2008 CarswellOnt 943
Ontario Superior Court of Justice

Lafarge Canada Inc. v. Khan

2008 CarswellOnt 943, [2008] O.J. No. 701, 170 A.C.W.S. (3d) 487, 298 D.L.R. (4th) 686, 57 C.P.C. (6th) 253, 89 O.R. (3d) 619

Lafarge Canada Inc. v. Daniel Khan

Strathy J.

Heard: February 1, 2008
Judgment: February 26, 2008 *
Docket: 07-CV-341403PD2

Counsel: D. Shiller for Moving Party
W. Ryan, Q.C. for Responding Party

Subject: Evidence; International; Civil Practice and Procedure

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Forms considered:

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Form 34D — referred to

MOTION by witness for order setting aside summons to witness.

***Strathy J.*:**

1 This is a motion pursuant to Rule 38.11 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("Ontario Rules") to set aside an order made without notice enforcing a letter of request to examine a witness issued by the Supreme Court of Nova Scotia. The motion raises the following issues concerning "incoming" provincial letters of request: (a) the jurisdiction to make an order; (b) the notice to be given to the proposed witness; (c) the test for enforcement; (d) the scope of the proposed examination; (e) the protection of the witness on the examination; (f) the procedure

to be followed; and (g) whether the witness may have counsel present at the examination and, if so, at whose expense.

The Underlying Action

2 The underlying action was brought in the Supreme Court of Nova Scotia by Lafarge Canada Inc. ("Lafarge"), a cement manufacturer, against a former employee, Daniel Khan ("Khan"). In that action, Lafarge claims that Khan intentionally disclosed confidential information to third parties. Specifically, Lafarge claims that Khan disclosed a technical document to Maureen Reilly ("Reilly"), who allegedly gave it to an Ontario provincial agency. Reilly, an Ontario resident, is the witness sought to be examined.

3 Khan denies misuse of confidential information and counterclaims for damages for wrongful dismissal. On discovery, he denied having provided the technical document to Reilly.

The Letter of Request

4 Before applying for a letter of request in Nova Scotia, Mr. Ryan, counsel for Lafarge, wrote to Reilly proposing examination on consent. His letter stated that if the examination could not be arranged consensually, he would apply for a court order.

5 Reilly did not consent and on March 28, 2007, Lafarge brought an application in the Supreme Court of Nova Scotia before Wright, J. in Chambers to issue a letter of request to the Ontario Superior Court of Justice that a Notice of Examination be issued for the examination for discovery of Reilly in Toronto on May 3, 2007, in accordance with the Nova Scotia *Civil Procedure Rules*, made pursuant to the *Judicature Act*, R.S.N.S. 1989, c. 240 ("Nova Scotia Rules"). Khan, who is self-represented, did not oppose the application, indicating that he, too, wished to examine Reilly. The order of Wright, J. together with a letter of request, was issued on March 28, 2007.

6 An application was then brought by Lafarge in this Court for an order giving effect to the letter of request and for the issuance of a summons to Reilly. While Khan was named as a responding party, Reilly was neither named nor given notice of the application. An order was made, without notice to Reilly, by a Judge of this Court on April 20, 2007, for the issuance of a summons to Reilly for the purpose of examination pursuant to the letter of request.

7 Reilly could not be served with the summons prior to the scheduled examination date, so Lafarge made a second application to the Nova Scotia Supreme Court and a letter of request was again issued by the order of Wright, J. dated October 2, 2007.

8 Like the letter of request issued on March 28, 2007, the October 2, 2007 letter of request asks the Ontario Superior Court to summon Reilly to be examined "orally or by interrogatories touching the matters in question" and to cause her to produce "all books papers, documents and

records in his [sic] custody, possession, or control containing any entry, memorandum, or minutes relating to the matters in question between the parties to this action." The letter also requests "that you will cause the examination to be conducted in accordance with Civil Procedure Rules 18.07 to 18.13 inclusive of the laws of the Province of Nova Scotia, a copy of which is attached hereto".

9 A fresh application was made by Lafarge in Ontario, again with the consent of Khan and again without naming Reilly as a respondent and without notice to her, and an order was issued by another Judge of this Court on October 19, 2007. It is this order that Reilly moves to set aside. Alternatively, Reilly asks for directions concerning the scope of questioning at the examination and the costs thereof.

The Nova Scotia Rules

10 Examination for discovery in Nova Scotia is governed by the Nova Scotia Rules, *supra*. The letter of request asks that the examination be conducted in accordance with Nova Scotia Rules 18.07 to 18.13. Although not specifically referred to in the letter of request, Rule 18.01 states:

> 18.01. (1) Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.

11 Discovery of witnesses is permitted in Nova Scotia, whereas discovery in Ontario is confined in the first instance to parties. In Ontario, leave is required to examine non-parties under Rule 31.10 and will only be granted if certain conditions are met.

12 Also relevant is Nova Scotia Rule 18.09:

> 18.09(1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.
>
> (2) In order to comply with paragraph (1), the person being examined may be required to inform himself and the examination may be adjourned for that purpose.
>
> (3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.

13 The Nova Scotia courts have held that the discovery provisions of the Nova Scotia Rules are to be interpreted in a broad and liberal manner to give effect to full disclosure: *Upham v. You* (1986), 73 N.S.R. (2d) 73 (N.S. C.A.) and cases referred to therein; *Campbell v. Jones* (1998),

168 N.S.R. (2d) 1 (N.S. S.C.); *Westminer Canada Holdings Ltd. v. Coughlan* (1989), 91 N.S.R. (2d) 214 (N.S. C.A.).

14 Although the Nova Scotia Rules regarding discovery are arguably somewhat broader than the comparable Ontario Rules, I am not convinced that the difference is material. In Ontario, the "semblance of relevancy" test has considerably broadened the scope of discovery: *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (Ont. H.C.).

15 The procedure followed on discovery in Nova Scotia is different than in Ontario. Nova Scotia Rule 18.08 provides:

> 18.08. Any person examined for discovery may be further examined on his own behalf or on behalf of any party and may then be re-examined, and any such further examination and re-examination shall be proceeded with immediately after his examination by the other party and may take the form of a cross-examination.

16 Thus, the person examined has the right to be examined by his or her own counsel, following examination by the party requesting the examination.

17 A person being examined can also be compelled to produce additional documents:

> 18.11 Anyone who admits upon an examination for discovery that he has in his custody or power any book, paper document or record relating to the matters in question in the proceeding, not privileged or protected from production, shall produce the same for the inspection of the party examining him upon the direction of the examiner or order of the court within a reasonable time as fixed by the direction or order.

18 Rule 18.12 deals with objections:

> 18.12(1) An examiner shall, upon an examination for discovery, cause every question and answer to be taken down and a note made upon the dis-positions of any question objected to and the ground of the objection, but the evidence objected to shall be taken subject to the objection
>
> (2) No objection to any question shall be valid if made solely upon the ground that any answer thereto will disclose the name of a witness, or that the question will be inadmissible at the trial or hearing if the answer sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (3) Any ruling or direction of the examiner may be appealed to the court, and the examiner shall upon request certify under his hand the question raised, any answer thereto, and his ruling or direction thereon.

> (4) The validity of an objection to any question, answer, ruling or direction shall be decided by the court, and the costs of and occasioned by the objection shall be in the discretion of the court and may be ordered to be paid by the person under examination.

19 On its face, the rule requires that all questions must be answered, with any objection being noted on the record and the court having the authority to rule on the objection. This is in contrast with the Ontario Rules, which contemplate that a party may make objections to questions, refuse to answer, give an undertaking or take a question "under advisement" (Ontario Rule 31.07).

20 In *Wall v. Horn Abbot Ltd.*, [2003] N.S.J. No. 438 (N.S. C.A.), the Nova Scotia Court of Appeal indicated that, in practice, the strict dictates of Nova Scotia Rule 18.12 are not always followed, and that from time to time objections are taken and rulings as to relevancy and other matters are later sought from the court.

Submissions on behalf of Reilly

21 In her affidavit filed in support of this motion, Reilly sets out the history of the matter and says that she understands that she can be ordered to provide discovery evidence and will comply with any order the court makes. She says that she has nothing to hide from Lafarge, but expresses the concern that because she is an "environmentalist" and "some of my work involves criticisms of the applicant and I have no doubt that the applicant does not hold me in high regard" she does not want to be examined on matters beyond the scope of the underlying action. Reilly admits that she came into possession of the technical document but says that it was provided to her anonymously. Finally, she says that she cannot afford to pay a lawyer to attend at the examination with her and has had to borrow money to retain counsel for the purposes of this motion.

22 On this motion, Mr. Shiller, counsel on behalf of Reilly asks: (a) that the order enforcing the letter of request be set aside on the basis that it was "irregularly obtained"; or, alternatively (b) for directions with respect to the order, particularly as to (i) the payment to Reilly of "all legal fees and other expenses associated with the examination for discovery" and (ii) an order "setting the parameters of the questions that may be asked of the non-party at her examination for discovery."

23 Mr. Shiller submits that the application to give effect to the letters of request should have been served on Reilly. He says that unlike Ontario Rule 37.07(2), which permits a motion to proceed without notice, there is no such provision with respect to applications and points to Ontario Rule 38.06(1) which requires an application to be served on all parties. He argues that the failure to give notice is such a fundamental defect that the order enforcing the letter of request should be set aside. He notes that in most of the cases cited by Mr. Ryan, notice of the application has been given to the proposed witness.

24 Acknowledging the importance of the principle of "comity" between provinces, Mr. Shiller submits that while it may make some superficial sense for me to deal with the enforcement of the letter of request in spite of the procedural defect, an order of this kind is such an intrusion into the affairs of a resident of Ontario that there should be strict compliance with the Rules. He says that the order should be set aside, the materials re-served on Reilly and a new motion date set to argue the same issues. While he admits that this will result in additional costs, and delay, he says that a message needs to be sent to all litigants that in applications of this kind "you have to play by the rules".

25 Mr. Shiller also expresses concerns about the broad scope of the examination permitted under the Nova Scotia Rules. Prior to the motion, there had been correspondence between counsel in which Mr. Ryan had set out the proposed scope of his examination. In his submissions before me, Mr. Ryan assured me that he was not interested in investigating matters beyond the scope of the underlying action, but Reilly has some concerns, as expressed by her counsel, that Lafarge may have ulterior motives. Mr. Shiller submitted that the court should impose specific restrictions on the scope of the examination.

26 Mr. Shiller notes that Nova Scotia has an "implied undertaking rule" and "witness immunity rule", but he wants a "written undertaking to the effect that none of the information coming from the examination will be used in any way to commence action against Reilly anywhere in the world".

27 Finally, Mr. Shiller submits that Reilly is entitled to be represented by counsel on the examination and wants Lafarge to pay her legal fees in that regard, up to $10,000.00.

Submissions on Behalf of Lafarge

28 Mr. Ryan notes that the use of letters of request is a common feature of modern litigation and that the courts of Ontario routinely give effect to these requests, whether from other countries, or other provinces or territories. He submits that the procedures are similar in each province and that the invariable practice, in his experience, is that no notice of the application to enforce an "incoming letter of request" is given to the proposed witness and that following the application a summons is simply issued by the court of the province where the examination is to take place. He takes the position that there is no obligation under the Ontario Rules to give notice to the proposed witness and notes that both orders of this Court in this matter were granted without notice. He candidly acknowledges that with the benefit of hindsight, he would give notice in future applications of this nature, if only to avoid disputes such as this.

29 Mr. Ryan says that this is a Nova Scotia examination and it is governed by Nova Scotia procedural rules. He notes that the letter of request asks that the examination be conducted in accordance with the Nova Scotia Rules and notes the broad scope of Nova Scotia Rule 18.09(1).

30 Mr. Ryan says that he will be conducting Reilly's examination and assures me that he does not intend to pursue irrelevant matters.

31 Finally, Mr. Ryan submits that Reilly is protected by the "implied undertaking" rule, which is recognized in Nova Scotia as well as by the "witness immunity" rule. He acknowledges that she is entitled to have counsel present at the examination, but says that this must be at her own expense, as part of her obligation to cooperate with the legal process in spite of personal inconvenience.

Analysis

(a) Jurisdiction to Enforce Incoming Letters of Request

32 Letters of request are an important feature of modern litigation. Ontario Rules 34.07(2) and (3) and 36.03 contemplate the use of "outgoing" letters of request for the purpose of examinations generally (Rule 34) or for the taking of evidence before trial (Rule 36). The form for a letter of request (Form 34D) is the same whether the request is to the judicial authorities of another province, a state, or a country. The form is not dissimilar to the Nova Scotia form, but includes the added words at the end:

> AND WHEN YOU REQUEST IT, the courts of Ontario are ready and willing to do the same for you in a similar case.

33 There is no specific provision in the Ontario Rules for "incoming" letters of request. There is, however, authority to give effect to "incoming" letters of request from foreign tribunals in section 60 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23:

> 60.(1) Where it is made to appear to the Superior Court of Justice or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court.

34 A similar provision is found in section 46 of the *Canada Evidence Act*, R.S.C. 1985, c. C.5, as amended:

> 46.(1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

35 In *Mulroney v. Coates* (1986), 54 O.R. (2d) 353 (Ont. H.C.) (sub nom. *Southam Inc. v. Mulroney*), aff'd. (April 15, 1987), Doc. CA 264/86 (Ont. C.A.), Catzman, J., as he then was, noted that while these provisions are directed to requests from jurisdictions outside Canada, there is precedent for using them to enforce "incoming" letters of request from other provinces, what he described, at para. 15, as "a practical, if not literal, approach which I am prepared to perpetuate in the present case notwithstanding the proclamation in 1985 of the *Interprovincial Subpoenas Act* ...."

36 Justice Catzman noted that the enforcement of letters of request is based on the principle of comity and referred to the judgment of Dickson, J., as he then was, in *R. v. Zingre*, [1981] 2 S.C.R. 392 (S.C.C.), at 400-401, (1981), 127 D.L.R. (3d) 223 (S.C.C.), at 230, in which he stated:

> As that great jurist, U.S. Chief Justice Marshall, observed in *The Schooner Exchange v. M'Faddon & Others*, [(1812), 7 Cranch's Reports 116] at pp. 136-37, the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.
>
> It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al*. [[1980] 2 S.C.R. 39, 111 D.L.R. (3d) 74, 51 C.P.R. (2d) 1]) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.

37 Justice Catzman continued, at para. 23:

> On this last topic, I should record the suggestion made by Mr. Morphy that, by reason of the existence of one common sovereign, the notion of comity may not extend to relations between provinces. For his part, Mr. Henderson entertained no doubt on the subject. Curiously, neither counsel has been able to find any reported decision on the point, nor have I. If there is no such thing as interprovincial judicial comity, by that or any other name, one may be permitted to wonder why the form of letter of request (Form 34D) prescribed by our Rules of Civil Procedure for use where, in connection with a proceeding pending in our courts, a person is to be examined outside Ontario — which may as readily be directed to the judicial authorities of another province of Canada as to those of a State or country outside our nation's borders — betokens reciprocity in its penultimate paragraph in these words:
>
> > AND WHEN YOU REQUEST IT, the courts of Ontario are ready and willing to do the same for you in a similar case.
>
> While it is not essential to express any concluded view on the subject in the present case, the concept of extending the hand of comity to a superior court of a sister province of this country, subject to the recognized limitations on the doctrine identified in the passage from *Zingre* quoted above, so commends itself to me that, in the absence of authority to the contrary, I would be loath to accept that such a doctrine is without legal foundation. Assuming the existence of that doctrine, and adverting to the limitations mentioned, I do not consider that enforcement of the letter of request under consideration would either be contrary to the public policy of this province or otherwise be prejudicial to its sovereignty or its citizens.

38 Apart from *Mulroney v. Coates, supra*, there have been few decisions dealing with inter-provincial letters of request. This is perhaps because until relatively recently the practice of pre-trial "depositions" of witnesses, as opposed to parties, was more common in the United States than in Canada. In *Mulroney v. Coates*, Catzman, J. referred to *Kirchoffer v. Imperial Loan & Investment Co.* (1904), 7 O.L.R. 295 (Ont. Ch.), a decision of Chancellor Boyd, which gave effect to a Manitoba order for the examination of a person for discovery, based on the provisions of a federal statute: *An Act respecting the taking of evidence relating to proceedings in Courts out of Canada*, R.S.C. 1886, c. 140. He also referred to *Graham v. Vancouver Stock Exchange* (1984), 54 B.C.L.R. 69 (B.C. S.C.), in which a judge of the British Columbia Supreme Court, relying on the provincial *Evidence Act*, enforced an Ontario order for the taking of commission evidence. I should also note *Nova Scotia (Commission of Inquiry into the Westray Mine Disaster*) *v. Frame*, [1997] O.J. No. 5425 (Ont. Gen. Div.), in which Sheard, J. gave effect to a letter of request from the Nova Scotia Supreme Court for the taking of evidence in Ontario in relation to a provincial public inquiry.

39 Decisions of the Supreme Court of Canada subsequent to *Zingre*, *supra*, have stressed the importance of interprovincial judicial respect and cooperation. In *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at 270, LaForest, J. stated:

> The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already averted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice...

40 Similar considerations were averted to by McLachlin, C.J., dissenting on a different point in *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612 (S.C.C.) at para 79:

> Although the enforcement of money judgments across provincial boundaries raises unique considerations and constitutional dimensions, the underlying principles of comity, order and fairness must apply both interprovincially and internationally. As Major J. noted in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72, "[t]he principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law" (para. 27). These principles do not exclude the enforcement of non-monetary judgments from another country. At the same time, comity, which requires respect for the legitimate sovereignty of others and for the needs created by relationships that "involve a constant flow of products, wealth and people across the globe", may favour it: *Hunt*, at p. 322.

41 *Mulroney v. Coates* was followed in the New Brunswick case of *Binder v. Royal Bank*, [1997] N.B.J. No. 64 (N.B. Q.B.), an application to enforce a letter of request from Nova Scotia. In that case, Creaghan, J. held that, as a matter of comity, the New Brunswick Court of Queen's Bench would perfect an order of the Nova Scotia Supreme Court for the examination of witnesses on discovery, stating at para. 11 of his Reasons:

> It should be noted that this is not an application to obtain testimony pertaining to a matter before a court in a foreign country. While there remains a discretion in the jurisdiction to which a request is made, I adopt the view of Mr. Justice Catzman in *Mulroney v. Coates* that the concept of extending the hand of comity to a superior court in a sister province of this country must be supported as a matter of law unless it is contrary to the public policy of the jurisdiction to which the request is directed. On the evidence before me, there is no evidence that leads me to conclude that an examination for discovery of the persons proposed would be contrary to the public policy in this jurisdiction.

42 I respectfully agree with this observation. In the recent decision of the Ontario Court of Appeal in *Connecticut Retirement Plans & Trust Funds v. Buchan*, [2007] O.J. No. 2492 (Ont.

C.A.), dealing with the enforcement of California letters rogatory, Weiler, J.A., writing for the Court, noted at para. 13 that, in considering the enforcement of letters of request, "[T]he Canadian court does not function as an appellate court in respect of the decision of a foreign court." This statement is equally, if not more, applicable to the enforcement of letters of request from another province. I would suggest that a request from another province would be presumptively honoured except in the most unusual circumstances.

43 The fact that the order to be enforced would not normally have been granted in Ontario, or that the order is based on a procedure not available in Ontario, would not be a sufficient basis on which to refuse the request.

(b) Notice Requirements

44 The application in this case was dealt with on consent, because the nominal "responding party", Khan, supported the application and also wished to examine Reilly. The application was stated to be brought pursuant to Ontario Rule 31.10(1) (discovery of non-parties with leave) and 34.04(4) (service of summons).

45 Rule 38.06(1) provides that

> The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions. [my emphasis]

46 Presumably the application was not served on Reilly because she was not a "party". It does not appear from the materials that the issue of service on Reilly was raised with either of the judges who heard the applications in Ontario or that directions were sought as to service under Rule 38.06(1).

47 In answer to Mr. Shiller's submission that the proposed witness should be served, Mr. Ryan contends that the witness is adequately protected by Rule 38.11 which provides:

> 38.11(1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

48 Mr. Ryan's submission is supported by analogy by *Ryndych v. Hamurak*, [1999] O.J. No. 4718 (Ont. S.C.J.), in which Molloy, J., in a motion dealing with, among other things, a request to examine a non-party pursuant to Rule 31.10, held that it was not necessary to serve notice of the motion on the non-party (who had said that she was not going to answer questions unless

subpoenaed by a lawyer) and that the non-party was protected under the Rules because she would be entitled to move to have the order set aside, it having been made without notice.

49 Reviewing the cases dealing with letters of request, however, I agree with Mr. Shiller's submission. In this province the practice seems to be to make the proposed witness a respondent to the application, together with the party or parties in the "foreign" litigation. This was the practice ultimately followed in *Mulroney v. Coates* and also appears to have been followed in *Morgan, Lewis & Bockius LLP v. Gauthier*, [2006] O.J. No. 4936 (Ont. S.C.J.); *B.F. Jones Logistics Inc. v. Rolko* (2004), 72 O.R. (3d) 355 (Ont. S.C.J.); *Triexe Management Group Inc. v. Fieldturf International Inc.*, [2005] O.J. No. 4359 (Ont. S.C.J.); *Kong Wah Holdings Ltd. (Liquidator of) v. Yong*, [2006] O.J. No. 3714 (Ont. S.C.J. [Commercial List]); *Presbyterian Church of Sudan v. Taylor*, [2005] O.J. No. 3212 (Ont. S.C.J.); *Four Seasons Hotels Ltd. v. Legacy Hotels Real Estate Investment Trust*, [2003] O.J. No. 1341 (Ont. S.C.J.); *D.G. Jewellery of Canada Ltd. v. Valentine* (2000), 11 C.P.C. (5th) 378 (Ont. S.C.J.), to mention a few.

50 As a matter of efficiency and procedural fairness, the proposed witness should have notice of the application and an opportunity to make submissions as to whether the letters of request should be enforced, and, if so, as to any limitations concerning their scope and the procedure to be followed on the examination.

51 That being said, I do not accept Mr. Shiller's suggestion that the order under attack should be set aside and that Lafarge should be required to apply, yet a third time, for a fresh letter of request and to bring a third application. The issues have been fully argued before me and setting aside the order would not advance the objects of the Rules. Mr. Ryan advises that all other interlocutory proceedings have been completed and that the examination of Reilly is the last step required before the action can be set down. I see no reason to further delay the matter.

(c) The Test for Enforcement

52 In *Presbyterian Church of Sudan v. Rybiak* (2006), 275 D.L.R. (4th) 512 (Ont. C.A.) at para. 30 the Ontario Court of Appeal confirmed the criteria for the enforcement of letter of request from a foreign jurisdiction: (a) the evidence sought is relevant; (b) the evidence sought is necessary for trial and will be adduced at trial, if admissible; (c) the evidence is not otherwise obtainable; (d) the order sought is not contrary to public policy; (e) the documents sought are identified with reasonable specificity; and (f) the order sought is not unduly burdensome, bearing in mind what the witnesses will be required to do, and produce, were the action to be tried.

53 In addition, the Court of Appeal indicated that the receiving court is required to balance two broad considerations in deciding whether to exercise its discretion to enforce foreign Letters Rogatory. Those considerations are the impact on Canadian sovereignty and whether justice requires the taking of commission evidence.

54 Obviously the impact on Canadian sovereignty is not an issue to be considered in an application to enforce letters of request from another province or territory. Without commenting on whether the weight to be given to the other criteria should be lower in the case of interprovincial letters of request, I am satisfied that the criteria have been met in this case. Indeed, this has not been seriously disputed by Mr. Shiller on behalf of Reilly.

(d) Scope of Examination

55 Nova Scotia Rule 18.09, set forth above, provides that the witness may be questioned about "any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings."

56 The comparable Ontario Rule 31.06(1) provides that a witness on discovery must answer "to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4)..." Subrules 31.06 (2) to (4) deal with the disclosure of the names and addresses of witnesses, the disclosure of the findings, opinions and conclusions of experts, and disclosure of the particulars of insurance policies.

57 Mr. Ryan has provided Mr. Shiller with a list of the areas he proposes to cover on Reilly's examination. Mr. Shiller protests that some of the areas are too broad and urges me to "whittle down" the scope of the examination.

58 Mr. Ryan submits that the court may deny a request from another jurisdiction if the request is considered to be too broad or a fishing expedition, referring to *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 (Ont. Gen. Div.) and *D.G. Jewellery of Canada Ltd. v. Valentine*, *supra*. He says, however, that the court does not have jurisdiction to narrow the request but must deny it outright if too broad.

59 First, I do not propose to narrow the scope of the examination. I am dealing with a request from a Superior Court of a sister province and I begin with the presumption that I should give effect to that request unless there is some compelling reason to refuse it.

60 Second, the scope of the examination is itself circumscribed by Nova Scotia Rule 18.09 which is not materially different from our own Rule ("any matter ... that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings" as opposed to "any proper question relating to any matter in issue"). I agree with the observation of Catzman, J. in *Mulroney v. Coates* at para. 37 that any difference is "more apparent than real".

61 Finally, it seems to me that, as a practical matter, the scope of questioning of all witnesses in the underlying Nova Scotia action should be confined by the same boundaries.

62 For the sake of clarity, and to prevent any misunderstanding at the examination, the scope of Mr. Ryan's examination of Reilly will be circumscribed by the Nova Scotia *Civil Procedure Rules*. I do not propose to rule, in advance, on whether the topics set out in Mr. Ryan's letter to Mr. Shiller of January 22, 2008 meet the test of those rules. The letter should, however, give Mr. Shiller and his client a reasonable indication of what to expect on the examination.

(e) Protection of the Witness

63 In making an order giving effect to the letters of request, the receiving court is entitled to impose conditions to protect the witness. In the case of "foreign" letters of request, jurisdiction is given by section 60(1) of the Ontario *Evidence Act* which gives the judge enforcing the request jurisdiction to "give such directions as to ...all other matters connected therewith as seem proper." In the case of provincial letters of request, additional jurisdiction can be found under Rule 1.05, which provides that "[W]hen making an order under these rules the court may impose such terms and give such directions as are just." The conditions imposed by the court can include the manner of examination, the right to have counsel present, and the costs of the examination itself. As one example of this, in *Kong Wah Holdings Ltd. (Liquidator of) v. Yong*, *supra*, Mesbur J. ordered that a witness, who had specific health concerns arising from the examination, was entitled to be examined in his home, by video, that his physician be present, and that the attendant costs be funded by the applicant party.

64 Mr. Ryan submits that Reilly is protected by the "implied undertaking" rule against the use of her evidence or information obtained in the discovery for any purpose other than the proceeding in which it is obtained, and cites the Nova Scotia cases of *Sezerman v. Youle* (1996), 135 D.L.R. (4th) 266 (N.S. C.A.), *Oickle v. L & B Electric Ltd.* (2004), 238 D.L.R. (4th) 293 (N.S. C.A.), *Colby Physioclinic Ltd. v. Ruiz* (2005), 237 N.S.R. (2d) 342 (N.S. S.C. [In Chambers]). I am satisfied that this is the case and I do not require that Mr. Ryan give the blanket undertaking requested by Mr. Shiller.

65 Mr. Ryan also submits that Reilly will have the benefit of the "witness immunity rule," which gives her immunity from action in respect of evidence given by her in legal proceedings. He refers to *Elliott v. Insurance Crime Prevention Bureau* (2002), 208 N.S.R. (2d) 356 (N.S. S.C. [In Chambers]), aff'd. (2005), 256 D.L.R. (4th) 674 (N.S. C.A.). I have also reviewed the statement of this principle set out in *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (Ont. C.A.) and *Reynolds v. Smith* (2006), 267 D.L.R. (4th) 409 (Ont. Div. Ct.) and I agree that this protection applies.

66 In light of these safeguards, as well as the protections Reilly enjoys under the *Canada Evidence Act*, the Ontario *Evidence Act* and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, C.11, I see no reason to impose further conditions.

(f) Procedure to be Followed on Examination

67 There is one material difference between the Nova Scotia Rules and the Ontario Rules. On its face, Nova Scotia Rule 18.12 requires a witness being discovered to answer a question in spite of objection. The answer must be given, subject to the objection, with the court ruling on the propriety of the question at a later date. Ontario Rule 31.07 contemplates that a witness on discovery may refuse to answer a question and Rule 34.12 deals with the procedure applicable to objections.

68 In *Mulroney v. Coates*, which, like this case, was an application to enforce letters of request from Nova Scotia, Catzman, J. held that the witness should be entitled to object to any question on the basis of Crown immunity "or on any other proper ground" and held that the procedure governing objections should be that set out in Rule 34.12 of the Ontario Rules.

69 In *Binder v. Royal Bank*, *supra*, Mr. Justice Creaghan of the New Brunswick Court of Queen's Bench followed *Mulroney v. Coates* and held that the law of the place of examination should govern, and that the examination should be conducted in accordance with Rule 18 of the Nova Scotia Rules, except in the event of a conflict with the New Brunswick Rules, in which event the laws of New Brunswick would govern.

70 In the recent decision of the Ontario Court of Appeal in *Connecticut Retirement Plans & Trust Funds v. Buchan* (2007), 225 O.A.C. 106, 42 C.P.C. (6th) 116 (Ont. C.A.), the Court upheld the enforcement of Letters Rogatory from the United States District Court for the Northern District of California for the deposition of a former executive of a class action defendant. It was argued that the request that U.S. rules be applied was an infringement on Canadian sovereignty. The Court of Appeal rejected this, pointing out that the action for which the information was sought was not an Ontario action and that the Ontario Rules are specific to Ontario actions. The Court of Appeal referred to its earlier decision in *United States v. Pressey* (1988), 65 O.R. (2d) 141 (Ont. C.A.) at paras. 11-12, to the effect that 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. It noted that s. 60(1) of the Ontario *Evidence Act* empowers a judge enforcing a foreign letter of request to "give such directions as to ...all other matters connected therewith as seem proper." It held that the application judge did not err in ordering that the examination be conducted by U.S. counsel pursuant to the U.S. rules.

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 objections is both reasonable and practical. Nor does it do violence to the decision of the Court of Appeal in *Connecticut Retirement Plans & Trust Funds v. Buchan*. While we are not dealing with constitutional rights of the same order as those considered in *United States 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.

72 I find support for this conclusion in the decision of Richard, J. of the Nova Scotia Supreme Court in *Coates v. Citizen*, [1987] N.S.J. No. 458 (N.S. T.D.), the sequel to *Mulroney v. Coates* In the course of the Ontario examinations, ordered pursuant to the order of Catzman, J., several witnesses objected to questions on the basis of Crown immunity. A motion was then brought, in Nova Scotia, to compel answers. Richard, J. held that he had no jurisdiction to compel answers and that the proper course would be to apply in Ontario. He stated:

> In the simplest terms, what this court is being asked to do is to compel residents of a foreign jurisdiction — the Province of Ontario — to re-attend at a discovery examination in Ontario and answer certain questions which they have already refused to answer on grounds of Crown immunity. In so doing, I am to rule, either expressly or impliedly on the question of whether or not the claim for Crown immunity is valid. This, in spite of the fact that the Court of Appeal of Ontario has already expressly agreed with the proposition that Crown immunity does apply at common law to residents of that province.
>
> I am aware of no authority which would allow this court to make such an order. Even if I felt constrained to grant such an order, and I do not feel so constrained, I don't know how the applicant would be able to enforce compliance in Ontario. Catzman, J. granted the order compelling the witnesses to appear at discovery, even though they are not parties to this action. He further ordered that the discoveries could proceed subject to the several witnesses' claims for Crown immunity. He deferred that question until "the functions of these deponents and the content of the questions to be asked of them have been more clearly defined." That has now been done and it is my view that it is the Ontario court which has the clear authority to now deal with that "deferred" matter.
>
> If authority is needed to support these several propositions which I find to be self-evident then I refer to *McQuire v. McQuire and Desourdi*, [1953] O.R. 328 where Laidlaw, JA. said at page 335:
>
> > 'The Legislature of this Province has not attempted to give jurisdiction to the Courts of this Province over persons outside its territorial jurisdiction, and there is no statutory power in those courts to make the order in question.'

73 Accordingly, I order that the objection process be governed by that set out in the Ontario Rules and that any disputes in that regard should be dealt with accordingly.

(g) Right to Counsel and Costs of Counsel

74 Mr. Ryan does not oppose Reilly's request to have counsel present at her examination. The real issue is whether Lafarge should be required to pay Reilly's legal costs and if so, to what extent.

75 Mr. Ryan refers to *Weiszman v. 491 Lawrence Avenue West Ltd.* (1985), 5 C.P.C. (2d) 160 (Ont. H.C.), in which Potts, J. granted an order for discovery of a non-party under Ontario Rule 31.10. He held that the witness was entitled to have counsel present at the examination, but expressed some doubt as to his jurisdiction to order that the examining party pay the costs of the non-party. Even if he had the jurisdiction, he would not have done so because the witness was required to cooperate with the judicial process.

76 On the other hand, in *Lana International Ltd. v. Menasco Aerospace Ltd.*, 2000 CarswellOnt 3625 (Ont. Master), aff'd. [2000] O.J. No. 4798 (Ont. Div. Ct.), a case relied on by Mr. Shiller, an order was sought to examine two non parties for discovery pursuant to Ontario Rule 31.10. The proposed witnesses did not appear on the motion, although one had been served with the motion and the other had been notified through his counsel. A letter from one of the witnesses was received by Master MacLeod, and apparently filed without objection, in which the witness complained that he was being harassed by the parties and had already given many hours of testimony and that the entire process was causing him emotional strain. The Master referred to Rule 31.10(2)(c)(iii) which provides that the order granted must not result in unfairness to the person examined, which he said could include not only expense, but also admissions against interest, exposure to liability or psychological stress. He concluded that the best way to minimize the emotional strain on the witness would be to have him examined with his own counsel present. The master ordered that the witness would be entitled to have counsel present during the examination and was entitled to retain and instruct counsel "for this sole purpose at the expense of the defendant not to exceed $5,000.00." He further ordered that the transcripts of the examination and any documents may not be used for any purpose other than this litigation without leave of the Court. An appeal from the Master's order was dismissed at the Divisional Court by O'Driscoll J., who described the Master's order as legal and thoughtful and one which arose out of a common sense solution to the problem that the Master faced.

77 Witnesses at trial are not normally afforded the right to counsel. They come to court pursuant to a summons to witness and they are required to give evidence before the court in spite of the inconvenience and even potential embarrassment or upset. As Potts, J. said in *Weiszman v. 491 Lawrence Avenue West Ltd.*, compliance with legal process is a responsibility of Ontario residents.

78 That being said, a witness at trial is subject to the over-riding protection of the trial judge who can ensure that the witness is treated fairly and that his or her rights are protected. A non-party being discovered, sometimes in an unfamiliar and hostile environment, has no such protection.

79 In my view, a witness examined pursuant to letters of request should be entitled to legal representation at the examination.

80 As a general rule, the cost of retaining counsel, if desired, should be an expense of the witness and not the examining party. In this case, there are several reasons why, in my view, there should be a departure from the general rule: (a) Reilly has denied under oath that she received the technical document from Khan and he denies having given it to her — the examination will clearly challenge her credibility; (b) Reilly's undisputed evidence is that she cannot afford counsel and that she has had to borrow money to retain counsel for this motion; (c) Reilly's evidence is that there is a "history" between her and Lafarge and she is concerned that the examination will extend to matters beyond the scope of the underlying action; and (d) the broad scope of discovery under the Nova Scotia Rules make it desirable that she be fully informed, both before and, if necessary, during the examination, concerning her responsibilities.

81 I therefore think it is reasonable to require Lafarge to pay a modest allowance for the fees of counsel for Reilly. Mr. Ryan has stated that his examination should not last more than an hour or two. Mr. Khan wishes to examine and I think it is reasonable to conclude that the examination will last a half day — i.e., three hours. It is also reasonable to assume that it will take two to three hours for counsel to prepare Reilly for the examination. I think a counsel fee of $3,000.00, inclusive of GST, would be reasonable for preparation and examination. If the examination by Lafarge lasts more than three hours, Lafarge will pay costs of $400.00 for each additional hour or part thereof that is occupied by Lafarge's examination. Reilly will bear the costs of any additional examination by her own counsel or by Khan.

82 Although counsel on behalf of Reilly is entitled to be present at the examination, in view of the broad scope of the examination, and the protection afforded by the implied undertaking and witness immunity rules, I would expect that counsel's role would be limited. One would also expect that unnecessary interventions, objections, refusals or obstruction of the examination could result in cost consequences.

Disposition

83 For the foregoing reasons, I order that Reilly attend to be examined pursuant to the letter of request attached to the order of Mr. Justice Wright of the Nova Supreme Court, dated October 2, 2007. Such examination shall take place within thirty (30) days of the date hereof, or such other date as counsel may agree. The examination shall be conducted in accordance with the Nova Scotia Rules except that the procedure with respect to objections shall be governed by Ontario Rule 34.12, as set forth herein.

84 The letter of request asks that Reilly be caused to produce and show at the examination all documents in her possession relating to the matters in question in the underlying action and I so order. To facilitate the examination, such documents shall be provided to counsel for Lafarge at least ten days before the examination. Counsel for Lafarge shall produce to counsel for Reilly, at least ten days before the examination, copies of any documents he proposes to put to the witness.

85 All costs of the examination, including attendance money in accordance with Tariff A and the cost of providing a copy of the transcript of examination to Reilly, shall be paid by Lafarge. In addition, Lafarge shall pay the sum of $3,000.00 towards Reilly's legal costs in the preparation for and attendance at the examination, as well as the further sum of $400.00 for each hour or part thereof, in excess of three hours, taken by Lafarge's examination.

86 No submissions were made as to the costs of this motion. If the parties are unable to agree on costs, both parties shall serve and file with my office written costs submissions, including a Costs Outline within fifteen days of the date of receipt of this Endorsement. The written submissions shall not exceed three pages in length, excluding the Costs Outline. Each party may file a two-page response to the other party's submissions within ten days of receipt thereof.

Order accordingly.

Footnotes

∗ Additional reasons at *Lafarge Canada Inc. v. Khan* (2008), 2008 CarswellOnt 1585 (Ont. S.C.J.).

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