COURT OF APPEAL FOR ONTARIO

CITATION: Perlmutter v. Smith, 2020 ONCA 570
DATE: 20200911
DOCKET: C68404

Lauwers, Brown and Nordheimer JJ.A.

BETWEEN

Isaac (“Ike”) Perlmutter and Laura Perlmutter

Applicants (Respondents)

and

David Smith

Respondent (Appellant)

AND BETWEEN

Harold Peerenboom

Applicant (Respondent)

and

David Smith

Respondent (Appellant)

Jordan Goldblatt and Jordan Katz, for the appellant

Jerome Morse and David Trafford, for the respondent Harold Peerenboom

Winston Fogarty and Pavle Masic, for the respondents Isaac Perlmutter and Laura Perlmutter

Heard: August 24, 2020 by video conference

On appeal from the order of Justice Thomas Lederer of the Superior Court of Justice dated May 11, 2020, with reasons reported at 2020 ONSC 2679, and costs reasons reported at 2020 ONSC 4722.

BROWN J.A.:

I. OVERVIEW

[1] David Smith appeals the order of the application judge (the "Order") giving effect to two Letters of Request, or requests for international judicial assistance, addressed to the Ontario Superior Court of Justice from Judge Cymonie Rowe of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County (the "Florida Court"). Judge Rowe issued the Letters of Request at the instance of the respondents, Harold Peerenboom, Isaac Perlmutter, and Laura Perlmutter, in a proceeding commenced by Mr. Peerenboom in Florida against the Perlmutters.

[2] Mr. Smith also seeks leave to appeal the application judge's order that each party bear its own costs of the applications.

[3] For the reasons set out below, I would dismiss the appeal and deny leave to appeal the costs order.

II. THE FLORIDA PROCEEDING

[4] The background to the Florida proceeding initiated by Mr. Peerenboom against Isaac Perlmutter and his wife, Laura Perlmutter, was described by the application judge at para. 6 of his reasons:

> The two [principal] applicants, Harold Peerenboom, a Canadian, and Isaac Perlmutter, an American (with his wife Laura Perlmutter), own homes, in Florida, within the same "private" community. They disagreed over the management of the community, particularly concerning the operation of its tennis centre. Within a time frame coincident with this dispute Harold Peerenboom began receiving what was referred to throughout the hearing of these applications as hate mail.
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> From 2011 through 2016 Mr. Harold Peerenboom ("Mr. Peerenboom") was the victim of a malicious and prolonged campaign of defamation and threats to harass, intimidate and extort him into leaving his Florida home. Throughout this period, repeated salvos of hundreds of anonymous hate letters falsely accusing him of loathsome crimes, including murder and sexual assault against a minor, were mailed throughout the United States and Canada to Mr. Peerenboom's family, friends, neighbours, business associates, employees and clients (the "hate mail campaign").

[5] Mr. Peerenboom thought the Perlmutters were orchestrating the hate-mail campaign. He commenced an action against them in the Florida courts (the "Florida Main Action"), as described by the application judge at paras. 12 and 13:

> During October 2013, Harold Peerenboom commenced an action in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Suffice it to say the Complaint (in our lexicon, the Statement of Claim) has attached to it, exhibits which reference many more mailings to a wide assortment of people making all manner of insulting and unseemly comments about the character and actions of Harold Peerenboom.
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> The action named as defendants Isaac Perlmutter and his wife Laura Perlmutter, and unknown-at-the-time co-conspirators and asserted "…causes of action for defamation and defamation per se, intentional infliction of emotional distress, tortious interference, civil conspiracy

> and injunctive relief in connection with their actions in perpetrating the vicious and baseless hate mail campaign directed at Peerenboom". On July 16, 2016, Isaac and Laura Perlmutter commenced a counterclaim against Harold Peerenboom and others for "…illegally, analysing and disclosing the Perlmutter's genetic information in violation of Florida statutory and common law, in an effort to defame the Perlmutters by falsely implicating them in the Hate-Mail Campaign".

[6] Mr. Smith is an Ontario resident. His involvement in the hate-mail campaign issues pleaded in the Florida Main Action came about in the following way, as described by the application judge at paras. 15, 16 and 18:

> On January 21, 2016, the Detroit office of the Department of Homeland Security intercepted a package. Among other things, it contained anonymous letters that are described as "threatening in that the sender stated that he would send letters to various jails and prisoners in those jails, stating that Mr. Peerenboom is a child molester, if the Peerenboom[s] did not leave their home on Palm Beach". On April 19, 2017, the Palm Beach Police Department notified the parties to the action that had been commenced by Harold Peerenboom against Isaac Perlmutter and his wife that the package had been intercepted.
>
> The package included two letters one of which was addressed separately to two executives of Mandrake Management Consultants, identified as an executive search firm based in Toronto, and founded by Harold Peerenboom. The letter suggests that the two executives are just pawns of Harold Peerenboom and challenges them to convince him to sell his Florida home. It threatens that if they do not, the clients of the firm will be advised, by email and mail, of what a horrible person Harold Peerenboom is and suggests his involvement in "…sexual assault here in Florida, in Cuba and in the Far East and even up there in Canada". It alleges that Harold Peerenboom has caused distress to his own family and

> makes negative assertions about his wife and youngest son.
>
> …
>
> The sending of the package was initiated at a United Parcel Service ("UPS") store in Toronto. The shipping label identified the sender as Thomas Thorney. He was interviewed by the police. Investigators came to realize that he was unaware of the matters being investigated. A review of the surveillance tape maintained by UPS revealed that the person who had delivered the package under the name of Thomas Thorney was, in fact, his business partner, David Smith. In the Amended Notice of Application, it is alleged that David Smith is a former employee of Mandrake Management Consultants who was terminated after 15 years of service, for cause. In the Florida proceedings commenced by Harold Peerenboom against Isaac Perlmutter and his wife, it is alleged that Isaac Perlmutter is complicit in the intention to deliver the letters found in the package. [Emphasis added.]

III. THE ONTARIO APPLICATIONS TO ENFORCE LETTERS OF REQUEST

[7] In August 2017, after discovering Mr. Smith's involvement, the Perlmutters and Mr. Peerenboom filed a joint motion in the Florida Court for a letter of request seeking the Superior Court of Ontario's assistance in obtaining evidence from Mr. Smith and Thomas Thorney. On September 1, 2017 the Florida Court issued its first Request for International Assistance to the Ontario Superior Court of Justice (the "Initial Letter of Request").

[8] Thomas Thorney complied with the Initial Letter of Request and was deposed in February 2018. Mr. Smith was not prepared to comply voluntarily with the Initial Letter of Request. He took the positions that it was overbroad and, since

the motion for the Initial Letter of Request was granted on consent, the letter was not the product of substantive consideration by the Florida Court. The respondents then commenced an application in the Ontario Superior Court of Justice on February 1, 2018 to enforce the Initial Letter of Request.

[9] The application judge described, at para. 22, the ensuing events affecting the proceeding to enforce the Initial Letter of Request:

> The issue of the cooperation of David Smith with this first Letter of Request was determined by the actions of the plaintiff, Harold Peerenboom. During February 2018 he commenced another action in Florida; this one against David Smith, Thomas Thorney and unnamed co-conspirators for their actions in working with others, including the Perlmutters, in perpetrating the hate mail campaign. Counsel for the various parties consulted. They agreed. There was no purpose in continuing with the existing Letter of Request. Counsel for the two applicants, the Perlmutters and Harold Peerenboom canvassed Ontario law (whether the Letter of Request would be enforced) and determined that as constituted, with Harold Peerenboom as co-applicant, that application could not succeed. Counsel for David Smith expressed the view that the existing application was "doomed to fail". In commencing the action against David Smith, Harold Peerenboom had opened another avenue through which to obtain the evidence of David Smith. It was "otherwise obtainable". The applicants sought to adjourn that matter. Counsel for David Smith refused. It was withdrawn.

[10] I shall refer to Mr. Peerenboom's Florida action against Mr. Smith as the "Florida Smith Action".

[11] The next steps in the respondents' efforts to enforce letters of request were described by the application judge at para. 23:

> On April 30, 2018, Isaac Perlmutter and his wife commenced this application in the Superior Court of Ontario in an effort to "normalize" the application by removing Harold Peerenboom as a co-applicant. This renewal of the application was opposed by David Smith. He signalled his intention to bring a motion to strike the attempted renewal as an abuse of process. The parties convened a scheduling conference before Madam Justice Dietrich. It took place on May 28, 2018. Rather than schedule the application and the motion to strike, Madam Justice Dietrich ordered that "counsel for the moving party will seek a fresh letter of request on [an] expedited basis from the Florida Court following which, if he is successful in obtaining the letter, responding counsel will agree to a date for the application."

[12] By the time of the May 28, 2018 scheduling conference, the Florida Court had set the Florida Main Action down for trial in the fourth quarter of 2018.

[13] The respondents returned to the Florida Court which, in August 2018, granted two Letters of Request: one in favour of the Perlmutters, and the other in favour of the Perlmutters and Mr. Peerenboom (the "Second Letters of Request").

[14] Earlier, in May 2018, Mr. Smith had brought a motion in the Florida Court to dismiss the Florida Smith Action for lack of personal jurisdiction. His motion was dismissed in September 2019. Mr. Smith appealed. His appeal was dismissed in early 2020, before the parties had concluded their submissions before the application judge.

[15] In May 2019, the Perlmutters obtained leave to intervene in the Florida Smith Action, which entitled them to discover Mr. Smith on the issue of personal jurisdiction.

[16] The application judge heard the two applications to enforce the Second Letters of Request in March and April, 2020. He released his Order giving effect to the Second Letters of Request on May 11, 2020.

[17] I shall describe aspects of the application judge's Order and reasons in more detail when considering the various grounds of appeal advanced by Mr. Smith. At this point, I simply wish to note that the Order, broadly speaking, does three things: (i) it gives effect to the Second Letters of Request; (ii) it provides some directions regarding the implementation of the Second Letters of Request, including the scope of documentary production; and (iii) it sets out the procedure for the disposition and review of electronic devices belonging to Mr. Smith that are in the possession of the Toronto Police Service. In his application to enforce the Second Letters of Request, Mr. Peerenboom sought relief in respect of those devices. The parties asked the application judge for an order reflecting their agreement on the procedure concerning the devices, which he made at para. 62 of his reasons.

[18] On June 18, 2020 Mr. Smith filed his notice of appeal seeking to set aside the application judge's Order in its entirety. The hearing of this appeal was expedited. The fresh evidence filed on consent discloses that (i) by order dated

July 2, 2020 the Florida Court consolidated the Florida Main Action and the Florida Smith Action for discovery and trial, and (ii) by order dated July 14, 2020 the Court set the actions down for trial in January, 2021 and directed the parties to complete all discovery by the end of this year.

IV. ISSUES ON APPEAL

[19] Mr. Smith submits that, in enforcing the Second Letters of Request, the application judge made four errors warranting the intervention of this court. Specifically, he contends that the application judge erred in:

(i) concluding that Mr. Smith's evidence was not otherwise obtainable;

(ii) finding that the Second Letters of Request did not impose an undue burden on Mr. Smith;

(iii) holding that the documents sought were identified with reasonable specificity; and

(iv) failing to go behind the Second Letters of Request to identify defects in the process before the Florida Court that led to their issuance.

[20] As well, Mr. Smith seeks leave to appeal the order of the application judge that each party was required to bear its own costs of the applications: 2020 ONSC 4722 (the "Costs Reasons"). Mr. Smith argues that he should be awarded his substantial indemnity costs of the applications.

V. THE GOVERNING PRINCIPLES

[21] The grounds of appeal Mr. Smith advances must be assessed in light of the general principles applicable when an Ontario court considers a request for assistance from a foreign tribunal pursuant to s. 60 of the *Evidence Act*, R.S.O. 1990, c. E.23[1] or s. 46 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. As the application judge correctly noted, at para. 4: "The fundamental principle to be applied in considering such a request is recognition of the comity of nations: that one sovereign nation voluntarily adopts or enforces the laws of another out of deference, mutuality, and respect." As a result, a foreign request is to be given full force and effect unless it is contrary to the public policy or otherwise prejudicial to the sovereignty or the citizens of the jurisdiction to which the request is directed: *Gulf Oil Corporation v. Gulf Canada Ltd. et al.*, [1980] 2 S.C.R. 39; *R. v. Zingre*,

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[1] Section 60(1) of the *Evidence Act* provides:

> 60 (1) Where it is made to appear to the Superior Court of Justice or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court.

[1981] 2 S.C.R. 392, at p. 401, quoted in *Presbyterian Church of Sudan v. Taylor,* (2006), 275 D.L.R. (4th) 512 (Ont. C.A.), at para. 17.

[22] The application judge was guided by the test repeated by this court in *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 ONCA 264, 115 O.R. (3d) 161, at para. 59, which requires a court to:

> consider whether the request imposes any limitation or infringement on Canadian sovereignty and whether justice requires an order for the taking of commission evidence. The considerations encompassed by the phrase "Canadian sovereignty" … include [an] assessment of whether the request would give extra-territorial authority to foreign laws which violate relevant Canadian or provincial laws …; whether granting the request would infringe on recognized Canadian moral or legal principles …; and whether the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested.

[23] The application judge properly observed, at para. 33, that international comity dictates a liberal approach to requests for judicial assistance. As a result:

> [T]he judge making the request is entitled to considerable deference in the Canadian application and … the court receiving the request for assistance does not sit in appeal from the decision of the requesting court. The Ontario Court of Appeal has held that orders originating from the United States should be given full faith and credit unless to do so would be contrary to the interests of justice or infringe on Canadian sovereignty.

[24] At para. 36, the application judge correctly stated that to balance the need for comity against the possible infringement of Canadian sovereignty he was required to consider the factors set out in *Re Friction Division Products, Inc. and*

E.I. Du Pont de Nemours & Co. Inc. et al. (No. 2) (1986), 56 O.R. (2d) 722 (H.C.), at p. 732, and *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 (Gen. Div.), at p. 194, aff'd (1997) 32 O.R. (3d) 417 (C.A.), namely:

> Before an order giving effect to letters rogatory will be made, the evidence (including the letters rogatory) must establish that:
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> (1) the evidence sought is relevant;
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> (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
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> (3) the evidence is not otherwise obtainable;
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> (4) the order sought is not contrary to public policy;
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> (5) the documents sought are identified with reasonable specificity;
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> (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.

[25] The *Friction Division* factors act as "useful guideposts", not rigid pre-conditions, to the exercise of a judge's discretion: *Lantheus*, at paras. 61 and 69. Of course, an Ontario court must decline a foreign court's request if enforcing it would be contrary to public policy or inconsistent with the laws of this province: *Treat America Ltd. V. Nestlé Canada Inc.*, 2011 ONCA 560, 340 D.L.R. (4th) 707, at para. 12.

[26] The decision to grant or refuse a foreign request is a matter of judicial discretion, to which this court must give deference in the absence of a

demonstrated error in principle by the court below: *Presbyterian Church*, at paras. 19 and 30.

VI. FIRST ISSUE: DID THE APPLICATION JUDGE ERR IN CONCLUDING THAT MR. SMITH'S EVIDENCE WAS NOT OTHERWISE OBTAINABLE?

A. The issue stated

[27] The application judge had "no trouble in finding that David Smith has relevant evidence to offer": at para. 46. Mr. Smith does not challenge that finding; his challenge to the Order lies elsewhere. First, Mr. Smith submits that the application judge erred in concluding that the evidence sought through the Second Letters of Request was "not otherwise obtainable." Mr. Smith contends that the application judge made two main errors in this regard:

(i) before he rendered his decision, the parties had informed the application judge that Mr. Smith's jurisdictional appeal in the Florida Smith Action had been turned down. Yet, the application judge failed to consider that, as a result, Mr. Smith's evidence had become compellable by the respondents in the Florida proceedings; and

(ii) he failed to acknowledge that many of the documents sought through the Second Letters of Request were "otherwise obtainable" by other measures, including directly from the parties themselves.

B. Analysis

The effect of the dismissal of Mr. Smith's jurisdictional challenge

[28] In his reasons, the application judge acknowledged counsel had informed him that Mr. Smith's appeal of the jurisdictional decision in the Florida Smith Action had been dismissed. However, the application judge discounted the significance of that dismissal, stating, at para. 31:

> As it is, since the commencement of the hearing in this Court but before the submissions were complete, counsel advised that the Court in Florida has dismissed the appeal. In the circumstances there is no reason to believe that David Smith will agree to attend and be deposed in Florida. Certainly, his counsel had opportunities to disabuse the Court of this concern and did not do so. The second action, the one commenced by Harold Peerenboom against David Smith, does not stand as an alternative means of obtaining his evidence.

[29] The application judge's explanation for that conclusion is found in two places in his reasons. Earlier in para. 31, the application judge found:

> What is apparent from the bringing of the [jurisdictional] motion and the subsequent appeal is that David Smith is [loath] to appear in the United States to give that deposition. There is nothing in the record that indicates a willingness to attend. He has been acting in a manner consistent with an intention to avoid it. This concern was raised during the submissions made by counsel. What would happen if the appeal was turned down and the action against David Smith left to proceed? The prospect of a default judgment was raised, either by counsel for David Smith or without his objection.

[30] The application judge returned to the point at para. 46, stating:

> David Smith has by his actions, motions and appeals made it clear that he is unwilling to respond to the procedures of the Florida Court.

[31] I see no palpable and overriding error in the application judge's finding that Mr. Smith was loath to appear in the United States to be deposed. That finding was reasonable based on the record of Mr. Smith's conduct, including his conduct since the issuance of the Second Letters of Request. Although Mr. Smith had moved to challenge the jurisdiction of the Florida Court and had been deposed on that motion, his jurisdictional motion was not construed as an attornment to the Florida Court and his deposition was limited to issues regarding the personal jurisdiction of the Florida Court. At the time the application judge rendered his decision, Mr. Smith had not voluntarily submitted to discovery on the merits of the Florida proceedings and his jurisdictional challenge had prevented the respondents from compelling his discovery in the Florida actions. Accordingly, on the record as it stood when he rendered his decision and based on Mr. Smith's conduct to that point, it was open to the application judge to find as he did: that Mr. Smith was "[loath] to appear in the United States to give [a] deposition" and by his actions had "made it clear that he is unwilling to respond to the procedures of the Florida Court."

[32] Mr. Smith argues the application judge erred by failing to consider that his evidence was compellable in the Florida actions. Mr. Smith did not file any

evidence before the motion judge explaining how, under Florida law, a court could compel a non-resident party like Mr. Smith to appear and give evidence.

[33] New information not before the application judge was placed before this court on appeal. First, in response to a question from the court, Mr. Smith's counsel advised that Mr. Smith had filed an answer or defence in the Florida Smith Action.

[34] Second, Mr. Smith filed a brief of "fresh evidence" containing two pieces of correspondence between counsel. There appears to be no dispute that Mr. Peerenboom's Florida counsel served notices of examination on Mr. Smith for depositions this past June and August, which were cancelled by respondents' counsel for a variety of reasons, including counsel's health. A further notice has been sent for an October 6, 2020 deposition of Mr. Smith.

[35] Finally, Mr. Peerenboom also filed "fresh evidence" consisting of two pieces of correspondence between counsel. In an email dated April 7, 2020 Mr. Smith's Florida counsel imposed several pre-conditions on Mr. Smith's attendance at a deposition. The main pre-condition was that Mr. Smith would "not appear to be deposed unless and until the dangers and legal restrictions associated with coronavirus have been fully lifted by Canadian and American authorities." Other conditions required that Mr. Peerenboom dismiss his Canadian lawsuits against

Mr. Smith[2] and limit questioning in the Florida action to areas of inquiry not covered in his deposition for the jurisdictional challenge motion. An August 19, 2020 email from Mr. Perlmutter's Ontario counsel indicated that some of the cancellations of the previously noticed deposition of Mr. Smith resulted from the pre-conditions Mr. Smith had placed on his examination.[3]

[36] Although this new information provides further details about the litigation, in my view it does not undermine the conclusion reached by the application judge that Mr. Smith's evidence was "not otherwise obtainable". Mr. Smith remains resident in Ontario and counsels' correspondence in the "fresh evidence" sheds no definitive light on whether Mr. Smith will appear for deposition in the Florida proceedings. Nor has Mr. Smith filed any evidence to explain how a Florida court can compel a party who is an Ontario resident to give evidence in a Florida action. A failure to attend for deposition might result in the striking out of any answer filed by Mr. Smith, but it would not result in the securing of his evidence.

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[2] Companies in which Mr. Peerenboom has an interest – Mandrake Management Consultants Corporation, Crestwood Preparatory College Inc. and Crestwood School – have commenced proceedings in Ontario against Mr. Smith. Mandrake Management Consultants Corporation, a company for which Mr. Smith had worked, has commenced two proceedings against Mr. Smith in Ontario: one that alleges the breach of minutes of settlement, and another that alleges misappropriation of confidential information. One Crestwood action alleges that defamatory statements made by Mr. Smith in the hate-mail campaign have caused economic harm to the school and interfered with its economic relations. Mr. Peerenboom also has commenced a defamation action against Mr. Smith for statements made in the hate-mail campaign. It appears that none of the actions have proceeded beyond the pleadings stage.

[3] In response to a question from this court, Mr. Smith's counsel advised that Mr. Smith had waived the pre-conditions for his deposition. However, counsel for Mr. Peerenboom stated that such a waiver had never been communicated to the respondents.

The availability of the information from other sources

[37] Mr. Smith argues that the application judge erred in holding that his evidence was "not otherwise obtainable" because many of the documents sought through the Second Letters of Request are obtainable by other measures, including directly from the parties themselves.

[38] The application judge explicitly addressed this issue at para. 46 of his reasons, stating:

> The evidence being sought from David Smith extends beyond his involvement in the sending of the package and the material it contained. That evidence indicates the possibility of his involvement in the alleged hate mail campaign. How far does that involvement reach? As will become apparent, the Letters of Request ask for any documents and communication between David Smith and a large number of other people including the Perlmutters and Harold Peerenboom. His counsel objects. Whatever communication there is between his client and the parties to the action within which the Letters of Request were issued, they would already have. Delivering hate mail, being part of a campaign to discredit anyone by spreading misinformation about another person (in this case the allegations include child molestation and murder) is a serious wrong. That is why it is a crime. It does not just affect those who are involved, it colours our society because it reflects on its values. The alleged involvement of David Smith in the sending of the material through UPS connects him to such activity. In this case, the involvement of David Smith is tied to the allegation that he conspired with others in the furtherance of this campaign. Hate mail and conspiracy are not, generally made accessible by those involved. These activities are not carried out where they are easily observed. The wide inquiry sought by the Florida Court

> through the Letters of Request makes it problematic to send the parties (Harold Peerenboom and the Perlmutters) to inquire of the array of people who may have received the hate mail if they have, and if the answer is yes, what communication of this kind they received, and then to determine what, if any of it involved David Smith. Harold Peerenboom may not be able to discern where the material came from, who was involved in preparing it and who was responsible for it being delivered. The nature of the Letters of Request makes clear the intention of the Court in Florida to shed light on the full breadth of the allegations. To fail to enforce them on the basis that any of this information was otherwise available would undermine that purpose. The information sought through these Letters of Request is not otherwise obtainable.

[39] The application judge's analysis is sound. It is anchored in the scope of the dispute as set out in the Florida proceedings and the reality of the difficulties in establishing causes of action based on conspiracy and a wide-spread hate campaign. It also reflects what this court stated in *Lantheus*, at para. 64: that evidence is not otherwise obtainable when "evidence of the same value as that sought from the person to be examined cannot be otherwise obtained." Accordingly, I see no reversible error.

[40] For these reasons, I am not persuaded by this ground of appeal.

VII. SECOND ISSUE: DID THE APPLICATION JUDGE ERR IN CONCLUDING THAT THE SECOND LETTERS OF REQUEST DID NOT IMPOSE AN UNDUE BURDEN ON MR. SMITH?

A. The issue stated

[41] Mr. Smith submits the application judge erred by not meaningfully addressing the burden the Second Letters of Request would place on him. Since his jurisdictional appeal had been dismissed, Mr. Smith argues that he must now submit to two rounds of pre-trial discovery through two different procedures: first as a party in the Florida proceedings; then, pursuant to the Second Letters of Request.

B. Analysis

[42] I see no merit in this submission. The application judge concluded that Mr. Smith's evidence in respect of the issues in the Florida Main Action was "not otherwise obtainable" because his "actions, motions and appeals made it clear that he is unwilling to respond to the procedures of the Florida Court": at para. 46. As previously stated, I see no palpable and overriding error in that conclusion and the "fresh evidence" sheds no definitive light on whether Mr. Smith will appear for deposition in the Florida action.[4]

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[4] If, as matters unfold, Mr. Smith submits to discovery in the Florida actions before any examination pursuant to the Second Letters of Request takes place and the respondents insist on proceeding with an examination under the Second Letters of Request, it is always open to Mr. Smith to move to stay the Order and request the appropriate costs order.

VIII. THIRD ISSUE: DID THE APPLICATION JUDGE ERR IN CONCLUDING THAT THE SECOND LETTERS OF REQUEST IDENTIFIED THE DOCUMENTS WITH REASONABLE SPECIFICITY?

A. The issue stated

[43] *Friction Division* requires a court to consider whether the documents sought by a letter of request are identified with reasonable specificity. Mr. Smith submits the application judge made two errors with respect to this factor:

(i) failing to give appropriate weight to the facial overbreadth of the Second Letters of Request, specifically the lack of any temporal limitation on the documents and their requirement to produce "a multitude of clearly irrelevant" documents; and

(ii) engaging in a "limiting process" that reframed and reduced the scope of documentary production set out in the Second Letters of Request, a power that Mr. Smith contends the application judge did not possess.

B. Analysis

The alleged overbreadth of the Second Letters of Request

[44] Mr. Smith contends the Second Letters of Request were flawed on their face. He says they were overbroad because they lacked any temporal limitation and required the production of irrelevant documents, such as those concerning Marvel Entertainment LLC, Disney, and several other corporations. This

overbreadth, according to Mr. Smith, should have led the application judge to dismiss the applications to enforce.

[45] I am not persuaded by this submission. The application judge squarely addressed Mr. Smith's complaint of overbreadth in his reasons. He stated that "at first viewing", overbreadth appeared to be an issue. However, on further reflection, he concluded that it was not: at para. 51. As he explained at para. 56:

> The evidence sought through the Letters of Request is in furtherance of the possibility, degree and nature of the involvement of David Smith in the hate mail campaign. The Letters of Request ask for the production of documents dealing with a myriad of connections and people whose only association with David Smith, if there is any relationship, would arise from his involvement in that campaign. This is the "narrow range of documents" to which the affidavit of Jared Lopez refers. The overall context for the Letters of Request is the hate mail campaign. The Letters of Request both make clear that this is the substantive limitation that restricts the response being required of David Smith. [Emphasis added.]

[46] The application judge went on to note that, on their face, the Second Letters of Request limit the scope of production to documents relevant to the allegations concerning the hate-mail campaign as set out in the pleadings for the Florida Main Action.[5] This led the application judge to conclude, at para. 59:

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[5] For example, at para. 57 of his reasons the application judge states:

> The Letter of Request directed to the benefit of both Harold Peerenboom and Isaac Perlmutter (in company with his wife Laura Perlmutter) under the heading "Assistance Required: Specific Evidence Sought by This Court" notes:

> With the limitation that the evidence that is sought through the Letters of Request is with respect to the hate mail campaign having been established, it is apparent that the documents sought are identified with reasonable specificity and that the order to be enforced is not … unduly burdensome.

[47] I see no error in that analysis. It is rooted firmly in the language of the Second Letters of Request, considered in light of the allegations contained in the pleadings in the Florida Main Action. Although Mr. Smith contends that documents concerning communications with certain companies, such as Marvel Entertainment LLC, Disney, and others, are irrelevant, the allegations in the Florida pleadings refer to those companies and explain the relevance of the production of such documents. On the face of the pleadings in the Florida Main Action, the evidence requested appears to be relevant to the issues in the Florida litigation: *Presbyterian Church*, at para. 29.

> This Court hereby ORDERS that the Requesting Parties are authorized to obtain information *that may be relevant* to the prosecution and defence of the claims and counterclaim set forth in this lawsuit, including the existence, description, nature, custody, condition and location of all documents or other tangible things pertaining to, and the identity and location of persons with knowledge of, *relevant information pertaining to the anonymous mailing campaign*….
> …
>
> This Court hereby ORDERS that, in connection with the foregoing, the Requesting Parties are hereby authorized to obtain the following documents and other information *that may be relevant* to the claims, counterclaims, and/or defence of same from the non party witness hereinafter identified:…
> [Emphasis in original].

Exceeding the proper bounds of the power to give directions

[48] Mr. Smith contends the revisions the application judge made to the scope of documentary production set out in the Second Letters of Request exceeded the scope of his power to give directions under s. 60(1) of the *Ontario Evidence Act*. According to Mr. Smith, the revisions indicate the application judge reached an entirely different conclusion than the Florida Court regarding which documents were relevant to the underlying litigation. Mr. Smith submits that "it was not for the Application Judge to weigh in on this issue to this degree, and doing so was an error of law."

[49] I am not persuaded by this submission. The application judge did not err at law nor was his exercise of discretion unreasonable in the circumstances.

[50] As the jurisprudence of this court has made clear for many years, it is open to the Ontario court to narrow a request for international judicial assistance if the supporting material sustains only a more circumscribed request: *Fecht* (Ont. C.A.), at p. 419; *Presbyterian Church*, at para. 45. In *Presbyterian Church* this court observed that in related Alberta litigation the application judge had only given effect to a small number of the discrete topics described in the letter of request. The Alberta judge did so because, in his view, the materials did not demonstrate the information on the other topics was relevant or necessary for trial: *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 2005 ABQB 920, [2006] A.W.L.D. 945,

at paras. 51-69, cited in *Presbyterian Church*, at paras. 38-40. For Ontario cases where the court reduced the scope of the letter of request, see: *AstraZeneca LP v. Wolman*, 2009 CarswellOnt 7787 (S.C.), at paras. 52, 54 and 59; *Pecarsky v. Lipton Wiseman Altbaum & Partners*, [1999] O.J. No. 2004 (S.C.), at para. 41.

[51] Although in his reasons the application judge concluded "it is apparent that the documents sought are identified with reasonable specificity and that the order to be enforced is not … unduly burdensome," his Order did not simply give effect to the Second Letters of Request. Instead:

(i) in para. 5 of the Order, the application judge stated that the "documents to be produced and the examination to be conducted will be governed by two overarching requirements", namely that the productions and questions posed must be relevant to the issues in the Florida proceeding and the temporal scope of all documents is limited to the period between May 1, 2011 and June 30, 2016;

(ii) in para. 6 of the Order, the application judge ordered Mr. Smith to produce specific categories of documents, explaining this was "[f]or the purpose of providing guidance as to the understanding of what is and is not relevant but, at the same time, making it clear that this in no way limits the obligation of David Smith to produce any document and answer any question that falls within the parameters of the two Letters of Request"; and

(iii) in para. 7 of the Order, the application judge directed, "[f]or the purpose of providing further guidance as to what is and is not relevant", that Mr. Smith is not required to disclose certain documents.

[52] It may not have been necessary for the application judge to include paras. 5 and 6 in his Order, since those provisions simply re-phrase the categories of relevant documents set out in the Second Letters of Request. However, the application judge evidently thought that paras. 5 and 6 would assist the parties in carrying out the requirements of the Second Letters of Request. Consequently, I view those parts of his Order as falling within his power under s. 60(1) of the *Evidence Act* to "give all such directions as to … all other matters connected [with the examination] as seem proper."

[53] I also regard the application judge's decision to narrow the scope of production ordered in para. 7 of his Order as falling well within the reasonable exercise of his power to give directions. This narrowing primarily seeks to confine production to those documents directly relevant to the issue of Mr. Smith's knowledge of, or participation in, the hate-mail campaign. One provision – Order para. 7(f) – does not reduce the scope of production expressly requested in the Second Letters of Request but appears designed to steer the parties away from a topic that, in the language of r. 25.11(b) of the Ontario *Rules of Civil Procedure*, would be considered "scandalous, frivolous or vexatious" and, therefore, irrelevant. In my view, it was reasonable and within the application judge's authority to do so.

[54] I would simply observe that when a judge narrows the scope of the requested production, the best practice is to explain in his or her reasons why the narrowing has been ordered. However, as outlined above, in the present case the explanation for the narrowing can be gleaned from a reading of the reasons as a whole.

[55] Accordingly, I would not give effect to this ground of appeal.

IX. FOURTH ISSUE: DID THE APPLICATION JUDGE ERR BY FAILING TO DECLINE RECOGNITION OF THE SECOND LETTERS OF REQUEST BECAUSE OF DEFECTS IN THE FLORIDA COURT'S PROCESS?

A. The issue stated

[56] Mr. Smith contends that the Second Letters of Request were issued as a result of a flawed process in the Florida Court. He argues there were several deficiencies in that process, namely:

(i) a letter of request was issued at the instance of Mr. Peerenboom although he did not file a motion to obtain one;

(ii) Mr. Peerenboom misrepresented that the Ontario Court had found "the institution of the Smith Action in Florida was a sufficient material change in circumstances to justify annulling the First Letter Rogatory", when no court in Ontario had made such a finding;

(iii) two different Second Letters of Request were granted to the Perlmutters and Mr. Peerenboom, despite Judge Rowe directing both parties to

"agree" on language at the hearing on August 28, 2018. Those differences are not merely superficial; they include different categories of information sought from Smith and different summaries on material facts supporting the request; and

(iv) Mr. Peerenboom's Second Letter of Request provides that Mr. Smith's costs of compliance are to be borne equally by Mr. Peerenboom and the Perlmutters. There is no explanation or logical reason why the Perlmutters would bear any of those costs, when they sought to issue their own Letter of Request.

B. Analysis

[57] Mr. Smith bases this ground of appeal on language found in the jurisprudence to the effect that although an Ontario court does not sit in appeal of the decision of a foreign court, "it is not bound to accept the language of the letters of request 'as the final say' but is entitled to go behind letters rogatory to examine precisely what it is the foreign court is seeking to do and to give effect to them only if they satisfy the requirements of the law of this jurisdiction": see the cases cited in *Aker Biomarine AS v. KGK Synergize Inc.*, 2013 ONSC 4897, [2013] O.J. No. 5048, at para. 26 and *AstraZeneca*, at para. 18. From this Mr. Smith crafts an argument that the application judge erred by not examining, in some detail, the process that led the Florida Court to issue the Second Letters of Request.

[58] The language Mr. Smith relies on traces its origin to the decisions of Blair J. in *Fecht*, at p. 195, and this court in *Presbyterian Church*, at para. 32. It usually refers to the duty of the Ontario court to satisfy itself that the evidence sought is relevant and not otherwise obtainable, not to conduct an inquiry into the minutiae of the process used by the foreign court to grant the letter of request.

[59] In some circumstances, the process used by a foreign court may well shed light on the relevance of the evidence sought and whether it is not otherwise obtainable. The fairness of the process of the foreign court is generally considered in the *Friction Division* analysis under the public policy factor, which is based on the principle 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": *Zingre*, at p. 401.

[60] Letters of request frequently flow back and forth across the border between Canada and the United States of America. Such is the consequence of our highly integrated economies and easy cross-border movement. As accepted by this court in *Ontario Public Service Employees Union Pension Fund (Trustees of) v. Clark* (2006), 270 D.L.R. (4th) 429 (Ont. C.A.), at para. 22, "an Ontario court should 'give full faith and credit' to the orders and judgments of a U.S. court unless it is of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty."

[61] Applying those principles, I see no merit in this ground of appeal for four reasons.

[62] First, the application judge was alive to the issue and, in fact, "went behind" the Second Letters of Request to some extent in order to address Mr. Smith's complaints. In paras. 32 and 35 of his reasons, the application judge examined at some length the process used by the Florida Court leading up to its issuance of the Second Letters of Request. He considered Mr. Smith's complaint that Mr. Peerenboom did not file a separate motion, yet the Florida Court ultimately issued two Letters of Request, as well as his submission that no affidavit evidence supported the request to the Florida Court. His reasons clearly disclose that he was not persuaded the process tainted the Second Letters of Request such that it would be contrary to the interests of justice to enforce them. The application judge stated, in part, at paras. 34 and 35:

> In the case I am asked to decide, Judge Cymonie Rowe was concerned with the original form of the Letter of Request put to her. She asked that it be amended. It is apparent that she considered the substance of what she was being asked to do and the substance of the justification for that request (that is the concerns expressed on behalf of Harold Peerenboom). The form of the motion evolved, as motions do here and elsewhere. The response to her expressed concern was to put to her the two Letters of Request. There is no reason, nor would it be appropriate, for this Court to look behind the process adopted by the requesting Court.
>
> This same analysis applies to a further objection made on behalf of David Smith. It was submitted that the

> decision to grant the Letters of Request was made without any evidence supporting the request … Counsel for the Perlmutters pointed out that the material supporting the application for the granting of the Letters of Request by the Court in Florida contains a reference to the source of every factual component of the request. This is evidence by another means. In considering the process utilized by the Florida Court the importance of comity, the deference, mutuality, and respect it calls for overrides the sort of technical concerns raised on behalf of David Smith.

[63] Second, our jurisprudence recognizes that the procedural practices in the American state and federal district courts differ in some respects from those in Ontario. For example, some American courts issue letters of request in the absence of affidavit evidence: *Presbyterian Church,* at para. 11; and the scope of discovery in American civil proceedings generally is much broader than in Canada: *Aker Biomarine*, at para. 27. Yet, comity requires that inflexible rules are not applied to such procedural differences. Instead, a Canadian court must balance any possible infringement of Canadian sovereignty with the natural desire to assist the courts of a foreign land: *Zingre*, at p. 403.

[64] Third, there is no evidence that the process which resulted in the issuance of the Second Letters of Request did not comply with the procedural rules of the issuing court.

[65] Finally, the process that led to the issuance of the Second Letters of Request lacks any hallmarks of an unfair process. In advance of moving before the Florida Court in late August 2018, the respondents invited Mr. Smith's Ontario counsel to

indicate which provisions in the Initial Letter of Request were overbroad. Mr. Smith's counsel declined to do so. However, Mr. Smith's Ontario counsel did request that certain facts be placed before the Florida Court for its consideration, which the respondents did. As well, the Perlmutter's motion to the Florida Court to issue a further Letter of Request was made on notice to Mr. Smith.

[66] In sum, I see nothing in the record to suggest the Second Letters of Request that issued from the process of the Florida Court would infringe on any recognized Canadian legal or moral principle: *France (Republic) v. De Havilland Aircraft of Canada Ltd.* (1991), 3 O.R. (3d) 705 (C.A.), at p. 719.

[67] For these reasons, I would not give effect to this ground of appeal.

X. CONCLUSION ON THE APPEAL

[68] For the reasons set out above, I would dismiss the appeal from the Order.

XI. LEAVE TO APPEAL THE COSTS ORDER

A. The issue stated

[69] By order dated August 5, 2020 (the "Costs Order"), the application judge ordered that "[e]ach party is required to bear its own costs of these Applications." Mr. Smith seeks leave to appeal the Costs Order even if he does not succeed on his appeal.

[70] Mr. Smith submits that the discretionary Costs Order is tainted by two errors in principle or is plainly wrong: *Johnson v. Marzouca*, 2016 ONCA 298, 130 O.R. (3d) 795, at para. 13. First, the application judge tethered the costs determination to the outcome of the Florida proceedings, effectively awarding "costs in the cause" for a proceeding that was not before him. Second, the application judge erred by departing from the general principle that non-party respondents to applications to enforce letters of request are entitled to receive their costs on an elevated scale regardless of the outcome of the enforcement application.

B. Analysis

[71] I am not persuaded the application judge made any error in principle in making the Costs Order or that the order is plainly wrong. I would not grant leave to appeal.

[72] First, it is clear on the face of the application judge's reasons that he did not tether the Costs Order to the outcome of the Florida proceedings. Rather, he explained why the conduct of each party made it difficult for him to determine who was entitled to costs: Costs Reasons, at paras. 10-14. In his view, it was "not possible to meaningfully decide the issue of costs without knowing the ultimate results of the two [Florida] actions": at para. 15. That did not lead him to order "costs in the cause," as contended by Mr. Smith. On the contrary, his reasons, at para. 24, plainly disclose that he was <u>not</u> doing so:

> The amounts related to activities in the Court in Florida will be assessed there, based on the law that applies. The differences that remain as a result of the work attributable to proceedings before this Court are not so great that anyone will be unduly prejudiced. Any suggestion that this should be left to be dealt with at the end, leaving this Court to unravel, understand and assess the result and impact of the Florida proceedings is neither appropriate nor practical.

[73] In the result, he ordered that in these Ontario applications "[t]here will be no order as to costs. Each party is to bear its own": at para. 25. The application judge did not exceed his jurisdiction in making such order; it was squarely confined to the applications before him.

[74] Second, the case law discloses that on unsuccessful applications to enforce letters of request, courts have awarded the resisting respondent full indemnity costs, substantial indemnity costs, partial indemnity costs, or no costs: see the cases cited in *Oticon v. Gennum Corp.*, 2010 ONSC 1638, [2010] O.J. No. 1082, at para. 3. In *Scoular Co. v. Detlefsen*, 2016 ONSC 4001, 92 C.P.C. (7th) 197, at paras. 44 to 51 Spies J. reviewed the costs awards in cases where the applicant successfully enforced letters of request. In those cases, the awards ranged from an order of partial indemnity costs to the successful applicant in one case, to an award of full indemnity costs to the unsuccessful respondent in another. In her case, Spies J. granted the application to enforce but ordered no costs of the application: at para. 53.

[75] The jurisprudence does not establish any bright line rule regarding the award of costs on successful applications to enforce letters of request. Consequently, the application judge did not err in principle in awarding no costs, nor was his Costs Order plainly wrong.

[76] For those reasons, I would not grant Mr. Smith leave to appeal the Costs Order.

XII. DISPOSITION

[77] For the reasons set out above, I would dismiss the appeal and deny Mr. Smith leave to appeal the Costs Order.

[78] If the parties are unable to agree on costs for this appeal, they may each serve and file written costs submissions, limited to three pages each, together with their bills of costs and any offers to settle, within ten (10) days of the release of these reasons.

Released: “PL” SEP 11 2020

“David Brown J.A.”
“I agree. P. Lauwers J.A.”
“I agree. I.V.B. Nordheimer J.A.”