

Litigation - Canada

Ontario court requires proper evidentiary basis for enforcement of letters rogatory

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Introduction

Canada is not a signatory to the Convention on the Taking of Evidence in Civil or Commercial Matters 1970. Therefore, in order to compel evidence from a witness in Ontario for use in another jurisdiction, letters rogatory (or letters of request) must be used.

The enforcement of letters rogatory has been primarily based on the comity of nations - a friendly recognition by one country's government of the laws of another country, unless they contradict the public policy of the enforcing jurisdiction. Accordingly, Canadian courts have respected and given "full faith and credit" to foreign courts, provided that enforcement of the letters rogatory did not infringe Canadian sovereignty and was not otherwise contrary to the interests of justice.⁽¹⁾

Notwithstanding this broad standard and a trend over the past 25 years for favouring enforcement of letters rogatory, in *Oticon Inc v Gennum Corporation*⁽²⁾ the Ontario Superior Court of Justice issued a stark reminder that minimum evidentiary standards must be met before a request will be enforced. When, as is frequently the case, the parties to the foreign proceeding consent to the issuance of letters rogatory, the Canadian court will be particularly vigilant to ensure that there is a cogent evidentiary basis to support the enforcement of those letters rogatory in Canada.

Facts

Oticon Inc, a US manufacturer of hearing aids, sued its competitors, Vivatone Hearing Systems LLC and SeboTek Hearing Systems LLC, for patent infringement. In connection with this suit, Oticon, Vivatone and SeboTek consented to an order of the US District Court of New Jersey for the issuance of letters rogatory. The objects of the letters rogatory were Ontario companies Gennum Corporation and Sound Design Technologies Ltd. It was alleged that they had information relevant to the US proceedings and that such information was "not otherwise available".

Decision

The Superior Court of Justice declined to enforce the letters rogatory, stating that the evidence submitted was insufficient. The court referred to the often-cited decision in *Re Friction Division Products Inc and El Du Pont de Nemours & Co Inc (No 2)*,⁽³⁾ which held that the following requirements must be met before letters rogatory will be enforced:

- the evidence sought is relevant;
- the evidence sought is necessary for trial;
- the evidence is not otherwise obtainable;
- the order sought is not contrary to public policy;
- the documents requested are identified with reasonable specificity; and
- the order sought is not unduly burdensome.

In this case the court was satisfied that the documents sought were both relevant and necessary to the US proceeding. Further, the court held that the documents requested were readily identifiable. This issue was with respect to the third requirement - namely, that the documents were 'not otherwise obtainable'.

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What appears to have troubled the court was that the supporting affidavit evidently did no more than simply repeat, in a conclusory fashion, the six requirements of the *Re Friction* test. With respect to the 'not otherwise obtainable' requirement, there was no factual explanation of the status of discovery in the US proceedings which might have explained the situation. The court held that while the 'relevance' and 'necessity' requirements could be assessed more readily (eg, by reviewing the pleadings), some factual background was necessary to the 'not otherwise obtainable' test. According to the court, "[a]lthough the strength of some of the assertions, such as relevance and necessity can be checked readily... others, such as the 'not otherwise obtainable' factor, require further explanation".

This evidentiary deficiency was undoubtedly exacerbated because the letters rogatory in this case had been granted on consent 'over the counter'. According to the Canadian court, there was thus a real question of whether the US court had in fact engaged in an analysis of the merits as to whether the letters rogatory should issue. In such circumstances the Ontario court was required to scrutinize the supporting evidence carefully.

Comment

This case is instructive on a number of levels. First, it reinforces the need for local counsel to be vigilant to ensure that the record contains a sufficient evidentiary basis on which letters rogatory may be enforced. Further, foreign counsel and Ontario counsel should work together as early as possible to ensure that all legal requirements for a successful letters rogatory application are met. Finally, the case is a clear warning that the letters rogatory process is not a 'rubberstamp' exercise.

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Endnotes

- (1) *Zingre v The Queen* [1981] 2 SCR 392.
- (2) 2009 CanLII 72032 (ON SC).
- (3) (1986), 56 OR (2nd) 722 (HCJ).

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