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Enforcing Letters Rogatory in British Columbia – An Update

by Stephen Antle

Editor's note: A "Letter Rogatory," or in federal law a "Letter of Request," is a request from a court in one nation to the court of another nation to enforce an order for deposition or discovery of evidence. Historically, Canadian courts would not enforce orders for discovery, but would enforce orders for depositions in lieu of appearing at trial. In February 1995, *Bar News* carried a piece about this important aspect of cross-border practice, highlighting practical points involved in obtaining an order from the Supreme Court of British Columbia enforcing letters rogatory issued by American federal or state courts. Now author Stephen Antle, Q.C., brings us up to date.

Substantive Law

The making of an order enforcing letters rogatory remains a matter within the discretion of the Supreme Court (British Columbia's trial court). However, the basis on which the court will exercise that discretion has changed. Previously the court had generally refused to enforce letters rogatory unless their principal purpose was to obtain evidence for use at trial, rather than as part of a discovery process. While the purpose of letters rogatory remains a factor in the exercise of the court's discretion, it is no longer determinative. The key issue now is the impact the proposed examination will have on the British Columbia witness, and whether the imposition and inconvenience of being required to testify in a foreign proceeding compromises Canadian sovereignty by placing an undue burden on him or her. (*Campbell Estate v. Stenhouse*, [1995] B.C.J. No. 2304; *GST Telecommunications Inc. v. Provenzano* [2000] B.C.J. No. 378).

Comparative Burden Test

The extent of the burden on witnesses is often measured by comparing it to what would be required of them if the litigation were in the Supreme Court of British Columbia, rather than a foreign court. Under British Columbia Rules of Court, a nonparty witness who refuses to be interviewed or to answer written questions can be ordered to be examined under oath. In most circumstances, examination under letters rogatory is not an undue burden in comparison.

Provenzano provides an example of circumstances which did amount to an undue burden. The letter rogatory named British Columbia counsel for the party obtaining the letter rogatory as the "commissioner" before whom the examination was to be conducted. The letter rogatory did not limit questioning of the witness to issues relevant to the American action of which the witness was said to have knowledge. The letter made an extremely broad request for production of documents; it did not recognize that the witness's evidence might be subject to solicitor-client privilege or confidentiality (the witness was a lawyer for one of the parties in the American action). The evidence sought could have exposed the witness to liability.

Provenzano is also noteworthy because, despite the unduly burdensome nature of the letter rogatory, the court addressed that burden by placing limiting conditions on the enforcement of the letter, in effect restricting its request for assistance rather than simply refusing to enforce it, as had been the previous practice.

Recent cases also raise a number of practical and procedural points. In *United States Securities and Exchange Commission v. Ono* (2001), 94 B.C.L.R. (3d) 385, the British Columbia Supreme Court reiterated that not only the proposed witness, but the other parties in the American action, should be named as respondents to the petition seeking to enforce the letter rogatory and should be served with that petition and its supporting affidavits. In *Ono* this was not done. However, in another example of the Canadian court's recent willingness to remedy deficiencies in letters rogatory rather than refusing to enforce them, the court ordered that the letter rogatory be enforced, but required the enforcing order to be served on the other American parties, and gave them 10 days from the service date to seek reconsideration or modification.

Lead Time for Enforcement

A practical consequence of naming the other parties to the American action as respondents is that under the Rules of Court, residents of the United States have 28 days from service of the petition to file an appearance in the proceeding. The petition

cannot be heard until those 28 days have passed. If the other parties do appear and take a position, there will be further delay while materials for the hearing are exchanged.

Where there is no dispute between the American parties that the proposed witness should be examined, it is often possible to persuade the other parties to waive their 28 days to appear, and advise that they do not intend to file an appearance. Armed with evidence of that, it is possible to have the petition heard within the 28 days. Otherwise, it generally takes about seven weeks from service to hearing of the petition. This may cause problems with discovery cutoffs in the American litigation. Counsel should give themselves plenty of lead time to have their letters rogatory enforced in British Columbia.

Letters rogatory generally require that the witness be examined before a "commissioner," who functions as a sort of referee, to ensure that the examination takes place as ordered. Where the examination is not expected to be contentious, there is no real need for a commissioner. It is generally my practice to have the court reporter for the examination serve formally in that capacity; however, where there are likely to be issues between the American parties or between the witness and the parties, it is wise to have an experienced British Columbia litigation lawyer serve as commissioner. In *Ono*, a master of the Supreme Court was appointed commissioner. Counsel should bear in mind that when lawyers serve as commissioners, they will charge their usual hourly rate for doing so.

The Supreme Court has made it clear that examinations of witnesses under letters rogatory are to be conducted according to procedural and evidentiary rules of both British Columbia and American jurisdiction, with those of British Columbia to prevail in the event of a conflict. Under British Columbia rules, the party who obtained the letter rogatory calls the witness. That party must examine the witness-in-chief and may not, ordinarily, cross-examine him. It has been my practice to recommend that letters rogatory be obtained expressly permitting counsel to examine the witness in accordance with the Federal Rules of Civil Procedure, which I understand give the party obtaining the letter rogatory the right to cross-examine. Many orders enforcing such letters rogatory have been granted, but not, to my knowledge, in a contested case. I expect that if a petition seeking such an order were to be contested by the witness or the other parties, that term would be refused.

Notwithstanding that British Columbia procedural and evidentiary rules govern, the relevance of the questions on the examination is to be determined under American law. This is only common sense, as the examination is to be evidence in an American action. In

Ono, the order enforcing the letters rogatory provided for the referral of questions of relevance to the American court for resolution.

The Supreme Court will likely limit questioning of witnesses, and their obligation to disclose documents, to specific issues in the American action about which they have been shown to have knowledge. The court will also likely limit the documents the witness is required to disclose at the examination to those held in his personal capacity, as distinct from corporate officer or counsel. Documents held in those capacities would have to be obtained directly from the corporation or client. It is generally possible to negotiate the disclosure of such documents in advance of the examination in the interest of making the process more cost-efficient for all concerned.

In *Provenzano*, the court suggested that the witness (who was a lawyer) would not be required to disclose documents which were confidential or the subject of solicitor-client privilege. Presumably they would not be required to answer questions of that nature either. And presumably the rationale was that these documents and issues could be canvassed with the client.

At least where the documents on which the witness may be examined are numerous, the court has required the party examining the witness to disclose in advance of the examination the particular issues and documents they intend to put to the witnesses.

Limitation of Use

British Columbia law requires that parties obtaining evidence through the discovery process use it only for the purposes of the action in which it was obtained, unless they have the consent of the party from whom they obtained the evidence, or a court order permitting them to do otherwise. In *Ono*, the court made it a condition of the order enforcing the letter rogatory that the parties' use of the evidence obtained in the examination be similarly restricted, and required counsel for the parties to provide written undertakings to that effect.

The issue of compensation for the witness is difficult. Under British Columbia Rules of Court, a witness is entitled to only C\$20 per day of examination. However, he is also entitled to "a reasonable sum" for necessary preparation to give evidence. That amount is entirely in the discretion of the court. At least where the witnesses are lawyers and the issues are complex, the court has been willing to allow significant amounts for preparation, although not usual lawyers' fees.

The court has also been willing to allow the witness to be represented by counsel at the examination, where the issues warrant it. However, the court has been clear that such counsel have no general right to participate in the examination. They may only advise the witness about issues such as solicitor-client privilege and confidentiality. The court has not expressly required the examining party to pay for the witness's counsel.

While these procedural and practical issues may make the prospect of enforcing letters rogatory in British Columbia seem daunting, counsel should remember that they arise in complex, contested cases, often where the proposed witness is the British Columbia lawyer for one of the American parties.

As with most legal issues, the more complex case will likely generate a more contentious and complex dispute over the use and enforcement of letters rogatory. In a more routine case, where the witness is simply a lay person who was somehow involved in the events giving rise to the American action, few of these issues are contentious. In such cases the details of the examination are usually negotiated among the American parties and the witness, and if the petition seeking enforcement of the letter rogatory is actually heard at all, it is unopposed.

Under any circumstances, in recent years the British Columbia court has become more friendly to American lawyers looking for information in B.C., especially if they are prepared in advance to work with the B.C. court.

Stephen Antle is a partner in the Vancouver, British Columbia, office of Borden Ladner Gervais LLP, a national Canadian law firm. His expertise is in commercial litigation, administrative law, and alternative dispute resolution, with a particular interest in disputes involving more than one jurisdiction.

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