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Letters Rogatory: Who Should Pay? And How Much?

In an increasingly global society, obtaining evidence from witnesses outside of a party's jurisdiction can be costly.

For those seeking a costs order for complying with requests for inter-jurisdictional production, however, courts will consider the "reasonable costs" in the circumstances and whether the witness is a true "stranger to the litigation."

In *The Scoular Company v Detlefsen,* the Ontario Superior Court considered an application to enforce Letters Rogatory issued in connection with an action brought against a corporate defendant in the United States District Court for the District of Minnesota.

The respondents, former executives of the defendant, had agreed to comply with Letters Rogatory compelling production of evidence, but sought to rely on indemnification agreements with their former employer which entitled them to reimbursement of all "out-of-pocket costs" if they became involved in litigation. The respondents argued they were entitled to full indemnity costs for responding to the discovery request and the application brought in the Ontario court.

The sole issues before the Court were whether the respondents' costs should be capped at $20,000, as argued by the applicant, and whether they should be awarded costs for the application.

The Court first concluded that the respondents were not true "strangers to the litigation" as they were not "neutral non-parties with no interest whatsoever in the outcome of the action or the parties to the action," but were closer in nature to defence witnesses. Justice Spies rejected the narrow interpretation favoured by the respondents that "strangers" were those not named as parties to the action in question. That interpretation has historically favoured full indemnity costs. As evidence for this finding, Justice Spies relied upon the above-noted indemnification agreements and affidavits of the respondents indicating that they were central figures in the litigation who head "clearly aligned themselves with (the defendant)."

Justice Spies relied on the line of cases including *Neuwirth v DaCosta, AstraZeneca LP v Wolman,* and *Advance/Newhouse Partnership v Brighthouse, Inc.* in reaching the conclusion that, while the "general rule" of witness costs in such applications

implicitly included costs on a full indemnity basis, such costs were subject to a cap to ensure that applicants are "only compelled to pay the *reasonable* fees and disbursements incurred in responding to Letters Rogatory."

According to Justice Spies, entitlement to full indemnity costs is: "not meant to be construed as a blank cheque." Given the relationship between the respondents and the defendants in the Minnesota action, such a blank cheque would "indirectly permit (the defendant) to prepare important witnesses for trial… at the cost of the Applicant." Consequently, Justice Spies ruled that where a court assesses what it considers to be reasonable costs in the circumstances, on a full indemnity basis, setting a cap on such costs "avoids the potential for further costs being incurred by all the parties and the waste of judicial resources in dealing with disputes."

In ruling in favour of the $20,000 cap, Justice Spies considered a variety of contextual factors, including these: the respondents had already produced a large number of documents, the costs of which ought not be retroactively passed onto the applicant; the respondents stated that cooperation made it unlikely that further costs of production would greatly exceed the 52 hours already billed; and the time limit on examination for discovery of 7 hours per respondent assisted by counsel charging a reasonable hourly rate which Justice Spies assessed at $400.00 per hour.

In denying costs for the application, Justice Spies noted that, while authority existed entitling a non-party to full indemnity costs regardless of the outcome, since the respondents in this case were not true "strangers to the litigation" and had failed in resisting the application. The scale of costs, therefore, "ultimately remains a matter of discretion of the presiding judge, having regard to all the circumstances of the case."

With Notes from Jonathan Langley