# ENFORCEMENT OF LETTERS ROGATORY ISSUED BY A FOREIGN ARBITRATION TRIBUNAL

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## Introduction

Letters Rogatory are traditionally thought of as a request by a court made of a foreign court, in writing, to secure the aid of the foreign court in obtaining desired information by way of a deposition or production of a record.[3]

An interesting issue is whether Canadian courts will enforce Letters Rogatory issued by a foreign arbitration tribunal, as opposed to a foreign court.

It seems clear that a Canadian court will enforce Letters Rogatory if the arbitration tribunal invokes the assistance of a foreign court and the Letters Rogatory thus emanate from the foreign court[4], but

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3 See Daphne A. Dukelow, The Dictionary of Canadian Law (2 ed.) (Scarborough, Ontario: Carswell, 1995) at p. 726.

4 See Michael Penny, "Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?"(2001), 12 *Am. Rev. Int'l. Arb*. 249; *Four Seasons Hotels Ltd.* v. *Legacy Hotels Real Estate Investment Trust* (2003), 36 C.P.C. (5th) 138.

will a Canadian court enforce Letters Rogatory from a foreign administrative tribunal if there is no such judicial assistance?

The home court of the authors is Alberta, and it would seem on the surface that the *Alberta Evidence Act*[5] would allow for such enforcement through its definitions of "action" and "court". The *Alberta Evidence Act* expressly defines "action" to include an arbitration[6] and defines "court" to include an arbitrator[7]. (A historical review of the *Alberta Evidence Act* indicates that the definitions of "action" and "court" to include an arbitration and an arbitrator have been included in the statute since the introduction of the *Alberta Evidence Act* in 1910[8].) The *Alberta Evidence Act* then goes on to state that when, on application to the court, it is made to appear that a court or tribunal of competent jurisdiction of a foreign country has authorized the obtaining of testimony in or in relation to an action pending before the foreign court or tribunal the court may order the examination of the witness[9]. Therefore, by the use of the words "action" and "court", the *Alberta Evidence Act* would seem to contemplate the enforcement of Letters Rogatory issued by an arbitration tribunal in a foreign jurisdiction.

(The *Canada Evidence Act* has provisions which allow for the enforcement of Letters Rogatory[10], but without the expansive definitions of "action" and "court" found in the Alberta statute.)

Matters are not this simple, however, as a result of the seminal decision of *Re McCarthy and Menin*[11], a decision of the Ontario Court of Appeal. In this case, the Ontario courts were asked to enforce Letters Rogatory from the United States Securities and Exchange Commission, which is an administrative tribunal. Aylesworth J.A. limited the plain meaning of the words of the *Ontario Evidence Act*, which were virtually identical to the wording of the *Alberta Evidence Act* and had an expanded definition of "court" to include an arbitrator. Aylesworth J.A. stated that the Ontario

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5 R.S.A. 2000, c. A-18
6 s. 1(a)(I)
7 s. 1(b)
8 *Alberta Evidence Act*, S.A. 1910, c. 3, s. 2
9 s. 56
10 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 46(1).
11 (1963), 2 O.R. 154

legislation's definition of "court" was only to be read in such a broad context when it was used singly, however, and not when it was used within the phrase "court or tribunal competent jurisdiction".

Aylesworth J.A. then went on to establish three basic tests for the enforceability of Letters Rogatory issued by a foreign administrative tribunal [12]:

> (1) The foreign administrative tribunal must have the power of directing or taking depositions and procuring evidence outside of its jurisdiction;
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> (2) There must be "reciprocity" between the courts in that the foreign administrative tribunal must have the power of mutually assisting an Albertan court;
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> (3) Most significantly, the foreign administrative tribunal must have the "well-known sanctions of a court of law or equity" with which it is able to enforce its orders.

Aylesworth J.A. refused to enforce the Letters Rogatory of the U.S. Securities and Exchange Commission.

The Supreme Court of Canada case of *R.* v. *Zingre*[13], followed up by the Supreme Court of Canada case of *United States District Court* v. *Royal American Shows* [14], substantially liberalized the Canadian courts' approach to enforcement of Letters Rogatory, however, such that now a more "liberal approach should be taken to requests for judicial assistance, so long as there is more than ephemeral anchorage in (the) legislation to support (enforcement)." *R.* v. *Zingre* arguably suggests a new test (in addition to the traditional criteria[15]) such that Letters Rogatory issued by a foreign arbitration tribunal should be enforced unless it is contrary to public policy and if it does not prejudice the sovereignty of Canada.

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12 As interpreted by the subsequent case of *Re A.J. Becker Inc.* (1984), 45 C.P.C. 163.

13 [1981] 2 S.C.R. 392

14 [1982] 1 S.C.R. 414

15 See footnote 20.

This article will review a series of cases which support the view that *Re McCarthy and Menin* has been supplanted and that *R.* v. *Zingre* and "a more relaxed and liberal approach to the exercise of discretion founded on the notion of judicial comity" should be applied to the enforcement of Letters Rogatory from a foreign arbitration tribunal.

More specifically, the case of *Republic of France* v. *De Havilland Aircraft of Canada Ltd. and Byron-Exarcos* [16] can be pointed to as explicitly undermining one of the three tests in *Re McCarthy and Menin* as it states that reciprocity is not a precondition for enforcement of Letters Rogatory. Further, it appears to apply the "sovereignty" test of *R.* v. *Zingre*. Thus this case can be pointed to as directly liberalizing the *Re McCarthy and Menin* approach and supports the view that *Re McCarthy and Menin* should be supplanted in all respects.

This view is also assisted by the common law doctrine of *stare decisis*, which holds that decisions of a higher court are binding on lower courts. This doctrine is aptly described by Riddell J.A. in *Reference Re Canada Temperance Act* [17] as follows: "We must always bear in mind that we sit in Court, not as individual lawyers with the right to give judgement according to what our individual opinion may be as to what ought to be the law, but we are to give judgement according to what we find stated by the authorities, whose opinions are binding on us; and *stare decisis* is still as always a guiding principle."

The Supreme Court of Canada sits at the top of the Canadian judicial hierarchy and is Canada's most important court. The doctrine of *stare decisis* makes it decisions binding on all other courts. Thus, in accordance with the doctrine of *stare decisis*, the Supreme Court of Canada decision of *Zingre* and its liberal approach is binding on the Alberta courts. The decision of *Re McCarthy and Menin*, being a decision of an Ontario court, is not binding on the Alberta courts and arguably must give way to the decision of the Supreme Court of Canada.

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16 (1991), 3 O.R. (3d) 705

17 [1939] O.R. 570, affirmed *sub nom. Ontario (Attorney General)* v. *Canada Temperance Federation,* [1946] A.C. 193

Moreover, the Ontario courts have not themselves followed the restrictive tests set out in *Re McCarthy and Menin*, as is illustrated by *Republic of France* v. *De Havilland Aircraft of Canada Ltd. and Byron-Exarcos*. Recent decisions of the Ontario courts present problems, however[18].

It should be noted that the English courts and the American courts seem to have followed the approach of *Re McCarthy and Menin*, for different reasons, and do not allow the enforcement of Letters Rogatory from a private arbitration tribunal[19]. As previously noted, however, in accordance with the doctrine of *stare decisis* the Canadian courts are bound to follow the decisions of the Supreme Court of Canada, including *Zingre*, and not the courts of other countries.

**Jurisprudence**

The courts have articulated the traditional criteria which will be considered in exercising discretion to enforce Letters Rogatory, as follows[20]:

> (a) the evidence sought must be relevant;
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> (b) the evidence sought must be necessary for trial and will be adduced at trial, if admissible;
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> (c) the evidence is not otherwise obtainable;
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> (d) the order sought is not contrary to public policy;
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> (e) the documents sought are identified with reasonable specificity; and
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> (f) the order sought is not unduly burdensome, having in mind what the relevant

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18 *B.F. Jones Logistics Inc*. v. *Rolk*, [2004] O.J. No. 3518; *Corporacion Transnacional de Inversiones S.A. de C.V.* v. *Stet International S.p.A.* (1999), 45 O.R. (3d) 183; affirmed (2000), 49 O.R. (3d) 414; leave to appeal to the Supreme Court of Canada dismissed at [2000] S.C.C.A. No. 581.

19 See *Viking Insurance Co.* v. *Rossdale and others et al.* [2002] 1 Lloyd's Report 219; *In the matter of the application of Medway Power Limited* 985 F. Supp. 402; *National Broadcasting Company Inc.* v. *Bear Stearns & Co.* 165 F. 3d 184; and *Application of the Republic of Kazakhstan* 168 F. 3d 880.

20 *Friction Division Products Inc*. v. *E.I. Dupont de Nemours & Co.* (1986), 56 O.R. (2d) 722; *Four Seasons Hotels Ltd.* v. *Legacy Hotels Real Estate Investment Trust* (2003), 36 C.P.C. (5th) 138.

witnesses would be required to do, and produce, were the matter to be tried here.

It seems that there are special considerations when Letters Rogatory are issued from a foreign administrative tribunal, however.

Seminal Canadian authority which articulated these special considerations and did not allow the enforcement of Letters Rogatory from a foreign administrative tribunal is *Re McCarthy and Menin and United States Securities and Exchange Commission*[21], a decision of the Ontario Court of Appeal per Aylesworth J.A. It should be noted that in this case the *Ontario Evidence Act*[22] had provisions defining "action" and "court" to include an arbitration and arbitrator similar to the present statutory provisions in the *Alberta Evidence Act*[23].

In this case, the United States Securities and Exchange Commission applied to the Ontario courts for aid to compel the attendance of witnesses within the Ontario jurisdiction to give evidence under oath. The court considered whether such evidence was compellable pursuant to the *Ontario Evidence Act*, s.58 and pursuant to the *Canada Evidence Act*, s.43. These sections in effect authorized the Ontario court to enforce Letters Rogatory from a "court or tribunal of competent jurisdiction" of a foreign country. At issue was whether the United States Securities and Exchange Commission, being an administrative tribunal, was a "court or tribunal of competent jurisdiction".

The Ontario Court of Appeal declined to enforce the Letters Rogatory from the United States Securities and Exchange Commission, seemingly on three bases. First, Aylesworth J.A. noted that the United States Securities and Exchange Commission had very limited sanctions to enforce any order that it could make. It was not empowered to direct the taking of depositions outside of the territories of the United States (a deficiency which was later cured by legislation).

Aylesworth J.A. limited the broad definition of "court" in the *Ontario Evidence Act* by stating that

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21 [1963] 2 O.R. 154

22 R.S.O. 1960, c.125

23 Further, s.58 of the then *Ontario Evidence Act* was substantively identical to the present s.56 of the *Alberta Evidence Act*.

the broad definition only applied when the word "court" was used as a single word within the Act, and not when it was used within the phrase "court or tribunal of competent jurisdiction in a foreign country".

Second, Aylesworth J.A. held that, as Letters Rogatory were based upon the "international courtesy" of comity of nations, it was necessary that the issuing tribunal have powers of a court of law or equity in order for there to be reciprocity. On this point, he stated[24]:

> ". . . The matter is not free from difficulty but in the absence of any precedents upon the interpretation of these sections, I feel bound to hold that the only foreign tribunal within the contemplation of the legislation is a Court of law or equity by whatever name it may be known, as for example "tribunal", and that an administrative tribunal such as the respondent does not come within the terms thereof.
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> . . . Can it be said that the phrase as it appears in our two statutes merely means a tribunal competent to adjudicate upon the matter before it, **or rather does it not mean a tribunal with all the well-known sanctions possessed by a Court of law or equity with which it is enabled to enforce its duly authorized order?"** In my view, the phrase as it appears in both our statutes is used in the latter and not the former sense." (Emphasis added.)

Third, Aylesworth J.A. seems to have been influenced by a "floodgates" argument, and noted that the enforcement of Letters Rogatory was a matter of discretion.

*Re McCarthy and Menin* was followed by *Re A.J. Becker Inc.*[25], a decision of Griffiths J. of the Ontario Supreme Court [High Court of Justice]. This case again involved a request by the United States Securities and Exchange Commission to enforce Letters Rogatory seeking production of documents from certain Ontario residents. Griffiths J. summarized the principles set out in *Re McCarthy and Menin*[26] as follows:

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[24] At pp. 160, 161
[25] (1984), 45 C.P.C. 163
[26] At p. 165

> "The Court stressed three principles which would govern the granting of an order under either the *Ontario Evidence Act* or the *Canada Evidence Act*:
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> (1) that the foreign tribunal seeking to enforce the Letters Rogatory have power under its enabling statute and rules to direct the taking of depositions outside the United States. At that time, the United States Securities and Exchange Commission did not have such powers;
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> (2) that the principle of international courtesy or comity recognizes there be a mutuality of purpose and of powers between the Ontario Court and the foreign tribunal. Letters Rogatory emanating either in an Ontario Court or received in this Court from a foreign Court, should implicitly contain an expression by the applicant "We shall be ready and willing to render the like assistance to you when requested". The Court of Appeal held that there was not that mutuality of purpose between Ontario Courts and the Commission;
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> (3) that the words "court or tribunal of competent jurisdiction" as they now appear in s.60 (1) of the *Ontario Evidence Act*, should be limited to a tribunal having all the well-known sanctions of a Court of law or equity with which it was able to enforce its duly authorized orders. The Court of Appeal held that the Commission was not a tribunal in that sense.
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> . . . But for the decision of the Court of Appeal on *McCarthy* v. *Menin, supra,* I would be inclined to give the words "court or tribunal of competent jurisdiction" a fairly broad interpretation and to hold that the Commission, in this case, was a tribunal of competent jurisdiction . . ."

*Re McCarthy and Menin* was applied in *Ontario (Securities Commission*) v. *Bennett*[27], a decision of Steele J. of the Ontario Supreme Court, affirmed on appeal to the Ontario Court of Appeal. In this case, the Ontario Securities Commission applied to the Ontario Court requesting that the Ontario Court ask the British Columbia Court to summon the respondent to give commission evidence in

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[27] (1990), 66 D.L.R. (4th) 756; affirmed (1991), 77 D.L.R. (4th) 576

British Columbia. The application was dismissed on the basis that the Ontario Securities Commission empowering legislation did not authorize the taking of evidence outside of Ontario. The Ontario Court lacked jurisdiction to request the assistance of a court outside Ontario in respect of proceedings of an Ontario administrative tribunal. *Re McCarthy and Menin* and *Re A.J. Becker Inc.* were applied. Steele J. held that he was bound by the third test articulated in *Re A.J. Becker Inc.* in that the words "court or tribunal of competent jurisdiction" in the *Ontario Evidence Act* limited matters to a tribunal having all the well-known sanctions of a court of law or equity and the Ontario Securities Commission was not a tribunal in that sense.

The decision of Steele J. was upheld by the Ontario Court of Appeal[28], with the appellate court noting *per curiam*: ". . . Unlike legislation in other provinces, to which we had been referred, the *Securities Act* contains no provisions empowering the Commission to issue summons outside of the province or to apply to the court for a commission for the obtaining of evidence from a witness outside the province."

In *Re United States of America and Executive Securities Corporation*[29], a decision of Steele J. of the Ontario High Court of Justice, Letters Rogatory issued by a grand jury in the state of New Jersey were not enforced on the basis that the grand jury was not conducting a trial and the evidence was therefore not sought for the purpose of a trial but rather for a preliminary hearing[30].

*Re McCarthy and Menin* and *United States* v. *Executive Securities Corporation* were applied in *National Bank of Canada* v. *Mann*[31], a decision of Master MacLeod of the Ontario Court, for the principle that: "The point is that our courts will not grant assistance to every kind of legal proceeding in a foreign jurisdiction but only to those which meet certain tests".

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28 At (1991), 7 D.L.R. (4th) 576

29 (1977), 15 O.R. (2d) 790

30 Note that subsequent Canadian case law has held that a Letter Rogatory may be enforced with respect to pretrial matters.

31 (1999), 37 C.P.C. (4th) 88, additional reasons at 1999 CarswellOnt 2620

In Jean-Gabriel Castel's, *Canadian Conflict of Laws* (5d)[32] it is stated that Canadian courts will only enforce Letters Rogatory if essential elements are met, and that:

> ". . . This means that it must be a court of law or equity rather than an administrative tribunal and must be "of competent jurisdiction", i.e. a tribunal with all the sanctions possessed by a court of law to enforce its orders."

Note that "tribunal" has a narrow definition in the legal dictionaries. *Black's Law Dictionary* defines "tribunal" as "a court or other adjudicatory body" or "the seat, bench, or place where a judge sits".

The *Dictionary of Canadian Law* (2d)[33] states:

> ""TRIBUNAL " . . . [A] generic word which includes courts in its scope. Thus, in this generic sense, all courts are tribunals, but all tribunals are not courts . . . 2. A court of justice. 3. A body or person which exercises a judicial or quasi-judicial function outside the regular court system. 4. One or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred. 5. Includes any court, body, authority or person having authority to take or receive information, whether on it's behalf or on behalf of any other court, body, authority or person . . . 6. Any person or body, from whom an appeal lies to the Court, including any board, commission, committee, municipal authority, public official, or other public or governmental agency or authority, including the lieutenant-governor in council, but not including a court or judge."

The Queen's Bench Division (Commercial Court) in England has recently stated in *Viking Insurance Co.* v. *Rossdale and Others et al*[34]. that a Letter of Request issued by a private arbitration tribunal is not to be enforced pursuant to the English statutory authority analogous to the *Canada Evidence Act* s.46 and the *Alberta Evidence Act* s.56 (the *Evidence Proceedings in Other Jurisdictions Act,*

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32 Butterworths, Markham, Ontario, 2002

33 Carswell Thomson Professional Publishing, Scarborough, Ontario, 1995

34 [2002] 1 Lloyd's Reports 219

*1975*) as it is not a "tribunal". In this case, Viking Insurance Co. & Commerce Insurance Co. of Canada brought arbitration proceedings in New York seeking to recover from certain Lloyd's underwriters and others sums alleged to be due under contracts of reinsurance relating to an automobile warranty insurance program. An issue arose in the arbitration as to whether the London brokers by whom Mr. Rossdale and Mr. Duckling were previously employed acted as agents of any of the parties to the arbitration in connection with the automobile warranty insurance program. Neither Mr. Rossdale or Mr. Duckling were willing to be called as a witness or to be deposed in accordance with the American procedure. At the request of Viking, the arbitrator sent a Letter of Request to the English court requesting an order that Mr. Rossdale and Mr. Duckling be examined on a number of questions. Mr. Rossdale and Mr. Duckling applied to set aside an order made by Mr. Justice Langley, arguing that the English court had no jurisdiction under the 1975 Act to respond to Letters of Request made by private arbitration tribunals, *inter alia*.

In the result, it was held by the Queen's Bench Division (Commercial Court) per Moore-Bick J. that the reference to a tribunal in s. 1 of the 1975 Act did not include a private arbitral tribunal. Moore-Bick J. stated[35]:

> "Mr. King's submission, however, depends entirely on the use of the word "tribunal". It is a word capable of covering a wide variety of persons and bodies charged with responsibility for making decisions. It is, of course, the expression normally used when referring to a private arbitral body, but can equally well be used to refer to a Court. I think it would be surprising if, in a statute whose primary purpose was to give effect to the Hague Convention, Parliament had intended to put private lay tribunals abroad on the same footing as judicial bodies exercising functions on behalf of other states . . ."

This is also the position in the American jurisprudence. An application to enforce Letters Rogatory is made pursuant to 28 U.S.C. 1782, which provides for "assistance to foreign and international tribunals and to litigants before such tribunals". The American Code provides:

> "The district court of the district in which a person resides or is found

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35 At pp. 221, 222

> may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a Letter Rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . ."

The U.S. Code was substantially amended in 1964 and the House and Senate Judiciary Committee Reports accompanying the 1964 amendments made it clear that they intended the scope of the provision to encompass administrative tribunals. Subsequent articles spanning from 1964 to the present day by the drafter of the provision, Hans Smit, also make it clear that it was the intention of the Code to provide for the enforcement of Letters Rogatory from foreign arbitral tribunals[36].

Notwithstanding this, however, a series of American cases have decided that Letters Rogatory from a foreign arbitral tribunal will not be enforced in an American court. The seminal authority for this principle is *In the matter of the application of Medway Power Limited*[37], a decision of Duffy J. of the United States District Court for the Southern District of New York. In this case an arbitration was taking place between Medway Power Limited and P.B.V. Power Limited in the United Kingdom and Medway sought an order of the New York District Court to require General Electric Company, a third party, to produce documents for use in the arbitration. Duffy J. noted that the arbitration was an unofficial, private arbitration and held that the arbitration was not a tribunal for the purposes of Section 1782. "Congress intended the statute to assist official, governmental bodies exercising an adjudicatory function. The legislative history of Section 1782 does not suggest an intention to encompass unofficial, private arbitrations . . ."

It was further noted in *Medway* that, unlike a formal tribunal, a private arbitrator had no power to order persons who have not agreed to his authority to do anything.

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[36] See Hans Smit, "American Judicial Assistance to International Arbitration Tribunals" (1997), 8 *Am. Rev. Intl. Arb.* 153; Hans Smit, "American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited" (1999), 25 *Syracuse* J. *Int'l L. & Com* 1.

[37] 985 F. Supp. 402

*Medway* was subsequently applied in *National Broadcasting Company* v. *Bear Stearns & Co. et al.*[38], a decision of the United States Court of Appeals for the Second Circuit per Cabranes, Circuit Judge. The thrust of this decision seemed to be that the major characteristic of arbitration is its efficiency and cost-effectiveness, characteristics which are at odds with full-scale litigation in the courts. Because of the unique features of arbitration, they should not be subjected to the discovery processes available in the courts.

A recent decision to the similar effect is *Application of the Republic of Kazakhstan*[39], a decision of the United States Court of Appeals for the Fifth Circuit per Jones, Circuit Judge, which elected to follow the *National Broadcasting Company* v. *Bear Stearns* decision and hold that Section 1782 did not apply to private international arbitrations. Jones, Circuit Judge stated[40]:

> "Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitrations. Moreover, as a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance. The parties may pre-arrange discovery mechanisms directly or by selecting an established forum or body of governing principles in which the conventions of discovery are settled . . ."

Notwithstanding the significant hurdle imposed by *Re McCarthy and Menin*, as interpreted in *Re A.J. Becker Inc.*, an argument can be constructed that these cases are outdated, do not reflect the new liberal attitude towards enforcement of Letters Rogatory established by the Supreme Court of Canada case of *R.* v. *Zingre*[41], and should give way to the more liberal approach.

In *R.* v. *Zingre* the Churchill Forest Industries (Manitoba) Limited forestry complex at the town of

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38 165 F. 3d 184
39 168 F. 3d 880
40 At p. 883
41 [1981] 2 S.C.R. 392

The Pas in Manitoba was funded by public funds through an agency of the Government of Manitoba. As a result of an investigation into the construction and financing of the project criminal charges were laid against Zingre and Reiser and others alleging fraud and conspiring to defraud. Millions of dollars were involved. Zingre and Reiser were Swiss citizens. The Minister of Justice of Canada issued a Letter of Request directed to the Swiss authorities requiring the assistance of the Swiss police in the inspection of records and documents of a number of companies and banks and in interviewing persons, including the accused. The Swiss Department of Justice and Police provided assistance to the Canadian R.C.M.P. as a result. In 1973 sworn testimony was given by some thirty-three witnesses before the Chief Provincial Court Judge of Manitoba. The evidence was taken in four different countries. As a result, on December 14, 1973 the judge issued warrants to arrest all of the accused persons, including Zingre and Reiser. Zingre and Reiser could not be deported to Canada because of an extradition treaty. The Attorney General of Manitoba therefore made an official request that Zingre and Reiser be prosecuted in Switzerland for the offences committed in Manitoba. The request was made pursuant to a treaty and a convention. Initially the Swiss Canton rejected the launching of criminal proceedings, but this was appealed and the Swiss public prosecutor was ordered to open a criminal inquiry as requested by Canada and Manitoba. Two "extraordinary investigating judges" in Switzerland were then appointed and their functions included examining documents and interrogating witnesses in order to assist the authorities in determining whether the evidence justified a former trial. As much of the relevant evidence was in Canada, the Federal Office for Police Matters of the Federal Department of Justice and Police in Switzerland submitted to the Canadian Embassy a request for assistance addressed to the Chief Justice of the Court of Queen's Bench for the province of Manitoba. A Manitoba Court of Queen's Bench judge ordered that two Canadian individuals be examined under oath in order to facilitate this request. Zingre filed a notice of motion requesting that the order be rescinded and therefore the issue was whether the Canadian courts were going to enforce the Letters Rogatory from the Swiss Federal Office for Police Matters.

In deciding that the Letters Rogatory should be enforced, Dickson J., writing for the court, made the following comments:

> "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 interchange of good offices with each other.
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> It is upon this comity of nations that international legal assistance rests. Thus the court 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 . . . or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction**."
> (Emphasis added.)

This decision has been frequently referred to as heralding in a new age of liberalism with respect to the enforcement of Letters Rogatory. The Supreme Court of Canada stated in *District Court (United States of America)* v. *Royal American Shows Inc*.[42] per Laskin C. J.[43]:

> "As this court has indicated in *Zingre* v. *The Queen*, [1981] 2 S.C.R. 392, comity dictates that a liberal approach should be taken to requests for judicial assistance, so long at least as there is more than ephemeral anchorage in our legislation to support them . . ."

Bradley J. Freedman and Gregory N. Harney in "Obtaining Evidence from Canada: the Enforcement of Letters Rogatory by Canadian Courts"[44] state[45]:

> ". . . The conservative approach to the enforcement of foreign Letters Rogatory adopted by Canadian courts in the past is now being liberalized . . .
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> The recent case law indicates that, in the interest of international

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42 [1982] 1 S.C.R. 414
43 At p. 421
44 (1987), 21 *U.B.C. Law Review* 351
45 At p. 351 and p. 354

comity, a foreign request for judicial assistance in obtaining evidence for use in a foreign proceeding should be given full force and effect whenever possible. Given this liberalization in the court's approach to the enforcement of Letters Rogatory, the limiting principles enunciated in the older cases should now be critically assessed . . ."

And more specifically[46]:

"The provincial and federal statutes require that the request for assistance be issued by "a court or tribunal of competent jurisdiction" in a foreign country. This requirement has been interpreted as having two aspects. First, the foreign court or tribunal must have the power, under its enabling statute and rules, to direct the taking of evidence outside its jurisdiction. There is a rebuttable presumption that the order of a foreign court is regular and in conformity with the rules and practice of that jurisdiction. However, it has been held that the foreign order granting the issuance of Letters Rogatory should be under the seal of the foreign court or judge, unless it be certified that they have no seal.

Secondly, the words "court or tribunal of competent jurisdiction" are limited to a tribunal having all of the well-known sanctions of a court of law or equity with which it is able to enforce its duly authorized orders. The leading case in this regard is the decision of Aylesworth J. in *Re McCarthy and Menin*, in which the Ontario Court of Appeal refused to enforce a request for judicial assistance from the United States Securities and Exchange Commission.

In that case, counsel made the argument that the words "court or tribunal" indicate that the request does not have to come from a formal court, but may also originate from another form of judicial tribunal. The court rejected this argument. Relying primarily on the premise that inherent in the idea of international comity is a mutuality of purpose and of powers between the requesting and enforcing court, the court concluded that the phrase "of competent jurisdiction" does not really mean a tribunal competent to adjudicate upon the matter before it, but rather a tribunal analogous to a court of law and equity. The court also relied on the floodgates argument: The possibility of Canadian courts facing endless requests for assistance from "innumerable foreign administrative tribunals of small local importance and possessing greatly limited powers and functions".

In *Re A.J. Becker Inc*. the court again refused to enforce letters of

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[46] At pp. 358-360

> request from the United States Securities and Exchange Commission on the ground that that Commission was not a "tribunal" within the meaning of the *Ontario Evidence Act*. However, Griffiths J. stated that had he not been bound to follow *Re McCarthy and Menin*, he would have given the word "court or tribunal of competence jurisdiction" a fairly broad interpretation.
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> This limited interpretation of the words "court or tribunal of competent jurisdiction" ignores the fact that the enforcement of Letters Rogatory is based on a comity between nations, and not merely a comity between courts. Furthermore, it may be argued that the comity upon which international judicial assistance rests is based in large part upon mutual deference and respect between friendly states and does not require precise reciprocity, if any, regarding the purposes and powers of the foreign and local tribunals.
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> A restrictive interpretation of the words "court or tribunal of competent jurisdiction" is inconsistent with the recent trend to liberalize the enforcement of Letters Rogatory. Canadian courts should, whenever possible, give effect to letters of request from all foreign courts and judicial and quasi-judicial tribunals authorized to issue letters of request."

In *Republic of France* v. *De Havilland Aircraft of Canada Ltd.*[47], a decision of the Ontario Court of Appeal per Doherty J.A., the court applied the liberal approach in *R.* v. *Zingre* and enforced Letters Rogatory even though there was no reciprocity from the French court, thus undermining one of the three tests set out in *Re McCarthy and Menin*. In this case Air Affaires Afrique Company ("A.A.A.") filed a complaint against Mr. Byron-Exarcos with the Senior Examining Magistrate of the High Court of Grasse in the Republic of France. A.A.A. asserted that under the terms of an agreement concluded in 1979, A.A.A. acted as an agent for De Havilland Aircraft of Canada Ltd. in various transactions involving the sale and maintenance of De Havilland aircraft in Canada. Mr. Byron-Exarcos took over the management of A.A.A. from his father in 1980 and retained control of the company's affairs until 1984. It was alleged that while Mr. Byron-Exarcos was in charge of the company he misappropriated commissions payable from De Havilland to A.A.A. to his personal use. He was accused of theft and breach of trust and possession of stolen property.

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[47] (1991), 3 O.R. (3d) 705

In December 1987 the First Examining Magistrate of the High Court of Grasse issued Letters Rogatory requesting that the competent Canadian authorities assist with respect to preliminary investigations into the complaints against Mr. Byron-Exarcos proceeding in the High Court of Grasse. It was argued before the Ontario court that the Letters Rogatory should not be enforced because the matter was merely a police investigation, and the evidence was not to be used in a trial, but rather as a preliminary matter. It was further argued that the High Court of Grasse was not a court of competent jurisdiction because it did not have the requisite ability to reciprocate to a Canadian request for commission evidence.

Doherty J.A. reviewed *Re McCarthy and Menin* and then stated that the ability of a requesting tribunal to effectively reciprocate was only relevant to the exercise of discretion under the *Canada Evidence Act*. Letters Rogatory should not be held to be unenforceable simply because there was no reciprocity. Doherty J.A. stated[48]:

> "Secondly, factoring judicial reciprocity into the definition of "court or tribunal of competent jurisdiction" misplaces the significance of that reciprocity. Reciprocity is relevant to a determination of whether an order for commission evidence should be made because it is a manifestation of the international comity between Canada and the country making the request. Reciprocity is a reflection of the relationship between nations, not a feature of the authority of the particular court or tribunal. It is inappropriate to limit considerations of reciprocity to the powers of the particular court or tribunal. Rather, the question must be, is there a mechanism in place within the foreign jurisdiction which could respond favourably to a Canadian request by way of Letters Rogatory."

Thus one of the three tests enunciated in *Re McCarthy and Menin* for disallowing enforcement of the Letters Rogatory from the United States Securities and Exchange Commission has been effectively overruled by this more liberal decision.

The liberalization of the approach to enforcement of Letters Rogatory consequent from the decision

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[48] At pp. 713, 714

of *R.* v. *Zingre* has also been noted by Lax J. of the Ontario Court (General Division) in *Germany (Federal Republic)* v. *Canadian Imperial Bank of Commerce*[49], wherein he stated[50]:

> "**The test set out in *Zingre* requires a consideration of whether the request imposes any limitation or infringement on Canadian sovereignty, and whether justice requires an order for the taking of commission evidence** . . . It was argued that *Zingre* stands for the proposition that s.46 of the *Canada Evidence Act*, and, by implication, s.60 of the *Ontario Evidence Act*, in the context of Letters Rogatory, have to be read in light of a treaty. This profoundly narrow interpretation of *Zingre* was rejected in *Mulroney* v. *Code* (1986), 54 O.R. (2d) 253 . . . and in *United States District Court* v. *Royal American Shows* . . . where the Supreme Court of Canada stated:
>
> > "As this Court has indicated in *Zingre* v. *The Queen* . . . comity dictates that a liberal approach should be taken to request for judicial assistance, so long at least that there is more than ephemeral anchorage in a legislation to support them."
>
> Moreover, it is clear from *Friction (#2)* and from *Mulroney*, that this court does not regard *Zingre* as "an exceptional case", confined to its facts. Rather, that decision heralded a more relaxed and liberal approach of the exercise of discretion and under s. 46, founded on the notion of judicial Comity. Nor is it so narrowly regarded by the Ontario Court of Appeal as is evident from the following passage from *De Havilland* . . .:
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> > "This modern approach not only recognizes the inherent value in international judicial cooperation between friendly nations, but also reflects an enlightened self-interest. In an ever-shrinking world, Canadian courts often require the assistance of foreign courts so as to do justice between parties engaged in litigation in Canada. A receptive judicial ear to requests from foreign courts can only enhance the chances that a Canadian court will receive assistance where required."

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49 (1997), 31 O.R. (3d) 684; affirmed at [1998] O.J. No. 2062

50 At pp. 695, 696

> **In summary, *Zingre* establishes that 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 or otherwise prejudicial to the sovereignty of the citizens of that jurisdiction** . . ." (Emphasis added.)

See also *Nova Scotia (Commission of Inquiry into the Westray Mine Disaster)* v. *Frame*[51], a decision of Sheard J. of the Ontario Court of Justice (General Division), wherein it was implicitly held that subpoenas issued by the Commissioner of the Inquiry into the Westray Mine explosion in Nova Scotia should be enforced in Ontario. This decision proceeded primarily on the basis of the *Interprovincial Subpoena Act*. Sheard J. went on to review the liberal approach in *De Havilland*, *Zingre* and in *Royal American Shows Inc.*, however, and noted the statement of Lax J. in *Germany (Federal Republic)* v. *Canadian Imperial Bank of Commerce* that *Zingre* has "heralded a more relaxed and liberal approach to the exercise of discretion in s. 46 (of the *Canada Evidence Act*), founded on the notion of judicial comity".

In *Global Securities Corp.* v. *British Columbia Securities*[52], the British Columbia Securities Commission signed a Memorandum of Understanding with the United States Securities and Exchange Commission contemplating reciprocal exchange of information relating to enforcement of Securities laws. The British Columbia government enacted a section of the *Securities Act* to facilitate its obligations under the agreement. The U.S. Securities and Exchange Commission requested the provincial Commission's assistance in connection with an investigation and the British Columbia Securities Commission issued orders requiring Global Securities Corp. to deliver up accounting and related information. Global Securities Corp. then challenged the British Columbia legislation as *ultra vires* the province. The trial judge ordered Global Securities Corp. to deliver up the information, and this was overturned by the British Columbia Court of Appeal. At the British Columbia Court of Appeal level Newbury J.A., for the majority, reviewed *Zingre* and *Re McCarthy*

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51 [1997] O.J. No. 5425

52 (1999), 162 D.L.R. (4th) 601, overturned by the Supreme Court of Canada (2000), 185 D.L.R. (4th) 439

*and Menin* and implied that the principle of comity would not extend beyond the powers of a superior court and would not apply to administrative tribunals. The British Columbia Court of Appeal was overturned in the result and the Supreme Court of Canada per Iacobucci J., in reviewing the appellate court's decision, noted Newbury J.A.'s comment that the S.E.C. was not a "court or tribunal competent jurisdiction" as it was an administrative tribunal. The Supreme Court of Canada did not further reflect on this point, however, and overturned the appellate court by finding that the British Columbia legislation was *intra vires*.

The recent Ontario case of *B.F. Jones Logistics Inc*. v. *Rolko*[53] gives one pause. In this case Lissaman J. refused to enforce a Letter of Request from a private arbitrator in Florida because Ontario's *International Commercial Arbitration Act*[54], which was based on the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law, did not have an express provision regarding assisting arbitrators outside of Ontario. Lissaman J. reasoned that if the Ontario legislature had intended to enforce Letters of Request from arbitrators outside of Ontario, it would have included a provision to effect this in the legislation.

Lissaman J. referred to the earlier case of *Corporacion Transnacional de Inversiones S.A. de C.V.* v. *Stet International S.p.A.*[55] as supporting authority. In this case Lax J. held that an Ontario arbitration tribunal could not compel the testimony of a Cuban witness by issuing a Letter of Request as the *International Commercial Arbitration Act* only authorized letters of request for assistance within the province where the arbitration was being conducted. The implication of the case was therefore that a similar view would be taken of an incoming request from a foreign arbitral tribunal, or at least one constituted under the Model Law[56].

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53 [2004] O.J. No. 3518

54 R.S.O. 1990, c. I.9

55 (1999), 45 O.R. (3d) 183; affirmed (2000), 49 O.R. (3d) 414 ; leave to appeal to the Supreme Court of Canada dismissed at [2000] S.C.C.A. No. 581

56 Per Michael Penny, "Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?"(2001), 12 *Am. Rev. Int'l. Arb*. 249.

**Conclusion**

Thus it can be seen that the Supreme Court of Canada in *R.* v. *Zingre*[57] has substantially liberalized the Canadian court's approach to enforcement of Letters Rogatory and a new test is suggested: in addition to an assessment made on the basis of the traditional criteria for enforcement, Letters Rogatory from a foreign administrative tribunal will be enforced unless it is contrary to public policy and if it does not prejudice the sovereignty of Canada. The previous tripartite test set out in *Re McCarthy and Menin*[58] has arguably been supplanted by the new test of *R.* v. *Zingre* and, on the basis of the notion of judicial comity, a more relaxed and liberal approach to the enforcement of Letters Rogatory will be taken.

57 [1981] 2 S.C.R. 392

58 (1963), 2 O.R. 154