

ENFORCING LETTERS ROGATORY IN CANADA

* Bonnie Roberts

Our world is shrinking. Increasingly, American lawyers are faced with the task of attempting to obtain evidence from Canadian residents for use in American proceedings. However, unless the Canadian is willing to voluntarily provide the desired evidence, the American lawyer must obtain an order from a Canadian court to compel production.

Generally, orders to compel the production of evidence by a Canadian resident for a proceeding in a foreign jurisdiction are issued as a result of a request from the foreign court, called letters rogatory or a letter of request. Such international judicial assistance is based upon international comity, whereby the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction out of mutual deference and respect.

The *Canada Evidence Act* authorizes a superior court of a province, pursuant to letters rogatory or similar orders from foreign jurisdictions, to order the examination of witnesses or the production of documents, or both, "for use in civil, commercial or criminal proceedings" out of the jurisdiction. An application to the Court for such an order is thus made under the rules of court of the Canadian province in which the witness resides.

The essential components of an application in Canada are valid and subsisting letters rogatory, a notice of application, and a supporting affidavit with accompanying exhibits.

Obtaining Letters Rogatory from the American Court

The first step in obtaining evidence from a Canadian source is for an American lawyer to apply to his or her own court for an order issuing letters rogatory to the Canadian court. Since Canadian courts will give effect to letters rogatory only if they satisfy the requirements of

Canadian law, American counsel should ensure that all of the conditions that have been established by the Canadian legislation and case law are fulfilled in the letters rogatory.

The *Canada Evidence Act* requires that the competence of the foreign court be established before a Canadian court can consider how it should exercise its jurisdiction. Thus, letters rogatory should assert that the American court properly has jurisdiction over the American proceedings, is a competent court of law and equity, and has the power to compel the attendance of witnesses and the production of documents by corporations and individuals both in and outside the jurisdiction. As a sign of mutuality and reciprocity, it is helpful if the letters rogatory confirm that the American court issuing the request could reciprocate by granting enforcement of letters rogatory from a Canadian court.

The evidence sought by letters rogatory must “be necessary for trial and intended to be adduced at trial, if admissible”. It is helpful to establish not only an absolute need to invoke the process of letters rogatory, but also that the evidence sought is necessary for the purposes of justice in the American proceedings. Where possible, letters rogatory should, among other things: (a) provide a summary of the American proceedings and relate the evidence sought to the case pending before the American court; (b) assert that the evidence required is relevant to the American proceeding; (c) explain the importance of the requested evidence to the proper and complete adjudication of the issue before the American court; and (d) state that the evidence sought is necessary for the purpose of the American trial.

Since the Court will not make an order beyond that specifically requested in the letters rogatory of the American court, counsel must be careful to ensure that the letters rogatory request everything that is required for the American proceeding. The letters rogatory should include the names and addresses of all of the witnesses whose evidence is sought and any non-personal capacity in which they are to be examined.

No order for the production of documents will be made by a Canadian court unless the documents are "sufficiently identified". A general request to search out and produce all documents relating to the issue is too broad. Thus, the letters rogatory should identify the

documents sought with such precision as is reasonable in the circumstances of each case. It is best to provide a specific description and list identifying the documents requested.

The inappropriateness of dates set out in letters rogatory will not frustrate otherwise valid letters rogatory. However, it is best if the letters rogatory do not specify a particular date for the examination.

The Canadian Application

Once the letters rogatory are obtained, the next step is for Canadian counsel to apply to the Canadian court for an order enforcing the letters rogatory. The application is made according to the rules of court of the particular province where the letters rogatory are to be enforced.

The affidavit should be sworn by the lawyer involved in the lawsuit in the American jurisdiction and it should contain certain elements. First, it should evidence the jurisdiction of the American court seeking assistance. It should state that the American court authorizing the letters rogatory has proper jurisdiction over the American proceedings, is a competent court of law and equity, and has the power to compel the attendance of witnesses and the production of documents by corporations and individuals both within and outside of its jurisdiction.

Second, the affidavit should outline the issues in the American action and stress that the evidence required is necessary to allow the American court to justly determine the issues before it. Exhibits outlining the progress of the proceeding through pleadings may be helpful in this regard. It is also helpful if the affidavit confirms that the evidence of the witness is not obtainable by consent or without the intervention of the Canadian court, and that the success of the American action depends on the granting or refusing of the order sought in the case.

Third, the burden imposed upon a witness who is to give evidence should be considered in the affidavit. The question considered by the court will be whether the burden to be placed upon the proposed witness by requiring him to attend and give oral testimony or produce documents for inspection is, in all of the circumstances, justified.

Fourth, the affidavit should address any concerns that the Court may have about the order interfering with Canadian sovereignty or public policy. A foreign request will be given full force and effect unless it is contrary to public policy of the Canadian jurisdiction or otherwise prejudicial to Canada or its citizens. Therefore, an order enforcing letters rogatory will be refused if the evidence is sought to be obtained from a person accused of a criminal offence in the US and is intended to be used to incriminate him in an American trial.

Conclusion

Having valid and complete letters rogatory, a notice of application and supporting affidavits before it, the Court can then make an order to enforce the letters rogatory. Such an order will name the parties to be examined and the documents to be produced, specify the time and place of the productions and appoint a commissioner.

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