LETTERS ROGATORY

Your Rules or Mine? Choosing a Procedure When Gathering Evidence in Ontario for Foreign Proceedings

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Introduction

Occasionally, litigants require the evidence of witnesses who are located outside of the jurisdiction where the litigation is taking place. Because such witnesses are typically beyond the reach of the presiding court, the court often seeks judicial assistance from the witness's home jurisdiction. Ontario courts routinely receive "letters rogatory" from foreign courts (most frequently U.S. courts), asking for assistance in compelling the testimony of witnesses located here, or the production of documents in their possession, or both.

Where the Ontario court agrees to honour the request and make an order to that effect, a perhaps unglamorous but nevertheless important side question is: what procedural rules will apply to the collection of the evidence – Ontario's? Those of the requesting court? Some hybrid of the two? The criteria that Ontario courts apply in deciding whether it is appropriate to compel the witness to provide evidence in the first place are well-established,[1] but the law is less clear as to the procedural rules that ought to govern the ensuing examination or document production.

It is a question that warrants consideration by both foreign litigants and local witnesses. A difference in procedure can mean a difference in the substance of the evidence that can be obtained as a practical matter, or affect the time frame and expense involved in the completion of the evidence-taking process. As a corollary, in cases lending themselves to the negotiation of a consent order, the procedure governing the conduct of the examination or production of documents can be an important bargaining chip.

What Difference Does Procedure Make?

While procedural differences between jurisdictions with comparable legal systems, such as the U.S. and Canada, are often of marginal practical importance, they can occasionally be significant, particularly in the context of pre-trial discovery.

Consider, for example, the difference between the handling of objections on oral examinations under the United States *Federal Rules of Civil Procedure* (the "U.S. *Federal Rules*"), and under the Ontario *Rules of Civil Procedure*. Under the U.S. *Federal Rules*, a witness at a pre-trial deposition may object to a question on the record, but must proceed to answer it, except in narrowly prescribed circumstances – a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on the examination ordered by the court, or to present a motion to terminate or limit the examination.[2] The U.S. *Federal Rules* contemplate that if, later on, a party seeks to admit deposition testimony at a hearing or trial, the admissibility of any evidence that is objected to will be determined at that time.[3] The advantage gained by requiring answers on a deposition, even to improper questions, is one of efficiency: the propriety of the question need only be adjudicated by the court if and when the issue crystallizes at a hearing or trial, and need not interrupt the discovery process. A potential downside, however, is that a witness may be required to answer an unfair

[1] See, for example, *Presbytarian Church of Sudan v. Rybiak* (2006), 275 D.L.R. (4th) 512 (C.A.); *R. v. Zingre,* [1981] 2 S.C.R. 392; *Re Friction Division Products Inc. v. E.I. Du Pont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722 (H.C.J.).

[2] Fed. R. Civ. P., Rule 30(*c*)(2). A further exception is that, as a matter of U.S. constitutional law, a witness may "take the Fifth" – that is, refuse to answer a question where the response could criminate the witness.

[3] Fed. R. Civ. P., Rule 32(*b*).

question, or disclose sensitive information to the parties at a deposition, even over an objection that is later deemed to be valid.

In contrast, under the Ontario *Rules of Civil Procedure*, a witness at an out-of-court examination, including an examination for discovery, is not obliged to answer a question to which an objection is made.[4] Where a question is objected to and not answered, a ruling on the propriety of the question may be subsequently obtained on motion to the court.[5] If the court determines that the objection was improper, the court can order the witness to re-attend and answer the question.[6] This process can be cumbersome, slow and expensive. On the other hand, it offers the witness protection from having to divulge information that is ultimately inadmissible at a hearing or trial, but could nevertheless be prejudicial to the witness in the hands of the parties.

Other procedural differences that may be of significance to the parties and the witness in a given case include such matters as whether the examining party can put leading questions to the witness;[7] whether the witness may be asked to give undertakings to answer questions;[8] whether a witness from whom documents are sought has an obligation to produce them in a particular form, or organize them in a particular way;[9] or what uses may be made of evidence disclosed in the discovery process.[10]

Of course, whatever the differences between the jurisdictions, the driving force behind a preference for a given procedure can sometimes be the simple comfort that comes from using one's "home" rules. When evidence is collected in Ontario, it is typically the foreign lawyers who conduct any oral examinations, and they will naturally be more at ease operating under the rules applicable to the underlying proceeding. The party seeking the evidence may prefer to have the procedure of the requesting court apply simply for that reason. Conversely, the Ontario witness may prefer that Ontario procedure govern, so that they can be more easily assisted by local counsel, rather than having to retain foreign counsel.

What Does the Law Say?

The Statutory Framework

Both the Ontario *Evidence Act* and the *Canada Evidence Act* contain provisions addressing incoming letters rogatory.[11] Neither statute, however, provides definitive guidance on the question of procedure.

Under Ontario's *Evidence Act*, the question of procedure is effectively left to the

[4] The exception is where the ground for the objection is that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding. In that case, pursuant to s. 9 of the Ontario *Evidence Act*, the witness is not excused from answering, but the answer is not admissible against the witness in subsequent proceedings (s. 5 of the *Canada Evidence Act* contains similar language).

[5] Rule 34.12(3).

[6] Rule 35.

[7] Under Ontario's *Rules of Civil Procedure*, a witness on discovery cannot object to a question on the ground that it constitutes cross-examination, unless the question is directed solely at the credibility of the witness: Rule 31.06(1)(*b*). Similarly, a witness whose evidence is taken for a motion or application may be cross-examined by the examining party: Rule 39.03(2). Under the U.S. *Federal Rules*, in contrast, the examination and cross-examination of a deponent during deposition are to proceed "as they would at trial under the *Federal Rules of Evidence*": Fed. R. Civ. P. 30(*c*)(1). The *Federal Rules of Evidence*, in turn, provide that leading questions should not be used on direct examination, "except as necessary to develop the witness's testimony" or when the witness is hostile, an adverse party, or "identified with" an adverse party: Fed. R. Evid. 611(*c*).

[8] Ontario's *Rules of Civil Procedure* contemplate undertakings to answer questions (see, e.g., Rule 31.07); the U.S. *Federal Rules*, for example, do not.

[9] The U.S. Federal Rules of Civil Procedure, for example, require a person responding to a subpoena to produce documents to organize and label them to correspond to the categories in the demand: Fed. R. Civ. P. 45(*d*)(1)(A).

[10] In Ontario, the deemed undertaking rule would apply, generally limiting the use of the evidence to the purposes of the proceeding in which it was obtained: Rule 30.1. U.S. jurisdictions do not have a similar rule, and litigants must instead rely on case-specific confidentiality or protective orders.

[11] Although it has never been clearly established when and on what basis the *Canada Evidence Act* applies to letters rogatory addressed to the superior courts of a province, the cases in Ontario have referred to both statutes (typically, counsel bringing applications to enforce letters rogatory cite both for good measure).

discretion of the receiving court. Pursuant to section 60(1), the Superior Court of Justice may order the examination of a witness "in the manner and form" directed by the foreign court, but may also "give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper."

Section 46(1) of the *Canada Evidence Act* (the comparable provision to section 60(1) of the Ontario *Evidence Act*) is silent on the question of procedure. However, additional provisions in the *Canada Evidence Act* do contemplate that foreign procedure will apply where testimony is given by "virtual presence." Specifically, sections 46(2) and 50(1.1) provide:

> 46(2) For greater certainty, testimony for the purposes of subsection (1) may be given by means of technology that permits the virtual presence of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.
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> 50(1.1) Despite subsection (1),[12] when a party or witness gives evidence under subsection 46(2), the evidence shall be given as though they were physically before the court or tribunal outside Canada, for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the Canadian law of non-disclosure of information or privilege.

The philosophy behind section 50(1.1) seems clear – where technology permits the witness to be "present" before the requesting court, which will therefore be controlling the proceedings directly and in real time, deference to the requesting court's procedure is sensible. These provisions have yet to be judicially applied or interpreted, however, and it remains to be seen what influence they may have in cases involving pre-trial discovery, and other types of examination where the witness does not physically appear before the court.

The Case Law

Perhaps because it is often an afterthought for the parties, there is not a great deal of case law in which the matter of procedure is squarely addressed. The few cases there are go both ways.

On the one hand, the case law demonstrates that it is clearly within the court's discretion to order that an examination take place according to the requesting court's procedure. In *Connecticut Retirement Plans and Trust Funds v. Buchan*,[13] the Court of Appeal for Ontario upheld the decision of an application judge who had ordered that an examination pursuant to letters rogatory take place pursuant to U.S. rules, as requested by the foreign court. In particular, the Court rejected the submission that permitting a foreign lawyer to conduct an examination in Ontario according to foreign rules would infringe Canadian sovereignty. Similarly, in *AstraZeneca LP v. Wolman*,[14] the Court denied a witness's request that his examination proceed under the Ontario *Rules of Civil Procedure*, and instead ordered that the U.S. *Federal Rules* and the Local Rules of the United States District Court for the District of Delaware would govern the examination (although the Court required the applicants in that case to undertake that the witness would enjoy the protection of Ontario's "deemed undertaking" rule, limiting the use of his evidence).

Indeed, there has been some suggestion in the case law that there is a common law presumption in favour of the requesting court's procedure. The courts in both *Connecticut Retirement* and *AstraZeneca* relied, in ordering that the procedure of the foreign court apply, on *United States of America v. Pressey*.[15] In both cases, the Court characterized the holding in *Pressey*, at paragraphs 11-12, as follows: "the technical rules of evidence of the requesting state should apply to the examination unless the proceedings are dealing with fundamental values and the rights of witnesses."

However, the reasons in *Pressey* do not in fact appear to stand for the proposition that the foreign rules of procedure should be

[12] Section 50(1) preserves any local right the witness may have to refuse to answer questions tending to criminate the witness.

[13] 2007 ONCA 462.

[14] 2009 CanLII 69793 (Ont. S.C.J.).

[15] (1988), 65 O.R. (2d) 141.

presumptively applicable. *Pressey* (a case decided under a former version of the *Canada Evidence Act*) dealt with the rights of a witness testifying in Ontario for the purpose of a U.S. criminal proceeding. The question was whether the witness could invoke American constitutional law, and refuse to answer questions on the basis that the answer could criminate him, or whether the witness's examination was subject to the Canadian law of evidence, and specifically the provisions of the *Canada Evidence Act* that require a witness to answer such questions (but prohibit the use of the answers in any subsequent proceeding against the witness). The Court of Appeal first considered English decisions in which courts had held that, in respect of an examination conducted in England at the request of a foreign court, the rules of admissibility of the foreign courts should guide the English court in determining the validity of any objections. What the Court of Appeal then actually said at paragraphs 11-12 was as follows:

> [11] In my respectful view, however, this willingness to accommodate the evidentiary rules of the requesting Court extends only to what might be described as the technical rules of evidence. For example, if a foreign jurisdiction regards hearsay as admissible then there would be little point in excluding such evidence in an examination taking place in this country. Certainly the witness would have little or no interest in whether or not he recounted hearsay.
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> [12] However, different considerations must apply when more fundamental values are involved and where the rights of the witness are at stake.

It thus appears that the Court in *Pressey* was commenting on the applicable law of evidence, rather than adopting a presumption in favour of foreign procedure. Indeed, at paragraph 8, the Court in *Pressey* stated:

> [8] Despite the fact that the process is initiated by a foreign Court, ss. 43-48 [of the *Canada Evidence Act*, R.S.C. 1970, c. E-10] make it clear that the examination is controlled by and rests on the authority of a Canadian Court. The legal process that takes place in this country is not a mere extension of the requesting Court, but is an independent process conducted to assist the requesting Court.

The Court ultimately concluded that the witness could not rely on U.S. constitutional law, and was subject to the *Canada Evidence Act*. The door is likely open, therefore, to ordering the application of local procedure in an appropriate case.

Indeed, there were cases before *Connecticut Retirement* in which this was the outcome,[16] and in at least one reported case post-*Connecticut Retirement*, the Superior Court of Justice has, after considering the question, ordered that an examination pursuant to a letter of request be governed at least in part by Ontario rules. *Lafarge Canada Inc. v. Khan*[17] dealt with a letter of request from Nova Scotia,[18] asking the Ontario court to summon a witness for examination, and requesting that the examination be conducted in accordance with Nova Scotia's rules of procedure. Nova Scotia's rules differ from Ontario's in that, like the U.S. *Federal Rules*, they require a witness being discovered to answer a question in spite of an objection, with the court ruling on the propriety of the question at a later date.

In *Lafarge*, Strathy J. (as he then was) adopted the approach taken in *Mulroney v. Coates*,[19] a previous case involving a letter of request from Nova Scotia, in which Catzman J. (as he then was) had held that the procedure governing objections should be that set out in Rule 34.12 of the Ontario *Rules of Civil Procedure*. At paragraph 71, Strathy J. concluded:

> [71] While I am mindful of the desirability of giving full force and effect to letters of request from another province, it appears to me that the course of action taken by Catzman, J. in *Mulroney v. Coates* as regards

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[16] See, for example, *Advance/Newhouse Partnership and Bright House Networks, LLC v. Brighthouse Inc.*, 2005 CanLII 3461 (Ont. S.C.J.).

[17] 2008 CanLII 6869, 89 O.R. (3d) 619, 298 DLR (4th) 686 (S.C.J.).

[18] The Court confirmed that although the law regarding letters of request is traditionally directed at requests from foreign courts, the Superior Court of Justice has jurisdiction to enforce a letter of request from a sister province.

[19] (1986), 54 O.R. (2d) 353 (sub nom. *Southam Inc. v. Mulroney*) (Ont. H.C.J.), aff'd [1987] O.J. No. 408 (C.A.).

> objections is both reasonable and practical. Nor does it do violence to the decision of the Court of Appeal in *Connecticut v. Buchan*. While we are not dealing with constitutional rights of the same order as those considered in *United States of America v. Pressey*, it seems reasonable to conclude that a witness should not be compelled to answer a question to which her counsel has objected without a ruling of the court. The Ontario Superior Court has a legitimate interest in ensuring that the examination of witnesses pursuant to its orders is subject to its over-riding supervision.

Strathy J. therefore ordered that the objection process and any disputes in that regard be governed by the Ontario *Rules of Civil Procedure*.

Conclusion

The question of which procedure (or which aspects of which procedure) will apply to the collection of evidence for use in foreign litigation is secondary to whether that evidence should be compelled in the first place, and the law on this subject is, perhaps understandably, limited. An Ontario witness can usually count on the court at least imposing Ontario's deemed undertaking rule,[20] but it would be prudent to consider everything else to be an open question, regardless of whether the requesting court has specified a preference in the letter itself. In many cases, the applicable procedure will not be of any real consequence, but parties are well-advised to at least consider in advance whether procedure matters to them in their particular case, and if so, to try and negotiate the outcome of this question where possible.

[20] See, for example, *AstraZeneca*, supra note 14.