

ENFORCING LETTERS ROGATORY IN BRITISH COLUMBIA

by **Stephen Antle,**
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This commentary highlights some practical points involved in obtaining an order from the Supreme Court of British Columbia enforcing letters rogatory issued by the American federal or state courts and provides precedent documents to be used in doing so. It is not a discussion of the substantive British Columbia law of enforcing letters rogatory. A good summary of that law can be found in B.J. Freedman and G.N. Harney, *Obtaining Evidence from Canada: The Enforcement of Letters Rogatory* (1987) 21 U.B.C. Law Rev. 351.

There are two substantive legal points which it is important to bear in mind from a practical point of view. The first is that the making of an order enforcing foreign letters rogatory is a matter within the discretion of a chambers judge or master of the Supreme Court, within the statutory limits set out in section 59 of the B.C. *Evidence Act* and section 46 of the Canada *Evidence Act*.

The second is that the Supreme Court has generally refused to enforce foreign letters rogatory unless their principal purpose is to obtain evidence for use at trial, as distinct from as part of a pretrial discovery process. Recently some Canadian courts have recognized that there is necessarily an element of discovery in any examination under foreign letters rogatory, but it will still be necessary to convince the Supreme Court that at least the principal purpose of the examination is to obtain evidence for use at trial.

Before applying for letters rogatory, American counsel should confer with their B.C. colleague, who will apply for the order enforcing those letters rogatory. It is important to review with B.C. counsel the form of letters rogatory you will seek to ensure they are in a form and substance which the Supreme Court will enforce. The form letters rogatory accompanying this commentary are designed to be issued by the U.S. Federal Court. If your action is from a state court, they will have to be modified accordingly. They are not

necessarily suitable for use in other Canadian provinces.

The reference in the third paragraph of the requests in the letters rogatory to the Federal Civil Judicial Procedure and Rules (or to the corresponding state court provision) and to cross-examination is important. It has been held by the Supreme Court that an examination under the letters rogatory in B.C. is governed by B.C. law. The standard forms of letters rogatory request that the attorneys of the party obtaining the letters rogatory "be permitted to examine the witness and the attorneys of any opposing parties be permitted to cross-examine the witness." This wording has been held to imply that the party obtaining the letters rogatory is calling the witness himself and therefore his counsel may not cross examine. Counsel must examine, in chief, the opposing party can cross examine, and the party obtaining the letters rogatory can then reexamine on any matters raised for the first time in cross-examination. Only if the witness can be shown to be hostile can the party obtaining the letters rogatory cross examine the witness under the standard letters rogatory. The wording in this third paragraph may permit you to cross-examine the witness, as if you were deposing them in the United States.

These documents contemplate an examination before an Official Court Reporter as Commissioner. This is the common procedure where the examination is by consent of the parties to the American action. If that is not the case, the Commissioner should be a member of the B.C. Bar and supervise the examination, which should still be recorded by an Official Court Reporter.

The other parties in the American litigation must be served with notice of your application for letters rogatory. The Supreme Court will not enforce letters rogatory issued without notice to the other parties. As a practical matter, it is also helpful to obtain the agreement of counsel to the other parties in the American litigation to the date on which the examinations under the letters rogatory will take place.


Once the letters rogatory have been obtained, the order enforcing them is obtained from the Supreme Court of B.C. by beginning a proceeding by filing a petition in the Supreme Court. That petition seeks an order modeled on the letters rogatory you have obtained. In the accompanying petition, that order is set out in paragraphs 1 through 6.

The petition must state the facts on which it is based. In the accompanying petition, those facts are set out in the second series of paragraphs, numbered 1 through 10. You should ensure before seeking your letters rogatory that these facts do exist in your case, and consult with B.C. counsel if they do not.

The petition must be supported by a filed affidavit which deposes that the facts on which the petition is based, as set out in the petition, are true. It is preferable that that affidavit be sworn by American counsel, rather than on information and belief by B.C. counsel. The affidavit must be in the accompanying form, the one acceptable to the B.C. courts. For the affidavit to be admissible in B.C., it must be sworn before a notary public, who must notarize the affidavit and any exhibits to it.

Once the petition and affidavit have been filed and served on the respondent (the proposed witness), the witness has seven days to file an appearance to the petition. The petition can then be set down for hearing at any time on three days' notice by filing and serving on the respondent a notice of hearing of petition. It therefore takes a minimum 11 days between the date B.C. counsel receives the letters rogatory and the making of an order enforcing them. You should bear this necessary lead time in mind.

The Supreme Court normally requires a further reasonable time between the making of its order enforcing the letters rogatory and the examinations themselves. It is helpful if American or B.C. counsel have been able to agree with the witness on convenient dates for their examinations.

Sample forms 

In the Supreme Court of British Columbia
Re: Section 59 of the Evidence Act, R.S.B.C. 1979, c.116

Re: Commission to Examine Witnesses and Compel Production of
Documents Issued by the United States District Court for
the [District] District of [State]

Between

[party obtaining letters
rogatory]

petitioner,

and

[witness]

respondent.

THIS IS THE PETITION OF:
[petitioner's name and address]

PETITION TO THE COURT

LET ALL PERSONS whose interests may be affected by the
orders sought TAKE NOTICE:

The petitioner applies to this court for an order that:

1. The respondent be examined on commission before a commissioner in the manner and form requested by the letters rogatory made on the ____ day of _____, 19__ by the United States District Court for the [district] District of [state] (the "United States District Court"), in Proceeding No. [case number] under the style and proceeding of [style of proceeding] (the "[state] Action").
2. The respondent attend at the offices of [B.C. law firm address] on [date] from the hour of 10:00 o'clock in the forenoon until 12:30 o'clock in the afternoon and from the hour of 2:00 o'clock in the afternoon until 4:00 o'clock in the afternoon and thereafter from day to day until the examinations are complete, or on such other dates and at such other times as the court may direct or the parties agree.
3. The respondent also produce at the examination all the documents in their possession or that of [any appropriate company] specified in schedule "A" to this petition.
4. [name], official court reporter, or their designate, provided that person is an official court reporter in the province of British Columbia, Canada, be appointed commissioner before whom the evidence is to be taken.
5. The attorneys or agents of any party present, including members of the [state] Bar, be permitted to examine the respondent in accordance with the Federal Civil Judicial Procedure and Rules and to cross examine the respondent.
6. The evidence of the respondent be recorded verbatim by an official court reporter and any documents produced on the examination be marked for identification, and the official court reporter authenticate the depositions taken on the examination and any document or certified copy thereof and have the same returned by registered or certified mail under cover duly closed and sealed up together with these presents addressed to the clerk of the United States District Court for the [district] District of [state], [address].

The petitioner's application is made under Section 59 of the Evidence Act, R.S.B.C. 1979, c.116, as amended, and Rule 10(1)(a) of the Rules of Court.

At the hearing of the petition will be read the affidavit of [U.S. counsel], a copy of which is served herewith.

The facts upon which this petition is based are as follows:

1. The letters rogatory were issued to the Supreme Court of British Columbia by the United States District Court on the ____ day of _____, 19__ in the [state] Action.
2. The United States District Court is a court of competent jurisdiction in the [state] Action.
3. The United States District Court has the authority to order the taking of evidence outside its jurisdiction in the circumstances, pursuant to Rule 28(b) of the Federal Civil Judicial Procedure and Rules.
4. The other parties in the [state] Action received proper notice of the application to the United States District Court for the order for issuance of letters rogatory.
5. In the [state] Action, the complainant claims [set out a brief summary of the issues, showing how the respondent's evidence is relevant].
6. The respondent has knowledge of facts and matters and is in the possession or control of documents the examination about which and the production of which are relevant and necessary for the purpose of justice and for the due determination of the matters in question between the parties in the [state] Action. The respondent's testimony is intended for use at trial and that is the purpose of the examination.
7. The respondent is now outside the jurisdiction of the United States District Court and is resident in British Columbia.
8. The respondent will not voluntarily submit to the jurisdiction of the United States District Court and give testimony in [state].
9. [U.S. counsel], counsel for the petitioner in the [state] Action, is prepared to attend in Vancouver to conduct the examination of the respondent and to do so at the petitioner's expense.
10. The testimony of the respondent and the identification of the relevant documents in evidence are necessary for the proper prosecution of the [state] Action and will be used at the trial of the [state] Action.

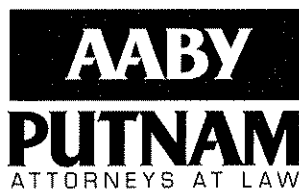
[B.C. counsel]
Solicitor for the Petitioner

SCHEDULE A 1.

1. [List documents with as much detail as possible.]

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In the Supreme Court of British Columbia

Re: Section 59 of the Evidence Act, R.S.B.C. 1979, c116

and

Re: Commission to Examine Witnesses and Compel Production of Documents Issued by the United States District Court for the [district] District of [state]

Between

[party obtaining letters rogatory],

petitioner,

and

[witness],

respondent.

ORDER

BEFORE THE HONOURABLE
MR./MADAM JUSTICE _____

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)
)
)

_____ DAY THE _____
DAY OF _____, 19__

THE APPLICATION of the petitioner coming on for hearing at Vancouver on this date, and on hearing [petitioner's B.C. counsel], counsel for the petitioner, and [respondent's B.C. counsel], counsel for the respondent, and on reading the affidavit of [U.S. counsel], sworn _____, 19__;

THIS COURT ORDERS that the respondent be examined on commission before a commissioner in the manner and form requested by the letters rogatory made on the ____ day of _____, 19__ by the United States District Court for the [district] District of [state] (the "United States District Court"), in Proceeding No. [case number] under the style and proceeding of [style of proceeding].



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**REFER
NOTICE TO**

The Board of Governors having set May 15, 1995, as the mailing date for ballots on the referendum to eliminate state bar services, the May 1995 *Washington State Bar News* will be devoted entirely to that topic. Members are invited to send in their views, pro and con, by

THIS COURT FURTHER ORDERS that the respondent attend at the offices of [B.C. law firm; address] on _____, 19____ from the hour of 10:00 o'clock in the forenoon until 12:30 o'clock in the afternoon and from 2:00 in the afternoon to 4:00 o'clock in the afternoon and thereafter from day to day until the examinations are complete, or on such other dates and at such other times as the court may direct or the parties may agree.

THIS COURT FURTHER ORDERS that the respondent also produce at the examination all the documents in their possession or that of their employer and specified in schedule "A" to this order.

THIS COURT FURTHER ORDERS [name] official court reporter, or her designate, provided that person is an official court reporter in the province of British Columbia, Canada, be appointed commissioner before whom the evidence is to be taken.

THIS COURT FURTHER ORDERS that the attorneys or agents of any party present, including members of the [state] Bar, be permitted to examine the respondent in accordance with the Federal Civil Judicial Procedure and rules and to cross-examine the respondent.

AND THIS COURT FURTHER ORDERS that the evidence of the respondent be recorded verbatim by an official court reporter and any documents produced on the examination be marked for identification and the official court reporter authenticate the depositions taken on the examination and any document or certified copy thereof and have the same returned by registered or certified mail, under cover duly closed and sealed up together with these presents addressed to the clerk of the United States District Court for the [district] District of [state], [address].

BY THE COURT

DEPUTY DISTRICT REGISTRAR

APPROVED AS TO FORM:

Counsel for the Petitioner

Counsel for the Respondent

SCHEDULE A

1. [List documents with as much detail as possible].
.....

ENDUM MEMBERS

March 15, 1995. To make room for as many contributions as possible, please limit your comments to one page and, if possible, send them on a computer disk to: *Washington State Bar News*, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

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