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Gone Fishing Letters Rogatory Applications will not be Rubber-Stamped

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The Ontario Court of Appeal recently confirmed that although the basic principle of comity of nations applies – in order to compel evidence or testimony from an Ontario witness for a foreign proceeding, the Applicant’s evidence must satisfy the six requirements in *Re Friction*.ⁱ When insufficient evidence is presented, the successful Respondent will be entitled to their full indemnity costs.ⁱⁱ

To be recognized in Ontario, the letter of request (also referred to as “letters rogatory”) must be precise and the evidence presented in support of recognizing the request (including the letter of request itself) must comply with the applicable federal and provincial Rules of evidenceⁱⁱⁱ and the following six requirements:^{iv}

1. The evidence sought is relevant;
2. The evidence sought is necessary for trial;
3. The evidence sought is not otherwise obtainable;
4. The order sought is not contrary to public policy;
5. The documents requested are identified with reasonable specificity; and
6. The order sought is not unduly burdensome.

Although the procedure of the Court in which the main action is being tried will govern over the issuance of the letters rogatory, retaining local Ontario counsel to consult in drafting the letter of request can assist in successfully enforcing it in Ontario.

The Ontario Court will seek to give “full force and credit” to a foreign Court’s request that does not infringe upon Canadian sovereignty and is not contrary to public policy. However, before the Court will do so, it must be satisfied that the Applicant is not embarking on a fishing expedition and that each of the six *Re Friction* requirements are met.

The letter of request will often be obtained on consent of the foreign parties. Consequently, the Ontario Court will exercise its discretion to ensure that the evidence produced in the Application satisfies the six requirements for obtaining evidence from an Ontario based non-party to foreign litigation. The Applicant bears the burden of establishing each of the criteria. The Respondent will likely be successful if it demonstrates that even one requirement has not been met.

In two separate 2009 Ontario Superior Court Applications, J2 Global Communications Inc. (“J2”) sought to enforce California issued letters of request to compel Ontario based companies and individuals to provide oral and documentary evidence. In each, J2 failed to satisfy the Court that the evidence sought met all six of the requirements.^v

With respect to relevance, Justice Ray stated that a “fishing expedition must be avoided at all costs.”^{vi} The Applicant must clearly define the documents or information it is seeking. A blanket list, such as the Respondent’s internal memos, correspondence, contracts, etc., should be avoided unless direct



relevance can be established. Once defined, the Applicant's evidence must explain how the documents or information sought will be used in the foreign trial – more particularly, how the evidence will assist in establishing the various causes of action at issue. An over-reaching letters rogatory may not be fatal to the Application; the Judge can exercise his or her discretion and narrow the request so to limit it to information which satisfies the “relevance” criteria.^{vii}

Moreover, the letters rogatory itself must define the evidence sought with reasonable specificity. For evidence to be classified as relevant, it must be identified with sufficient detail to permit the Respondent to readily identify and locate the information.^{viii}

Before requiring a non-party to a foreign litigation to incur the time, expense or inconvenience of providing evidence, the Applicant must satisfy the Court that the information in the Respondent's possession is not otherwise obtainable. Where a party, employee of a party, expert, etc. also has access to the information requested, the foreign non-party will not be ordered to assist.

The evidence sought must be necessary for trial. The analysis of this requirement is closely linked with those of relevance and otherwise obtainable. The Applicant must demonstrate that the evidence it is seeking will be adduced at trial, if admissible. Evidence that the documents or information sought will simply be reviewed and considered in advance of trial will generally be deemed insufficient for meeting the “necessity” branch of this test.^{ix}

The Court will not consider a request that is contrary to Canadian public policy – either due to its nature or purpose.^x The court will evaluate whether the request is contrary to the Respondent's constitutional rights, whether the request affects third party rights and whether the obligations imposed upon the parties by the request substantially exceed the obligations that would have been imposed had the litigation been based in Canada. In some instances, the Respondent will seek to apply the Canadian “deemed undertaking rule” to any evidence given in the foreign proceeding. This protects the non-party's evidence from being used in other proceedings – and is particularly important in corporate commercial litigation where competitors may acquire confidential business information through the letters rogatory evidence.

Finally, the non-party must not be unduly burdened by the request.^{xi} The Applicant should consider the Sedona Canada Principles^{xii} regarding discovery and explain to the Court how the search it is requesting can be accomplished with little interruption to the non-party's business operation.

In each of J2's denied Applications, the Court awarded the Respondents their full indemnity costs.

In the first decision, Justice Ray awarded the Respondent, Protus IP Solutions Inc., its full indemnity costs and confirmed that even if the Applicant had been successful, he would have entertained arguments from the Respondent as to the issue of its indemnification for costs.^{xiii}

If I were to have granted the application, I would have entertained argument on the issue of whether, since it was an indulgence, the Respondent should be indemnified for all costs. Since the application was dismissed, I can see no reason why the Respondent should not be completely indemnified under these circumstances.

In the second Application, the Court of Appeal upheld the trial Court's decision to reject the letters rogatory and to award \$107,789.73 in costs to the Respondent. The motions Court reduced the costs sought by the Respondent by almost \$45,000 to account for what Regional Senior Justice Hackland found to be excessive and disproportionate costs as compared to the issues at hand and beyond what the Applicant could reasonably have expected to pay.^{xiv}



The Ontario Courts have provided us with a clear message: letters rogatory will not simply be rubberstamped. To successfully enforce a foreign request - prepare a precise, well drafted letter rogatory, consider the applicable Rules of evidence and address each of the six *Re Friction* criteria.

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ⁱ *j2 Global Communications, Inc. v. M.A.*, 2010 ONCA 594 (Ont. C.A.); *Re Friction Division Products Inc. and El Du Pont de Nemours & Co Inc. (No 2)*, (1986), 56 OR (2nd) 722 (HCJ)

ⁱⁱ *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.); *J2 Global Communications, Inc. v. M.A. et al.*, 2010 ONSC 760 (Ont. S.C.) aff'd 2010 ONCA 594 (Ont. C.A.) leave to appeal to the Supreme Court of Canada discontinued [2010] S.C.C.A. No. 433 (S.C.C.)

ⁱⁱⁱ (Ontario) *Evidence Act*, R.S.O. 1990, c. E. 23, as amended, s. 60; *Canada Evidence Act*, R.S.C. c. C-5, as amended, s. 46

^{iv} *Re Friction Division Products Inc. and El Du Pont de Nemours & Co Inc. (No 2)*, (1986), 56 OR (2nd) 722 (HCJ)

^v *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.); *J2 Global Communications, Inc. v. M.A. et al.*, 2010 ONSC 760 (Ont. S.C.) aff'd 2010 ONCA 594 (Ont. C.A.) leave to appeal to the Supreme Court of Canada discontinued [2010] S.C.C.A. No. 433 (S.C.C.)

^{vi} *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.)

^{vii} *OptiMight Communications, Inc. v. Innovance, Inc.* (2002), 18 C.P.R. (4th) 362 (Ont. C.A.)

^{viii} *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.)

^{ix} *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.)

^x *Presbyterian Church of Sudan v. Rybiak* (2006), 33 C.P.C. (6th) 27 (Ont. C.A.)

^{xi} *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.); *Re Friction Division Products Inc. and El Du Pont de Nemours & Co Inc. (No 2)*, (1986), 56 OR (2nd) 722 (HCJ)

^{xii} *The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery* (October 2010), www.thesedonaconference.org (February 1, 2011).

^{xiii} *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, [2009] O.J. No. 5131 (Ont. S.C.)

^{xiv} *J2 Global Communications, Inc. v. M.A. et al.*, 2010 ONSC 760 (Ont. S.C.) aff'd 2010 ONCA 594 (Ont. C.A.) leave to appeal to the Supreme Court of Canada discontinued [2010] S.C.C.A. No. 433 (S.C.C.)