

Letters of Request denied for access to confidential business information

Letters of Request | Litigation | Litigation & Dispute Resolution

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The process by which a foreign court seeks the assistance of an Ontario court to gather evidence for use in local proceedings, as discussed in a [previous blog](#), involves bringing an application to enforce Letters of Request (LoR). LoRs are frequently sought in Canada in connection with legal proceedings in the United States in a dispute between competitors of cloud-based communications services.

The Ontario Court of Appeal has released a further decision on the issuance of LoRs which addresses a request for confidential — but not necessarily privileged — business information: ***Actava TV, Inc. v. Matvil Corp.*, 2021 ONCA 105.**

The LoR in question arose from ongoing litigation in the Southern District of New York, District Court, between various Russian TV Channels (owners, operators, and producers of television channels that are broadcast in Russian), and Actava TV, Inc. (“Actava”), which was in the business of streaming Russian-language TV channels to customers in North America.

For a period of time from 2016 to 2018, Actava was party to a referral agreement with an Ontario company, Matvil Corp. (“Matvil”), which was in the business of broadcasting television content from Russia and other countries to customers around the world. The agreement represented a very small percentage of Matvil’s customers, and Matvil terminated the referral agreement with Actava in August 2018.

In July, 2018, Actava sued the Russian TV Channels in the S.D.N.Y. District Court along with Kartina Digital GmbH (“Kartina”), the main competitor of Matvil. Actava alleged that the Russian TV Channels and Kartina engaged in an unlawful campaign to interfere with Actava’s business. Actava asserted that the Russian TV Channels and Kartina’s actions prevented Actava from performing its referral agreement with Matvil for approximately 10 months and that they pressured Matvil to terminate the referral agreement.

While the damages requested in the New York action include Actava’s lost revenue and profits arising from the termination of the referral agreement, Matvil was not a party to Actava’s U.S. action and none of the parties to that action made any allegations of wrongdoing against it. Matvil’s conduct was not in issue and it has no interest in the U.S. action.

Actava obtained an LoR from the U.S. court to seek Matvil’s yearly financial records, from 2015 to present, of its revenues and/or profits derived from the referral agreement; and all documents, from 2015 to present, containing or constituting an appraisal of Matvil’s valuation. Actava then brought an application in Ontario to enforce the LoR.

Actava’s stated reason for the evidence requested from Matvil was to calculate its damages in the U.S. proceedings using a “yardstick” method of assessment, which looked at Actava’s actual growth during the subject period and compared it to the financial results of other ‘comparable’ companies in the same industry. The Ontario Court of Appeal described the basis for the LoR as follows:

In summary, the information in issue is sought not because of Matvil’s involvement in the factual matrix but because it is a comparator company. Put differently, the documents are desired to assist the expert in his calculation of Actava’s damages, nothing more.

On the return of the initial application to enforce the LoR, there was no dispute that the Ontario statutory requirements had been met. The application judge also observed that the U.S. court's decision was entitled to considerable deference and that the Ontario court was not sitting on appeal from that decision. The application judge found that Actava had established the six factors to be considered on an application to enforce LoRs, outlined by the Court of Appeal in *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ON CA), at para. 20, and made an order enforcing the LoR.

The Court of Appeal reversed the decision and found that the application judge had erred with regard to the assessment of relevance, public policy, and sovereignty.

With regard to relevance, the Court of Appeal found that the evidence sought by Actava from Matvil had nothing to do with their referral agreement and was overly broad, as it encompassed financial records for Matvil's global business, and not simply the small part that relates to Actava or the business lines in which Actava operates. Further, the relevance of the requested evidence was entirely speculative as Actava admitted that it had no knowledge of what the evidence would reveal: "Evidence anchored in speculation is incompatible with a characterization of relevance."

The Court of Appeal noted that the stated purpose of Actava's production request — to obtain evidence to calculate damages — undercut the purpose for an LoR request as Actava was not seeking production of evidence to establish that it suffered damages. Nor did it plead that its damages were linked to Matvil's financial performance, profitability or valuation. Rather, the production was sought for the sole purpose of (potentially) assisting a damages expert with his preferred methodology so as to quantify the extent of any loss. Actava conflated the existence of damages with the calculation of those damages.

In this regard, Matvil submitted that the order to enforce LoRs granted by the application judge was the first and only order in any commonwealth jurisdiction, including Ontario, which had directed a non-party to produce documentation and information for the sole purpose of informing an expert to assist a party in calculating damages. The Court of Appeal soundly rejected such approach to comparative evidence-gathering:

Although the financial performance of unrelated comparable companies may be useful to an expert, this does not mean that the documentation is both relevant to the issues in dispute in the U.S. action and producible. If it were otherwise, an argument could be made that proprietary financial performance and valuation evidence be produced by an innocent corporate bystander in every case involving a claim for loss of profits by a player in a comparable industry. This is not, and ought not to be, the law.

With regard to public policy, the Court of Appeal noted that the court will decline to enforce an LoR if enforcement is contrary to public policy. As recognized in *Glegg v. Glass*, 2020 ONCA 833 (CanLII), public policy considerations include interference with solicitor-client privilege and confidentiality concerns. In addition, previous decisions have addressed public policy issues relating to business confidentiality concerns, Crown privilege, and trade secrets.

Accordingly, confidentiality concerns may be considered as part of the public policy analysis. The Court of Appeal stated that it was important to stress the nature of the information sought from Matvil and that financial performance and valuation evidence "strike at the heart of a corporation. Nothing could be more confidential and open to abusive use." This was of particular concern when the information sought from Matvil would be disclosed to its main competitor in the course of a lawsuit with which it had no involvement.

Finally, the Court of Appeal found that the application judge had not given due consideration to the issue of Canadian sovereignty and whether justice required that the LoR be enforced. LoRs are not simply an enabling mechanism for the requesting party; there must be some balancing and consideration of whether the order is prejudicial to the Canadian sovereignty. The phrase "Canadian sovereignty" encompasses whether the LoR gives extra-territorial authority to foreign laws that violate Canadian or provincial laws, and whether granting the request would infringe on recognized Canadian moral or legal principles.

In this case, the Court of Appeal had no hesitation in concluding that had a comparable request for production from a non-party been made in a proceeding in Ontario under the local *Rules of Civil Procedure* (rule 30.10), the order sought would *not* have been granted. The application judge failed to recognize Matvil's sovereignty interest and neglected to consider the justice of the case.

As a result, Matvil's appeal was allowed and Actava's application to enforce the LoR issued by the U.S. court was dismissed. Matvil was entitled to costs for responding to the application and the appeal totaling \$115,000. A PDF version is available to download [here](#).

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