NYSBA—Montreal Seasonal Meeting 2018

Panel 17—Cross-border litigation: Comity and culture clash

October 26, 10am-11:15am

Azim Hussain, Norton Rose Fulbright Canada LLP, Montreal

Mathieu Piché-Messier, Borden Ladner Gervais LLP, Montreal

Presentation by A. Hussain

1. The themes for this panel are comity and culture clash. One area where we see those themes being engaged is cross-border discovery.

2. In the case of discovery by an American party of a Quebec third party, from a Quebec perspective there can sometimes be a culture clash.

3. The key idea I want to present today is that the typically wide approach of American lawyers in discovery, and the comparatively more restrained approach of Quebec lawyers, are a function of the internal logic of each system.

4. There are perhaps two factors that explain the difference in approach to discovery. One factor is structural, and the other factor is cultural.

5. First, American civil litigation is generally determined by jury trials.

6. Second, the American judicial ethos is more open to dispositive motions when compared to Quebec.

7. The result is that the American process can be compared to a funnel whereas the Quebec process is like a cylinder.

8. There are no jury trials for civil matters in Quebec. So one can see how the structure of pre-trial proceedings will be different in the two systems.

9. A system that has civil jury trials will be like a funnel, starting out very widely during discovery and then whittling down the admissible evidence through motions practice so that when the matter comes before the jury, questions of admissibility and probative value have largely been addressed.

10. Accordingly, relevance will be considered more widely so that those motions can be decided on a sufficient record.

11. In contrast, a system that does not have a civil jury trial and is not so open to motions to dismiss and motions for summary judgment will be more like a

cylinder rather than a funnel, not having such a wide discovery process and leaving it to the trial judge to decide evidentiary questions.

12. There is an internal logic, a culture, to each system, but they are different and so they can clash if a rogatory commission comes from the U.S. to Quebec to obtain documents and testimony.

13. The task for the Quebec judge is to balance the competing interests: a concern in Quebec to protect third parties, and a concern in the U.S. to obtain as much relevant information as possible during discovery so that there is enough of a foundation to adjudicate dispositive motions and so that if the matter is to proceed to trial, the jury is not interrupted by questions of admissibility. This weighing exercise by the judge is done against a backdrop of comity that is generally owed between U.S. and Canadian courts.

14. The *Code of Civil Procedure* ("CCP") in Quebec, at articles 504-506 CCP, governs foreign rogatory commissions.

15. The Code was reformed recently and these provisions replace the statute called the *Special Procedure Act*, which used to be the statute governing foreign rogatory commissions in Quebec.

16. An innovation in the new provisions is that it allows the Quebec court to derogate from the Quebec rules of procedure in favour of rules of procedure requested by the foreign court, article 505 CCP.

17. This can allow for a more expeditious execution of the rogatory commission, *e.g.* as it relates to issues like international service of originating proceedings.

18. Another thing that the reform changed is the role of relevance during discovery. One can no longer prevent discovery testimony on the basis of an objection as to relevance, article 228 CCP.

19. So it might be that in Quebec we are going in the direction of the U.S. as far as objections based on relevance are concerned.

20. What the reform did not touch is the Quebec blocking statute, called the *Business Concerns Records Act* ("BCRA"). It prohibits Quebec parties from disclosing business documents when those documents are the subject of a judicial order of a foreign court seeking to compel disclosure. One of the exceptions is if the business documents in question have previously left Quebec.

21. The BCRA is something to keep in mind in the context of rogatory commissions coming to Quebec.

Presentation by M. Piché-Messier

1. In addition to the BCRA, a U.S. party wanting discovery in Quebec will have to contend with general issues of public policy, or what is referred to in Quebec parlance as public order.

2. An example of an issue that involves considerations of public order is the issue of whether a given document is privileged.

3. A recent domestic case that did not deal with a rogatory commission but is relevant to the issue of privilege and what documents are discoverable is the case of *Rivard v. Eoliennes de l'Érable*, 2017 QCCS 2259.

4. Summary of the case: Small community, research study in this community on the impact of a controversial new wind power plant, researcher's journal contained many very personal and different positive and negative comments from the participants, disclosure of identities would have undermined the social harmony of the community.

5. In that case, the Superior Court of Quebec decided that the notes in the researcher's journal, which contained the identity of the research subjects and their comments, were privileged under the Wigmore test.

6. The Supreme Court of Canada has set out three categories of privilege in Canada:

    (a) The constitutionally protected privilege for attorney-client communications;

    (b) Common law privileges similar to attorney-client privilege, like litigation privilege; and

    (c) Case-by-case privilege based on the four criteria of the Wigmore test.

        - *R. v. National Post*, [2010] 1 SCR 477 at paras. 39, 42;
        - *Globe and Mail v. Canada (Attorney General)*, [2010] 2 SCR 592 at paras. 20-22.

7. The criteria of the Wigmore test were applied in the following way in the *Rivard* case:

    1. The communications must originate in a confidence that they will not be disclosed.

An undertaking, a fundamental condition or a contract. In the *Rivard* case, there was an undertaking of confidentiality given to the interviewees.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties both during and after the Research Project.

The granting and maintenance of the promise of confidentiality to the participants as a condition of participation in the Research Project was an essential part of the funding approval.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

Not doing so would limit the quantity, quality and truthfulness of the scientific results of the information gathered by the researchers. Such information and studies are essential for the general public and the political, scientific and university communities.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained by the correct determination of the litigation.

Requirement to weigh the protection of the relationship in question with any countervailing public interest such as national health, security, public safety, or investigation of a particular crime. In *Rivard*, the Court decided that the injury from disclosure of the notes would outweigh any benefit to the fact-finding process in the trial.

8. To conclude, cases like *Rivard* will be important to consider in the context of rogatory commissions where the evidence that is sought is the raw data of scientific research. The general point is that public policy considerations are not very far off in cross-border litigation.