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Letters Rogatory for disclosure in California divorce proceeding enforced in Ontario

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As a matter of international comity, Ontario courts will take steps to recognize and enforce requests for assistance issued by foreign courts provided that certain criteria are met. The process by which a foreign court seeks the assistance of an Ontario court involves bringing an application to enforce Letters of Request, also known as "Requests for International Judicial Assistance," or more simply "Letters Rogatory."

While a decision to enforce letters rogatory is matter of discretion of the judge hearing the application, the Supreme Court of Canada has repeatedly held that foreign letters of request are to be given full force and effect by domestic courts unless they are contrary to public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction to which the request is directed: *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980 CanLII 192 \(SCC\)](#); *R. v. Zingre*, [1981 CanLII 32 \(SCC\)](#).

In *Adler v. Deloitte Touche Tohamtsu*, [2022 ONCA 855](#), the Ontario Court of Appeal upheld an order for disclosure sought in Ontario, pursuant to letters of

request from a California court, in the context of a divorce action.

The appellant husband was engaged in divorce proceedings with the respondent wife in the Superior Court of the State of California for the County of Los Angeles. The husband was a successful businessman. The wife alleged that the husband had a complex web of corporations, including several in Canada, which he used to shield his substantial income and assets.

The record disclosed that there were multiple attempts by the wife to obtain financial information about her husband's financial interests in the corporations in the divorce action. The California court held more than six hearings to compel compliance and issued a sanction of \$25,000 against him.

As compliance was incomplete, the wife then sought letters rogatory to obtain the information required for her claims for property, spousal and child support. In 2021, the California court issued two "Requests for International Judicial Assistance."

The wife issued an application in the Ontario Superior Court of Justice to enforce the letters rogatory issued by the California court. The letters rogatory required production from the corporate appellants and from the husband's personal assistant.

The application judge ordered that the letters rogatory be recognized, with a "reading down" of certain information sought from the personal assistant.

The husband appealed the order on behalf of the corporate appellants to the Ontario Court of Appeal. He argued that the application judge should not have heard the application because he and one of the corporations were not served and further that the application judge applied the wrong legal test.

The authority to enforce letters rogatory in Ontario is set out in the [Canada Evidence Act](#), at [section 46\(1\)](#), and the Ontario [Evidence Act](#), at [section 60\(1\)](#). The basic requirements are that:

- (a) a foreign court, desirous of obtaining testimony in relation to a pending civil, commercial or criminal matter, has authorized the obtaining of evidence;
- (b) the party from whom the evidence is sought is within the jurisdiction of Ontario;
- (c) the evidence sought from the Ontario party is in relation to a pending proceeding before the foreign court or tribunal; and
- (d) the foreign court or tribunal is a court or tribunal of competent jurisdiction.

When balancing Canadian sovereignty considerations with the justice of the enforcement request, the courts will consider whether the evidence, including the letters of request, establishes six non-exhaustive factors or useful guideposts:

- (1) the evidence sought is relevant;
- (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
- (3) the evidence is not otherwise obtainable;
- (4) the order sought is not contrary to public policy;
- (5) the documents sought are identified with reasonable specificity;
- (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

The request to enforce letters rogatory may be refused in circumstances where the nature of the request would infringe on matters of public policy such as solicitor-client privilege (*Glegg v. Glass*, [2020 ONCA 833](#)) or makes evidentiary requests that would not have been available under Ontario law (*Actava TV, Inc. v. Matvil Corp.*, [2021 ONCA 105 \(CanLII\)](#)).

In the case at hand, the Court of Appeal agreed with the application judge that the wife's disclosure requests issued by the California court should be enforced. The procedural service grounds raised by the husband "ignore[d] the realities of the situation" given that he was provided with standing in California and Ontario to make submissions in response to the request.

The husband argued that the wife's requests amounted to a fishing expedition and that the documents which were requested would not have been producible under Ontario law.

The Court of Appeal disagreed with the characterization of the wife's requests as a fishing expedition. Rather, as determined by the application judge, the information sought by the wife was relevant because they related to the nature, scope and extent of the husband's business interests in the various appellant corporations.

The Court of Appeal referred to the basic obligation of financial disclosure in family law litigation:

Full financial disclosure is immediate and absolute. Failure to disclose has been called "the cancer of family law litigation": *Michel v. Graydon*, [2020 SCC 24](#), 449 D.L.R. (4th) 147, at para. 33. This court has repeatedly echoed similar comments. The documents are clearly relevant and would be required to be produced in Ontario.

On the question of whether the information requested was otherwise obtainable, the husband argued that the application judge had reversed the onus to require him to prove that the documents were otherwise obtainable. However, in the Court of Appeal's view, this ignored the record before the court which demonstrated that there were multiple attempts, court orders and sanctions in play to obtain disclosure. It was therefore clear from the record that the documents sought by the wife were not otherwise obtainable. The Court of Appeal affirmed the application judge's decision to enforce the letters rogatory.

The decision shows that the courts will assess the nature of the foreign request for judicial assistance by carefully considering the evidence filed by the applicant seeking to enforce the

letters rogatory. The courts will independently consider whether the requests complied with Ontario's legal requirements for enforcement and whether there are any public policy reasons that would affect whether deference should be shown to the foreign court.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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