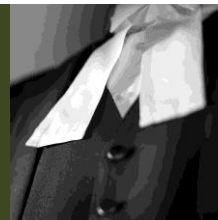


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The letters rogatory that got away

BY [G. L. SONNY INGRAM](#), AFFLECK GREENE ORR LLP.

Last fall, the Ontario Court of Appeal overturned an order enforcing a request for international judicial assistance (also known as letters rogatory) that sought to compel a former executive of a Talisman Energy Inc. subsidiary to be deposed in a U.S. action. Judicial assistance to the U.S. court was refused on the basis that the request was overly broad and sought evidence not relevant or necessary to the issues in the U.S. litigation.¹

The request had been issued the U.S. District Court for the Southern District of New York in a civil action brought against Canadian oil company Talisman by residents and former residents of Sudan. They claimed that Talisman, which has oil exploration and extraction operations in Sudan, aided and abetted Sudanese government acts of genocide, enslavement, torture, rape and other human rights violations. Notwithstanding a lengthy discovery process in the U.S. that had seen 21 Talisman executives already deposed, the New York plaintiffs also sought to examine Ontario resident, Richard Rybiak, who is a former manager with Talisman's Dutch subsidiary.

Interestingly, the Canadian government had previously delivered a diplomatic note to the United States in January 2005 expressing concern over the New York litigation against Talisman. Among other things, the Canadian government opposed the U.S. court's assertion of extra-territorial jurisdiction over Canadian individuals in relation to alleged activities taking place entirely outside the U.S.

On the initial application, Ontario Superior Court Justice Romain Pitt enforced the U.S. court's request and ordered Mr. Rybiak to testify. Mr. Rybiak appealed.

In overturning the order of Pitt J. and refusing to enforce the U.S. court's request, the Ontario Court of Appeal did not accept that the diplomatic note by the Canadian government meant that the U.S. court's request was somehow improper or against public policy. However, the Court of Appeal did find that Justice Pitt had erred in enforcing the U.S. court's request without addressing whether Rybiak's evidence was relevant and necessary to the issues in the U.S. litigation and without considering whether the sought-after evidence was otherwise obtainable.

On behalf of a unanimous appeal panel, Goudge J.A. cautioned that, "without some showing of relevance, the court may be sanctioning a fishing expedition..." and found that an evidentiary record comprised of "bald assertions" of relevance by the plaintiffs' New York lawyer did not meet that onus. Further, the New York court's request sought evidence that went well beyond the matters at issue in the U.S. litigation and that was, in any event, available through other channels. In the circumstances, the order enforcing the U.S. District Court's request for assistance could not stand.

This case illustrates that, notwithstanding the principles of international comity that call upon courts to give due regard to other courts' decisions and the trend toward increasing international judicial co-operation, Canadian enforcement of foreign letters of request is not a rubber stamp. Courts in Ontario and elsewhere in Canada will be loath to enforce a foreign request that is not shown to meet Canadian standards of relevance, is overly broad, or seeks to obtain evidence that is available elsewhere. Parties seeking Canadian judicial assistance in support of foreign proceedings must

put forward real evidence that addresses these issues or they risk having judicial assistance denied.

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¹ For the full September 2005 decision of the Court of Appeal in *Re Presbyterian Church of Sudan*, link to: http://www.ontariocourts.on.ca/decisions/OntarioCourtsSearch_VOpenFile.cfm?serverFilePath=D%3A%5CUsers%5COntario%20Courts%5Cwww%5Cdecisions%5C2006%5Cseptember%5CC44057%2Ehtm



For more information contact:

G.L. Sonny Ingram, Affleck Greene Orr LLP

Tel: 416-360-00668

Email: singram@agolaw.com