



CONFLICTS ISSUES

OBTAINING EVIDENCE IN FOREIGN JURISDICTIONS AND DEALING WITH FOREIGN LETTERS OF REQUEST IN B.C.

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I. Introduction

This paper deals with three conflict of laws topics:

- (1) obtaining general evidence from outside Canada through British Columbia letters of request;
- (2) obtaining evidence of foreign law for use in B.C. litigation; and
- (3) enforcing and resisting the enforcement of foreign letters of request in B.C.

II. Obtaining Letters of Request in British Columbia and Enforcing them Elsewhere

This section of this paper deals with obtaining evidence from outside Canada through letters of request.

Evidence from other provinces and territories of Canada can be obtained by inter-provincial subpoena under the B.C. *Subpoena (Interprovincial) Act*, which is not discussed here.

A letter of request is a request by, in this case the Supreme Court of B.C., to a court in a foreign jurisdiction, asking that court to order that a resident of that jurisdiction provide evidence to be used in a B.C. proceeding.

In B.C., obtaining letters of request is governed by Rule 38 of the *Rules of Court*. (Rule 38 and the Supreme Court Rules forms referred to below are in Appendix "A".)

Note that in B.C. a letter of request can be obtained only to procure evidence for use at trial. It cannot be used to obtain evidence in a pre-trial investigation, or an examination for discovery or similar procedure.

In the case of examinations for discovery, presumably that is because the Supreme Court has the ability to order the parties before it to make representatives who are residents of foreign jurisdictions available to be examined if appropriate, and because B.C. procedure does not contemplate the wide ranging "deposition"—style discovery of numerous witnesses common in the U.S.

A. The Court's Discretion

Issuing a letter of request is in the discretion of the Supreme Court. Under Rule 38(2), the Court must take into account in exercising that discretion:

- The convenience of the potential witness;
- The possibility that the witness may be unavailable to testify at trial because of death, infirmity, sickness or absence from B.C.;
- The possibility that the witness will be beyond the jurisdiction of the Supreme Court (i.e., outside B.C.) at the time of trial; and
- The expense of bringing the witness to trial.

There is relatively little case law interpreting this aspect of Rule 38. Perhaps that is because requests for letters of request are relatively rare in B.C., for the reasons set out above. It may also be because such requests are rarely contested; once the relevance of the potential witnesses' evidence and the party's inability to call them at trial are made clear, the focus of the dispute may shift to the logistics of their examination, rather than whether it should take place.

In any event, what case law there is indicates that, in addition to the factors set out in Rule 38(2), before the Court will exercise its discretion to issue a letter of request it must be satisfied that:

- The evidence the potential witness is able to give would be "directly material" to the issues at trial (*Quinn v. Hurford* (1978), 5 B.C.L.R. 375 at 378 (S.C.)); and
- The party seeking the letter of request could not make out its case without the potential witness's evidence (*Bland v. International Sealand Shipping Service Ltd.* (1980), 18 B.C.L.R. 40 at 44 (S.C.)).

B. A Willing Witness

Rule 38 contemplates two procedures, depending on whether the potential witness is willing to be examined.

If the Court is satisfied on the factors set out above and the proposed witness is willing to be examined, the Court does not in fact issue a letter of request at all. Instead, it makes an order, in Form 31 of the *Rules of Court*, appointing an examiner to take the witness's evidence, setting the notice of the examination which the examiner is to give the parties and the witness, requiring the examination to be conducted in accordance with attached instructions, and requiring the examiner to return the transcript of the examination and any documents referred to in it to the Registrar of the court registry in which the B.C. action was begun.

The Court's instructions to the examiner, to be attached to the order, are set out in Form 32 of the *Rules of Court*. They provide that B.C. law applies to the examination, that the party wishing to examine the witness is required to serve them with a subpoena and pay the proper witness fees and that the examiner is to send the transcript to the Registry, and they set out the oaths or affirmations to be used.

C. An Unwilling Witness

If the Court is satisfied on the factors set out above but the potential witness is unwilling to be examined, the Court orders, in Form 33 of the *Rules of Court*, that a letter of request be issued, and that the Registrar, on receipt of any transcript and documents resulting from it, deliver the originals to the party which applied for the letter of request and copies to any party which requests them.

The letter of request itself is set out in Form 34 of the *Rules of Court*. Among other things, it provides that the party calling the witness may examine them, that any opposing party may cross-examine them, and that the party calling the witness may then re-examine them. This makes it clear that the party calling the witness is to examine the witness in chief, as would be the case at trial.

The letter of request requests the foreign court to authenticate the transcript of the examination and any documents identified at it, and to return them to the Undersecretary of State for External Affairs of Canada in Ottawa for transmission to the Registrar of the registry in which the B.C. action was begun.

This latter provision ties in with subrule 38(9), which requires the solicitor for the party obtaining the order for the issuing of the letter of request to file with the Undersecretary their undertaking to be personally responsible for all expenses incurred by the Undersecretary in respect of the letter of request and to pay them on receiving notification of their amount.

Subrule 38(10) requires that the examining party deliver copies of a subpoena to the witness and all parties of record not less than seven days before the examination.

Subrule 38(11) again makes it clear that the examining party is to "examine" the witness (that is, examine them in chief) and that the witness is subject to cross-examination and re-examination.

Rule 38(12) provides for objections to questions asked at the examination to be recorded by the court reporter and their validity decided by the Supreme Court, which may order the witness to submit to further examination.

However, there is authority that the Court may, in the case of a willing witness at least, order that the examiner have the power to rule on objections, subject to the trial judge's determination of ultimate admissibility of the evidence (*R. v. Robertson*, [1982] 3 W.W.R. 270 at 278 (B.C.C.A.)).

Rule 38(13) provides that, unless otherwise ordered, the examination shall be either recorded by an official court reporter, or videotaped or filmed.

D. Enforcing a Letter of Request in the U.S. Federal Courts¹

Foreign letters of request may be enforced in the U.S. federal courts through a proceeding begun by application to the court for an order under a federal statute (28 U.S.C. §1782(a)).

Section 1782(a) gives federal courts the express authority, but does not require them, to assist foreign tribunals and “interested persons” in obtaining discovery. It provides:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege (28 U.S.C. §1782(a)).

Perhaps most notable is the fact that there is no requirement that a letter of request first be obtained in the foreign jurisdiction. Instead, an “interested person” need merely apply to the district court for the place in which the subject person or entity resides or can be found. An “interested person” need not be a formal “litigant” or “party” in the foreign proceeding, so long as they have significant “procedural” or “participation” rights in it (*Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-57 (2004) (holding that entity filing an antitrust complaint with the Directorate-General for Competition of the European Commission is an “interested person” under s. 1782(a))).

Further, the “proceeding” for which discovery is sought need not be pending or even imminent, but only “within reasonable contemplation” (*Id.* at 258-59).

There is also no foreign discoverability threshold. Although matters or materials safeguarded by an applicable privilege are shielded from discovery under s. 1782, there is no requirement that what is sought be discoverable in the foreign jurisdiction (*Id.* at 260-61).

The application should state the facts upon which it is based, make clear that the requirements of s. 1782(a) have been met, and be supported by an affidavit sworn on the basis of personal knowledge. A proposed order should also be submitted to the court in accordance with its local rules.

There is no explicit requirement in the statute that notice of the application be provided to adverse parties, and courts have in fact granted *ex parte* applications (see, e.g., *Application of Sumar*, 123 F.R.D. 467, 468 (S.D.N.Y., 1988)).

However, the better practice, especially in the absence of a foreign letter of request, is to give notice to the adverse or potentially adverse parties in the foreign proceeding as well as to the person or entity from whom discovery is sought, in accordance with Rule 5 of the Federal Rules of Civil Procedure.

¹ This section prepared by Ward B. Washington of Vorys Sater Seymour and Pease LLP, Cincinnati, Ohio.

Assuming that the threshold statutory requirements are met, the U.S. Supreme Court has enunciated at least two factors to consider in ruling on a s. 1782(a) request.

The first is whether the person from whom discovery is sought is a participant in the foreign proceeding. The Court reasoned that the need for s. 1782(a) aid is generally not as evident when evidence is sought from a participant in the foreign proceeding, since the foreign tribunal has jurisdiction over the parties before it and can itself order them to produce evidence.

The second factor is decidedly more amorphous. It includes consideration of “[t]he nature of the foreign tribunal, the character of the proceedings ... and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance” (*Intel* at 264-65).

This likely includes a consideration of international comity and parity concerns which “may be important as touchstones for a district court’s exercise of discretion in particular cases” (*Id.* at 261).

More specifically, in determining whether a discovery order should be granted, district courts may consider whether the “request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States” (*Id.* at 265). “[U]nduly intrusive or burdensome requests may be rejected or trimmed” (*Id.*).

In short, s. 1782(a) grants broad discretion to the district courts to grant, deny or limit a request for assistance in a given case.

III. Obtaining Evidence of Foreign Law

This section of the paper deals with how to obtain evidence of foreign law for use in B.C. litigation. This may be necessary if, for example, a relevant contract is governed by foreign law.

A. A Question of Fact

B.C. law is clear that foreign law is a question of fact, to be pleaded and proved on a balance of probabilities by the party asserting it (J. Walker and J.A. Castel, *Canadian Conflict of Laws*, 6th ed., (Toronto, Butterworths, 2005) at 7-9).

The B.C. court will not take judicial notice of foreign law (Walker, *supra*, at 7-9). It will not take foreign law from copies of foreign authorities (*Allen v. Richardson Greenshields of Canada Limited* (1988), 23 B.C.L.R. (2^d) 1 at 7-9 (C.A.)). It will not conduct its own research into foreign law (*Bumper Development Corp. Ltd. v. Commissioner of Police of the Metropolis*, [1991] 4 All E.R. 638 at 644-6 (C.A.)).

If the party asserting foreign law does not prove it as a fact, the court will (in older language) assume foreign law to be the same as B.C. law or (in more recent language) simply apply B.C. law, because it has no other choice (Walker, *supra*, at 7-8).

Sometimes the court will draw a distinction between B.C.’s “general” law (the common law and statutes which are similar in many jurisdictions) and B.C.’s specialized statute law. If the foreign law is not proved as a fact, the court will apply B.C.’s general law, but not its specialized statute law (Walker, *supra*, at 7-8 to 7-9).

The difficulties of this approach are obvious. How to determine whether a B.C. statute is sufficiently universal to be part of its general law? What law to apply if there is a specialized B.C. statute covering the relevant issue?

These difficulties, and the artificiality of this analysis, suggest that a more satisfactory approach would simply be to place squarely on the parties the onus of proving as a fact the law they say applies to the

dispute before the B.C. court. If they cannot do that, then the B.C. court should simply apply B.C. law. Full stop. The court really has no other viable choice.

This law gives rise to a strategic issue for a party, for example, suing for damages for breach of a contract containing a choice of foreign law provision: does that party *need* to prove foreign law? Is it necessary for that party to succeed in the litigation for the B.C. court to conclude that the foreign law, which governs the contract, is different in some respect from the relevant B.C. law? If not, there is no need to prove foreign law.

B. The Necessary Evidence

Assuming your client does need to prove foreign law, there is no magic to doing it. You will have to obtain evidence, either *viva voce* or by affidavit depending on the B.C. procedural situation, from someone with personal knowledge (unless the B.C. context is interlocutory) of what the foreign law is.

Almost certainly that person will be a lawyer in the foreign jurisdiction. You will find them in the same way you would find a foreign lawyer if your client needed legal advice in the foreign jurisdiction: review your contacts, consult your colleagues, search the Internet and, if necessary, consult *Martindale & Hubbell*.

Assuming you have a choice of foreign lawyers to provide evidence of foreign law, the criteria for making that choice are generally the same as for any expert witness: you want someone whose evidence will be persuasive to the court.

- You want reasonably senior lawyer, who the court will accept as having significant experience with the foreign law.
- You want a lawyer who practices in the specific legal field in question. Although they are not an expert witness and therefore not required to provide a formal statement of their qualifications, it is a good idea to introduce their curriculum vitae into evidence. And it is a better idea if it is clear from that document that they have experience in the relevant field, for example from descriptions of cases they have been involved in, titles of articles they have published or the nature of their involvement in local bar associations.

Having chosen your foreign lawyer, you need to consider how to prepare their evidence itself, to be as persuasive as possible. Again, there is no magic to the relevant considerations.

- The lawyer should state the foreign law clearly and fairly.
- You should consider introducing into evidence copies of the foreign decisions relied on by the foreign lawyer in his explanation of the foreign law. While the court will not take the law directly from those decisions, it is tactically useful for the court to see that the foreign decisions actually say what the foreign lawyer says they say.

C. American Affidavits

In my experience, if your foreign lawyer is American and their evidence is to take the form of an affidavit, it will be important to spend some time explaining to them the format of the affidavit and the manner of its swearing which will be necessary for the affidavit to be admissible in the B.C. courts. B.C. and American evidentiary law in this area seem to be significantly different. American lawyers tend to have a much more casual attitude to swearing affidavits than their B.C. counterparts.

In particular it will be important to emphasize the following points:

- If the affidavit is to support an application for a final order, the supporting evidence must be on personal knowledge. Evidence on information and belief will not be admissible. You will have to emphasize to the American lawyer that they must have personal knowledge of everything set

out in the affidavit. If they do not, you will have to obtain additional affidavits from other deponents to cover off all the necessary facts. If the application is not for a final order, evidence on information and belief will be admissible, but the source of the information must be specifically stated in the affidavit.

- Under the B.C. *Evidence Act*, to be admissible in the B.C. courts, the affidavit must be sworn before a notary public for the jurisdiction in which the American lawyer is when they swear the affidavit. That is not normally a problem, as notaries public seem to be easily available in the U.S. But, the normal American practice to swear affidavits before other officials. American lawyers will not likely swear their affidavits before a notary public unless you bring this requirement to their attention.
- The deponent must sign the affidavit, and the notary public must sign, date and seal the affidavit, where indicated in the *jurat* on the last page.
- All the exhibits referred to in the affidavit must be physically attached to the text, and be identified by the deponent to the notary public, when the affidavit is sworn. And the notary public must sign, date and seal the “exhibit stamp” on the first page of each exhibit. This procedure will probably be totally foreign the American deponent. It is not uncommon for them to simply attach exhibits to the text of the affidavit after it has been sworn, without any identification by the person before whom the affidavit is sworn.

It is wise to review all these requirements with the American deponent before hand, and then to repeat them in the letter or email sending them the finalized affidavit for execution.

Failure to do so may well result in your receiving an inadmissible affidavit, and having to delay the hearing you need it for while the affidavit is properly resworn.

IV. Dealing with Foreign Letters of Request

This section of this paper deals with how to enforce (or resist the enforcement of) a foreign letter of request in B.C.

A. The Petition and Affidavit

Foreign letters of request are enforced in B.C. through a proceeding begun by petition under Rule 10 of the *Rules of Court*. (Precedents for such a petition and its supporting affidavit are in Appendix “B”.)

Normally the party to the foreign litigation which obtained and seeks to enforce the letter of request will be the petitioner in the B.C. proceeding.

The petition must name as respondents in that proceeding not only the proposed witness but also the other parties to the foreign litigation (*U.S. Securities & Exchange Commission v. Ono* (2001), 94 B.C.L.R. (3^d) 385 (S.C.)).

The petition must set out the order sought. It should do so in detail.

It should state that the witness is required to attend at a specific place, and at a specific time and date, to be examined.

If the letter of request requests that the witness be ordered to produce documents, those should be specifically identified. The order sought should also give a specific time and date by which the documents are to be produced, and identify the person to whom they are to be produced.

The order should appoint someone as commissioner before whom the examination is to take place. It may be wise for the order to spell out the commissioner’s responsibilities.

The order should include instructions for the court reporter recording the examination about what to do with the transcript.

If the examination is to be videotaped, that should be stated and instructions to the videographer about what to do with the videotape also included.

The petition must also state the facts on which it is based. To maximize the likelihood of the order sought in the petition being granted, and the letter of request therefore enforced, it is important that the facts be stated in a way which makes it clear that the factors relevant to the court's consideration of whether to enforce the letter rogatory are in fact present.

The petition must be supported by an affidavit containing evidence that the facts on which the petition is stated to be based are true. That affidavit must be sworn on the basis of personal knowledge, not information and belief, because the order sought will be a final order. Normally, it is possible for the petitioner's foreign counsel to swear that affidavit.

B. The Court's Discretion

Whether to enforce a foreign letter of request is in the discretion of the Supreme Court.

In exercising that discretion, the Court seeks to balance international comity, including the Court's desire to assist foreign courts, with the Court's concern about interference with Canadian sovereignty. The general rule is that the Court will enforce a foreign letter of request, unless to do so would be contrary to Canadian public policy or otherwise prejudicial to Canada's sovereignty or citizens (*Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 401).

Canadian courts have established the following specific factors to consider in weighing this balance of comity and sovereignty (*Re Friction Division Products Inc. and E.I. Du Pont de Nemours & Co. Inc.* (No. 2) (1986), 56 O.R. (2^d) 722 at 732 (H.C.J.)).

- The evidence sought must be relevant to the foreign litigation;
- The evidence must not be obtainable other than through the letter of request;
- The order sought in the petition must not be contrary to Canadian public policy;
- Any documents sought to be produced must be identified with reasonable specificity;
- The order sought must not be unduly burdensome on the proposed witness, having in mind what would be required of them if the foreign litigation were tried in Canada.

C. Trial v. Discovery

Previously, Canadian courts had generally refused to enforce foreign letters of request unless their purpose was to obtain evidence for use at trial, rather than as part of a discovery process. That is apparently still the case in Alberta. In other provinces, certainly B.C. and Ontario, the purpose of a foreign letter of request does remain a factor in the exercise of the court's discretion to enforce it, but it is no longer determinative. The key issue now is the impact the proposed examination will have on the proposed 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 the Canadian witness (*Campbell Estate v. Stenhouse*, [1995] B.C.J. No. 2304 (S.C.); *GST Telecommunications v. Provenzano*, [2000] B.C.J. No. 378 (S.C.)).

The extent of the burden on potential witnesses is often measured by comparing it to what would be required of them if the litigation was in Canada rather than the foreign court. (*Re Friction Division, supra*, at 734) Under the B.C. *Rules of Court*, a non-party can be ordered to disclose to the parties documents in their possession, control or power which are relevant to the issues in the action. A non-party witness who refuses to be interviewed or to answer written questions about their knowledge of relevant issues can be ordered to be examined under oath. Given those possibilities, in most cases, examination under letters of request is not a undue burden in comparison.

D. Partial Enforcement

Another relatively recent change in the enforcement of foreign letters of request is the court's willingness to partially enforce them. Previously, if the court found a letter of request unduly burdensome or objectionable in some other respect, it would simply refuse to enforce it, holding it had no ability to change the foreign court's request. More recently, the courts have dealt with this situation by placing limiting conditions on the enforcement of letters of request or only partially enforcing them (e.g., *GST Telecommunications, supra*).

E. The Commissioner

One of the issues an order enforcing a foreign letter of request must deal with is the identity of the "commissioner" before whom the examination of the witness is to take place. The commissioner's role is to:

- preside over the examination as a neutral officer of the court;
- administer the oath or affirmation to the witness;
- ensure the examination is conducted in accordance with the law specified by the B.C. court;
- deal with objections to questions as instructed by the B.C. court;
- seek further directions from the B.C. court if necessary.

In cases where the examination is not expected to be contentious it is my practice to have the letter of request that an official court reporter be appointed as commissioner, in effect combining the roles of reporter and commissioner. This keeps things simple and avoids unnecessary expense.

However, if there is any risk that the examination will be contentious, or that procedural or evidentiary rulings will actually be required of the commissioner, then it would be wise to appoint an experienced B.C. litigation lawyer as commissioner, so those issues can be properly dealt with. That will significantly increase the cost of the examination, but it may be necessary to ensure that it results in useable evidence.

There is authority for the appointment of a B.C. Supreme Court master as commissioner (*Ono, supra*). A B.C. Supreme Court judge should generally not be commissioner (*Cansulex Ltd. v. Perry* (1982), 37 B.C.L.R. 399 at 400 (S.C.)).

F. Governing Law

B.C. law is that the examination of a witness under a letter of request is to be governed by B. C. law and the law of the foreign jurisdiction, with B.C. law to prevail in the event of a conflict (*Ono, supra*).

This is a bit odd, because, although the examination is taking place by virtue of a B.C. court order, it is an examination in the foreign proceeding. There is a strong argument that, because its purpose is to produce evidence to be used in the foreign proceeding, it should be governed by the foreign law.

Many letters of request to the Supreme Court of B.C. come from U.S. jurisdictions. As I understand it, at least the U.S. *Federal Rules of Civil Procedure* permit the party calling a witness at a deposition to cross-examine that witness. That is generally what U.S. counsel are expecting to be able to do.

But that is not the effect of B.C. law. Under B.C. law the party seeking to enforce the letter of request is considered to call the witness being examined. The witness being that party's witness, that party's lawyer is only entitled (absent special circumstances) to examine the witness in chief, and may not cross-examine them or ask leading questions.

In my experience, most petitions to enforce foreign letters of request end up being unopposed. While the potential witness may initially be unwilling to be drawn into foreign litigation, once the foreign party goes to the extent of obtaining a letter of request and filing and serving a B.C. petition seeking to enforce it, they generally realize they are probably going to have to testify, and the debate turns to the logistical details of when, where and how that will take place. Eventually, the logistics are agreed and the petition is consented to or not opposed, or not heard at all.

For that reason, it is my practice to seek in the petition an order that the examination be governed by the law of the foreign jurisdiction and that the party calling the witness be permitted to cross-examine them. Generally, the proposed witness does not object to that. It is my practice to draw the unusual nature of that provision to the attention of the Court at the hearing of the petition. I have never had the court refuse to grant that order in those circumstances. However, in my view, if this term of the enforcing order were to be opposed, the Court would not likely grant it, and would instead order the examination to be governed by B.C. and foreign law, with B. C. to prevail in the event of a conflict, with the lawyer for the party obtaining the letter of request limited to examining the witness in chief.

It is important to note that, even if the examination is to be conducted according to B.C. law, the relevance of the questions on the examination is determined under the foreign law (*Ono, supra*). This is only common sense, because the evidence resulting from the examination is to be evidence in a foreign proceeding.

There is even authority for the referral of issues of relevance to the foreign court for resolution (*Ono, supra*). Although that may be logistically difficult, it makes more sense than referral to the B.C. court. Perhaps more sensible yet would be for the B.C. court to order the commissioner to resolve such issues according to the foreign law.

G. Documents

Often the real purpose of a party obtaining a foreign letter of request is not so much the examination of a witness as the production of documents by that witness or their employer. If so, the B.C. order enforcing the letter of request must allow sufficient time between the order being granted and the examination for the documents to be located produced, and reviewed by examining counsel. That is frequently one of the logistical matters for negotiation. Generally, in this situation the party obtaining the letter of request will want a term of the enforcing order that documents be produced by a particular date in advance of the witnesses' examination. This will require further lead time.

It may also be the situation that the party obtaining the letter of request already has a large number of relevant documents, disclosed in the foreign litigation. In that situation it may be the B.C. witness who wants to know in advance what documents they are going to be examined about. Again, that is often a matter for negotiation. The B.C. court will likely order the examining party to disclose to the witness in advance of the examination the documents on which they will be examined, if the witness requests it (*Ono, supra*).

The B.C. court is not likely to require a witness to disclose privileged documents (*Provenzano, supra*; *GST Telecommunications, supra*). Presumably it would not require them to answer questions of that nature either.

H. The Implied Undertaking

Note that B.C. 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 (*Hunt v. T & N, plc* (1995), 4 B.C.L.R. (3^d) 110 (C.A.)). The B.C. courts have applied this principle to evidence obtained by foreign letters of request, requiring the parties to use it only for the purposes of the foreign action in which the letter of request was issued. They have even required a counsel for the foreign parties to provide written undertakings to that effect (*Ono, supra*).

I. Witness Compensation

The issue of compensation for the witness is difficult. Under the B.C. *Rules of Court* a witness is entitled only to \$20 per day of examination. However, they are also entitled to “a reasonable sum” for necessary preparation to give evidence. That amount is entirely in the discretion of the court (*Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2^d) 124 at 128-30 (S.C.)). In cases where the witnesses have been lawyers and the issues have been complex, the B.C. court has been willing to allow significant amounts for witness preparation, although not based on the lawyer’s usual hourly rates (*Ono, supra*).

J. Counsel

The B.C. court has also been willing to allow witnesses to be represented by counsel at their examinations, 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 privilege and confidentiality (*GST Telecommunications, supra*). The court has not expressly required the examining party to pay for the witnesses’ counsel.

K. Timing

One practical consequence of the necessity for naming the other parties to the foreign litigation as respondents is that they will, presumably, not be residents of B.C. and will therefore, under the *Rules of Court*, have 28 days from service of the petition, in the case of U.S. residents, or 42 days, in the case of residents outside North America, to appear in response to the petition. That can significantly increase the time required from obtaining the foreign letter of request to actually conducting the examination of the witness. It usually takes around seven weeks from receipt of a letter of request from a U.S. court to conduct of the examination under it.

This can be a significant issue. Again, many letters of request directed to the B.C. courts come from U.S. courts. U.S. litigation tends to be more tightly managed than in B.C., and is common for there to be in place discovery cut-offs. U.S. counsel not often being aware of the time it takes to enforce a letter of request in B.C., it can often be difficult to have a petition heard and the examination conducted before the discovery cut-off, particularly if the witness is required to produce a significant volume of documents.

One way of dealing with that difficulty is to have the petitioner’s U.S. counsel raise the issue with U.S. counsel to the other U.S. parties. Frequently, the other U.S. parties are as anxious to have the letter of request enforced as the petitioner, and have no intention of opposing the petition or even appearing in response to it. In that event, it may be possible to obtain their agreement to waive the 28 days they would normally have to appear. They may even consent to the order sought in the petition. Armed with evidence of that sort of position, it is usually possible to have the petition heard within the time the other U.S. parties would normally have to appear. That can shorten the required timelines considerably.

V. Conclusion

The issuing of a B.C. letter of request and the enforcement in B.C. of a foreign letter of request are within the discretion of the Supreme Court of B.C. Paying attention to the factors governing the exercise of those discretions is crucial in dealing with letters of request.

There are also significant practical considerations in both those contexts, and in obtaining evidence of foreign law in B.C. litigation. Paying attention to those considerations is also important.

Dealing with those discretionary and practical considerations properly is the key to handling applications for B.C. letters of request and to enforce foreign letters of request, and to obtaining evidence of foreign law.

VI. Appendix A: Obtaining a B.C. Letter of Request

B.C. Reg. 221/90

COURT RULES ACT
SUPREME COURT RULES

Rule 38 – Depositions

RULE 38 – DEPOSITIONS**Examination of person**

- (1) By consent of the parties or by order of the court, a person may be examined on oath before or during trial, before an official reporter, or any other person the court may direct, in order that the deposition be available to be tendered as evidence at the trial.

[am. B.C. Reg. 147/95, s. 3.]

Grounds for order

- (2) In exercising its discretion to order an examination under subrule (1), the court shall take into account
- (a) the convenience of the person sought to be examined,
 - (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence,
 - (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial, and
 - (d) the expense of bringing the person to the trial.

Subpoena

- (3) Where a party is entitled to examine a person under this rule, by serving on that person or a party a subpoena in Form 21, the party may require the person or the party to bring to the examination
- (a) any document in the person's possession or control relating to the matters in question in the action, without the necessity of identifying the document, and
 - (b) any physical object in the person's possession or control which the examining party contemplates tendering at the trial as an exhibit, but the subpoena shall identify the object.

[am. B.C. Reg. 95/96, s. 12.]

Place of examination

- (4) Unless the court otherwise orders, or the parties to the examination consent, an examination under this rule shall take place at the office of an official reporter that is nearest to the place where the person to be examined resides.

[am. B.C. Reg. 136/2005, s. 4.]

Application of rule outside British Columbia

- (5) So far as is practicable this rule applies to the examination of a person residing outside British Columbia, and the court may order the examination of a person in the place and the manner it thinks just and convenient.

[am. B.C. Reg. 101/2001, s. 2.]

Where person willing to testify

- (6) If the person to be examined is willing to testify, the order shall be in Form 31 and the instructions to the examiner appointed in the order shall be in Form 32.

Where person not willing to testify

- (7) If the person to be examined is unwilling to testify, or if for any other reason the assistance of a foreign court is necessary, the order shall be in Form 33 and the letter of request referred to in the order shall be in Form 34.

Letter of request

- (8) Where an order is made under subrule (7), the letter of request shall be sent by the party obtaining the order to the Under Secretary of State for External Affairs of Canada (or, if the evidence is to be taken in Canada, to the Deputy Attorney General for the Province of British Columbia), and shall have attached to it
- (a) any interrogatories to be put to the witness,
 - (b) a list of the names, addresses and telephone numbers of the solicitors or agents of the parties, both in British Columbia and in the other jurisdiction, and
 - (c) a copy of the letter of request and any interrogatories translated into the appropriate official language of the jurisdiction where the examination is to take place and bearing the certificate of the translator that it is a true translation and giving his or her full name and address.

Filing of undertaking

- (9) The solicitor for the party obtaining the order shall file with the Under Secretary of State for External Affairs of Canada (or the Deputy Attorney General for the Province of British Columbia, as the case may be) his or her undertaking to be personally responsible for all the charges and expenses incurred by the Under Secretary (or the Deputy Attorney General, as the case may be) in respect of the letter of request and to pay them on receiving notification of the amount.

Notice of examination

- (10) Notice of examination of a person under this rule shall be given by the examining party delivering copies of the subpoena to the person to be examined and to all parties of record not less than 7 days before the day appointed for the examination.

Mode of examination

- (11) The examining party shall examine the witness, who shall be subject to cross-examination and re-examination.

Objection to question

- (12) If an objection is made to a question put to a witness in an examination under this rule, the question and the objection shall be taken down by the official reporter and the

validity of the objection may be decided by the court, which may order the witness to submit to further examination.

Recording of deposition evidence

- (13) Unless otherwise ordered, the deposition shall be recorded either by
- (a) the official court reporter in the form of questions and answers, or
 - (b) on videotape or film.

Perpetuating testimony

- (14) A person who, under the circumstances alleged by the person to exist, would become entitled, on the happening of any future event, to an estate or interest in property, the right or claim to which cannot by the person be brought to trial or hearing before the happening of the event, may apply by originating application for an order to perpetuate any testimony which may be material for establishing the right or claim by examination under this rule.

FORM 31

No. _____
Registry

In the Supreme Court of British Columbia

Between

Plaintiff

and

Defendants

**ORDER FOR EXAMINATION OF PERSONS
OUTSIDE THE JURISDICTION**

BEFORE) _____, the _____ day
) of _____, _____.

THE APPLICATION of the [party], coming on before me on [date] and upon hearing [name], counsel for the applicant, and [name], counsel for the [party]:

THIS COURT ORDERS that [name], of [address], is appointed an examiner for the purpose of taking the examination, cross-examination, and re-examination orally, on oath or affirmation, of [name and address of persons to be examined on part of party] and of any other persons as the solicitors or agents of the parties shall mutually request the examiner in writing to examine, at [city] in [name of province, state or county]:

AND FURTHER ORDERS that the solicitor for the applicant give to the solicitor of each of the other parties [no. of days] days notice in writing of the date on which the solicitor proposes to send this order to the examiner for execution, and that [no. of days] days after delivery of the notice the solicitors for the parties respectively exchange the names of their solicitors or agents at [address], to whom notice relating to the examination of the persons may be sent:

AND FURTHER ORDERS that [no. of days] days notice (exclusive of Saturday and Sunday) before the examination of any person shall be given by the examiner to the solicitor or agent of each of the parties and to each person to be examined unless the notice is waived:

AND FURTHER ORDERS that the examination be conducted in accordance with the enclosed instructions, with such modifications as may be necessary:

AND FURTHER ORDERS that the depositions, together with any document referred to in them, or certified copy of or extract from the document be sent forthwith by the examiner to the Registrar of the Supreme Court of British Columbia at the courthouse at [address], who shall deliver the depositions and documents to the applicants and provide copies to any party on request.

By the Court.

_____ Registrar

APPROVED AS TO FORM:

Solicitor for the _____

Solicitor for the _____

FORM 32

No. _____
Registry

In the Supreme Court of British Columbia

Between

Plaintiff

and

Defendants

INSTRUCTIONS TO EXAMINER

To: [name]
[address]

You have been appointed Examiner to take the evidence of [name]. A copy of the order appointing you is attached. The law of British Columbia will apply to the taking of this evidence.

The party wishing to examine [name] before you is required to serve [him / her] with a subpoena and tender the proper fees not less than [no. of days] days before the date you fix for the examination.

The witness and any interpreter will be sworn or affirmed in accordance with the form set out below.

After the examination has been held and the evidence transcribed and the transcript certified by you as correct, you are to send the deposition and other documents by registered mail to the registrar, courthouse [address].

OATH (OR AFFIRMATION) OF WITNESS

Do you swear that the evidence that you will give in these proceedings shall be the truth, the whole truth, and nothing but the truth, so help you God?

(Or)

Do you affirm that the evidence that you will give in these proceedings shall be the truth, the whole truth, and nothing but the truth?

INTERPRETER'S OATH

Will you truly, faithfully, and without partiality to any party in this proceeding, and to the best of your ability, interpret and translate any oath or affirmation that will be administered and all questions that may be asked of any witness and his or her answers, so help you God?

DATED: [date]

«Lawyer_Name»
Solicitor for the [Party(ies)]

FORM 33

No. _____
Registry

In the Supreme Court of British Columbia

Between

Plaintiff

and

Defendants

**ORDER FOR ISSUE OF A LETTER OF REQUEST TO
JUDICIAL AUTHORITY OF ANOTHER JURISDICTION**

BEFORE THE HONOURABLE

)
)
)

_____, the ____ day

of _____, _____.

UPON THE APPLICATION of the [party(ies)], coming on before me on [date] and upon hearing [name of counsel], counsel for the applicant[s], and [name of counsel], counsel for the [party(ies)]:

THIS COURT ORDERS that the attached letter of request be issued:

AND FURTHER ORDERS that the registrar, on receipt of the deposition taken pursuant thereto, shall deliver them to the applicant[s] and provide copies to any party on request.

By the Court.

Registrar

APPROVED AS TO FORM:

Solicitor for the [Party(ies)]

Solicitor for the [Party(ies)]

FORM 34

No. _____
Registry

In the Supreme Court of British Columbia

Between

Plaintiff

and

Defendants

**LETTER OF REQUEST FOR EXAMINATION
OF WITNESS OUT OF JURISDICTION**

To the judicial authority of _____ in the _____ of _____.

Whereas this proceeding is now pending in the Supreme Court of British Columbia in which the plaintiff claims _____:

And whereas it appears to me that it is necessary for the purposes of justice and for the due determination of the matters in question between the parties that the following persons should be examined upon oath or affirmation relating to those matters, namely _____, of _____, and _____, of _____, and such other persons

as the solicitors or agents of the parties shall mutually request you in writing to examine, and it appears that persons are residents within your jurisdiction:

Now I, _____, a Judge of the Supreme Court of British Columbia, hereby request that, for the assistance of the court, you will be pleased to summon the solicitors or agents of the parties and the witnesses to be examined, to attend at such time and place as you shall appoint, either before you or such other person as according to your procedure is competent to take the deposition examination of witnesses, and that you will cause the witnesses to be examined orally or by interrogatories relating to the matters in question, in the presence of the

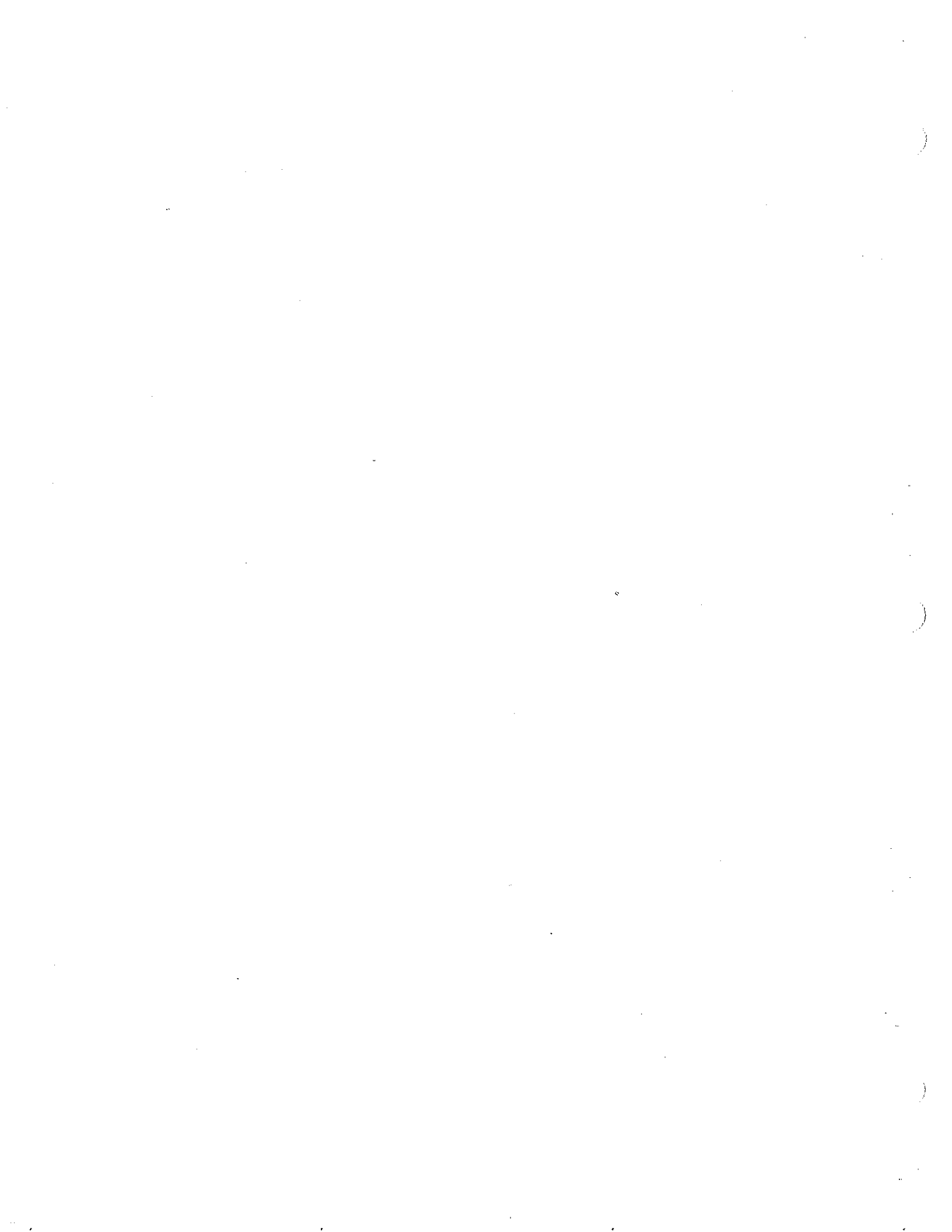
solicitors or agents of the parties or such of them as shall, on due notice given, attend the examination:

And I further request that you permit the solicitor or agent of any party present to examine any witness called by the solicitor or agent and the solicitor or agent of any opposing party to cross-examine the witness and the solicitor or agent of the party calling the witness to re-examine the witness:

And I further request that you will be pleased to cause the evidence of each witness to be recorded verbatim, and any document produced on the examination to be marked for identification, and that you will be further pleased to authenticate the depositions taken on the examination and any document, or certified copy of the same or any extract therefrom by the seal of your tribunal or in such other way as is in accordance with your procedure, and to return the same, together with any interrogatories and a note of the charges and expenses payable in respect of the execution of this request to the Under Secretary of State for External Affairs of Canada at Ottawa, Canada [*or, if the judicial authority to whom the letter is addressed is in Canada, to the Deputy Attorney General for the Province of British Columbia, Parliament Buildings, Victoria, British Columbia*], for transmission to the Registrar of the Supreme Court of British Columbia at the courthouse at _____.

Dated _____

A Judge of the Supreme Court
of British Columbia



VII. Appendix B: Enforcing Foreign Letters of Request—Precedents

No.
Vancouver Registry

In the Supreme Court of British Columbia

Re: Section 53 of the *Evidence Act*, R.S.B.C. 1996, c.124 and
Section 46 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5

Re: Commission to Examine Witnesses and Compel Production
of Documents Issued by the United States District Court for the Southern District of Ohio

Between

The Board of County Commissioners of
Hamilton County, Ohio

Petitioner

and

Steel Service Corporation, Harold Davies, Wayne Trask,
Rudy Derton and Paramount Detailing Service (1987) Ltd.

Respondents

PETITION TO THE COURT

THIS IS THE PETITION OF:

The Board of County Commissioners of Hamilton County, Ohio
c/o Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
Vancouver, B.C. V7X 7T2
Attention: Stephen Antle

ON NOTICE TO:

Steel Service Corporation
c/o Mockbee, Hall & Drake, P.A.
The Lamar Life Building
317 East Capitol Street, Suite 1000
Jackson, Mississippi

United States of America
Attention: Mary Elizabeth Hall

Harold Davies
938 Selkirk Street,
Coquitlam, British Columbia
V3J 6E5

Wayne Trask
c/o Paramount Detailing Service (1987) Ltd.
Suite F, 7850 Edmonds St.
Burnaby, British Columbia
V3N 1B8

Rudy Derton
4881 Skyline Drive
North Vancouver, British Columbia
V7R 3J2

Paramount Detailing Service (1987) Ltd.
Suite F, 7850 Edmonds St.
Burnaby, British Columbia
V3N 1B8

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the petitioners apply to the court for the relief set out in this petition.

IF YOU WISH TO BE HEARD at the hearing of the petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the petitioners' address for delivery, which is set out in this petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the petitioners may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR RESPONSE

IF YOU WISH TO RESPOND to the application, you must, on or before the 8th day after you have entered an appearance,

- (a) deliver to the petitioner
- (i) 2 copies of a response in Form 124, and
- (ii) 2 copies of each affidavit on which you intend to rely at the hearing,

and

- (b) deliver to every other party of record
- (i) one copy of a response in Form 124, and
- (ii) one copy of each affidavit on which you intend to rely at the hearing.

(1)	The address of the registry is: 800 Smithe Street Vancouver, B.C. V6Z 2E1
(2)	The ADDRESS FOR DELIVERY is: Borden Ladner Gervais LLP 1200 Waterfront centre 200 Burrard Street P.O. Box 48600 Vancouver, B.C. V7X 1T2 Attention: Stephen Antle Fax number for delivery (if any): None
(3)	The name and office address of the petitioner's solicitor is: Stephen Antle Borden Ladner Gervais LLP 1200 Waterfront Centre 200 Burrard Street P.O. Box 48600 Vancouver, B.C. V7X 1T2

The petitioner applies for an order that:

1. The respondent Harold Davies, on his own behalf, and as representative of the respondent Paramount Detailing Service (1987) Ltd., be examined on commission before a commissioner in the manner and form requested by the Letter Rogatory made on January 17, 2006 by the United States District Court for the Southern District of Ohio (the "Ohio Court"), in Case No. 1:04cv227, under the style of proceeding of *Steel Service Corporation v. Board of County Commissioners of Hamilton County, Ohio* (the "Ohio Action").

2. The respondent Harold Davies attend the offices of Borden Ladner Gervais LLP, 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, Canada V7X 1T2, on February 7, 2006 from the hour of 9:00 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 his examination is complete, or on such other dates and at such other times as the court may direct or the parties agree.

3. The respondent Harold Davies produce to counsel for the petitioner and the respondent Steel Service Corporation by 4:00 p.m. February 6, 2006 all the documents in his possession or control, and that of the respondent Paramount Detailing Service (1987) Ltd., specified in Schedule A to this petition.

4. The respondent Rudy Derton attend the offices of Borden Ladner Gervais LLP, 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, Canada V7X 1T2, on February 8, 2006 from the hour of 9:00 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 his examination is complete, or on such other dates and at such other times as the court may direct or the parties agree.

5. The respondent Rudy Derton produce to counsel for the petitioner and the respondent Steel Service Corporation by 4:00 p.m. February 6, 2006 all the documents in his possession or control specified in Schedule A to this petition.

6. The respondent Wayne Trask attend the offices of Borden Ladner Gervais LLP, 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, Canada V7X 1T2, on February 8, 2006 from the hour of 9:00 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 his examination is complete, or on such other dates and at such other times as the court may direct or the parties agree.

7. The respondent Wayne Trask produce to counsel for the petitioner and the respondent Steel Service Corporation by 4:00 p.m. February 6, 2006 all the documents in his possession or control specified in Schedule A to this petition.

8. Barbara Mulek, Official Court Reporter, or her designate, be appointed commissioner before whom the evidence is to be taken.

9. Barbara Mulek, or her designate:

- (a) preside over the examinations as a neutral officer of the court;
- (b) administer the oath or affirmation to the witnesses;
- (c) ensure the examinations are conducted in accordance with the Federal Rules of Civil Procedure and permit the attorneys or agents of any party present, including members of the Ohio bar, to examine and cross examine the witnesses;
- (d) note any objections to questions at the examination, require the witness to answer the questions objected to notwithstanding the objections, and refer those questions, objections and answers to the Ohio Court for resolution; and
- (e) seek such further directions from the court as may be necessary.

10. The evidence of the respondents Harold Davies, Rudy Derton and Wayne Trask be recorded verbatim by an Official Court Reporter, and the Official Court Reporter mark for identification any documents produced on the examinations, authenticate the transcripts of the examinations and any documents or copies thereof, and send the transcripts and documents by registered or certified mail to:

Mr. Phillip J. Smith
Vorys, Sater, Seymour and Pease LLP
Suite 2000, Atrium Two
221 East Fourth Street
Cincinnati, OH 45202
United States of America

11. The examination of the respondents Harold Davies, Rudy Derton and Wayne Trask be videotaped, and the videotapes sent by registered or certified mail to:

Mr. Phillip J. Smith
Vorys, Sater, Seymour and Pease LLP
Suite 2000, Atrium Two
221 East Fourth Street
Cincinnati, OH 45202
United States of America

The petitioner will rely on section 53 of the *Evidence Act*, R.S.B.C. 1996, c.124, as amended, section 46 of the *Canada Evidence Act*, R.S.C. 1985, c.C-5, as amended, and Rule 10(1)(a) of the Rules of Court.

At the hearing of this petition will be read the affidavit of Ward B. Washington, sworn January 23, 2006, a copy of which is served herewith.

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

Background

1. The Ohio Action arises from a contract awarded by the petitioner Hamilton County to the respondent Steel Service Corporation in 2000 for the detailing, fabrication and erection of structural steel for the construction of the Great American Ball Park in Cincinnati, Ohio (the "Ball Park project").

2. Paramount Detailing Service Inc., a Nevada corporation, was one of Steel Service's subcontractors on the Ball Park project. The respondent Paramount Detailing Service (1987) Ltd. actually performed the work under that subcontract.

3. Steel Service, as plaintiff, began the Ohio Action against Hamilton County, as defendant, on March 29, 2004, claiming breach of express and implied contractual obligations.

and breach of implied warranty of adequacy of plans and specifications. Steel Service claims damages in excess of US\$5 million.

4. Steel Service alleges, among other things, that it accelerated its performance on the Ball Park project after being delayed by inadequate designs and design changes, and by other acts or omissions of the Ball Park design team, Hamilton County and/or its agents. It claims numerous categories of resulting damages.

5. On May 17, 2004, Hamilton County filed its answer in the Ohio Action, generally denying most of the allegations asserted in Steel Service's complaint, and asserting affirmative defenses. Hamilton County alleges that Steel Service's inability or refusal to perform in accordance with its contractual obligations was a direct and proximate result of Steel Service's own acts and omissions, as well as those of its subcontractors.

6. Hamilton County also counterclaimed against Steel Service for breach of contract, breach of express warranty and breach of contract for indemnification and assumption of liability for damages. Hamilton County claims damages in excess of US\$7 million.

7. Hamilton County alleges that Steel Service not only caused its own delays, but its delays also caused Hamilton County to suffer substantial damages in the form of additional costs for the compression and acceleration of concurrent and follow-on trade contractors' schedules to overcome those delays.

8. The Ohio Court is a court of competent jurisdiction in the Ohio Action.

9. Neither Paramount Detailing Service Inc. nor Paramount Detailing Service (1987) Ltd. are parties to the Ohio Action.

The Letter Rogatory

10. On January 17, 2006 the Ohio Court issued a Letter Rogatory in respect of the respondents Harold Davies, Rudy Derton, Wayne Trask and Paramount Detailing Service (1987) Ltd. to the Supreme Court of British Columbia on the application of Hamilton County.

11. The Ohio Court had the authority to order the taking of evidence outside its jurisdiction in the circumstances.

12. All parties to the Ohio Action received proper notice under Ohio and U.S. Federal law of the application to the Ohio Court for the order for issuance of the Letter Rogatory. None had any objection to the issuance of the Letter Rogatory.

13. All of the evidence Hamilton County seeks to obtain in this proceeding is directly relevant to issues in the Ohio Action, as set out below.

14. Harold Davies, Rudy Derton, Wayne Trask and Paramount Detailing Service (1987) Ltd. are outside the jurisdiction of the Ohio Court and are residents of British Columbia, Canada.

15. Phillip J. Smith, counsel for Hamilton County in the Ohio Action, is prepared to attend in Vancouver to conduct examinations of Harold Davies, Rudy Derton and Wayne Trask, and to do so at Hamilton County's expense.

16. The testimony of Harold Davies, Rudy Derton and Wayne Trask, and the identification of the relevant documents in evidence, are necessary for the proper prosecution of the Ohio Action.

Documents Relevant to Steel Service's Claim

17. Steel Service's allegation that the sole cause of the delays was outside its control and that of its subcontractors places directly in issue the timing and flow of information between Paramount and other members of the Ball Park construction team, Paramount's performance, Paramount's internal detailing procedures and practices, and Paramount's detailing errors and omissions (Schedule A, items 1, 2 and 12-15).

Documents Relevant to Paramount's "Sponsored" Claim

18. Steel Service includes in its claim for damages in the Ohio Action the "sponsored" claims of two of its subcontractors, including a claim in excess of US\$700,000 on behalf of Paramount.

19. Although Hamilton County maintains that Steel Service has no legal ability under Ohio law to sponsor these claims, the issue remains open in the Ohio Action.

20. Paramount's sponsored claim includes such categories of damages as "inefficiency due to excessive overtime," "increased risk of error," "inefficiency as a result of RFI's and lack of complete design information" and "unabsorbed overhead." The documents and evidence sought are directly relevant to Paramount's entitlement to and quantification of those damages (Schedule A, items 1-15).

21. If Paramount's claim can be sponsored by Steel Service in the Ohio Action, then documents relating to Paramount's actual costs are relevant to the existence and quantum of its damages. Hamilton County seeks evidence of those actual costs (Schedule A, items 2-10) and the basis for Paramount's claimed damages (Schedule A, items 1, 8 and 11-15).

22. In its claim for "unabsorbed overhead" Paramount seeks to recover a percentage of the overhead expenses of "Paramount Group", which apparently consists of several legal entities. Hamilton County seeks evidence relating to the contractual and legal relationships between the "Paramount Group" entities and Steel Service Corporation (Schedule A, items 2-4, 8-12 and 15).

23. Paramount's calculation of damages apparently utilizes the overhead and drafting costs, among other categories of financial and accounting information, of all of the "Paramount Group" of entities. In order to analyze Paramount's claimed damages, Hamilton County needs to review the source documents for the summaries and calculations of Paramount's claimed damages (Schedule A, items 2-10).

Paramount's Payroll Records

24. Hamilton County has obtained from Steel Service in the Ohio Action some Paramount payroll records. Those documents have raised significant concerns about their authenticity. For example, Paramount submitted to Steel Service timecards for a full complement of staff working in Canada on Canadian Thanksgiving, on which witnesses will testify that no Paramount employees worked. In addition, although Paramount was working on other projects at

the same time as the Ball Park project, the records Paramount submitted to Steel Service show workers working exclusively on the Ball Park project for the same hours every day for months.

25. Steel Service has since reported to Hamilton County that Paramount: (1) has lost its payroll records; and (2) has no contact information for any of its employees who worked on the Ball Park project.

26. Hamilton County needs to see Paramount's complete payroll and financial records (Schedule A, items 2-10) to investigate Paramount's claim with the Paramount employees whose time it billed to the Ball Park project (Schedule A, items 6-8).

Paramount's Email Records

27. Steel Service claims that it has deleted from its servers all e-mail correspondence related to the Ball Park project and can no longer disclose these documents to Hamilton County in the Ohio Action. Paramount, or the proposed witnesses, may have retained e-mail correspondence with Steel Service that is relevant to the parties' claims and defenses in the Ohio Action but has been destroyed by Steel Service (Schedule A, item 1).

Hamilton County's Efforts to Obtain Paramount's Documents in Ohio

28. Steel Service has produced to Hamilton County in the Ohio Action some Paramount documents that Paramount voluntarily forwarded to it, but has reported that Paramount refuses, or is unable, to voluntarily produce further documents.

29. Hamilton County has sought to have the Ohio Court order Paramount to produce further documents relevant to its claim, but the Ohio Court has held that Paramount is not a party to the Ohio Action, is beyond its jurisdiction and cannot be compelled by it to produce documents.

30. Paramount will not voluntarily submit to the jurisdiction of the Ohio Court, or give testimony or produce further documents in Ohio.

The Witnesses

31. The respondent Harold Davies is the president of Paramount Detailing Service (1987) Ltd. It appears from documents disclosed in the Ohio Action that he communicated with Steel Service on behalf of Paramount throughout Paramount's involvement on the Ball Park project, including regarding its sponsored claim against Hamilton County. The County's counsel therefore believes he is likely to have evidence and documents about that claim (Schedule A, items 1-15).

32. The respondent Wayne Trask is one of Paramount's primary detailer supervisors. It appears from documents disclosed in the Ohio Action that he communicated with Steel Service on behalf of Paramount throughout Paramount's involvement on the Ball Park project, was a supervisor of Paramount's detailers in Canada, was involved with creating time records related to work on the Ball Park project and assisted in the preparation of Paramount's claim. The County's counsel therefore believes he is likely to have evidence and documents about actual costs incurred, any delays caused or suffered by Paramount, and the facts and analysis underlying Paramount's claim (Schedule A, items 1-15).

33. The respondent Rudy Derton was Paramount's accountant during and after its involvement with the Ball Park project. It appears from documents disclosed in the Ohio Action that he handled Paramount's accounting and cost reports, and was involved in the preparation of Paramount's claim against Hamilton County. The County's counsel therefore believes he is likely to have relevant evidence and documents about that claim (Schedule A, items 1-10, 12, and 15).

34. The County's counsel believes, from documents disclosed in the Ohio Action, that Harold Davies, Wayne Trask and Paramount are likely to have evidence of the terms of any agreements between Paramount and Steel Service related to the Ball Park project and the Ohio Action, including regarding Steel Service's sponsorship of Paramount's claim against Hamilton County (Schedule A, items 1, 2 and 15), Paramount and Steel Service's performances under these agreements (Schedule A, items 1, 2, 12 and 15) and Paramount's entitlement to compensation under them (Schedule A, items 14 and 15).

35. Hamilton County's counsel believes, from documents disclosed in the Ohio Action, that Harold Davies and Wayne Trask have evidence regarding the existence and cause of

delays in the completion of Paramount and Steel Service's performance, as well as delays to other trade contractors (Schedule A, items 1, 2, 10, and 12-14). The cause of delays on the project is relevant to both Steel Service's claim that it was not the cause of its own delays and to Hamilton County's claim that Steel Service is not only responsible for its own delays, but also for the resulting delays to concurrent and follow-on trade contractors.

36. Harold Davies, Rudy Derton, Wayne Trask and Paramount will not voluntarily submit to the jurisdiction of the Ohio Court, or give testimony or produce documents in Ohio.

The petitioner estimates that the application will take 30 minutes.

DATED: January 24, 2006

Stephen Antle
(BORDEN LADNER GERVAIS LLP)
Solicitor for the Petitioner The Board of
County Commissioners of Hamilton County,
Ohio.

Schedule A

1. All e-mails or electronic documents relating in any way to: (a) any facts underlying Steel Service's claims or defenses in the Ohio Action; (b) any facts underlying the letter dated May 14, 2000 to James A. Simonson from Harold Davies, attached hereto as Exhibit "A"; or (c) any delays, acceleration, schedules, manpower and/or staffing, management, design "freezes", backcharges, or claims relating in any way to the design or construction of the Great American Ball Park in Cincinnati, Ohio (the "Ball Park project").
2. All documents consulted or relied upon in any way in the preparation of the letter to James A. Simonson from Harold Davies dated May 14, 2002, attached hereto as Exhibit "A".
3. All annual financial statements for the years 2000, 2001, 2002 and 2003 for: (a) the entities described as "Paramount Detailing", "Parawest (1987)", and "Paraland" in the document attached hereto as Exhibit B; (b) Paramount Detailing Services Inc.; (c) Paramount Detailing Service (1987) Ltd.; and (d) any other person or entity that performed work on or for the Ball Park project (collectively, the "Paramount entities").
4. Any and all Federal Tax returns for all Paramount entities for the years 2000, 2001, 2002 and 2003.
5. All documents related to the calculation, collection or payment of Goods and Services Tax, including returns and any other documents evidencing any calculation of or claim for Input Tax Credits for any Paramount entity, for the years 2001, 2002 and 2003.
6. All time records, time cards and year-to-date payroll registers (by employee) for all persons performing work related to the Ball Park project and forms T4, TD1 and all records of employment issued or related to any and all such employees for the years 2000, 2001, 2002 and/or 2003.
7. All documents containing contact information for persons, including employees and subcontractors, who performed work on, for, or related to the Ball Park project.
8. All documents evidencing payments related to work performed by any person or entity on or for the Ball Park project.
9. All detail general ledgers for any and all Paramount entities for the years 2000, 2001, 2002 and 2003.
10. All job cost records for 2001 and 2002, for all projects performed by any Paramount entity or entities.
11. All documents constituting or relating to any contract or agreement related to Steel Service, the Ball Park project or any claims, damages or potential recovery in the Ohio Action.
12. All correspondence to or from James A. Simonson, Larry Cox, Steel Service Corporation, L. Ray Vinson, or any of their respective agents or attorneys, that is related in any way to the Ohio Action, or to delays, acceleration, claims or payments associated with the Ball Park project.

13. All documents regarding any drafting or detailing procedure(s) utilized by any Paramount entity on the Ball Park project (including all instructions, handbooks or other documents related to any design, drafting or detailing software used by any Paramount entity, Steel Service or any other individual or entity, on the Ball Park project).
14. All documents constituting or relating to any "NFCs" or "Notice of Field Corrections" relating to the Ball Park project.
15. All documents constituting or relating to any claims or backcharges made against any Paramount entities by Steel Service Corporation.

No.
Vancouver Registry

In the Supreme Court of British Columbia

Re: Section 53 of the *Evidence Act*, R.S.B.C. 1996, c.124 and
Section 46 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5

Re: Commission to Examine Witnesses and Compel Production
of Documents Issued by the United States District Court for the Southern District of Ohio

Between

The Board of County Commissioners of
Hamilton County, Ohio

Petitioner

and

Steel Service Corporation, Harold Davies,
Wayne Trask, Rudy Derton and Paramount
Detailing Service (1987) Ltd.

Respondents

PETITION

SA

BORDEN LADNER GERVAIS LLP

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P.O. Box 48600

Vancouver, British Columbia

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Telephone: (604) 687-5744

Attn: Stephen Antle

W.B. Washington #1
January , 2006

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Respondents

AFFIDAVIT

I, Ward B. Washington, attorney at law, of 221 East Fourth Street, Suite 2000, Atrium Two, in the City of Cincinnati, in the State of Ohio, in the United States of America, MAKE OATH AND SAY AS FOLLOWS:

1. I am an attorney employed by the law firm of Vorys, Sater, Seymour and Pease LLP, counsel to the petitioner The Board of County Commissioners of Hamilton County, Ohio (the "County") in case number 1:04cv227 in the United States District Court, Southern District of Ohio, Western Division (the "Ohio Court"), under the style of proceeding of *Steel Service Corporation v. Board of County Commissioners of Hamilton County, Ohio* (the "Ohio Action"). I have conduct of the Ohio Action on behalf of the County with my colleague Phillip J. Smith. As such I have personal knowledge of the facts deposed to in this affidavit.

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