Ontario, questions on examinations for discovery may be refused on the basis of relevance and privilege, and also on the basis of proportionality. The general proportionality requirement permeates all orders and directions issued by an Ontario court, and is another product of the 2010 amendments to the Rules of Civil Procedure. In applying the rules, the court's order must be "proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding".(8) With respect to proportionality in discovery, the court must consider several factors, similar in nature to the *Friction* factors, in determining whether a witness must answer a question or produce a document:

- The time required for the party or other person to answer the question or produce the document would be unreasonable;
- The expense associated with answering the question or producing the document would be unjustified;
- Requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- Requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- The information or the document is readily available to the party requesting it from another source.(9)

Therefore, it is prudent for both foreign and Ontario counsel to ensure that a letter rogatory application is consistent with the procedural requirements in Ontario. This may involve turning one's mind in advance of making the foreign request to such issues as the desirable procedure for raising objections to questions on an examination for discovery on the basis of relevance and/or proportionality, or to offering reasonable accommodation and compensation for the Ontario witness to provide evidence in the manner that is least disruptive to his or her daily business activities. Requiring a non-party to participate in the discovery process is inherently burdensome, but it becomes unduly burdensome if the time and expense required to comply with the letter rogatory are not proportionate to the intended use of the evidence.

Practical strategies

An Ontario court will readily exercise its discretion to refuse the enforcement of a letter

rogatory application if it determines that the application is nothing more than a fishing expedition by the foreign litigant into Canadian waters. Since letters rogatory are generally obtained in a "perfunctory manner"(10) – that is, in the absence of any detailed hearing or proactive findings by the issuing court, and unopposed by the foreign parties – the Ontario courts will require an application to be well supported with respect to enforcement. The Ontario court is entitled and obliged to go behind the mere recital of the terms of the foreign letters rogatory request, in order to examine precisely what it is that 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 Ontario have been met.

To that end, counsel should bear in mind the following tips when moving to enforce, or resisting, letters rogatory in Ontario.

Focus on relevance and be specific
Documents or information sought from the Ontario witness must be clearly identified with reasonable specificity for two reasons:

- so that the respondent knows what is sought and may object if necessary; and
- so that the respondent may be able to readily locate and identify the requested documents.(11)

Counsel should avoid overarching requests, instead being as concise as possible - not only because it minimises the inconvenience imposed on the witness, but also because judges will not look favourably upon requests for evidence that may not be relevant. For the same reason, counsel should avoid blanket requests for documents, unless there is a sound basis for the request. Counsel should ensure that the (personal and corporate) names of the requested witnesses are complete and accurate; and if a transcript or videotape of the examination is desired, this should be stated in the letter rogatory.

Explain why evidence is necessary
It is now generally accepted that letters rogatory may be enforced for pre-trial and discovery purposes, and not just for use at trial.(12) Regardless of the purpose of the evidence being sought, counsel must ensure that a letter rogatory application sufficiently explains how the evidence will assist in the foreign litigation, such as by establishing the cause of action. If scheduling orders are in place with respect to discovery cut-off in the foreign litigation that have not yet expired, Ontario counsel must be able to explain why the evidence cannot be obtained under the foreign jurisdiction's discovery processes. If the discovery cut-off deadline in the foreign litigation has passed, counsel must be able to explain the efforts taken to amend and extend the deadline.

Explain why evidence cannot be obtained elsewhere
This requirement does not mean that counsel must show that absolutely no foreign evidence is available in order for an Ontario court to grant the request. Rather, counsel for the applicant must establish that "evidence of the same value as that sought from the person to be examined cannot be otherwise obtained".(13) For example, redacted documentary disclosure is not of the "same value" as actual testimony of a responsible individual who can explain the documentation.(14) It is recommended that Ontario counsel put forward some form of affidavit evidence indicating the ways in which the applicant has sought to obtain the information, without success.(15)

Offer compensation
Demonstrate a willingness to reimburse the Ontario witness for all reasonable and documented expenses that he or she may incur in answering the production or examination request pursuant to the letter rogatory. Counsel for the applicant must convince the court that the witness will not be unduly burdened by the request, keeping in mind the overarching focus of proportionality which Ontario courts are now mandated to consider. Offering compensation demonstrates that the applicant is willing to minimise the burden imposed on the witness and may present counsel with an opportunity to reach a settlement that obviates the need for a court application.

Cooperate with opposing counsel
In addition to engaging in potential settlement discussions, active communications with opposing counsel will allow the applicant to schedule dates for examination of the witness that will work for the parties in the foreign litigation. Communication with counsel may assist in establishing a procedure for oral examination, including the choice of a convenient location for witness examination and how to resolve objections to questions during the examination.

Think about confidentiality, privilege and privacy
An Ontario court will not grant a request that:

- is contrary to Canadian public policy;
- may violate the Ontario witness's constitutional rights; or

- may impose obligations upon the witness that substantially exceed the obligations that would have been imposed had the litigation been based in Canada.(16)

Counsel responding to letters rogatory applications should ensure that if the application is granted, deemed or implied undertaking mechanisms or protection orders are in place to protect the Ontario witness from potential collateral uses of the documentation provided for the purpose of the foreign litigation. Similarly, counsel moving to enforce letters rogatory should ensure that any documents used in the supporting materials for the application are not themselves subject to confidentiality orders or agreements in the foreign jurisdiction, as they will become public upon filing with the court in Ontario.

Consider timing

Finally, timing considerations are important, especially with respect to any scheduled timelines in the foreign litigation. Counsel for the applicant should ensure that there is enough time to enforce the letter rogatory and examine the witness to meet any discovery deadline outlined in the foreign litigation. To that extent, counsel for the applicant and foreign counsel should cooperate to ensure that timing of the issuance of the letter rogatory is also planned well in advance of the enforcement stage. If it appears that there is insufficient time to meet foreign litigation timetables, an Ontario court will not place unreasonable time demands on the non-party witness.

For further information on this topic please contact Norm Emblem, Arden V MacLean or Amer Pasalic at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@dentons.com, arden.maclean@dentons.com or amer.pasalic@dentons.com). The Dentons website can be accessed at www.dentons.com .

Endnotes

(1) Rules of Civil Procedure, RRO 1990, Reg 194.

(2) Canada Evidence Act, RSC 1985, c C-5.

(3) Evidence Act, RSO 1990, c E23, s60(1).

(4) *France (Republic) v De Havilland Aircraft of Canada Ltd*, [1991] OJ No 1038, 3 OR (3d) 705 (CA).

(5) (1986), 56 OR (2d) 722 (Ont HC).

(6) *Lantheus Medical Imaging Inc v Atomic Energy of Canada Ltd*, 2013 ONCA 264, at para 69.

(7) The Sedona Canada Commentary On Enforcing Letters Rogatory Issued By an American Court in Canada: Best Practices & Key Points to Consider (June 2011).

(8) *Supra* note 1, r 1.04(1.1).

(9) *Ibid* at r 29.2.03(1).

(10) *Supra* note 7.

(11) *j2 Global Communications Inc v Protus IP Solutions Inc*, [2009] OJ No 5131 (Ont SC).

(12) *Supra* note 6 at para 70.

(13) *Connecticut Retirement Plans & Trust Funds v Buchan*, 2007 ONCA 462 at para 19.

(14) *Supra* note 6 at para 71.

(15) *Treat America Ltd v Nestle Canada Inc*, 2011 ONCA 560 at para 24.

(16) Supra note 7.

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