

## Can a foreign court compel the examination of witnesses and the production of documents located in Quebec? <sup>1</sup>

By Daniel Alain Dagenais

*Assuming that a foreign court exercises the power to issue letters rogatory or to appoint a commission to examine a witness in Quebec and to ask him to produce some documents, how can that be carried out in Quebec and is there a «blocking statute» protecting some of the documents?*

### **The Special Procedure Act (R.S.Q. c. P-27)**

The Special Procedure Act, Division VI (the «S.P.A.») governs rogatory commissions within Quebec for the purposes of a foreign lawsuit. Foreign courts have no jurisdiction to enforce in Quebec subpoenas issued by them, but the S.P.A. provides for the approval by a Quebec court of foreign letters rogatory.



#### **The steps are:**

- a commercial or civil case is pending before a foreign court;
- the foreign court orders that a witness located in Quebec be examined and be compelled to produce documents, and it issues letters rogatory to that effect;
- a petition is made before the Superior Court in Quebec (in the district where the witness is located) - the petition may be served on the witness, although this is not compulsory;
- the petitioner furnishes a surety to secure the indemnity due to the witness;

- the Superior Court summons the witness to appear for examination under oath, and orders him to produce the documents mentioned in the letters rogatory; it may also ask for any other document in his possession relating to the matter;
- the summons is served upon the witness;
- that decision is appealable or, if the witness has not been served with the petition, it may be contested by a third party opposition;
- if the witness fails to appear, the Superior Court may issue a warrant for his arrest;
- if he appears and, without valid reason, refuses to answer or to produce documents in his possession, he may be found guilty of contempt of court.

<sup>1</sup> Our comments are offered from the point of view of the law of Quebec; we do not interpret the law of any foreign country.



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The Quebec judge has a discretionary power to enforce the letters rogatory, but he will most likely automatically do so, unless granting enforcement would go against Quebec public policy or public international law as it is interpreted in Quebec. The Quebec judge may also restrict the deposition or quash the subpoena or part of it, if it conflicts with the provisions of the Business Concerns Records Act.<sup>2</sup>

<sup>2</sup> The communication of personal information outside Quebec is also governed by the legislation governing such information.

### ***The Business Concerns Records Act (R.S.Q. c. D-12)***

The Business Concerns Records Act (the «B.C.R.A.») subjects a person (individual or company) to contempt of court proceedings if he removes or sends, or causes to remove or send, outside Quebec any document whatsoever relating to a Quebec business concern, pursuant to any requirement issued by an authority outside Quebec.

The Act is widely drafted and has been liberally interpreted:

- the documents are protected, as long as they form part of the records or archives of a business concern;
- a business concern includes any company, business enterprise and commercial partnership;
- the requirement issued by the foreign authority is «any demand, direction, order, subpoena or summons»;
- the term «document» includes any writing or material;
- the prohibition covers not only the documents themselves, but also the information they contain, and the examining party may not inspect, study or copy any protected document, nor question any witness on the content of same.

### **However:**

- the Act itself provides four exceptions, subject to certain conditions:
  1. internal correspondence sent outside Quebec in the ordinary course of business;
  2. transmittal of documents by a company carrying on business in Quebec to a territory in which the sale of securities of such company has been authorized;
  3. transmittal of a document by a broker;
  4. transmittal of a document which is authorized by any law of Quebec or of Canada (other than S.P.A.);to our knowledge, these exceptions have not been interpreted by the courts; they would probably be interpreted restrictively;
- the Supreme Court of Canada has already determined that the B.C.R.A. is not applicable, on constitutional grounds, between Canadian provinces; whether the Court will eventually apply analogous reasoning (on grounds of comity or other) to demands for documents from foreign courts remains to be seen;

• the Quebec Court of Appeal has allowed:

1. questions when the witness recollected the events, even though they were also consigned in various documents;
2. asking the witness whether he prepared some documents;
3. questions dealing with documents that legally circulated outside Quebec.

The Quebec court would probably not dismiss a petition under the S.P.A, or completely quash a subpoena, since the B.C.R.A. does not confer immunity to the witness, unless it can be shown that the entirety of the eventual examination conflicts the B.C.R.A. But it is empowered to restrict the scope of the evidence allowed to be taken. It would also probably maintain valid objections made during the examination and based on the B.C.R.A. In fact, this is how the B.C.R.A. is used in most cases.

Also, any person having an interest in a business concern may apply to a judge of the Court of Quebec for an order requiring any person to furnish an undertaking or security to ensure that such person will not remove the document or information from Quebec.

The *Lavery de Billy* Litigation team members possess extensive experience in dealing with problems related to the examination of witnesses and the production of documents and the requests of a foreign court. As dedicated specialists, they can provide you with experts' advice and help you implement relevant and effective solutions to the problems confronting you in respect of these matters.

This Bulletin is provided for general information purposes only with respect to its content. For advice tailored to your own specific needs and circumstances, do not hesitate to contact Mr. Daniel Alain Dagenais at (514) 877-2924.

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