Cassels

Compelling Discovery from Canadian Witnesses

Mark Davis, Eric Mayzel

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Foreign subpoenas or orders for discovery are not automatically enforceable in Canada. Accordingly, if a person in Canada does not voluntarily give evidence in a foreign proceeding, it may be necessary to use judicial procedures to compel that evidence.

"Letters rogatory," also known as "letters of request," are a formal request by a foreign court to a local court requesting that the local court perform a specified act, such as compelling testimony from a witness located within the local court's jurisdiction for use in a proceeding in the foreign court. In Canada, a foreign request will usually be granted unless it is contrary to public policy or is prejudicial to the sovereignty or the citizens of Canada.[1]

A party seeking an order from a Canadian court to enforce letters rogatory must bring a proceeding in the superior court of the province in which the witness resides. The Federal Court of Canada has no jurisdiction to enforce letters rogatory.[2]

In Quebec, Canada's only civil law province, the enforcement of letters rogatory generally follows the same principles as the common law provinces set out below.

Statutory Preconditions to Enforce Letters Rogatory

The enforcement of letters rogatory is governed by both federal and provincial legislation. For example, in Ontario, the enforcement regime is governed by the *Canada Evidence Act*, RSC, 1985, c. C-5 and the *Evidence Act* (Ontario), RSO 1990 c. E.23. Each common law province has similar legislation. It is common practice for a party bringing an application to enforce letters rogatory to rely on both the *Canada Evidence Act* and the corresponding provincial statute.

In Ontario, there are four statutory pre-conditions that must be satisfied before the Ontario Superior Court of Justice may exercise its discretion to enforce a letter of request:

- It must appear that a foreign court is desirous of obtaining the evidence (*Canada Evidence Act*, section 46) or that the obtaining of the evidence has been duly authorized by commission, order, or other process of the foreign court (*Ontario Evidence Act*, section 60(1));
- The witness whose evidence is sought must be within the jurisdiction of the court which is asked to make the order;

- The evidence sought must be in relation to a civil, commercial, or criminal matter pending before the foreign court (*Canada Evidence Act*, section 45) or in relation to an action, suit, or proceeding pending before the foreign court (*Ontario Evidence Act*, section 60(1)); and
- The foreign court must be a court of competent jurisdiction.[3]

In Quebec, the enforcement of letters rogatory is governed by sections 504 to 506 of the *Code of Civil Procedure*, CQLR c C-25.01, which provide that a foreign party or authority may apply to the court for execution of a rogatory commission. The *Code of Civil Procedure* does not set out any statutory preconditions that must be met before a Québec court may determine whether to exercise its discretion to enforce letters rogatory.

Common Law Factors that Guide the Discretion of Canadian Courts on Whether to Enforce Letters Rogatory

Once the threshold statutory preconditions are met, a Canadian court *may* grant an order enforcing the letters rogatory.[4] In Ontario, the Ontario Superior Court of Justice will consider the following non-exhaustive factors in determining whether to exercise its discretion to grant an order enforcing letters rogatory:

- Whether the evidence sought is relevant;
- Whether the evidence sought is necessary for trial and will be adduced at trial, if admissible;
- Whether the evidence is not otherwise obtainable;
- Whether the order sought is not contrary to public policy;
- Whether the documents sought are identified with reasonable specificity; and
- Whether the order sought is not unduly burdensome, bearing in mind what the witnesses will be required to do, and produce, were the action to be tried.[5]

These factors are “useful guideposts” and not rigid preconditions to the exercise of a judge’s discretion, with the exception that the enforcement of the letters rogatory must not be contrary to public policy.[6] In addition, the enforcement of the letters rogatory must not undermine Canadian sovereignty (such as by violating provincial laws).[7] These or similar factors have also been considered and applied by courts in other provinces, including in Quebec, in determining whether to enforce letters rogatory.[8]

Practical Considerations

Some best practices to keep in mind when bringing an application to enforce letters rogatory in Canada include:

- The application should be supported by one or more affidavits that establish the factual basis for the relevance and need of the evidence being sought, the efforts to obtain the information from domestic sources, and evidence that the information is not otherwise available.
- The letters rogatory should outline the topics to be covered with reasonable clarity. Canadian courts may express concern about enforcing letters rogatory if the subject matter is vague and overly broad.
- It is also common practice to rely on an undertaking that the evidence gathered will be used only for the purpose of the foreign proceeding as well as an undertaking as to costs. In Quebec, section 505 of the *Code of Civil Procedure* requires that the foreign authority seeking the enforcement of the letters rogatory give an undertaking to guarantee the payment of costs.

Conclusion

Canadian courts generally take a liberal approach to granting letters rogatory to compel testimony from a witness located in Canada for use in a foreign proceeding. The specific statutory requirements for granting letters rogatory vary between provinces, with the most notable differences under Quebec civil law. Canadian courts will generally grant the request provided that it is not contrary to public policy or prejudicial to the sovereignty or the rights of the proposed witness. Parties seeking to compel discovery from a witness in Canada for use in a foreign proceeding are encouraged to contact local Canadian counsel for further information.

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[1] *Zingre v R*, [1981] 2 SCR 392 at para 18 and *Perlmutter v Smith*, 2020 ONCA 570 at para 21 [*Perlmutter*].

[2] *Federal Courts Act*, RSC 1985, c. F-17, s 17(6).

[3] *King v KPMG*, [2003] OJ No 2881 at para 6; *Riverview-Trenton Railroad Company v Michigan Department of Transportation*, 2018 ONSC 2124 at para 33; and *Actava TV, Inc v Matvil Corp*, 2021 ONCA 105 at para 40 [*Actava*].

[4] *Lantheus Medical Imaging Inc v Atomic Energy of Canada Ltd*, 2013 ONCA 264 at para 56 [*Lantheus*].

[5] *Lantheus* at paras 60-61 and *Perlmutter* at para 24.

[6] *Lantheus* at paras 61 and 65 and *Perlmutter* at para 25.

[7] *Actava* at para 51.

[8] See e.g., *Elie c Ouimet*, 2018 QCCS 522 at para 20 and *Rossetti Associates Incorporated c Canam Group Inc*, 2021 QCCS 5363 at para 86.
