A COMPELLING SITUATION: ENFORCING AMERICAN LETTERS ROGATORY IN ONTARIO

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Where a party seeks to take evidence from an unwilling party in a foreign jurisdiction, a formal request for judicial assistance must be made by the party's domestic court to a court in the foreign jurisdiction. Such a request is called a letter rogatory. The author describes the process whereby an American party would request the judicial assistance of an Ontario court, including the formal requirements for a letter rogatory and the various preconditions to enforcement of which an Ontario court must be satisfied. The granting of such a request is a discretionary matter for Ontario courts; the author also reviews factors which will affect the exercise of the discretion.

Lorsqu'une partie souhaite recueillir le témoignage d'une partie qui refuse de témoigner et qui se trouve dans une juridiction étrangère, une demande officielle doit être faite par le tribunal afin d'obtenir l'assistance judiciaire du tribunal étanger. Cette demande s'appelle une lettre rogatoire. L'auteure décrit la procédure que doit suivre une partie américaine pour solliciter l'assistance judiciaire d'un tribunal de l'Ontario, y compris les exigences normatives de la lettre rogatoire ainsi que les diverses conditions préalables auxquelles la partie doit satisfaire pour convaincre le tribunal ontarien de procéder à l'exécution. Les tribunaux de l'Ontario étant dotés du pouvoir discrétionnaire de décider ou non d'accorder ce type de demandes. L'auteure examine également les facteurs que le tribunal considère dans l'exercice de ce pouvoir discrétionnaire.

1. Introduction

There are no rules in Canada that prevent foreign litigants from taking evidence from a willing person in private civil matters. Parties in the United States may arrange to depose a willing witness in Canada without prior consultation with or permission from Canadian federal or provincial authorities. However, when a witness who resides in Canada is unwilling to testify or produce documents voluntarily with respect to an action that is proceeding in the United States, the assistance of a Canadian court is generally required.

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A letter rogatory, or "letter of request," is a formal written communication sent by a court in one country to a court in a foreign country requesting the assistance of the foreign court in obtaining testimony or documentary or other evidence of a witness within the jurisdiction of the foreign court.[1] From the perspective of a Canadian resident, a letter rogatory issued by an American court, standing alone, is an unenforceable document. Rather, the appropriate Canadian court must decide to recognize and give effect to the foreign request. It is the order of the Canadian court enforcing the American letter rogatory, not the American letter rogatory itself, which compels the Canadian resident to provide evidence for the American legal proceeding. Failure of the resident to comply is punishable not by the American court as a violation of its request, but by the Canadian court as contempt of its order.

Canada is not a party with the United States to a convention on obtaining evidence, and Canadian courts will only enforce American letters rogatory that satisfy the requirements of Canadian law and legislation. It is therefore customary, and often necessary, that parties to American civil actions retain Canadian counsel to advise them on this matter. For Canadian practitioners, the practical implications of the enforcement of American letters rogatory are three-fold: (1) Canadian practitioners may be retained by American law firms to provide assistance in framing letters rogatory to be issued by American courts in an effort to meet the concerns of the Canadian courts and increase the likelihood of their enforcement; (2) Canadian practitioners may be retained to seek enforcement of the American letters rogatory in Canada; or (3) the person whose testimony or documents are sought, or some other affected party, may retain a Canadian lawyer to resist the recognition and enforcement of the letter rogatory.

This article is intended to provide an overview of the current state of the law in Ontario with respect to the enforcement of American letters rogatory. Many of these legal principles, however, apply more generally to Canada's federal jurisdiction and that of the other provinces.

2. Substantive Law of Letters Rogatory in Ontario

A. Underlying Principles

1) International Comity

Letters rogatory are a form of judicial assistance founded upon principles

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[1] Joseph K. Nolan, ed., *Black's Law Dictionary* 6th ed. (St. Paul: West Publishing, 1990), referred to in *Prima Tek II v. Sonneman Packaging Inc.*(2003), 68

of international comity.[2] Although the meaning of this term is somewhat elusive in practice, international comity has been judicially defined as follows:

> "Comity" in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.[3]

In determining whether to enforce letters rogatory, Ontario courts will have regard to the requests of American courts, not as a matter of obligation, but out of mutual deference and respect.[4] Comity therefore requires that a court engage in an analysis that attempts to balance two broad considerations: (1) the impact of the proposed order on Canadian sovereignty; and (2) whether justice requires that the evidence be ordered.[5] The criteria used in this "comity analysis" have been adopted by Ontario courts in considering whether to exercise their discretion to enforce foreign letters rogatory.

In past decades, Canadian courts were apt to adopt a narrow and conservative approach to the enforcement of foreign letters of request, but since the 1980s, recognition of the need to facilitate international commercial relationships has set the tone for the approach of the contemporary Canadian courts to enforcement.[6] This approach is reflected in the observation of Laskin C.J.C. that "comity dictates that a liberal approach should be taken with requests for judicial assistance, so long at least as there is more than ephemeral anchorage in our legislation to support them."[7]

O.R. (3d) 451 at 451 (S.C.J.) [*Prima Tek*].

[2] *Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 401 [*Zingre*].

[3] *Hilton v. Guyot*, 159 U.S. 113 at 163-64 (1895), as adopted by LaForest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096, cited with approval in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 913-914.

[4] *Zingre, supra* note 2.

[5] *Fecht v. Deloitte & Touche* (1997), 32 O.R. (3d) 417 (C.A.); aff'g (1996), 28 O.R. (3d) 188 (Gen. Div.) [*Fecht*].

[6] *Advance/Newhouse Partnership v. Brighthouse, Inc. (c.o.b. Brighthouse Branding Group), (*2005), 38 C.P.R. (4th) 559 [*Advance/Newhouse*].

[7] *District Court of United States, Middle District of Florida v. Royal American Shows Inc.*, [1982] 1 S.C.R. 414 at 421.

2) Reciprocity

A liberal approach to judicial assistance reflects not only judicial cooperation, but also self-interest. Implicit in a request for international assistance is a pledge of reciprocity, a promise that the courts of the requesting state will, in the future, provide similar assistance to the courts of the receiving state.[8] As stated by Doherty J.A. for the Ontario Court of Appeal:

> In an ever-shrinking world, Canadian courts often require the assistance of foreign courts so as to do justice between the parties engaged in litigation in Canada. A receptive judicial ear to requests from foreign courts can only enhance the chances that a Canadian court will receive assistance when required.[9]

Although Ontario courts will consider the ability of a foreign court to reciprocate a Canadian request for judicial assistance, reciprocity is not a pre-condition for enforcement of the request. An Ontario court may still enforce a foreign letter rogatory where the foreign issuing court could not reciprocally enforce a letter rogatory issued from Ontario.[10]

B. Governing Legislation

As previously mentioned, Canada is not a party to a convention on obtaining evidence to which the United States is signatory.[11] Accordingly, American requests to take evidence from Ontario are governed by Canadian legislation and common law. An Ontario court has jurisdiction to enforce letters rogatory pursuant to section 46 of the *Canada Evidence Act*[12] and section 60 of the *Ontario Evidence Act.*[13] The judges of the Ontario Superior Court are empowered by these sections to enforce letters rogatory by ordering examination of, or production from, a witness within the Ontario court's jurisdiction in relation to proceedings pending in the United States. Both statutes are valid and applicable with regard to civil matters.

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[8] B.J. Freedman and G.N. Harney, "Obtaining Evidence from Canada: The Enforcement of Letters Rogatory by Canadian Courts" (1987) 21 U.B.C. L. Rev. 351 at 353.

[9] *France(Republic) v. De Havilland Aircraft of Canada Ltd.* (1991), 3 O.R. (3d) 705 (C.A.) [*De Havilland*].

[10] *Appeal Enterprises v. First National Bank of Chicago* (1984), 10 D.L.R. (4th) 317 at 319 (Ont. C.A.); *DeHavilland, ibid.*

[11] Canada is not a signatory to the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* (18 March, 1970).

[12] *Canada Evidence Act*, R.S.C. 1970, c. E-10 [*CEA*].

[13] *Ontario Evidence Act,* R.S.O. 1980, c. 145 [*OEA*].

In older case law, there was uncertainty as to whether Ontario judges had the power to place terms or conditions on the enforcement of letters rogatory as issued by foreign courts.[14] Although the language of the *CEA* does not expressly endow Canadian courts with this authority, section 60 of the *OEA* is broader and reads:

> ...[T]he court may...give all such directions as to the time and place of examination, and all other matters connected therewith as seem proper...[15]

Judges now regard section 60 of the *OEA* as empowering them to place terms and conditions on the enforcement of a letter rogatory where it is otherwise in the interests of justice to do so.[16] The Ontario court, as the recipient of the request for assistance, is not bound to accept the language of a letter rogatory as the final say.[17] Further, once an order is made giving effect to a letter rogatory, subsequent orders can be made pursuant to the *OEA* to give directions for "all matters connected therewith as seem proper." In *Signature Properties International, LP v. Bank of Nova Scotia*, the Ontario Superior Court considered a request to re-examine an Ontario witness for a foreign proceeding.[18] The court had previously upheld a request to examine the witness, conditional on the examination being completed in one day. After the examination had been conducted, the applicant obtained new documents that pertained to the testimony of the witness and were relevant to the foreign action. The court ordered the respondent to re-attend for re-examination, finding authority to issue the subsequent order pursuant to section 60(1) of the *OEA* and noting that the order was also justified based on the principle of comity of nations.[19]

C. Oral Testimony and Production of Documents

Ontario courts are empowered to enforce letters rogatory requesting the oral examination of witnesses under oath, the production of documents, or both. The court should, however, consider a request for production of documents independently from a concurrent request for the oral examination of a witness.[20] Regardless of the nature of the evidence sought, whether oral or documentary, the request for the production of documents must meet the

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[14] *Germany (Federal Republic) v. Canadian Imperial Bank of Commerce*, [1997] O.J. No. 70 (Gen. Div.)[*Germany (Federal Republic)*].

[15] *Supra* note 13.

[16] See for example, *Pecarsky v. Lipton Wiseman Altbaum & Partners*, [1999] O.J. No. 2004 (Sup. Ct.) at para. 35 [*Pecarsky*].

[17] *Internet Law Library Inc. v. Matthews*, [2003] O.J. No. 1139 (Sup. Ct.) [*Internet Law Library*].

[18] [2000] O.J. No. 3285 (Sup. Ct.) [*Signature Properties*].

[19] *Ibid.* at paras. 10-11.

[20] *Re Radio Corporation of America v. Rauland Corporation* (1956), 5 D.L.R. (2d)

same legislative conditions and is subject to the same limiting principles as a request for the oral examination of a witness.[21] Further, the request must be for evidence that is contemplated by the applicable legislation. In *Giaimo v. Canada Trust*, the Ontario Superior Court considered in *obiter dicta* whether it had jurisdiction to enforce a letter rogatory requesting that a party "prepare a report" of relevant information for the applicant.[22] The Court concluded that there was no statutory basis for requiring that a report be made since section 60 of the *OEA* referred only to examination of witnesses and the production of documents.[23]

D. Preconditions to Enforcing Letters Rogatory

Four preconditions must be satisfied before an Ontario court will consider exercising its discretion to enforce a letter rogatory:[24]

1. *The witness whose evidence is sought is within the jurisdiction of the Ontario court.*

2. *The foreign court is desirous of obtaining the evidence*[25] *or the obtaining of evidence has been duly authorized by commission, order or other process of the foreign court.*[26]

The documents supporting an application to enforce a letter rogatory must be under the seal of the issuing court or judge (unless it is certified that there is no seal). This ensures that the foreign court or judge has "duly authorized" the obtaining of the requested evidence.[27] The letters rogatory must constitute a formal request from a court in the United States to a Canadian court. A request from the United States Embassy or its consulates, for example, is not sufficient.[28]

3. *The evidence sought is in relation to a civil, commercial or criminal matter pending in a foreign court or in relation to a suit, action or proceeding pending before the foreign court.*

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424 (Ont. H.C.)at 431; see also Freedman and Harney, *supra* note 8 at 358.

[21] *Rapid Data Systems and Equipment Ltd. (Receiver of) v. Rockwell International Corporation* (1979), 11 C.P.C. 228 (Ont. H.C.) at 238 [*Rapid Data Systems*].

[22] [1998] O.J. No. 4000 (Gen. Div.) [*Giaimo*].

[23] *Ibid.* at para. 21.

[24] *King v. KPMG*, [2003] O.J. No. 2881 (Sup. Ct.) at para. 6 [*King*].

[25] *CEA*, *supra* note 12, s. 46.

[26] *OEA*, *supra* note 13, s. 60.

[27] *Re Comtesse and Zelig* (1959), 23 D.L.R. (2d) 506 (Ont. H.C.).

[28] J.Walker, ed., *Walker and Castel on Canadian Conflict of Laws* 6th ed. looseleaf (Toronto: Lexis Nexis Inc., 2005) at para. 6.4.b.

Section 46 of the *CEA* empowers Canadian courts and judges to compel testimony or documentary evidence pursuant to any "civil, commercial or criminal matter" pending before a foreign tribunal,[29] whereas s. 60 of the *OEA* refers to an "action, suit, or proceeding," and is therefore applicable only to civil matters.[30] The general practice is to apply to an Ontario court pursuant to both federal and provincial legislation, and it is generally recognized that both statutes are valid and applicable with regard to civil matters.[31]

4. The foreign court is a court of competent jurisdiction.

Both the *OEA* and the *CEA* require that a letter rogatory be issued by "a court or tribunal of competent jurisdiction" in the foreign country. The expression "court of competent jurisdiction" in the *OEA* and *CEA* is *not* concerned with whether a foreign court is properly seized of the subject matter before it,[32] and there is a rebuttable presumption that a foreign court's order conforms with the rules and practices of that jurisdiction.[33] Rather, courts have interpreted jurisdictional competence narrowly as having only two aspects.

First, the foreign court or tribunal must have the power, under its enabling statutes and rules, to direct the taking of evidence outside its jurisdiction.[34] Thus, an Ontario court cannot enforce letters of request that have been issued by a foreign private arbitrator,[35] although it may enforce

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[29] *CEA*, *supra* note 12.

[30] *OEA*, *supra* note 13.

[31] Freedman and Harney, *supra* note 8 at 356; *Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co.* (1985), 51 O.R. (2d) 244 (H.C.) [*Friction*]; *Germany (Federal Republic)*, *supra* note 14. But note that a contrary view has been expressed in *Medical Ancillary Services v. Sperry Rand Corporation* (1979), 95 D.L.R. (3d) 735 (Ont. H.C.) at 737, where Steele J. opined that only provincial legislation applied to letters rogatory relating to foreign civil matters. Conversely, Freedman and Harney, *supra* note 8 at 356 suggest that because letters rogatory relate to international relations and the assistance of foreign countries, their enforcement should fall under exclusive federal jurisdiction. However, as these authors also note, due to the similarity of the federal and provincial legislation and the practice of applying pursuant to both statutes, this is unlikely to become a contentious issue.

[32] The enforcement by the Ontario Court of a foreign letter rogatory does not contemplate or acknowledge a foreign court's "jurisdiction" in the private international law context. See *Re Presbyterian Church of Sudan,* [2005] O.J. No. 3212 (Sup. Ct.)at para. 15 [*Church of Sudan*].

[33] Freedman and Harney, *supra* note 8 at 359.

[34] *Ibid.* at 358.

[35] See *B. F. Jones Inc. v. Rolko* (2004), 72 O.R. (2d) 355 (Sup. Ct.) [*B.F. Jones*] where Lissaman J. of the Ontario Superior Court of Justice determined (at 358) that a reading of the *OEA* in conjunction with the *International Commercial Arbitration Act,*

letters of request issued by a foreign court for use in a private arbitration.[36] Nevertheless, a court may still be of "competent jurisdiction" even where it cannot reciprocate a letter of request issued by Ontario courts.[37]

Secondly, the words "court or tribunal of competent jurisdiction" require that a tribunal have the sanction of a court that is able to enforce its duly authorized orders. In *McCarthy v. United States Securities and Exchange Commission,*[38] the Ontario Court of Appeal refused to enforce letters of request issued by the United States Securities and Exchange Commission because the Commission did not have the jurisdiction to issue letters of request. It was not sufficient that the tribunal was competent to adjudicate upon the matter before it. Rather a "tribunal of competent jurisdiction" must be analogous to "a court of law or equity."[39] Critics have remarked that in this respect the enforcement of letters rogatory is not based on comity between nations, but rather comity between courts.[40]

E. Factors Affecting a Court's Discretion

The onus is on the applicant to persuade a court that it should exercise its discretion to enforce a letter rogatory.[41] As noted by Freedman and Harney, however, as a practical matter the evidentiary burden may rest with the party opposing the enforcement of the letter rogatory.[42] Ontario courts do not have to accept the recitals in a letter rogatory and may embark on a broad range of inquiry into relevant evidence including scrutinizing transcripts of the foreign proceedings and the affidavits, memoranda and dispositions that have been filed with the foreign court.[43] However, it is clear that "it is not the function of the Court to act as an appellate court in

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R.S.O. 1990, c. I.9. indicated that letters rogatory issued by foreign private arbitrators were not intended to be enforced by Ontario courts. The Court also noted (at 359) that nothing in the Commercial Dispute Resolution Procedures of the American Arbitration Association authorized an arbitral tribunal to issue letters rogatory nor could private arbitral tribunals reciprocate requests to enforce letters rogatory.

[36] *Four Seasons Hotels Ltd. v. Legacy Hotels Real Estate Investment Trust,* [2003] O.J. No. 1341 (Sup. Ct.) [*Four Seasons*].

[37] In *De Havilland, supra* note 9 at 714, the Ontario Court of Appeal considered a request for commission evidence from the High Court of Grasse in France when the French court did not have the ability to reciprocate a Canadian request for commission evidence. In upholding the request, the Court of Appeal concluded that reciprocity is not an element of jurisdictional competence.

[38] [1963] 2 O.R. 154 (C.A.) [*McCarthy*].

[39] *Ibid.* at 161.

[40] Freedman and Harney, *supra* note 8 at 360.

[41] *Church of Sudan, supra* note 32 at para. 15.

[42] Freedman and Harney, *supra* note 8 at 378.

[43] *Rapid Data Systems, supra* note 20.

respect of the decision made in the foreign court,"[44] and there is a rebuttable presumption that the foreign court has acted reasonably and responsibly in issuing a letter rogatory.[45] In the oft-cited decision of *Friction Division Products, Inc. and E. Du Pont de Nemours & Co. (No. 2)*, Osbourne J. articulated the following criteria to be considered by an Ontario court when deciding whether to enforce foreign letters rogatory:

> Before an order giving effect to letters rogatory will be made, the evidence (including the letters rogatory) must establish that:
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> (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 here.[46]

Other factors may also be relevant to the determination in each particular case.

1) The Evidence Sought is Relevant

The evidence sought by letters rogatory should be directly relevant to issues raised in the foreign proceedings. Courts may be extremely reluctant to enforce letters rogatory that prove only that the evidence is "marginally relevant"[47] or "potentially relevant,"[48] and may narrow their orders accordingly. The assertion of a lawyer or foreign court that testimony or documents are relevant to foreign litigation is generally not sufficient to satisfy an Ontario court. An Ontario court may engage in an independent assessment of the relevance of requested evidence and refuse a letter rogatory if the application materials do not adequately set out the allegations raised in the foreign pleadings and the factual context of the proceedings.[49] In *Giaimo,* the Ontario court considered a letter rogatory issued by an Argentine court for a disqualification action.[50] The only

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[44] *D.G. Jewellery of Canada Ltd. v. Valentine* (2000), 11 C.P.C. (5th) 379 (Ont. Sup. Ct.) at para. 2 [*D.G. Jewellery*].

[45] *Advance/Newhouse, supra* note 6 at para 7.

[46] (1986), 56 O.R. (2d) 722 (H.C.) at 732 [*Friction No. 2*].

[47] *Pecarsky, supra* note 16.

[48] *Fecht, supra* note 5.

[49] For example, see *Johnson v. Callaghan*, [1996] O.J. No. 4293(Gen. Div.) at para. 3.

[50] *Supra* note 22.

evidence regarding the relevance of the evidence sought was an affidavit by an Argentine lawyer stating that the Argentine judge considered the information to be relevant, and that the judge would not rule on a petition until the information had been collected from Canada. The Ontario court held:

> No information has been provided in the material before me as to what issues have been raised in the disqualification action as might, for example, be delineated in the pleadings or in the summary of the pleadings. The only evidence is the second-hand bald statement by Mr. Rabinovich that Judge Basavilbaso has indicated that the information is relevant. No explanation as to how or why it is relevant has been given. In my view, there is insufficient evidence before me to determine the issue of relevance.[51]

Grossi J. expanded on these concerns as follows:

> It does seem to me that when ...a broad and general request is made with no indication of relevance to the issues and no indication as to why relevant information would not be otherwise obtainable, there is a danger that the main purpose of seeking the information could be to serve as a "fishing expedition."[52]

Ontario courts may also require a clear indication that the foreign court has given due judicial consideration to the relevance of the evidence it seeks to compel. In *Safety-Kleen Corp. v. Kroeze*, a South Carolina court issued a letter rogatory to the Ontario Superior Court for an order authorizing the plaintiff to take depositions of three named witnesses in Canada.[53] The witnesses had formerly acted as auditors for a defendant to an action in South Carolina. On an application before the Ontario court to enforce the letter rogatory, the plaintiff's attorney deposed that the South Carolina judge had "judicially determined that the testimony of the witnesses...was material and relevant and necessary for use at the trial of the action."[54] Contrary to this assertion, the letter rogatory contained only a rubber stamp of the judge's name and no affidavit evidence had been filed in support of its issuance. The letter rogatory itself contained no particulars,[55] and was date-stamped as having been filed two minutes after the motion materials had been filed before the South Carolina court. The Ontario court refused to enforce the letter rogatory on the basis that the letter rogatory was "woefully lacking in substance" and that there was no evidence that the South Carolina judge had considered whether the respondents could give relevant evidence. In dismissing the application, Wright J. stated:

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[51] *Ibid.* at paras. 7-8.

[52] *Ibid.* at para. 19.

[53] [2003] O.J. No. 4718 (Sup. Ct.) [*Safety-Kleen*].

[54] *Ibid.* at para. 4.

[55] *Ibid.* at para. 6. The totality of the body of the letter rogatory read:

> In my view, before a [letter rogatory] issues, consideration must be given to the relevance of the information sought and that the information cannot be obtained from other sources. It is not up to this court to familiarize itself with the proceedings to date and to start from scratch to determine relevancy issues and whether the information is already available or obtainable from other sources. The purpose of the application before me is to give opportunity to the respondents to argue that effect should not be given to the [letter rogatory]. Since on its face the [letter rogatory] says nothing to support the issuance of the [letter rogatory], and no reasons are given for its issuance, the respondents have nothing to which they can respond. Because of the inadequacy of the [letter rogatory], I decline to give effect to it. [56]

Nonetheless, the fact that the letter of request is overly broad, or seeks to compel both relevant and irrelevant evidence, is not in and of itself a reason for refusing the request; where substantial damages have been claimed and the issues in the litigation are complex, a request for the production of voluminous documents is to be expected.[57] Ontario courts also have the power to narrow the request contained in the letter rogatory to that which the court views as relevant, although a request may be so broad that it cannot be narrowed by a court and must be refused.[58]

2) Use at Trial

Historically, the requirement that the evidence sought by a letter rogatory be used at trial was the most frequently invoked limitation on a court's discretion to enforce the request, notwithstanding that this requirement was not apparent on a plain reading of either the *OEA* or *CEA*. Currently, in accordance with an increasingly liberal trend towards enforcement, Ontario courts no longer restrict enforcement of letters rogatory to those which seek evidence intended primarily for use at trial. Letters rogatory will be enforced to compel evidence for use at other stages or purposes in

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> "TO THE APPROPRIATE COURT IN THE PROVINCE OF ONTARIO:
> The undersigned Judge of the Court of Common Pleas for Richland County South Carolina hereby authorizes Safety-Kleen Corp. and the Plaintiff Directors, through their counsel, to take the depositions of former PwC-Canada auditors Hank Krowze, Louisa Covello, and Greg Smith in the above captioned matter. We respectfully request that you, by proper and usual process of your Court, compel these witnesses to appear for examination pursuant to a subpoena and/or appropriate order issued by your Court."

[56] *Ibid.* at paras. 17-21.

[57] *Ontario Public Service Employees Union Pension Trust Fund (Trustees of) v. Clark*, [2005] O.J. No. 3515 at para. 25, *aff'd* [2006] O.J. No. 2475 (C.A.) [*Clark*].

[58] For instances where a court has refused or limited letters rogatory on grounds

litigation including pre-trial or discovery-type depositions of non-parties and post-judgment discovery in aid of execution.[59]

a) Pre-Trial Examination of a Non-Party and Rule. 31.10

Letters rogatory are available where evidence requested is to be used at a preliminary inquiry or other judicial proceeding. Doubt as to the availability of letters rogatory for discovery purposes was removed in Ontario by the amendment to s. 60 of the *OEA* to incorporate the words "for a purpose for which a letter of request could be issued under the rules of court."[60] This amendment was enacted to integrate the provisions of s. 60 of the *OEA* with the 1985 amendment to rule 31.10 of Ontario's *Rules of Civil Procedure*[61] which broadened the examination for pre-trial discovery in connection with litigation commenced in Ontario to include the discovery of non-parties, something which had not previously been permitted.[62] Ontario's rule 31.10 is not a condition precedent to be overcome before being entitled to examine a non-party and there need not be compliance with rule 31.10 in a foreign jurisdiction.[63] As stated by Sanderson J. in *Ontario Public Service Employees Union Pension Trust (Trustees of) v. Clark*:

> Recognizing that international assistance rests on the comity of nations, I am of the view that our courts should not be quick to reject foreign procedural rules or to impose our own procedures on them unless they infringe on Canadian sovereignty because they are prejudicial to our country or its citizens. [64]

There is still debate, however, as to whether the case law requires a higher standard to be met to enforce letters of request directed to pre-trial

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of relevance, see *OptiMight Communiciations, Inc. v. Innovance Inc.*, [2002] O.J. No. 577 (C.A.) at paras. 28-31 [*OptiMight*]; *Fecht, supra* note 5 at 419; *Pecarsky, supra* note 16 at para.17.

[59] For an excellent review of the genesis of this requirement, see Freedman and Harney, *supra* note 8 at pp. 363-367.

[60] *Pecarsky, supra* note 16 at para. 13; *MAN Aktiengesellschaft v. Valentini,* [2006] O.J. No. 2822 (Sup. Ct.) at paras. 20-23 [*Valentini*].

[61] R.R.O. 1990, Reg. 194 [*Rules*]. Rule 31.10 gives the court broad discretion to make such an order, in the event that the moving party would be unable to obtain the information from other persons, and that it would be unfair to require the party to proceed to trial without the information.

[62] *Fecht, supra* note 5 at 420; *Valentini, supra* note 60 at para. 23.

[63] *Triexe Management Group, Inc. v. FieldTurf International, Inc.*, [2005] O.J. No. 4359 (Sup. Ct.) at para. 18 [*Triexe*].

[64] *Supra* note 57 at para. 78.

discovery as compared to those related to evidence for trial.[65] Courts may still consider it a useful exercise, before turning to the factors which more directly relate to a request from a foreign court, to consider whether the request would meet the criteria in the *Rules of Civil Procedure* if the action had been brought in Ontario.[66] The requirements of rule 31.10 have been described by the court as "useful guideposts" that contain important criteria for determining whether an order should be granted to give effect to letters rogatory.[67] Rule 31.10 will also be relevant to courts when considering whether letters rogatory contain the elements encompassed in the "Canadian sovereignty" aspect of the comity analysis, and whether the request places an undue burden on a witness, as discussed in further detail, below.[68]

b) Post-Judgment Examinations and Rule 60.18

Ontario courts have jurisdiction to enforce the request of a foreign court to conduct a post-judgment examination in aid of execution of a foreign judgment.[69] In determining whether to enforce these requests, courts have closely adhered to rule 60.18 which sets out Ontario's procedural provisions for examinations in aid of execution.[70] Since rule 60.18 only applies to "true" debtor-creditor relationships, courts have only permitted discovery in aid of execution in order to facilitate the recovery of money pursuant to a judgment. Thus in *Prima Tek II v. Sonneman Packaging Inc et al.*, the Ontario Superior Court held that "comity" would not justify examinations in aid of execution in cases of patent infringement.[71] However, recent decisions such as *Clark* may be indicative of a relaxing of this strict adherence to Ontario procedural requirements in future cases.[72]

In *Pandjiris Inc. v. Liburdi Pulsweld Corp.*, Lofchik J. of the Ontario Superior Court considered a letter rogatory issued by a Missouri court for

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[65] *Church of Sudan, supra* note 32 at para. 11; *Valentini, supra* note 60 at para. 23.

[66] *Pecarsky, supra* note 15 at para. 15; *Fecht, supra* note 5; *Mulroney v. Coates* (1986), 54 O.R. (2d) 353 (H.C.) [*Mulroney*].

[67] *Fecht, supra* note 5.

[68] *Ibid.*; *Triexe, supra* note 63 at para. 18.

[69] *Four Embarcadero Center Venture et al. v. Mr. Greenjeans Corp. et al.* (1987), 59 O.R. (2d) 229; aff'd (1988), 65 O.R. (2d) 256 (C.A.)

[70] *Rules, supra* note 61, rule 60.18.

[71] *Prima Tek, supra* note 1. However in this case, the judge ultimately concluded that the letter rogatory did not deal with a post-judgment motion but rather a contempt motion respecting patent infringements and therefore fell within the ambit of rule 31.10 dealing with pre-trial discovery.

[72] *Supra* note 57.

the purpose of enforcing judgment against a Missouri corporation.[73] The letter rogatory sought the examination of multiple parties, although under Ontario's *Rules of Civil Procedure* the applicant would only have been entitled to one examination in a twelve-month period unless a court ordered otherwise.[74] Accordingly, the Ontario court ordered examination of only one representative of the debtor corporation. The court held that if, after the examination, it was still necessary to examine other parties, only then would the court be willing to consider applications for further examinations.

3) The Evidence is not Otherwise Obtainable

An Ontario court will generally not order an Ontario resident to submit to the process of a foreign court unless the foreign court has no other means of obtaining the desired evidence.[75] In *King v. KPMG*, applicants from New York sought production of an investigative report pertaining to a corporate defendant's financial affairs.[76] The report was comprised principally of information gathered from an examination of the corporation's books, records, and documents, and from interviews of individuals with knowledge of the corporation's financial affairs. All of this information was available in the United States. The applicants sought to have the report produced because it would be of organizational assistance to them as a "road map" in preparing their case. The Ontario court refused the application, in part because the information was otherwise obtainable in the United States.

Ontario courts may also refuse to enforce letters rogatory if a foreign court has internal domestic procedures for compelling the evidence it seeks, even where evidence could be obtained more expediently and efficiently through letters rogatory enforced in Ontario.[77] This is illustrated in *World Youth Day, Inc. v. Perry*, where a United States federal court could not compel the necessary evidence by its own processes in accordance

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[73] [2002] O.J. No. 3267 (Sup. Ct.) [*Pandjiris*].

[74] *Rules, supra* note 61, rule 60.18 (4).

[75] *Friction, supra* note 31 at 248.

[76] *King, supra* note 24.

[77] But see *Triexe, supra* note 63, pertaining to an Illinois action. The defendant was not satisfied that the plaintiff had fully complied with a request for documents, and elected to obtain a letter rogatory, which it then sought to enforce in Ontario. The plaintiff challenged the motion for enforcement, arguing that the defendant had not sought all legal remedies available in Illinois. In deciding to give effect to the Illinois court's letter rogatory, McMahon J. of the Ontario court gave considerable deference and respect to the conclusions of the Illinois judge in the letter rogatory that justice could not be done between the parties without the requested evidence, stating (at paras. 21-22):

with a timetable set out for the action.[78] A letter rogatory was issued to an Ontario court which sought the discovery of certain individuals in order to maintain a litigation timeframe. On considering the application, Sharpe J. stated:

> While comity requires that the assistance of this Court be extended where the interests of justice require, the authorities make it clear that there is a minimal threshold of need or necessity to be satisfied by an applicant...Timetables to ensure that law suits proceed expeditiously are important features of modern litigation, but are tools rather than masters. The timetable relied on here provides an inadequate basis for the order sought.[79]

A foreign litigant who seeks evidence from non-parties in Ontario may first be required to examine all parties to the action in order to satisfy an Ontario court that sought-after evidence is otherwise unobtainable.[80] Similarly, if a witness is willing to appear and give evidence at a foreign trial, the parties to the foreign action may be precluded from obtaining pre-

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> It is not my role to sit in the appellate view of the Illinois Court. That Court concluded the respondent's evidence and documentation is necessary to ensure justice is done in Illinois. If that Court concluded that the defendant could obtain the documentation through further legal process in Illinois, it would not have had to resort to the extraordinary remedy of Letters of Request.

Accordingly, McMahon J. held that the defendant had met the burden of establishing that the sought after evidence could not otherwise be obtained.

[78] [1995] O.J. No. 2594 (Gen. Div.) [*World Youth Day*].

[79] *Ibid.* at para. 5.

[80] See *Internet Law Library*, *supra* note 16, where the plaintiff in an American action sought to examine a defendant's former employees, who resided in Ontario. The Ontario court dismissed the plaintiff's application on the basis that examination of the defendants might produce the evidence purported to be necessary for trial. But see *Clark*, *supra* note 57, where the Ontario Court of Appeal upheld the decision of Sanderson J. giving effect to an American letter rogatory seeking financial statements and working papers from a Canadian non-party, an independent auditor of a defendant in the American action. The respondent argued that the plaintiff could not show that the evidence was unavailable from other sources until it had deposed the defendants. Justice Sanderson rejected this argument, stating (at paras. 76-78):

> It would be unfair to the plaintiffs to require them to proceed to trial without the Specified Documents and Evidence...In the case at bar, I am satisfied that the necessary link exists and that justice requires the enforcement of the letters rogatory. The Specified Documents and the Specified Evidence are crucial to the determination of the issues in the U.S. action...Even if I had been of the view that our procedural rules should trump those of the New York court, I would still have agreed with Magistrate Judge Dolinger that the evidence sought is not "otherwise obtainable."

But see *Triexe*, *supra* note 63.

trial examination of those same witnesses. In *E-Beam Services, Inc. v. AECL Technologies, Inc.*,[81] the applicant sought an order in Ontario giving effect to letters rogatory issued by a New Jersey court requesting that four individuals be required to appear for an examination in Toronto in relation to a New Jersey proceeding. The respondents advised that although they would not willingly appear to be examined under oath, they would be prepared to attend at the trial in New Jersey to give evidence. The Ontario court held that the evidence sought by way of examination *was* otherwise obtainable - in the form of oral testimony in court.[82] The letter rogatory was refused, subject to leave in favor of the applicant to seek an *ex parte* order forthwith in the event that any of the respondents failed to appear in court after receiving a proper summons to appear from the United States District Court.

4) The Order Sought is not Contrary to Public Policy

a) Canadian Sovereignty

The policy objectives behind international comity require a balancing of two broad considerations: the impact of the proposed order on Canadian sovereignty, and whether justice requires that the evidence be ordered.[83] Considerations encompassed by the phrase "Canadian sovereignty" include an assessment of:

(1) Whether the request would give extra-territorial authority to foreign laws which violate relevant Canadian or provincial laws;
(2) Whether granting the request would infringe on recognized Canadian moral or legal principles; and
(3) Whether the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested.[84]

With respect to Canada's relations with the United States, it will be a rare occasion where legal assistance should be denied on the ground that to grant it would run counter to the public policy of Canada.[85] Case law suggests that for policy objectives to bar a request for international judicial assistance, there must be a clear and forceful expression by the Canadian government of a policy concern that relates specifically to the production of the requested evidence.

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[81] [2003] O.J. No. 2410 (Sup. Ct.) [*E-Beam Services*].

[82] *Ibid.*

[83] *Fecht, supra* note 5.

[84] *De Havilland, supra* note 9; *Church of Sudan, supra* note 32 at para. 21.

[85] *Re Westinghouse Electric Corporation and Duquesne Light Company* (1977), 16 O.R. (2d) 273(H.C.) at 291 [*Re Westinghouse*].

In *Re Westinghouse Electric Corporation and Duquesne Light Company*,[86] letters rogatory were issued from a United States federal court seeking testimony and documents from a representative of the Canadian government which was subject to the *Uranium Information Safety Regulations*[87] under the former *Atomic Energy Control Act*.[88] The Regulations, as approved by Canada's Governor in Council, specifically forbade production or disclosure of such evidence, except on certain terms which were not applicable in the circumstances. The evidence was to be used to show that anti-competitive activities in Canada had raised the price of uranium in the American market. The Attorney General of Canada intervened in an application before the Ontario court and filed an affidavit of the Minister of Energy, Mines and Resources deposing that the Government of Canada had, as a matter of public policy, taken the position that the information sought by the United States court should not be disclosed. Robins J. acknowledged that, in the interests of comity, Ontario courts should wherever possible lend judicial assistance at the request of foreign courts, but stated that it was improper for a foreign court to invoke principles of international comity in an attempt to hold Canada, as a sovereign nation, accountable to the laws of that foreign state. Further, the Government of Canada had relied on public policy to oppose the disclosure of the documents. The policy was "clearly and forcefully expressed" and "related specifically to the evidence and documents in issue." Although Robins J. acknowledged that the enforcement of a letter rogatory is always a matter within the discretionary power of the court, he stated:

> In these circumstances the Court, in my view, should take judicial cognizance of the stated public policy in exercising its discretionary power...and should not force the disclosure of information if to do so would, on the authority of the government, be harmful to the public interest. To decline to lend a foreign Court assistance through the use of judicial machinery in such circumstances is not to act in breach of the doctrine of comity but in accord with it.[89]

In *Gulf Oil Corporation v. Gulf Canada Limited*,[90] letters rogatory were issued to the Supreme Court of Canada similarly pertaining to civil proceedings in the United States seeking the production of documents which were subject to the *Uranium Information Safety Regulations*. The respondents agreed that the documents were relevant and necessary for the United States actions, but were unwilling to violate the prohibition against disclosure prescribed by the Regulations or to risk the resulting penalties and

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[86] *Ibid.*

[87] SOR 2000-206.

[88] R.S. 1970, c. A-19, now renamed the *Nuclear Energy Act*, R.S. 1985, c. A-16.

[89] *Supra* note 85 at 291.

[90] [1980] 2 S.C.R. 39 [*Gulf Oil*].

sanctions. Were it not for the Regulations, they were prepared to disclose the documents in order to assist in the foreign actions. The applicant challenged the validity of the Regulations. It also relied on an exception in the Regulations that such documents could be validly released where so required "by or under a law of Canada." The applicant argued that a favorable order of the Court enforcing the letter rogatory pursuant to the *CEA* would fall within the exception for disclosure. Further, it was submitted, public policy concerns should not attach to trading or commercial activities of the government, or between persons who were not government employees or Ministers of the Crown. In any event, it was not shown how the public interest would be damaged by disclosure of the requested documentation.[91]

In response to the applicant's argument that the documents could be validly released by a court order, Laskin C.J.C. held that the Minister of Energy, Mines and Resources had refused consent to such disclosure, and thus this was not a case where disclosure should be made. Regardless of their validity, it was the policy behind them, rather than the Regulations themselves, that were a factor in the Court's exercise of discretion.[92] With respect to the submission that the effect on the public interest had not been made clear, Laskin C.J.C. stated, "It is not for a Court, when called upon to consider whether it should enforce letters rogatory, to take issue with the Government's determination of public policy or to measure its impact."[93] Finally, there was no support for the contention that public policy should not be recognized in respect of evidence pertaining to trading or commercial activities of government:

> [W]here the government is a party to the arrangements out of which the documents, whose disclosure is sought, emerge, and it has promoted the arrangement as a facet of its energy policy in which the marketing of uranium is a central feature, I fail to see how public policy can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest.[94]

The documents were not private documents, but rather resulted from discussions and negotiations which reflected an input by representatives of the Government of Canada. The Court adopted the reasons of Robins J. in *Re Westinghouse* and refused to give effect to the foreign letter of request.

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[91] *Ibid.* at 59.
[92] *Ibid.* at 55-56.
[93] *Ibid.* at 59.
[94] *Ibid.* at 61.

Conversely, where the Canadian government expresses a general diplomatic concern towards a proceeding in a foreign state, rather than making a request for the production of evidence specifically, this concern may not sufficiently outweigh the concern that justice be done in the foreign proceeding. In *Re Presbyterian Church of Sudan*,[95] a letter rogatory was issued by a New York District Court for evidence pertaining to an action commenced under the United States *Alien Tort Claims Act*[96] which, contrary to generally accepted principles of international law, purported to give American courts extra-territorial jurisdiction over any tort committed in violation of the law of a nation or treaty of the United States. The Canadian Embassy in the United States had previously expressed concerns to the United States State Department regarding the jurisdiction of the American court to assert such broad extra-territorial jurisdiction, and had indicated that the American action was frustrating Canadian government policy vis-à-vis Sudan.[97] The Canadian Embassy did not, however, take a direct position on the request for the production of evidence to be used in the action. The respondent, the human resources manager of a company alleged to have acted in concert with the Sudan government, challenged a motion to enforce the letter rogatory in Ontario, arguing that the declarations of Canadian foreign policy should be accorded substantial deference in the Court's exercise of discretion. In considering the application, Pitt J. noted that the American proceeding would continue whatever the decision rendered by the Ontario court, and stated:

> It is my view that, while the Canadian government's concern as to the American court's jurisdiction is well-founded and an important consideration, it is not sufficient, and was likely not intended to override the principles of comity, and the applicant's right to the evidence to conduct a fair trial. The compliance with the request for documents and answers to questions that are useful for the case is not contrary to the public policy of Canada.[98]

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[95] *Church of Sudan, supra* note 32.

[96] 28 U.S.C. §1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[97] *Ibid.* at para. 16. As noted by Pitt J., in a diplomatic letter from the Embassy of Canada to the U.S. Department of State, dated January 15, 2005, the Embassy stated that Canada had made the foreign policy decision to use the reinstatement of trade support services as an incentive in support of peace in Sudan. The Canadian Embassy expressed concern that the impending U.S. action removed that inducement, and further, that the assumption of foreign jurisdiction created a "chilling effect" on Canadian firms in Sudan.

[98] *Ibid.* at para. 43. Note that similar conclusions were reached by Justice LoVecchio of the Alberta Court of Queen's Bench in a companion case to this action, *Presbyterian Church of Sudan v. Talisman Energy Inc.*,[2005] A.J. No. 1808 (Q.B.).

The foregoing cases suggest that when justice can be better served by the ordering of evidence, Ontario courts should not refuse a foreign court's request for judicial assistance in order to promote general Canadian policy positions regarding foreign litigation. In order for Canadian policy concerns to justify refusing a foreign court's request for evidence, those concerns should relate specifically to the effect of production or disclosure of the requested evidence.

b) Allegations of Fraud

There is a suggestion in the case law that when allegations of fraud are raised in foreign proceedings, Ontario courts may be all the more willing to assist foreign courts by enforcing letters rogatory. In *Prima Tek,*[99] a district court in Illinois issued letters rogatory to the Ontario Superior Court seeking disclosure of certain customer lists for use in a patent infringement action in Illinois where fraud was alleged. The letter rogatory stated that the Illinois court sought the evidence for examination in aid of judgment execution; the examination was not, however, connected to a debtor-creditor relationship and there was no procedural equivalent of the requested examination under Ontario's *Rules of Civil Procedure.* In considering the application, Harris J. acknowledged that it was in the interests of both international and domestic administration of justice to lend assistance to foreign courts and that "it is particularly in the interests of justice to assist a foreign court in enforcing letters of request where allegations of fraud are raised."[100] In order to accommodate the application, the Ontario court re-characterized the letter rogatory as pertaining to a discovery for a pending contempt motion relating to the same case; the contempt motion had been withdrawn on a technicality but was to be reinstituted when discovery was complete. The letter rogatory was enforced on this basis.[101]

In *United States Federal Trade Commission v. TD Canada Trust,*[102] the United States Federal Trade Commission applied to the Ontario Superior Court for an order giving effect to a letter rogatory issued by the United States District Court requesting the production of certain documents in the custody of the Canadian respondents. The Canadian respondents were defendants in an American action where it was alleged that they had committed fraud pursuant to a joint scheme. The Federal Trade Commission had obtained default judgment against all but one of the defendants, against whom an action was still ongoing. The Ontario court

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[99] *Supra* note 1.

[100] *Ibid.* at para. 17.

[101] *Ibid.* at para. 20.

[102] [2004] O.J. No. 708 (Sup. Ct.).

found that the applicant had satisfied the criteria that a judge should consider in determining whether to give effect to letters rogatory, stating:

> The applicant's concerns about and allegations of fraud, in this case, override the privacy interests of the Responding Defendants who have allegedly committed fraud and could not be bothered to defend against those allegations.[103]

The Court ordered that the foreign request for evidence be given full force and effect. Similarly, in *MAN Aktiengesellschaft v. Valentini*, the Ontario Superior Court considered letters rogatory issued by an Oregon court pertaining to two actions involving allegations of fraudulent conveyances, oppressive conduct and transfer of assets between related corporations.[104] The applicants, who were plaintiffs in the main actions, sought to compel the respondents, a Toronto-based lawyer and his law clerk, to attend for videotaped examinations under oath and to bring with them relevant documents in their possession. Both of the respondents had served as directors of certain corporate defendants in the American action at relevant times, yet there was no allegation that the respondents had done anything wrong or improper. The respondents argued that given their limited role with respect to the allegations in the Oregon action, the applicants had failed to show that they had any relevant evidence to give that could not be obtained from other witnesses who had already been deposed or who could be deposed. Further, the Oregon court had not given sufficient judicial consideration to the relevance of the evidence requested — the application for issuance of the letter rogatory in Oregon had been made *ex parte,* without reference to Canadian criteria for enforcement of letters rogatory. In considering the respondents' arguments, Campbell J. stated:

> Given the nature of the claim and allegations, it is not surprising that neither the material before the Oregon court nor the letters themselves spell out in detail the specific questions that will be asked. What would appear to be of importance is who gave which instructions when, to do what acts? The nature of the claim and allegations also answers the second complaint of the Respondents that the Applicants have not demonstrated that the information is obtainable from other sources. Where fraud is alleged, both confirmation of other information and credibility will be important issues. This is all the more likely where the defendants in the Oregon action indicate that they may indeed want to rely on the evidence from the discovery at trial.[105]

Campbell J. adopted the rationale in *Prima Tek* that it is particularly in the interests of justice to assist foreign courts in enforcing letters of request

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[103] *Ibid.* at para. 10.

[104] *Supra* note 60.

[105] *Ibid.* at paras. 27-28.

where allegations of fraud are raised. Accordingly, Campbell J. issued an order enforcing the Oregon court's letter rogatory.[106]

c) Blocking Legislation

The taking of evidence, whether produced voluntarily or through judicial assistance pursuant to letters rogatory, may be expressly prohibited by federal or provincial blocking statutes. Blocking statutes, if applicable, provide an absolute defense to an application to enforce a letter rogatory. For example, under the *Foreign Extraterritorial Measures Act*,[107] the Attorney General of Canada may prohibit or restrict production, disclosure or identification of records where in his opinion the jurisdiction or powers of the foreign tribunal are likely to be exercised in a manner that may adversely affect significant international business interests or otherwise infringe on Canadian sovereignty. The *Business Records Protection Act*[108] may also serve to protect business records from removal to a location outside of Canada by enforcement of a letter rogatory. The relevant section reads:

> 1. No person shall, under or under the authority of or in a manner that would be consistent with compliance with any requirement, order, direction or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to any business carried on in Ontario, unless such taking, sending or removal...
>
> (d) is provided for by or under any law of Ontario or the Parliament of Canada.

In *De Havilland,* the Ontario Court of Appeal considered whether an order made pursuant to a foreign letter rogatory, which required production of original business records for a foreign action, would contravene the previous version of this section, which was substantially similar. Though the Court of Appeal ultimately declined to rule on this issue, Doherty J.A. stated in *obiter dicta*:

> The applicability of this section is doubtful. The order made by Eberle J. is not an order, direction or subpoena emanating from a jurisdiction outside of Ontario. I am also inclined to the view that s. 46 of the Canada Evidence Act triggers the exception to s.

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[106] *Ibid.* at para. 31-34.

[107] R.S. 1985, c. F-29, s. 3.

[108] R.S.O. 1990, c. B.19, s. 1.

> 1(d)...I am satisfied that the order requested will not compromise any federal or provincial statute.[109]

d) Deemed Undertaking Rule and the Canadian Charter of Rights and Freedoms

In Ontario, parties who are examined under oath for a civil action are required to answer questions notwithstanding that the answers might incriminate them, but those answers may not later be used against them in subsequent proceedings.[110] Similarly, parties may use evidence obtained by the discovery process only for that proceeding and not for the purpose of commencing fresh litigation against a witness who is compelled to produce the evidence. This protection is manifested as an implied undertaking both at common law and under rule 30.1.01.[111] Ontario's primary rationale for the implied undertaking rule is the protection of privacy. Discovery is an invasive process and Ontario courts regard it as wrong that a party who is compelled by law to produce evidence for the purpose of particular proceedings should be in peril of having that evidence used for some purpose other than the purpose of that particular legal proceeding.[112] A further rationale is that without such an undertaking, the fear of collateral use might in some cases operate as a disincentive to full and frank discovery. [113] In contrast, in the United States, parties may invoke the protection of the Fifth Amendment,[114] and are not required to answer questions in a civil proceeding that may tend to incriminate them, yet absent a protective order, parties are free to use any evidence obtained by way of discovery for any purpose, including commencing fresh litigation.

Because information collected in Ontario pursuant to a letter rogatory is not protected by the deemed undertaking rule, Ontario courts will often impose conditions on the use of information collected by a party for use in

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[109] *De Havilland, supra* note 9 at 719.

[110] *OEA, supra* note 13, s. 9.

[111] *Rules, supra* note 61.

[112] *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.).

[113] *Ibid.*

[114] The Fifth Amendment of the United States Constitution prescribes that "No person...Shall be compelled in any criminal case to be a witness against himself." Accordingly, the United States Supreme Court has determined that no individual may be compelled to testify in the United States "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." In a civil case, the decision not to answer permits a court, in its discretion, to draw an adverse inference from the invocation of that privilege; see *Baxter v. Palmigiano,* 425 U.S. 308 (1976).

American litigation, such as requiring the parties to file an undertaking with the court which would parallel the implied undertaking rule.[115] Ontario courts have held that to do otherwise would be contrary to public policy and prejudicial to the sovereignty of Canada and its citizens.[116] However, in *Somerset Pharmaceuticals Inc. v. Interpharm Inc.*,[117] Macdonald J. of the Ontario Superior Court considered whether enforcing a letter rogatory issued by a Florida district court would violate the Canadian *Charter of Rights and Freedoms*[118] The respondent argued that the letter rogatory, if granted, would compel him to give evidence that could potentially be used against him in a subsequent American criminal proceeding (although no such proceeding was pending at the time) with the result that he would be compelled to give answers to questions that might result in a denial of his liberty without the benefit of Canadian or American constitutional protection. Macdonald J., in *obiter dicta*, resolved this issue by recognizing that the *Charter* did not apply to private actions and thus could not be used to scrutinize letters rogatory issued by foreign courts in respect of private civil proceedings. Even if the *Charter* did apply, there was no factual basis in the case at hand to support a finding that a *Charter* right had or would be infringed.[119]

5) The Documents are Identified with Reasonable Specificity

In order to identify a document with reasonable specificity, a party does not have to go so far as to prove that the document actually exists.[120] In many instances, it will be impossible for a party to determine without inspecting them which documents are relevant to the case and which are ancillary, or even if such documents exist. Instead, documents are required to be identified with reasonable precision as determined by the circumstances of each case.

Where a party is a stranger to the documents it seeks, identifying documents by topic or class will be sufficient to meet the specificity

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[115] For example, see *Four Seasons, supra* note 36, at para. 6 where Wilson J. ordered: " The applicants shall, therefore, deliver to the respondents' solicitor, and file with the Court, a written undertaking that they will not use any documents produced or evidence adduced pursuant to its Order and the Letters Rogatory for any purpose other than the U.S. Arbitration unless they first obtain leave to otherwise use such documents from a judge of this Court as contemplated by Rule 31.1.01 of the *Rules of Civil Procedure.*" See also *Pecarsky, supra* note 16 at para. 41.

[116] *Four Seasons, ibid.* at para. 28.

[117] [1994] O.J. No. 99 (Gen. Div.).

[118] Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11.

[119] *Supra* note 117 at para. 34.

[120] *Friction No.2, supra* note 46 at 735-36.

requirement.[121] Similarly, specificity does not impose on parties the obligation to expressly delimit the precise questions that will be asked at an oral examination and courts have found it premature in these applications to make specific rulings as to the permissibility of questions to be asked during the commissioning of oral testimony.[122] It is seen as preferable that parties object to questions that are not directly relevant. If necessary, courts will be willing to make subsequent determinations respecting a party's refusals and potentially order a party's re-attendance.[123] For example, in *Friction,* the Court considered the argument that failure to state the questions to be asked during examination would result in a "fishing expedition" that might elicit confidential personal business information. Rather than limit the scope of questioning, the Court directed that parties to the examination were to be represented by counsel who would have the opportunity to participate in the examination to the same extent as if the examination were conducted under Ontario laws.[124]

In *Acton v. Merle Norman Cosmetics Inc.*,[125] however, the Ontario Court of Appeal overturned the order of the application judge enforcing an American letter rogatory. The order had authorized an open-ended examination of the Canadian deponent "concerning the matters in issue in the United States Litigation." The Court of Appeal noted that the matters in the American litigation were numerous and complex, and the intention of the applicant was to cross-examine the deponent as to his information, belief and personal knowledge on all the issues in the various pleadings in the American litigation. The Court of Appeal held that the order of the lower-court judge was so broad as to allow a fishing expedition and varied the order by limiting questions only to those that would elicit testimony that might be admissible at trial. Questions seeking to elicit information pertaining to mere information and belief about allegations raised in the pleadings were prohibited.

Similarly, in *Opti-Might Communications, Inc. v. Innovance, Inc.*,[126] the Ontario Court of Appeal considered an order of an application judge enforcing a letter rogatory issued by the United States District Court for an action commenced in California. The letter rogatory sought, among other things, a broad right of production and discovery against a Canadian company, which was not a party to the California action, in order to explore the extent to which the company may have unknowingly received

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[121] *Ibid.*

[122] *Advance/Newhouse, supra* note 6 at para. 13.

[123] *Ibid.*

[124] *Supra* note 31.

[125] [1992] O.J. No. 43 (C.A.).

[126] *Opti-Might, supra* note 58.

trade secrets from the defendant. Given the highly confidential documents and information produced in the litigation, the California court had issued a protective order over the production and discovery of all evidence disclosed in the action. A consequence of the order was that it did not permit parties to the litigation to disclose particulars of the trade secrets in issue to the Canadian company or the Ontario court. The application judge recognized that it would be difficult to fashion an order requiring that the company disclose all relevant information without permitting a "fishing expedition" but nonetheless opted for an order that was broader rather than narrower in scope, to avoid the possibility that relevant information would not be captured. The Court of Appeal overturned the application judge's order on the basis that it was overly broad and captured potentially irrelevant information. Notwithstanding that the protection order of the California court would preserve the Canadian company's privacy and trade secrets to a significant degree, this did not relieve the prospect of irrelevant, overly broad and unduly burdensome production and discovery.[127]

It is important to note that "specificity" and "relevance" are distinct criteria to be considered by Ontario courts. Although a letter rogatory need not state the precise questions that will be put to a witness, a letter rogatory must indicate the *relevance* of the potential evidence to be adduced by the witness. Thus, it is a useful exercise to outline for the Ontario court the proposed lines of questioning of a potential witness.

6) The Order Sought is not Unduly Burdensome

A letter rogatory will not be enforced in Ontario if the request is perceived as unduly burdensome on a witness. This consideration is closely tied to public policy since allowing a foreign state to unduly burden an Ontario witness may be regarded as infringing on Canadian sovereignty. Although Ontario courts may enforce letters rogatory for the examination of persons or documents even where these examinations might not have been available under Ontario's *Rules of Civil Procedure,* those rules are often determinative of whether a foreign letter rogatory will be unduly burdensome on a Canadian resident.[128] A letter rogatory may be seen as unduly burdensome where the request is not a normal inconvenience that a witness could have been subjected to had the action originated in Ontario.[129] The burden may be mitigated, however, by offering reasonable monetary compensation for the time and effort necessary to comply with

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[127] *Ibid.* See also, *Clark, supra* note 57.

[128] *Mulroney, supra* note 66; *D.G. Jewellery, supra* note 44 at para. 1.

[129] *Pecarsky, supra* note 16 at para. 21.

the order.[130] Thus, foreign requests for production of evidence may be wide but this does not necessarily make the request unreasonably or unduly onerous.[131]

In *Clark,* plaintiff shareholders of Nortel Networks Corporation brought a class action against Nortel in New York, alleging that they had relied on false and misleading statements by Nortel about its true financial condition.[132] The class action plaintiffs sought to enforce a letter rogatory in Ontario for production of financial statements and working papers from Nortel's independent auditors in Canada. The sought-after documents possibly exceeded a million pages and consisted mostly of documents in electronic form that would require manual formatting since relevant documents were extensively commingled with irrelevant documents. The respondents argued that the request was unduly burdensome as it would take thousands of hours of work for employees to review the documents and reproduce the relevant ones. The applicants responded by offering either to have their own employees do the work or to pay the respondents up to US$100,000 for employee services and reimbursement of expenses. In upholding the application judge's decision to enforce the letter rogatory, the Court of Appeal stated:

> The application judge noted that it is obligated by professional standards to compile and secure its working papers in a manner in which they can be made available to regulatory entities and successor auditors. It should follow that the documentation is not impossible to prepare for production. Requests for production of voluminous documentation, in electronic and hard copy form, are hardly unknown in today's world of complex general and class litigation. In that sense, there is a certain "cost of doing business" element in the call for Deloitte to respond to the letters rogatory – an offset to the undoubtedly considerable revenues that the appellant earns from providing high level and complex auditing services to companies such as Nortel.[133]

The Court of Appeal accepted the findings of the application judge that the evidence was relevant, crucial and otherwise unobtainable. Production would not be unduly burdensome to the respondent. Given the pre-existing confidentiality agreements and protective orders, the respondent's interests would not be unduly prejudiced in a manner that violated Canadian sovereignty.

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[130] *Triexe*, *supra* note 63 at para. 38.

[131] *Ibid.*; *Fecht, supra* note 5 at 420.

[132] *Clark, supra,* note 57.

[133] *Ibid.* at para. 23.

3. Conclusion

A letter rogatory issued by an American court must satisfy a Canadian court that the request for evidence constitutes a formal request to a Canadian court. The foreign court seeking a letter rogatory must have the power under its enabling statutes and rules to direct the taking of evidence abroad. An Ontario court will require certification that the American court is a court of law or equity, rather than an administrative tribunal or consulate before which the matter is pending. Accordingly, the documents in support of such an application should be under the seal of the issuing court or judge.

The witness from whom the American court desires evidence must reside within the Ontario court's jurisdiction. An American court may seek a form of discovery from an Ontario court that is not permitted under Ontario's *Rules of Civil Procedure,* but there is a risk that the Ontario court will refuse such a request on the basis that it is unduly burdensome for the witness. Accordingly, attempts should be made to ensure that the request does not markedly depart from Ontario's Rules, particularly if the request concerns third parties, so that a witness will not be required to undergo a much broader form of inquiry than if the litigation were conducted in Ontario. Where compliance with a request will require much time and effort, monetary compensation should be offered to mitigate the burden on a witness.

The applicant must identify the evidence sought with reasonable specificity and convince the Ontario court that the sought-after evidence is relevant and necessary to the foreign proceeding. There should also be a clear indication that the American court has given due judicial consideration to these criteria before issuing the request. A letter rogatory should convince an Ontario court that the order sought is in the interests of justice and that compliance with the order will not violate Canadian public policy. The Ontario court should be satisfied that the evidence cannot be secured except by the Ontario court's intervention.