

Recent Treatment of Letters of Request from U.S. Courts by the Ontario Court of Appeal

Letters of Request | Litigation | Litigation & Dispute Resolution | Ontario Court of Appeal | Ontario Evidence Act

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As a result of the highly integrated economies and efficient cross-border movement between Canada and the United States (at least prior to the 2020 pandemic), the courts in each country frequently 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 of Request, also known as "Requests for International Judicial Assistance," or more simply "Letters Rogatory." The Court of Appeal has made it clear that an Ontario court should "give full faith and credit" to the orders and judgments of a U.S. court unless it is of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty": *Ontario Service Employees Union Pension Trust Fund v. Clark*, 2006 CanLII 20839 (ON CA) at para. 22, *Zingre v. R.*, 1981 CanLII 32 (SCC), [1981] 2 S.C.R. 392 and *France (Republic) v. De Havilland Aircraft of Canada* (1991), 1991 CanLII 7180 (ON CA), 3 O.R. (3d) 705 (C.A.) .

Two recent decisions of the Court of Appeal illustrate the considerations that will guide a court to accept or refuse to issue an Order giving effect to Letters of Request. In one case, the Letters of Request was enforced. In the other case, the Letters of Request was denied.

Perlmutter v. Smith

In *Perlmutter v. Smith*, 2020 ONCA 570 (CanLII), the Ontario Court of Appeal affirmed the decision of Justice Thomas Lederer giving effect to two Letters of Request issued by a Judge in a Florida Court at the instance of the Respondents, Harold Peerenboom, Isaac Perlmutter, and Laura Perlmutter, in a proceeding commenced by Mr. Peerenboom in Florida against the Perlmutter. The Letters of Request sought evidence from an Ontario resident, David Smith, in relation to his involvement in events being litigated in the Florida Court.

Mr. Peerenboom and the Perlmutter owned homes in a private community in Florida. In 2011 they became embroiled in a dispute over the management of the community, particularly concerning the operation of its tennis centre. Over a prolonged period of time thereafter, Mr. Peerenboom was subjected to a hate mail campaign that involved hundreds of anonymous hate letters falsely accusing him of loathsome crimes, including murder and sexual assault against a minor, which were mailed throughout the United States and Canada to his family, friends, neighbours, business associates, employees and clients.

In 2013, Mr. Peerenboom commenced an action in Florida against the Perlmutter alleging that they were orchestrating the hate-mail campaign. The Perlmutter subsequently commenced their own counterclaim against Mr. Peerenboom and others for attempting to defame the Perlmutter by falsely implicating them in the hate-mail campaign.

In January 2016, the Detroit office of the Department of Homeland Security intercepted a package which contained anonymous letters in which the sender threatened to send letters about Mr. Peerenboom to prisoners in various jails if the Peerenbooms did not leave their home on Palm Beach. The letters also challenged two executives of an executive search firm founded by Mr. Peerenboom to convince him to sell his Florida home, failing which clients of the firm would be advised of what a horrible person Mr. Peerenboom was.

The sending of the package was initiated at a United Parcel Service (UPS) store in Toronto. The shipping label identified the sender as Thomas Thorney. He was interviewed by the police. However, the surveillance tape maintained by UPS revealed that the person who had delivered the package under the name of Thomas Thorney was, in fact, his business partner, David Smith, an Ontario resident, who was alleged to be a former employee of the executive search firm who was

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terminated for cause after 15 years. Mr. Perlmutter was alleged to be complicit in the delivering the letters found in the package.

In 2017, after discovering Mr. Smith's involvement, the Perlmutter and Mr. Peerenboom filed a joint motion in the Florida Court for a letter of request seeking the Superior Court of Ontario's assistance in obtaining evidence from Mr. Smith and Mr. Thorney. The Florida Court subsequently issued Letters of Request to the Ontario Superior Court of Justice. Mr. Thorney complied with the Letter of Request and was deposed in February 2018.

Conversely, Mr. Smith was not prepared to comply voluntarily with the Letter of Request. After Justice Lederer granted the application to enforce the Letters of Request, Mr. Smith brought an expedited appeal which was decided by the Ontario Court of Appeal in September 2020.

The statutory basis for an application for Requests for Assistance is found in either the Ontario *Evidence Act*, section 60, or the *Canada Evidence Act*, section 46. The Court of Appeal confirmed that Justice Lederer had properly outlined the applicable principles to be considered:

- The fundamental principle to be applied in considering such a request is recognition of the "comity of nations," namely that one sovereign nation voluntarily adopts or enforces the laws of another out of deference, mutuality, and respect. As a result, a foreign request is to be given full force and effect unless it is contrary to the public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction to which the request is directed.
- International comity dictates a liberal approach to requests for judicial assistance, as a result of which the judge making the request is entitled to considerable deference in the Canadian application and the court receiving the request for assistance does not sit in appeal from the decision of the requesting court. Orders originating from the United States should generally be given full faith and credit unless to do so would be contrary to the interests of justice or infringe on Canadian sovereignty.
- A court is required to consider whether the request imposes any limitation or infringement on Canadian sovereignty and whether justice requires an order for the taking of commission evidence. The considerations encompassed by the phrase "Canadian sovereignty" include an assessment of:
 - whether the request would give extra-territorial authority to foreign laws which violate relevant Canadian or provincial laws;
 - whether granting the request would infringe on recognized Canadian moral or legal principles; and
 - whether the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested.
- In order to balance the need for comity against the possible infringement of Canadian sovereignty, Ontario courts have set out six factors that are to be considered as "guideposts" (not rigid preconditions) in an application before an order giving effect to letters rogatory will be made:

(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.

Of overriding concern, an Ontario court must decline a foreign court's request if enforcing it would be contrary to public policy or inconsistent with the laws of Ontario: *Treat America Ltd. v. Nestlé Canada Inc.*, 2011 ONCA 560 (CanLII), at para. 12.

The Court of Appeal found that the Letters of Request satisfied each of the guideposts. Mr. Smith's evidence was clearly relevant to the Florida proceedings and he had made it clear (through actions, motions and appeals in Florida), that he was unwilling to respond to the procedures of the Florida Court. The Court found that his evidence was "not otherwise obtainable" and the request was not overbroad given the overall circumstances of the underlying litigation involving the hate mail campaign.

Finally, Mr. Smith argued that the Letters of Request were issued as a result of a flawed process in the Florida Court and should not be enforced in Ontario. However, Justice Lederer examined at some length the process used by the Florida Court leading up to the issuance of the Letters of Request and no procedural unfairness or irregularities were noted.

Ontario jurisprudence recognizes that the procedural practices in the American state and federal district courts differ in some respects from those in Ontario. For example, some American courts issue letters of request in the absence of affidavit evidence and the scope of discovery in American civil proceedings generally is

much broader than in Canada. Comity requires that inflexible rules are not applied to such procedural differences. Instead, a Canadian court must balance any possible infringement of Canadian sovereignty with the natural desire to assist the courts of a foreign land: *R. v. Zingre*, 1981 CanLII 32 (SCC) at p. 403.

As a result, the Court of Appeal upheld the application judge's order requiring the examination of David Smith upon certain terms.

Glegg v. Glass

A different result was reached in *Glegg v. Glass*, 2020 ONCA 833, where the Court of Appeal upheld a decision to refuse to enforce other Letters of Request issued by a Florida Court.

Glegg involved a complex family law dispute. After an Ontario court had determined that a child (now an adult) had withdrawn from her father's parental control, the father commenced a separate action in Florida for parental alienation against his ex-wife and her new husband. As part of that action, the father obtained a Letter of Request which sought the assistance of the Ontario court to obtain the production of documents from the former lawyers for the ex-wife and their daughter.

In December 2019, Justice Paul Perell of the Ontario Superior Court of Justice dismissed *Glegg's* application to have Letters of Request enforced for public policy reasons. Specifically, Justice Perell found that the Letters of Request were contrary to the protection of solicitor-client privileged information and that the entire Florida action was contrary to the law established by the Supreme Court of Canada in *Frame v. Smith*, 1987 CanLII 74 (SCC), which prohibited parental alienation actions in Canada.

On appeal, the father contended that Justice Perell had conducted an unfair hearing and that His Honour erred in law in concluding that enforcing the Letter of Request would offend public policy.

The father's argument about unfairness was focused on the documents relied upon by Justice Perell on the original motion, that Justice Perell had conducted his own "independent investigation" and that Justice Perell relied on *Frame* without having brought it to the attention of the parties.

No procedural unfairness

With respect to procedural unfairness, the appellate court found that there was none. The material relied upon by Justice Perell in rendering his decision had all been properly placed before him. While the father complained that Justice Perell had relied upon materials that the father self-characterized as "Surplus Materials", the record showed that the father had relied upon some of those materials in his own argument and that other "Surplus Materials" were included in the record. The appellate court specifically noted that:

Schedule "C" to the Factum of Lorne Glass, dated 27 May 2020, cogently demonstrates that most of the findings of fact made by the application judge were based on materials filed by the appellant.

Among other reasons, the appellate court also noted that the father had not asked Justice Perell to disregard certain materials that had been filed and that in making his order, Justice Perell was required to understand the circumstances that led to the issuance of the Letter of Request in the first place. This was made necessary by the decision in *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 ONCA 264 at para. 59, which provides that when considering to enforce a Letter of Request, a judge must determine: "whether the request imposes any limitation or infringement on Canadian sovereignty and whether justice requires an order for the taking of commission evidence."

With respect to the reliance on the seminal case of *Frame*, the appellate court found in doing so Justice Perell had not followed an unfair process. The father had been given the opportunity after oral argument to file a supplementary factum and did so, in which, as stated by the appellate court at para. 44, he clearly understood that Justice Perell "was considering the fact that Ontario did not recognize the cause of action asserted in the Florida Action might bar enforcement of the Letters of Request on the grounds of public policy."

Public policy analysis

With respect to whether Justice Perell erred in his public policy analysis, the appellate court explained that His Honour had found two separate public policy grounds for not enforcing the Letters of Request. First, the Letters of Request interfered with solicitor-client privilege and client confidentiality. Second, it was contrary to public policy to enforce the Letters of Request in aid of a cause of action forbidden in Ontario.

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After describing the general principles that applied to the enforcement of Letters of Request, the appellate court found that Justice Perell's decision to not enforce the Letters of Request on the grounds that doing so was contrary to the protection afforded to solicitor-client privilege was not made in error.

Justice Perell's decision was entitled to deference because to either grant or refuse a foreign request was a matter of judicial discretion. A judge's discretionary order can only be reversed if the judge misapprehends or fails to take into account the evidence or if the judge's decision was clearly wrong or was an unreasonable result.

The appellate court found no such error.

The Letters of Request in *Glegg* sought information from lawyers that was either presumptively protected by solicitor-client privilege or that fell within the protection of litigation privilege.

As well, Justice Perell noted that the information being sought through the Letters of Request essentially could be used to collaterally attack decisions which had been made by the Ontario courts in the family dispute. The appellate court agreed that it was inappropriate for the Florida Court to make rulings on decisions made by Ontario Courts. At [para. 67](#), the Ontario Court of Appeal said:

For the Letters of Request to seek evidence that the appellant plainly intends to use to attack orders made by Ontario Courts amounts to a potential infringement on Canadian sovereignty.

Based on this finding, the appellate court was not required to determine whether or not the Letters of Request was unenforceable based on Justice Perell's reliance on *Frame*.

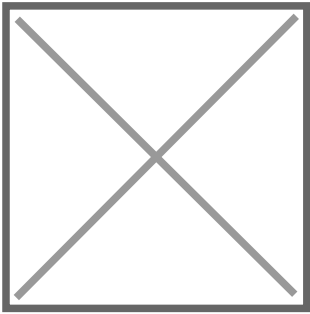
Although the appellate court recognized that *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ON CA) required the public policy analysis to focus on the request, not the underlying foreign litigation, consideration of this issue should await another case.

In *Glegg*, the successful respondent lawyer was represented by James R.G. Cook, litigation partner at Gardiner Roberts LLP, and James Beesley, litigation associate at the firm. They were assisted in the preparation of the written responding factum by Stephen Thiele, partner and Director of Legal Research at the firm.

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [James Cook](#) at 416.865.6628.

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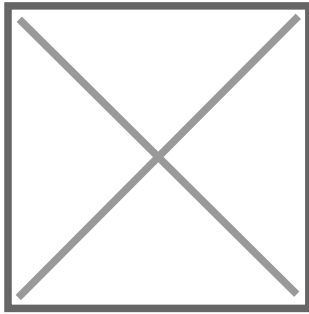
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