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Enforcing Letters Rogatory: A Warning to Connected Businesses operating in Multiple Jurisdictions

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Compelling productions from non-parties is often met with stiff resistance. Even more so, imagine the opposition a non-party would put up when the productions are required in a foreign jurisdiction. In *Treat America Ltd. v. Nestle Canada, Inc.*[1] this is precisely what occurred.

This recently decided Ontario Court of Appeal case was an appeal by Nestle Canada from an order enforcing a Letter of Request from a United States judge. The Letter of Request asked Nestle Canada to produce documents maintained by or for three of its former or current employees and to produce a representative to be examined in relation to the documents and to the issues raised in proceeds pending in the United States.

The U.S. proceedings involved anti-trust allegations against various corporate entities of candy brands. Nestle Canada was originally a party to the proceedings, but the claims against it were eventually dismissed on jurisdictional grounds. Since the claims had been dismissed, neither the U.S. court nor the parties in the U.S. proceedings had any direct means to compel Nestle Canada to produce documents that might be relevant to the proceedings or to require it to produce a representative to be examined.

One of the plaintiffs in the U.S. Proceedings brought a Letter of Request application in the U.S. proceedings and sought its enforcement in Canada. Campbell J. of the Ontario Superior Court granted the order for enforcement of the Letter of Request.

Nestle Canada appealed that decision on the basis that the respondent failed to establish that the documentation and information sought was relevant or necessary for use in the U.S. proceedings, that the scope of production sought was too broad, and that the order sought was unduly burdensome on Nestle Canada since it was no longer a party to the U.S. proceedings.

The Ontario Court of Appeal considered the essential criteria that an Ontario court is to consider when determining whether to give effect to letters rogatory. The criteria outlined in *Re Friction*

[1] [2001] O.J. No. 3802, 2011 ONCA 560

Division Products, Inc. and E.I. Du Pont de Nemours & Co. Inc. et al. (No. 2[2]*)* states that in order to make an order giving effect to letters rogatory, the evidence must establish that:

(1) the evidence sought is relevant;

(2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;

(3) the evidence is not otherwise obtainable;

(4) the order sought is not contrary to public policy;

(5) the documents sought are identified with reasonable specificity; and

(6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

In dismissing the appeal, the Ontario Court of Appeal in *Nestle Canada* stated at paragraph 17 that "Canadian courts take a broad approach to such requests and as the application judge noted, 'the exercise of discretion is based on the general principle that international comity dictates a liberal approach to requests for judicial assistance."

This case is significant because it confirms the broad powers of our courts to enforce letters rogatory and compel corporations within Ontario to produce and appear in U.S. proceedings, notwithstanding that the corporation is not a party the proceedings. This decision should be taken as a warning to related businesses operating in multiple jurisdictions under different corporate entities. Relevant and cogent information sought after in other proceedings will have to be produced if the criteria for production are met. Courts are sensitive to the increasingly international nature of business and the inextricable links between connected corporate entities. International business entities should be aware of this decision and note the liberal approach to requests for judicial assistance.

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[2] (1986), 56 O.R. (2d) 722, at p. 732