



## FRASER MILNER CASGRAIN LLP

**Letters Rogatory: Selected Authorities**  
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### **Legislative/Regulatory Authorities**

*Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 46, 47

46. (1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

(2) For greater certainty, testimony for the purposes of subsection (1) may be given by means of technology that permits the virtual presence of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.

47. On the service on the party or witness of an order referred to in section 46, and of an appointment of a time and place for the examination of the party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, by one of the persons named, and on payment or tender of the like conduct money as is properly payable on attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause pending in that court or before that judge.

*Evidence Act*, R.S.O. 1990, c. E.23, s. 60

60. (1) Where it is made to appear to the Superior Court of Justice or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court.

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Superior Court of Justice.

(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself or herself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that the person could not be compelled to produce at the trial of such an action.

(4) Where the commission, order or other process, or the instructions of the court accompanying the same, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to administer the oath to the person or take his or her affirmation.

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*Rules of Civil Procedure*

34.07 (1) Where the person to be examined resides outside Ontario, the court may determine,

- (a) whether the examination is to take place in or outside Ontario;
- (b) the time and place of the examination;
- (c) the minimum notice period;
- (d) the person before whom the examination is to be conducted;
- (e) the amount of attendance money to be paid to the person to be examined; and
- (f) any other matter respecting the holding of the examination.

(2) Where the person is to be examined outside Ontario, the order under subrule (1) shall be in Form 34E and shall, if the moving party requests it, provide for the issuing of,

- (a) a commission (Form 34C) authorizing the taking of evidence before a named commissioner; and
- (b) a letter of request (Form 34D) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before the commissioner.

(3) The commission and letter of request shall be prepared and issued by the registrar.

(4) Where the person to be examined resides outside Ontario and is not a party or a person to be examined on behalf or in place of a party, the examining party shall pay or tender to the person to be examined the amount of attendance money fixed by the order under subrule (1).

(5) A commissioner shall, to the extent that it is possible to do so, conduct the examination in the form of oral questions and answers in accordance with these rules, the law of evidence of Ontario and the terms of the commission, unless some other form

of examination is required by the order or the law of the place where the examination is conducted.

(6) As soon as the transcript of the examination is prepared, the commissioner shall,

(a) return the commission, together with the original transcript and exhibits, to the registrar who issued it;

(b) keep a copy of the transcript and, where practicable, the exhibits; and

(c) notify the parties who appeared at the examination that the transcript is complete and has been returned to the registrar who issued the commission. R.R.O. 1990, Reg. 194, r. 34.07 (6).

(7) The registrar shall send the transcript to the solicitor for the examining party and the solicitor shall forthwith serve every other party with the transcript free of charge. R.R.O. 1990, Reg. 194, r. 34.07 (7).

36.03 Where an order is made under rule 36.01 for the examination of a witness outside Ontario, the order shall, if the moving party requests it, provide for the issuing of a commission and letter of request under subrules 34.07 (2) and (3) for the taking of the evidence of the witness and, on consent of the parties, any other witness in the same jurisdiction, and the order shall be in Form 34E.

### **Foundational Principles**

*R. v. Zingre*, [1981] 2 S.C.R. 392 (S.C.C.) – leading case, established modern approach; comity, deference to decisions of other jurisdictions; full force and effect is given unless it is contrary to public policy. Dickson J.’s famous quote is at p. 401:

As that great jurist, Chief Justice Marshall, observed ..., the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.

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 ...  
or otherwise prejudicial to the sovereignty or the citizens of the  
latter jurisdiction.

### **Test for Enforcement**

*Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co.* (1986), 56 O.R. (2d) 722 (H.C.J.) – leading case on test; six factors to be considered:

- (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 in Ontario.

*Pecarsky v. Lipton Wiseman Altbaum & Partners* (1999); 38 C.P.C. (4th) 170 (Ont. S.C.J.) – A somewhat higher threshold applies when letters rogatory being sought for pre-trial purposes:

### **Relevance/Overbreadth**

*Fecht v. Deloitte & Touche* (1997), 32 O.R. (3d) 417 (C.A.): If a request is too broad, the court can attempt to narrow it; in *Fecht*, failure to ask questions of U.S. witnesses meant the request to enforce letters rogatory failed

*OptiMight Communications, Inc. v. Innovance, Inc.* (2002), 18 C.P.R. (4<sup>th</sup>) 362 (Ont. C.A.) – another example of the court narrowing the request granted

### **Public Policy/Sovereignty Considerations**

*Presbyterian Church of Sudan v. Rybiak* (2006), 33 C.P.C. (6th) 27 (Ont. C.A.) - It is public policy in the enforcement of the order, not the underlying litigation, that the court must consider

*Morgan, Lewis & Bockius LLP v. Gauthier* (2006), 82 O.R. (3d) 189 (S.C.J.) – in this case the court refused enforcement because it would place sworn evidence within the territorial jurisdiction of the U.S. government, thereby risking that the examinee would be prosecuted, which would directly contradict the Canadian *Foreign Extraterritorial Measures (United States) Order*

The conduct of the examination is generally governed by the law of Canada – for example with regard to the right against self-incrimination, see *United States v. Pressey* (1988), 65 O.R. (2d) 141 (C.A.)

If letters rogatory are in furtherance of enforcement of judgment, consider whether foreign order is under appeal or has been stayed: see *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1987), 59 O.R. (2d) 229 (H.C.J.), aff'd (1988), 65 O.R. (2d) 256 (C.A.)

### **Outgoing Letters Rogatory**

For a recent case suggesting that the test is different and broader than that for incoming letters rogatory, see *Apotex Inc. v. Bausch + Strobel Maschinenfabrik Ilshofen GmbH + Co. KG (B+S)*, 2006 CarswellOnt 5442 (Ont. Master)

Tip: See the “Non-Resident Examination Chart” under Rule 34 in Watson and McGowan, *Ontario Civil Practice*