THE SEDONA CONFERENCE® WORKING GROUP SERIES℠

WGS℠

THE SEDONA CANADA™ COMMENTARY ON:

Enforcing Letters Rogatory Issued By an American Court in Canada: Best Practices & Key Points to Consider

A Project of The Sedona Conference®
Working Group 7 ("Sedona Canada™")

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THE SEDONA CANADA™ COMMENTARY ON ENFORCING LETTERS ROGATORY ISSUED BY AN AMERICAN COURT IN CANADA: BEST PRACTICES & KEY POINTS TO CONSIDER

A Project of The Sedona Conference® Working Group 7 ("Sedona Canada™")

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Preface

Welcome to another major publication in The Sedona Conference® Working Group Series℠ (WGS℠): *The Sedona Canada™ Commentary on Enforcing Letters Rogatory Issued By an American Court in Canada: Best Practices & Key Points to Consider.*

This effort is a product of our Sedona Canada™ Working Group (WG7) and represents the collective expertise of a diverse group of lawyers offering the considered perspectives of the private sector, the public sector, trial lawyers, and inside counsel. This Commentary was originally conceived in 2009 as one of a series of Commentaries expanding upon the release of *The Sedona Canada™ Principles* in 2008. A Working Group was formed and a meeting was held in Vancouver in September 2009. It was recognized that, due to the close connections between the United States and Canada, it is frequently the case that litigants in one country require access to evidence or information in the other country, and that much of this information is stored electronically. It became clear that counsel and courts in both countries would benefit from a detailed consideration of the differences between the two systems and the development of recommended best practices when enforcing letters rogatory in Canada. An extensive process of consultation, dialogue, and drafting then ensued, culminating in the current version of the Commentary.

On behalf of The Sedona Conference®, I want to thank the drafting team, the Editorial Board, and all WG7 members whose comments contributed to this Commentary and for all of their efforts to make this work product as helpful as possible. I especially want to acknowledge the contributions to the overall success of this project made by Ron Hedges, Ian MacGregor, Master Calum MacLeod, Stephen Maddex, Karim Renno, and Andrew Wilkinson, who assumed lead roles in the development of this Commentary.

As with all of our WGS℠ publications, this Commentary is first being published as a "public comment version." After sufficient time for public comment has passed, the editors will review the public comments, and to the extent appropriate, make revisions. The Commentary will then be re-published in "final" version, subject, as always, to future developments in the law that may warrant a second edition.

We hope our efforts will be of immediate and practical assistance to lawyers, judges, and others involved in the legal system. If you wish to submit a comment, please utilize the "public comment form" on the download page of our website at www.thesedonaconference.org. You may also submit feedback by emailing us at rgb@sedonaconference.org.

Richard G. Braman
Board Chair
The Sedona Conference®
June 2011

I. Introduction

Due to the very close economic and cultural ties between Canada and the U.S., it is quite common for legal disputes that occur in the American court system to spill over into Canada. One of the most common examples of this spillover occurs when there are documents or witnesses to an American action in Canada. It many cases, the evidence is provided on consent, however, where the witness in Canada will not, or is not in a position to, provide the evidence voluntarily, the litigants must look to courts in Canada for assistance.

Assistance from a Canadian court is required because an American court or procedural law has no jurisdiction or application in Canada. The mechanism used to request assistance from courts in Canada is through the issuance of letters rogatory, also referred to as letters of request. In this commentary, the focus will be on the U.S. and Canada, however, it should be noted that the process in Canada would be the same regardless of the location of the foreign court.

While the Canadian and American legal systems are similar, there are significant differences in procedural and substantive laws. These differences often cause confusion and misunderstanding for all involved when evidence located in Canada is sought by American counsel. This commentary is intended to provide judges and lawyers with some key points and best practices to consider with respect to the enforcement of letters rogatory in Canada. It may be a useful primer for American counsel who often are troubled by the fact that they cannot readily obtain evidence from a Canadian resident even after a formal request has been ordered by the American court. Further, American judges and counsel may review the commentary to gain an understanding of what a Canadian court will consider in the analysis of whether to grant a request.

This commentary will begin with recommended best practices and issues to be considered by the parties, and will then review the key differences in the legal systems regarding discovery, and provide an overview of the applicable Canadian legal principles and legal test that will be considered by a Canadian court.

II. Proposed Best Practices

While not exhaustive, the following recommendations outline issues to be considered in letters rogatory applications, and can be helpful in guiding the parties in preparing the moving and responding application materials and supporting affidavit evidence.

1. In determining whether to enforce the letters rogatory, Canadian courts and Canadian counsel should take into account that the American court issuing the letters rogatory may have done so in a perfunctory manner without consideration of the matters at issue or testing the evidence relied on in support of the request. The Canadian court is required to exercise its discretion, and in doing so, must reach its own conclusion with respect to the necessity and relevance of the information requested. The applicant will require affidavit evidence establishing the relevance and need of the evidence sought.

2. The application record and supporting affidavit evidence must set out sufficient evidence establishing i) the factual basis for the statements made in the letters rogatory with respect to relevance, need, and burden; ii) the efforts to obtain the information from domestic sources; and, iii) evidence that the information sought is not otherwise available, even in a different format.

3. The scope of the request needs to be as narrow as possible to reduce the potential burden on the non-party.

4. Any documents sought must be set out with as much specificity as possible and must not be vague or too wide ranging.

5. Canadian counsel should consider whether there exist any blocking statutes or other legal issues such as privilege that would prevent the Canadian court from enforcing the letters rogatory. This is particularly so if any of the information contains any private information about an identifiable individual.

6. In determining whether the information requested is otherwise available, the courts generally will take into account any scheduling orders in place in the American litigation and, any reasonable attempts by the requesting party to seek amendment of the American scheduling order. Counsel however are strongly advised to factor time needed for letters rogatory applications in Canada as the Canadian court will not place undue burdens on non-parties due to timetables in foreign jurisdictions.

7. It must be remembered that the implied undertaking does not exist in the US, and the statutory immunities from use in subsequent criminal and civil proceedings are different**.** Where this is an issue for the non-party, the orders should contain specific clauses to provide protection to the Canadian resident more closely in line with the implied undertaking rule, and the statutory immunities applicable to witnesses testifying in Canadian proceedings. Examples might include requiring the American litigants to destroy all copies of documents produced and all transcripts of testimony provided by the Canadian witness at the conclusion of the American litigation or to execute release and indemnity agreements in

favour of the Canadian witness with respect to any and all claims or causes of action that might arise on the basis of information obtained from the Canadian witness. Assurances may be sought from the U.S. court regarding the immunities to be granted to witnesses giving evidence in response to the letters rogatory. Further, Canadian courts should consider requiring the requesting party to file the Canadian order with the American court, and to provide proof to the Canadian witness that it has done so, so that the American court is aware of the conditions imposed by the Canadian court with respect to allowing the requesting party to obtain evidence from the Canadian non-party witness.

8. It may be appropriate for a party to seek an interim decision or adjournment to address any concerns raised and to allow the request to be revised and further evidence filed, if appropriate. As well, court-to-court communication with the participation of counsel has become a useful tool in cross-border proceedings and should be considered in some contexts. If the American judge who issued the letters rogatory has ongoing control over the case, will conduct the trial of the matter, and will determine whether the information requested will be relevant to the matters in dispute, initiating a dialogue with the American judge could be an important way to resolve the Canadian judge's concerns about the relevance and necessity of the evidence sought and/or any prejudice to the Canadian non-party witness.

9. The procedure for the oral examinations and the process for resolution of objections to questions should be discussed beforehand. Witnesses will be able to rely on Canadian law to object to improper questions based on relevance, privilege and proportionality.

10. Lastly, where the documents sought are voluminous and/or in electronic form, the parties should consider preparing a detailed plan having regard to *The Sedona Canada™ Principles Addressing Electronic Discovery.*

III. Legal Differences

The rules governing discovery in the U.S. court system are different from the rules governing discovery in Canada.[1, 2] As a consequence, when parties are seeking the assistance of Canadian courts to give effect to letters rogatory issued by a court in the U.S., understanding some of the fundamental differences will provide valuable insight. The differences include the scope of discovery, ability to obtain discovery from non-parties, subsequent use of the evidence, and objections to questions on discovery.

It is important for counsel on both sides of the border to remember that the Canadian legal process and principles will apply to determine if the evidence should be compelled.

A. Scope of Discovery

Historically, the scope of what is discoverable in the U.S. is generally broader than in Canada. Under Rule 26(b)(1) of the U.S. Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party"; however, "[d]iscovery of both privileged and unprivileged information may be limited by Rule 26(b)(2)."[3] Information is relevant in a federal action if it encompasses "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case."[4] If there is "*any possibility* the information sought *may be* relevant" to the case, it is discoverable; information is not discoverable only if it is clear "the information sought can have *no possible bearing* on the claims or defense of a party."[5] In addition, in some cases, the scope of discovery can extend beyond information related to claims and defences to include information that relates to the overall "subject matter" of the civil action.[6]

In Canada, the scope of discovery is narrower due to the interpretation of the term "relevant". In Ontario, the scope of discovery was limited by changes to the Ontario Rules of Civil Procedure effective January 1, 2010. The new rules have limited the scope of relevance to evidence that is

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[1] The Federal Rules of Civil Procedure, which apply to civil litigation before the U.S. district and bankruptcy courts, are cited herein as part of the discussion of certain general American legal principles. The Federal Rules provide a convenient starting point for discerning general principles. However, state courts can also issue letters rogatory, and the governing rules in individual states may vary.

[2] While common law provincial civil procedure rules vary across Canada, the general test for letters rogatory applications is consistent in the common law provinces. Reference will be made to both federal and provincial rules and legislation throughout the Commentary.

[3] FED. R. CIV. P. 26(b)(1). See also *Gill v. Gulfstream Park Racing Ass'n,* 399 F.3d 391, 400 (1st Cir. 2005) ("The final sentence in Fed. R. Civ. P. 26(1)(1) was added by the 2000 amendments to the rules to 'emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.'"); *Alessi Domenico S.P.A. v. OTC Int'l Ltd.,* 2006 WL 3050874, *1 (E.D.N.Y. Oct. 25, 2006) ("As the Advisory Committee noted with respect to the 2000 amendments to Rule 26(b)(1) which narrowed the scope of discovery, '[t]he Committee intends that the parties and the court focus on the actual claims and defenses involved in the action' ... When broader discovery is sought, the Court should determine the scope 'according to the reasonable needs of the action.'").

[4] *Amerinood Indus. v. Liberman*, 2007 WL 496716, *1 (E.D. Mo. Feb. 13, 2007).

[5] *Bolton v. Sprint/United Mgmt. Co.*, 2007 WL 756644, *2 (D. Kan. Mar. 8, 2007) (emphasis added).

[6] See FED. R. CIV. P. 26(b)(1) ("For good cause, a court may order discovery of any matter relevant to the subject matter involved in the action."); *Thompson v. Dept. of Housing & Urban Dev.*, 199 F.R.D. 168, 171 (D. Md. Mar. 13, 2001).

"relevant to any matter", from the former broader test of semblance of relevancy. The evidence must be relevant to matters actually in issue, and does not include evidence that is only sought because it could lead to other matters, or "may" be relevant, or may be relevant to other matters that *could* be in issue.

In light of the broader approach to the scope of discovery in the U.S., it is not uncommon for litigants in the U.S. to seek information from witnesses that might go well beyond what would be discoverable in Canadian litigation.

B. Discovery from non-parties

In Canada, production of documents from non-parties can generally only be obtained in limited circumstances, and typically with leave of the court.[7] In contrast, in the U.S., litigants generally have the right to examine under oath (or depose) non-parties who may have knowledge of facts and/or documents in their possession that may relate to the case. For instance, Rule 30 of the U.S. Federal Rules provides litigants the right to examine *any* witness without leave of court.[8] Along with compelling the witness to give oral testimony, litigants have the right to compel non-parties to produce documents that may be relevant to the case. Litigants in the U.S. have expansive powers to compel non-parties to produce a wide range of documents and testimony, even if it is only marginally relevant, or possibly relevant.

Due to the broad right to obtain evidence from non-parties, letters rogatory are often issued on consent, in a relatively perfunctory fashion, based on a relatively limited or incomplete record. As long as there is no dispute between the parties with respect to whether the foreign discovery should occur, the U.S. court may issue the letters rogatory without any meaningful consideration of the issues and without notice to the non-party.

In contrast, in Canada, leave of the court is required to examine for discovery a non-party and notice of the motion must be provided to the non-party.[9] Such an order can only be granted if the court is satisfied that the moving party is unable to obtain the information from other persons, or from the persons sought to be examined. Further the moving party must generally prove that it would be unfair to proceed to trial without the examination of the non-party, that it will not unduly delay the commence of the trial, entail unreasonable expenses for the other parties in the action, or result in unfairness to the non-party.

C. Deemed undertaking and subsequent use

In Canada, documents produced in litigation generally cannot be used by the litigants for a purpose

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[7] See, e.g., Ontario *Rules of Civil Procedure* [*Courts of Justice Act*, R.S.O. 1990, Reg. 194], Rule 30.10 which provides that a court must be satisfied before ordering production that the document is relevant to a material issue in the action, that the information is otherwise unavailable, and that it would be unfair to the moving party to proceed to trial without the document. Rule 31.10 applies to oral discovery of non-parties, and leave must be granted by the court. Also see Articles 397 and 398 of the Québec *Code of Civil Procedure* (R.S.Q., c. c-25), which are substantially to the same effect.

[8] See FED. R. CIV. P. 30(a)(1); see also FED. R. CIV. P. 45 (providing for the issuance of subpoenas to non-party witnesses to provide testimony and/or produce documents for use in litigation).

[9] See for example, Rule 31.10 of the Ontario Rules of Civil Procedure.

outside the litigation without leave of the court and they must not be disclosed to outside parties.[10] This deemed undertaking rule does not exist in the U.S. and documents produced in litigation may be shared with parties in other civil actions. In the U.S., the court may issue a protective order that places limits on the dissemination of documents, a protective order may not always provide the same protections enjoyed by litigants on the basis of the deemed undertaking.

Documents subject to a protective order issued by an American court could still be used by the American litigants to form the basis of a civil action against the Canadian party. The use of the documents in this manner would be a clear violation of the deemed undertaking, though it would not necessarily violate a protective order.

Further, witnesses testifying in Canadian courts are entitled to the protection of the provisions of the *Canada Evidence Act*[11] and various provincial Evidence Acts[12] that restrict the use of the compelled testimony in subsequent proceedings. Section 5 of the *Canada Evidence Act* provides:

> (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

Canadian courts may be concerned that a witness giving evidence in Canada in response to letters rogatory may not be similarly protected from such subsequent use of the evidence in a foreign proceeding. To address this concern, the court in *Treat America Limited v. Nestle Canada Inc.*[13] sought and obtained assurances from the requesting U.S. court that the Canadian party would be granted the same immunities in respect of the use of that evidence in the U.S. proceeding as would be applied in a Canadian proceeding.

D. Objections to questions on discovery

In Canada, questions on examinations for discovery may be refused based on relevance, privilege, and in some cases, proportionality. In practice, the basis for the refusal is stated for the record, and the examining party may bring a motion to compel answers to any improperly refused questions.

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[10] See for example, Rule 30.1 of the Ontario Rules of Civil Procedure. Also, see *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743 and *Juman v. Doucette*, 2008 SCC 8.
[11] *Canada Evidence Act*, R.S.C. 1985, c. C-5.
[12] For example, the Ontario *Evidence Act*, R.S.O. 1990, c.E.23.
[13] 2011 CanLII 617 (ONSC); 2011 CanLII 1252 (ONSC).

The witness however, is not compelled to answer the question at the discovery.[14] This is in contrast to the practice in the U.S. where once the objection is placed on the record, the witness must still answer the question. The process to deal with objections should be considered prior to the commencement of the examination under the letters rogatory, and if necessary, terms placed into the order regarding the resolution of objection disputes.

[14] See for example, Rules 29.2.03, 31.07 and 34.12 of the Ontario Rules of Civil Procedure.

IV. Legal Principles in Canada for the Enforcement of Letters Rogatory in Canada

It is well established that a Canadian court has the authority to enforce a request for letters rogatory under federal and provincial legislation. For example, s. 46(1) of the *Canada Evidence Act*,[15] provides the general authority for courts in Canada (save for the province of Québec, which we address below) to assist foreign courts in obtaining evidence in Canada for use abroad. Section 46 of the *CEA* provides:

> (1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

There is no mandatory requirement that Canadian courts honour letters rogatory issued by a foreign court. Such an order is at the discretion of the Canadian court, and can only be granted after an analysis of the evidence presented and satisfaction of the applicable legal test.

In *R. v. Zingre*,[16] the Supreme Court of Canada made clear it that, when Canadian courts determine whether to exercise their discretion, they must be guided by the principle that the enforcement of letters rogatory rests upon the comity of nations. This means that the courts of one state should give effect to the laws and judicial decisions of another out of mutual deference and respect, unless doing so would be contrary to the public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction enforcing the request.

The province of Québec has its own legislation governing requests for the enforcement of letters rogatory. Section 9 of the *Special Procedure Act* (R.S.Q., c. P-27) states that:

> When, upon petition to that effect, it is shown to the Superior Court or to one of the judges thereof, charged with the administration of justice in the district, that a court of any other Province of Canada, or of any other British possession, or of a foreign country, before which any civil or commercial case is pending, desires to have the evidence of any party or witness in the district, such court or judge may order that such party or witness may be examined under oath, either by means of question in writing or otherwise, before any person mentioned in the

[15] The provincial evidence statutes contain parallel provisions. See, for example, Ontario *Evidence Act*, R.S.O. 1990, c.E.23, s. 60(1).
[16] *R. v. Zingre*, [1981] 2 S.C.R. 392 at 400-1.

> said order, and may summon, by the same or by a subsequent order, such party or witness to appear for examination, and may order him to produce any writing or document mentioned in the order, or any other writing or document relating to the matter, and which may be in his possession.

While the legislative authority for the enforcement of letters rogatory is different in the province of Québec, Québec courts have consistently applied the principles set forth by case law regarding Section 46(1) of the *Canada Evidence Act*. The same rule applies, with the necessary modifications, when an inquiry commission instituted by the Governor General in Council or by the Lieutenant-Governor in Council of another province of Canada desires to have the evidence of a witness.

Prior to issuing an order compelling the documentary evidence or testimony, the applicant must satisfy the Canadian legal requirements, and the request must be from a court of competent jurisdiction.[17] In an application for letters rogatory, the court will consider the following factors:[18]

(i) The evidence sought must be relevant;

(ii) The evidence sought must be necessary for trial;

(iii) The evidence must not be otherwise available;

(iv) The documents sought are identified with reasonable specificity;

(v) The order must not be contrary to public policy; and

(vi) The order requested must not be unduly burdensome on the proposed witness, having in the mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.[19]

A. Relevance

Canadian courts will not enforce requests for information that amount to a fishing expedition.[20] Rather, only requests for evidence that is directly relevant to the matters at issue in the foreign litigation will be enforced. The party applying for enforcement of the letters rogatory bears the burden of demonstrating that the information sought is relevant to the matters at issue in the foreign litigation.[21] The broader relevance test used in the U.S. is not determinative and it is not sufficient that the evidence will lead to other evidence that may be relevant.[22]

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[17] *King v. KPMG* 2003 CanLII 49333 (ONSC), at para. 6.
[18] *Re Friction Division Products Inc. v. E.I. DuPont de Nemours & Co. et al* (No. 2) 1986 56 O.R. (2nd) 722 at 732. This decision and list of factors has been cited with approval many times.
[19] *Echostar Satellite Corporation v. Quinn*, 2007 BCSC 1225 at para. 38.
[20] *Polaris Industries Inc. v. Rasidescu*, J.E. 99-471 (Que. C.S.).
[21] See *Connecticut Retirement Plans and Trust Funds v. Buchan*, 2007 ONCA 462 at para. 10.
[22] *Third Point LLC v. Fenwick*, 2011 CanLII 2068 (ONSC), at para. 34.

In determining whether the evidence requested is relevant, Canadian courts are not obligated to accept a mere recital in the letter of request to that effect. To the contrary, the court will conduct an analysis of the facts, the evidence on the application, the pleadings in the action and any other pertinent information.[23]

As one Ontario court stated:

> Although the Ontario court does not function as an appellate court in respect of the decision of a foreign court, it is not bound to accept the language of the letters of request "as the final say"; it is entitled to go behind letters rogatory, to examine precisely what it is the foreign Court is seeking to do, and to give effect to them only if they satisfy the requirements of the law of this jurisdiction (citations omitted).[24]

Canadian courts may face difficulty in deciding whether the information requested is relevant if doing so requires analyzing American legal principles, which may be different from Canadian principles. Depending on the nature of the legal principles at issue the parties may need evidence defining those legal principles. In *Oticon, Inc. v. Gennum Corp.*, the Canadian witness argued that the documents requested were not relevant to matters at issue under prevailing American law, and that the request for Canadian evidence was premature, as the evidence requested was not relevant to the current stage in the patent proceedings. In response, the requesting party presented other American authorities that suggested the documents were relevant. Recognizing it was in no position to resolve this apparent conflict in American authorities, the court stated as follows:

> I think the simple answer to [Defendant's] argument of prematurity is that it would not be appropriate for me, as an Ontario judge, to wade into the finer points of American patent procedure, let alone attempt to ascertain the currently prevailing interpretation of the process by the Court of Appeals for the Federal Circuit. That is a matter for the American courts. The focus of my analysis must be on the impact the request has on issues of Canadian sovereignty, not to sit on appeal on the issue of whether the requesting foreign court properly understood the timing of production within the suit before it.[25]

B. Necessity for trial

Although Canadian courts typically require that the evidence sought be necessary for trial, and will be adduced at trial, this does not mean that letters rogatory will not be enforced if the information is sought merely for purposes of pretrial discovery. In the *Teleglobe* case,[26] the Québec Court of Appeal specifically considered that argument and held that the principles of international comity commanded Canadian courts to assist foreign courts generally in the gathering of evidence, whether or not that evidence will assuredly be used at trial. As such, Canadian courts have enforced letters rogatory if all other requirements are met, absent some other consideration.[27]

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[23] See *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ONCA) at paras. 31, 34.
[24] *Oticon, Inc. v. Gennum Corp.*, 2009 CanLII 72032 (ONSC) at para. 18.
[25] *Ibid.* at para. 26.
[26] *Samson Bélair/Deloitte & Touche v. Teleglobe Communications Corporation*, 2006 QCCA 819 (CanLII).
[27] See, e.g., *Man Aktiengesellschaft v. Valentini*, 2006 CanLII 23922 (ON S.C.) at para. 23.

C. Not otherwise obtainable

Canadian courts will not enforce letters rogatory that seek information from a non-party that is obtainable from another, more readily available source. The court will go behind the language of the letters of request and determine on its own whether there is sufficient evidence to show the information is not available from another source.[28] As one court noted:

> [Plaintiff] also submitted that I should accept the assertion in the Letters Rogatory that "it appears that Plaintiff is unable to obtain the Documents other than by means of this Request". The Letters Rogatory were issued on consent; the record does not disclose that the New Jersey District Court made its own inquiry into the matters recited in the Letters Rogatory. An Ontario court is entitled to go behind mere assertions or statements found in letters rogatory, or materials filed in support of their enforcement, in order to ascertain what, if any, evidence demonstrates that the documents sought from the targeted respondents are not otherwise obtainable.[29]

Accordingly, the application materials must contain sufficient evidence to show the information sought is not obtainable from an alternative source. Mere conclusions or recitations contained in the letters rogatory will not be sufficient. Affidavit evidence explaining the unsuccessful efforts at obtaining the evidence from other sources and unsuccessful attempts to obtain voluntary production from the non-party is important. In determining whether the evidence is otherwise unavailable, however, it may be sufficient to show that evidence of the same *value* as that sought from the person to be examined cannot otherwise be obtained.[30]

D. Identification with reasonable specificity

Information requested from a non-party must be sufficiently identified, either by identifying specific documents or by identifying discrete classes or categories of documents or topics of questioning.[31] The degree of specificity required to meet this threshold may vary according to the circumstances of each case. As the court noted in *Friction*:

> In many instances it will be impossible for a party on the outside, denied a look inside, to determine what documents are relevant to the issues and what documents may be reasonably ancillary to the evidence of a witness sought to be examined. Requiring a witness to search a number of files may in one case be burdensome, and in another quite reasonable.[32]

The determination of whether the information requested has been properly identified must be made on a case-by-case basis. It is, nonetheless, required that the applicant identify specific documents to the extent possible:

> [W]hen an applicant seeks the assistance of this Court to enforce letters rogatory, it falls on the applicant to identify, with as much specificity as possible in the circumstances of the case,

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[28] See *Presbyterian Church*, *supra* at para. 41.
[29] *Oticon, supra* at para. 32.
[30] See *Connecticut Retirement Plans, supra* at para. 19. In contrast, see *King v. KPMG*, at para. 13.
[31] See *Re Friction Division Products, Inc. and E. I. Du Pont de Nemours & Co. Inc.*, (1986), 56 O.R. (2d) 722 (H.C.J.) at para. 42.
[32] *Ibid.* at para. 38.

> the documents sought from the targeted respondent. When an applicant resists efforts to clarify what specific documents will be subject to the court order ... a court is inclined to conclude, as I do, that the applicant is more interested in legal sparring than in assisting the court to define clearly the process of pre-trial discovery.[33]

Similarly, the Québec Court of Appeal stated in *Nacan*[34] that the description of the information sought should be as precise as can reasonably be requested. Canadian Courts have refused the enforcement of letters rogatory where the evidence sought, while generally relevant, was described in such vague terms that it amounted to a fishing expedition.[35]

The need to identify requested documents with specificity has important implications for electronically stored information. The courts will likely not require non-parties to undergo time consuming or costly searches for electronic evidence, unless they are appropriately compensated. This issue is closely tied to the analysis regarding undue burden discussed below.

E. Public Policy

In determining whether a request for assistance violates Canadian public policy or sovereignty, courts in Canada have been concerned whether granting the request would violate Canadian or provincial laws or otherwise infringe on Canadian moral or legal principles.

In *Gulf Oil Corporation v. Gulf Canada Limited*,[36] the Supreme Court of Canada was asked to give effect to letters rogatory issued by two American courts to obtain documents in the possession of two Canadian companies that had been involved in the production of Canadian uranium. In this case, an American embargo on foreign uranium left producers such as Canada with a greatly diminished world market to sell its uranium. As a result, Canada entered into a marketing arrangement with several countries to establish minimum prices for the export of uranium to other countries. This arrangement lasted for several years. In 1975, Canada enacted legislation that prohibited the disclosure of documents relating to this marketing arrangement. In light of this legislation, the Supreme Court stated as follows:

> This case constitutes a rare occasion, certainly in relations with the U.S., in which, in my opinion, legal assistance should be denied on the ground that to grant it would be to run counter to a public policy of this country. The policy I refer to has been clearly and forcefully expressed; it relates specifically to the evidence and documents in issue. By affidavit and public statement a Minister of the Crown has made it plain that the Government of Canada has, as a matter of public policy, taken the position that the information and documents sought should not be disclosed.[37]

Accordingly, the Court held that enforcing the letters rogatory would be inconsistent with Canadian public policy and the application was dismissed.

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[33] *AstraZeneca LP v. Wolman*, 2009 CanLII 69793 (ONSC) at para. 49.
[34] *Commercial Union Assurance Company of Canada v. Nacan Products Limited*, [1991] R.D.J. 399 (Que. C.A.).
[35] *Teleglobe Communications v. BCE Inc.*, 2005 CanLII 245544 (QCCS) at paras. 19-21.
[36] *Gulf Oil Corporation v. Gulf Canada Limited*, [1980] 2 S.C.R. 39.
[37] *Ibid.* at 59.

There are other examples of statutory regimes in Canada that could be relevant in determining whether enforcing letters rogatory would violate Canadian law. For instance, privacy statutes, blocking statutes, and other such legislation could prohibit the disclosure of broad categories of documents and information.[38]

In Quebec, the most often invoked blocking statute is the Québec *Business Concerns Records Act* (R.S.Q. c. D-12). Section 2 of that Act states that:

> Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec, remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any concern.

Québec courts have interpreted Section 2 of the Act as not only prohibiting the communication of documents outside of the jurisdiction, but also as barring any questions to a witness that would require him or her to refer to or consult such a document in order to answer.[39] Similarly, the party seeking to enforce the letters rogatory cannot seek to view the documents in question[40] (even without taking copies).

In *Hunt* v. *T&N PLC*,[41] the Supreme Court of Canada expressed its dislike of blocking statutes in the following terms:

> "[...] The whole purpose of a blocking statute is to impede successful litigation or prosecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that that province finds objectionable. This is no doubt part of sovereign right, but it certainly runs counter to comity. In the political realm it leads to strict retaliatory laws and power struggles. And it discourages international commerce and efficient allocation and conduct of litigation. [...]"[42]

It declared the Act constitutionally inapplicable as between Canadian provinces, but it still applies to letters rogatory that emanate from foreign states.[43]

In *King v. KPMG*[44] Justice Ground discussed concerns about policy issues regarding a report sought where an Ontario court had previously found that the investigation and preparation of the report by KPMG constituted a breach of fiduciary duty it owed to its client, Mr. Drabinsky. Dissemination of this report to parties adverse in interest to Mr. Drabinsky would be contrary to public policy. Furthermore, Justice Ground raised concerns that the disclosure of the report to the applicants would raise issues of privilege and confidentiality of persons not party to the application. In this

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[38] See, e.g., *Business Concerns Records Act*, R.S.Q., c. D-12; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.
[39] *Walsh v. Gaitan & Cusack*, [1993] R.D.J. 621 (Que. C.A.).
[40] *Asbestos Corporation Ltd. v. Eagle-Picher Industries Inc.*, [1984] R.D.J. 253 (Que. C.A.).
[41] [1993] 4 S.C.R. 289.
[42] *Ibid.* at 327.
[43] *Southern New England Telephone Company v. Zrihen*, 2007 QCCS 1391 (Que. C.S.).
[44] *Supra*, at para 14

case, the application was denied.

Letters rogatory that seek the production of evidence that cannot be disclosed consistent with Canadian laws are not likely to be enforced by Canadian courts.

F. Undue Burden

In addition to requests for information that would violate Canadian law, courts have held that requests that impose an undue burden on a Canadian witness violate Canadian sovereignty. A request for assistance is a request to compel a local resident to provide evidence and produce documents in a proceeding they have no interest in and that is pending in a foreign country. Therefore, courts must balance the interest in providing assistance to foreign courts as a matter of comity with the need to protect local residents from being forced to participate in foreign judicial proceedings.[45]

Canadian courts will take into account the burden placed on the local witness, and will typically compare what a local witness could be required to do if the action was local and where leave to examine a non-party is required.[46] For instance, a request for documents that would require the witness to incur substantial costs and expenses to search for and produce the records might be regarded as unduly burdensome. In Canada, the costs of production and expenses of the witness, who is a stranger to the action, should have their costs paid on a full indemnity basis.[47] This should render moot most cost concerns in this regard.[48] The cost reimbursement may not however adequately address the time involved in gathering and producing the requested documentation.

Further, as one court stated:

> I consider it "unduly burdensome" to require the production of documents which are of limited probative value and marginal relevance in the action for which they are sought and the production of which would cause substantial damage to the interests of the non-party.[49]

In other words, Canadian courts recognize that requiring non-parties to participate in the discovery process is inherently burdensome and becomes unduly burdensome when the non-party is asked to provide records and information that likely will not assist the litigants in resolving their dispute.[50]

Although there are no cases yet on point, letters rogatory requests that involve significant electronic records will likely be constrained by principles of proportionality. As referenced under the need for

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[45] See, e.g., *Maverick LNG Holdings Ltd., supra* at paras. 22-23.
[46] See *Friction, supra* at para. 34; *AstraZeneca LP v. Wolman*, 2009 CanLII 69793 (ONSC) at para. 18; *Connecticut Retirement Plans, supra* at para. 13.
[47] *j2Global v. B.C.*, 2010 CanLII 3868 (ON S.C.).
[48] In Ontario, the party requesting documents from a non-party can be ordered to pay the reasonable costs of producing the documents, and where an oral examination is ordered, the examining party must pay the expenses and provide the non-party with a copy of the transcript at no cost. Rules 30.10 and 31.10 of the Ontario Rules of Civil Procedure.
[49] *Maverick LNG Holdings Ltd., supra* at para. 53.
[50] The balancing of the factors done by the Canadian court in considering enforcement of letters rogatory is consistent with the proportionality balancing required in other discovery contexts: See, in this regard, The Sedona Conference®, *The Sedona Canada™ Commentary on Proportionality in Electronic Disclosure and Discovery* (Phoenix: The Sedona Conference®, Oct. 2010), online: The Sedona Conference® <www.thesedonaconference.org>.

specifics, the courts will not likely require costly or time consuming electronic production without sufficient protection for the witness and an order that the requesting party will be responsible for all costs.

The timing of the application and requested examination is a factor considered as to whether a request will be considered unduly burdensome. A Canadian court will be hesitant to place unreasonable time demands on the non-party witnesses. For instance, in *Maverick LNG Holdings Ltd. v. Teekay Shipping (Canada) Ltd.*,[51] the court noted that the American litigation was scheduled for trial in January 2010, less than a year after the suit was filed. In addition, although the letters rogatory were issued by the American court in July 2009, the motion to enforce the letters rogatory was not heard by the British Columbia court until October 2009, less than three months before the scheduled trial date.[52] The court reminded the petitioner that the compressed time frame in the Texas action should not "work a tyranny on the respondents".[53]

In both countries, litigation is increasingly subject to litigation timetables and court orders. In the U.S. federal court, actions are typically assigned to a specific judge from the outset and there is judicial case management from inception through to conclusion. In Canada, the level of case management will vary depending on the particular matter. In both countries, the orders establishing timetables will provide deadlines for discovery, and any subsequent changes to a court order must be approved by the court. Counsel are strongly advised to factor in sufficient time to obtain evidence from foreign sources into the scheduling orders and litigation timetables.

[51] 2009 BCSC 1538 at para. 4.
[52] *Ibid.* at paras. 1-5.
[53] The court stated as follows in this regard (*ibid.* at paras. 93-94): "Counsel should set dates for the taking of deposition evidence forthwith. Of course, the depositions of necessity must be preceded by the document production and with the problem of invocation of the protective order, it may take the respondents some time to prepare their documents. I will leave it to counsel to work out the new schedule but will remind the petitioners that the speed with which they have proceeded in their action should not work a tyranny on the respondents and the court as well. If counsel are unable to work out a schedule for production of documents and deposition of witnesses, they may apply to the Court for assistance."

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The first Working Group was convened in October 2002, and was dedicated to the development of guidelines for electronic document retention and production. The impact of its first (draft) publication—*The Sedona Principles: Best Practices Recommendations and Principles Addressing Electronic Document Production* (March 2003 version)—was immediate and substantial. *The Principles* was cited in the Judicial Conference of the United State Advisory Committee on Civil Rules Discovery Subcommittee Report on Electronic Discovery less than a month after the publication of the "public comment" draft, and was cited in a seminal e-discovery decision of the Southern District of New York less than a month after that. As noted in the June 2003 issue of Pike & Fischer's *Digital Discovery and E-Evidence, "The Principles*...influence is already becoming evident."

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