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August 1, 2023

Letters Rogatory application against Ontario lawyer dismissed *(Hospira Healthcare v. Rotsztain)*

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Courts in Canada and the United States often seek each other's assistance to gather evidence for use in local proceedings. The process by which a foreign court seeks the assistance of an Ontario court involves bringing an application to enforce "Letters Rogatory" or "Letters of Request," more formally known as "Requests for International Judicial Assistance."

Courts in Ontario generally give full faith and credit to the orders and judgments of a U.S. court unless they are of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty. The decision in *Hospira Healthcare v. Rotsztain*, 2023 ONSC 4283 (CanLII), demonstrates how a request to enforce letters rogatory may be rejected when the request does not comply with the requirements of Ontario law.

The letters rogatory application arose out of litigation commenced by Apotex Corp. against Hospira Healthcare India Private Limited and Hospira Inc. in the State of New York involving a development and manufacturing agreement. Under the agreement, the parties agreed to develop and commercialize certain generic injectable antibiotics in the United States.

Apotex sued the Hospira companies in New York alleging breach of contract and various tort and quasi-contract claims. Apotex alleged that to mitigate damages flowing from Hospira's conduct, it entered into an agreement to obtain the supply of pharmaceutical products from an entity called Qilu Pharmaceuticals.

In response, Hospira alleged that Apotex concealed its contractual arrangement with Qilu from Hospira, by having an Ontario corporation (182 Ontario), serve as a nominal contractual counterparty with Qilu, with 182 Ontario later assigning its rights under the agreement to Apotex. Hospira also alleged that Apotex's agreement with Qilu breached certain provisions of an agreement between Apotex and Hospira for the supply of similar products.

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In August 2021, the Supreme Court of the State of New York signed letters rogatory seeking judicial assistance from the Ontario Superior Court of Justice.

Specifically, the letters rogatory requested the Ontario court's assistance in obtaining documentary and oral evidence from an Ontario lawyer, JR, and 182 Ontario for use in the U.S. action, and to require JR to attend a deposition for up to seven hours. The nature of the evidence sought related to the formation and corporate governance of 182 Ontario, the relationship between 182 Ontario and Apotex, and the efforts undertaken by 182 Ontario to enter into a supply agreement with Qilu on Apotex's behalf.

The statutory basis for an application for letters rogatory is found in the Ontario *Evidence Act*, section 60, and the virtually identical requirements of the *Canada Evidence Act*, section 46, which provide:

> (i) a foreign court has authorized the obtaining of evidence;
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> (ii) the witness whose evidence is sought is within Ontario;
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> (iii) the foreign court is a court of competent jurisdiction; and
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> (iv) the evidence sought relates to a proceeding pending before the foreign court.

There was no question that these basic statutory requirements were met in the case at hand.

However, in order to balance the need for comity against the possible infringement of Canadian sovereignty, Ontario courts also assess six factors that are to be considered as guideposts in an application before an order giving effect to letters rogatory will be made (*Presbyterian Church of Sudan v. Taylor* (2006), 2006 CanLII 32746 (ON CA), at paragraph. 20):

> (1) the evidence sought is relevant;
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> (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
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> (3) the evidence is not otherwise obtainable;
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> (4) the order sought is not contrary to public policy;
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> (5) the documents sought are identified with reasonable specificity;
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> (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 letters rogatory application at issue was framed as a request for "unique and necessary information" which the applicants believed to be in the respondents' possession concerning JR's representation of Apotex in connection with the Qilu agreement. The application claimed that JR was involved on behalf of Apotex to negotiate an agreement with Qilu relating to the development, manufacture and supply of the subject generic antibiotic injectable drug products.

However, JR's evidence was that he never acted for Apotex or any of the parties involved in the U.S. Action. Rather, he acted for a Canadian subsidiary of Apotex as well as 182 Ontario, strangers to the U.S. Action. JR's position was that he had produced relevant documents that were not subject to privilege and he was already cross-examined on the same topics to be covered during the requested deposition.

Essentially, the letters rogatory sought production of corporate, governance, financial and other information of 182 from the time it was incorporated to the time it was dissolved in 2020. In the court's view, this request was so

broad that it amounted to a fishing expedition.

Accordingly, it was not clear to the application judge how the corporate records and other communications sought would be relevant to a material issue in the U.S. Action. With respect to the first requirement of the test, the court therefore found that the applicants failed to establish that the documents sought or the topics to be covered at the deposition were relevant.

As to whether the evidence being sought was necessary and admissible for the purpose of the U.S. trial, there was only a general and broad statement in the application to this effect which did not satisfy the second requirement of the test.

Further, the evidence before the court was that JR and 182 Ontario had complied with the applicants' request for information, except for privileged information and documents, and that they did not have any further information to provide. The applicants failed to show that they could not obtain the information from Qilu or its principal.

With regard to public policy, the court found that due to the broad requests and areas to be canvassed at the deposition, the documents and information identified in the letters rogatory were presumptively protected by solicitor-client privilege: *Glegg v. Glass,* 2020 ONCA 833, at paragraph 62. Further, JR was duty-bound to protect his client's confidential and privileged information under the Law Society of Ontario's *Rules of Professional Conduct*.

In the court's view, granting the order would infringe on recognized Canadian legal principles of respect to the sanctity of solicitor-client confidentiality and privilege and, in the result, would amount to an infringement on Canadian sovereignty, which would require a lawyer to produce solicitor-client documents and information under oath. Had similar requests been made in Ontario for documentary production from a non-party under the *Rules of Civil Procedure,* the orders would not be granted.

Lastly, the court found that the documents requested were not identified with reasonable specificity and, given the expansive nature of the requests, enforcement of the letters rogatory would be unduly burdensome to the respondents, especially having regard to the requirement for production and to submit to discovery imposed by the law of Ontario on non-parties.

The decision shows that Ontario courts will take a close look at the nature of the evidence being sought pursuant to the letters rogatory issued by the foreign court. Applicants seeking to enforce letters rogatory in Ontario should review whether their proposed application meaningfully addresses each of the six guideposts required by the courts and should not rely on general and broad assertions in their material as evidence.

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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