

## What You Need to Know About Letters Rogatory in Ontario

Letters Rogatory are known as Letters of Request in Ontario. U.S. litigants can use a Letter Rogatory to obtain evidence and testimony from witnesses within the jurisdiction of Ontario courts. A Letter Rogatory is a request from a U.S. court that an Ontario court order individuals or corporations within its jurisdiction to be deposed by or provide documentary evidence to U.S. litigants. There is no treaty governing the collection, by U.S. litigants, of evidence from non-parties in Ontario. The Letter Rogatory is based on the principle of comity.

Ontario's rules governing discovery are more stringent than their counter-parts in most, if not all, American jurisdictions. An Ontario court considering a Letter of Request or Letter Rogatory from an American court will consider two (2) things:

1. whether the request is contrary to the sovereignty of Canada; and
2. whether, on a balance of probabilities the court *should* exercise its discretion to enforce the Letter of Request or Letter Rogatory.

### Getting Evidence from Foreign Non-Party Witnesses in Ontario

The granting of an Order to enforce a Letter Rogatory or a Letter of Request can be done by way of Application commenced in the Ontario Superior Court of Justice. The granting of such an Order is not routine. The Letter Rogatory *must* be structured in such a way that the request for witnesses or evidence is not unduly burdensome on the Canadian witnesses. In some cases this will mean that the witnesses will have to be paid for the cost of their attendance or of producing the documents. The U.S. litigant requesting the information must meet a high threshold in order to demonstrate for the Ontario court that its discretion should be exercised to compel testimony or documentary discovery.

An Ontario court considering a Letter Rogatory from an American court will apply a test based on statutory and common law. What you ask for and how you ask for it *will* effect whether and to what extent the request is granted.

## **What Will the Ontario Court Need?**

The burden of convincing the Ontario court to exercise its discretion to enforce a Letter Rogatory rests upon the U.S. litigant bringing the request to the court in Ontario. Among other things, the Ontario Court will consider:

- Is the evidence necessary for the U.S. proceeding?
- Is the request burdensome?
- Will the evidence be used for pre-trial motions or for trial?
- Is the evidence otherwise obtainable or duplicative of evidence given in the foreign proceeding?
- What is the effect of Ontario's Rules of Procedure, notably the "deemed undertaking rule"?

## **How We Can Help**

The lawyers of the Transnational Law Group of Lerner LLP are experienced in guiding U.S. litigants through the preparation of a Letter Rogatory in light of all of the considerations and issues relevant to the Ontario court in order to maximize your chances of success in Ontario. After you have successfully obtained a Letter Rogatory from the U.S. court we can assist you through the rules, laws and procedures during the Application process in the Ontario Superior Court.

Lerner can help you pilot your Letter Rogatory from inception to completion of the depositions. We have both the knowledge and the experience to help you structure the Letter Rogatory to ensure the maximum possible discovery rights, the ability to negotiate with the witnesses to achieve settlement, and the capacity, skill, and talent to argue the application for enforcement of the Letter Rogatory at the court.

Following your successful application, Lerner can further assist you with the logistics of foreign discovery. We have access to facilities, court reporters certified to take depositions under the U.S. Federal Rules of Procedure, and the infrastructure to videoconference or videotape these depositions in-house. Lerner can provide everything you need to facilitate depositions here in Toronto.

