CULTURE CLASH: THE TREATMENT OF FOREIGN BLOCKING STATUTES AND PRIVACY LAWS IN CANADIAN LITIGATION

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> "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 when required".[1]

This conception of judicial reciprocity, or comity, has been one of the principal policies guiding Canadian judicial decisions involving extraterritorial reach for decades.

Blocking statutes refer to laws of a foreign jurisdiction that hinder the application of the domestic forum court's laws. In the context of litigation, blocking statutes have the potential to affect a litigant's ability to comply with domestic forum's rules of evidence and procedure – and may effect a result that actually harms judicial comity between countries. Perhaps this potential to undermine comity is why, despite the existence of various blocking statutes, there are few decisions in which the Canadian courts have had to consider the effect of blocking statutes.

Nevertheless, in cases where blocking statutes are raised, either as a potential bar to letters of request/letters rogatory or acting as a limitation on the "ordinary course of litigation" court processes such as production of documents, Canadian Courts seek to accommodate the reasonable requirements of foreign law, particularly in the context of interjurisdictional discovery – so long as it is within the bounds of public policy, and Canadian sovereignty, to do so.

Recently, courts in the Province of Ontario (Canada's largest jurisdiction) have begun to take this same approach when reconciling the needs of entities from European Union member states that are parties to legal proceedings in Ontario – balancing the requirements of the European party's obligations to comply with the European Union's General Data Protection Regulation (EU) 2016/79 (the "**GDPR**"), and related privacy legislation, with the party's discovery obligations under the rules of court in Ontario.

The manner in which Canadian courts have dealt with conflicts presented by foreign blocking statutes and the restrictions of GDPR on the disclosure of personally-identifying information in producible documents in legal proceedings in Canada is summarized below.

A. Canadian Courts' Treatment of Foreign Blocking Statutes

When considering the potential consequences of foreign blocking statutes to litigants in Canada, Canadian courts have shown an inclination to attempt to accommodate foreign law, to the extent possible, so long as doing so does not compromise the fact-finding process of the Canadian courts.

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[1] *France v De Havilland Aircraft of Canada Ltd*. (1991), 3 OR (3d) 705 (CA).

In *Frischke v Royal Bank of Canada*[2] the plaintiff alleged that certain funds had been misappropriated by the principal defendants. In an effort to trace the flow of those funds, the plaintiff applied to have the defendant bank added as a party for the purpose of obtaining and enforcing injunctive relief compelling the bank to disclose information with respect to a payment from the bank's branch in Panama. Bank personnel in Toronto tried to comply with this order by making inquiries of the Panamanian branch. However, the Panamanian branch explained that it could not provide the information requested, as doing so would constitute a breach of civil and criminal bank secrecy laws in Panama. The Ontario Court of Appeal found that in light of this evidence concerning the law of Panama, a disclosure order should not have been made. The court wrote:

> An Ontario Court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws. The principle is well recognized.

Frischke was subsequently followed in *MacDonald v Briant*,[3] where a witness had sworn an affidavit, but when being cross-examined on that affidavit refused to answer certain questions on the ground that doing so would contravene Bahamian law. The court accepted that it should not compel the affiant to answer the questions, but at the same time held that the affidavit could not stand if it was impossible to test that evidence through cross-examination. In the result, the affidavit was struck out in its entirety.

However, a party's attempt to rely on *Frischke* to refuse to adduce evidence in the subsequent case of *R. v Spencer*[4] was unsuccessful. In *Spencer*, the Crown sought to call as a witness in a criminal prosecution an individual who, ten years earlier, had served as the manager of a branch of the Royal Bank of Canada in the Bahamas. The witness sought to quash the subpoena on the ground that Bahamian bank secrecy legislation prohibited him from giving evidence with respect to information he had obtained in his capacity as manager of the bank branch. Although successful at first instance, the Ontario Court of Appeal overturned that decision. The court held that the paramount public policy consideration was "the basic principle that the parties and the public have the right to every person's evidence". While international comity as recognized in *Frischke* was important, it could not be applied so as to override this right. On further appeal to the Supreme Court of Canada, that decision was affirmed; LaForest J. of the Supreme Court wrote:

> To allow Mr. Spencer to refuse to give evidence in the circumstances of this case would permit a foreign country to frustrate the administration of justice in this country in respect of a Canadian citizen in relation to what is essentially a domestic

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[2] (1977), 17 OR (2d) 388 (CA).

[3] (1982), 35 OR (2d) 161 (Master).

[4] (1983), 145 DLR (3d) 344 (Ont CA), aff'd [1985] 2 SCR 278.

> situation. Indeed such an approach could have serious repercussions on the operation of Canadian law generally.[5]

The concurring judgment of Estey J. gave somewhat greater weight to considerations of comity, writing:

> The fact that the giving of the evidence sought in this case may constitute a crime in another country cannot prevent the Canadian courts from compelling a witness to testify. However, the threat arising in a foreign jurisdiction of criminal proceedings against a Canadian resident for revealing information in a Canadian judicial proceeding is a serious consideration to be borne in mind in a proceeding such as this. Thus any course by which such a serious consequence may be avoided must be carefully considered by our courts. In these proceedings it is therefore relevant to take note of the fact that under Bahamian law an appropriate order releasing the appellant may be obtained from a Bahamian court.
> …
> It therefore would have been a preferable alternative at the trial level to have granted a stay of these proceedings so as to allow the appellant sufficient time to make application to a Bahamian court of competent jurisdiction for an order permitting disclosure of the evidence sought to be compelled.[6]

In *Comaplex Resources International Ltd. v Schaffhauser Kantonalbank*,[7] the plaintiff brought a motion for the production of documents, and the defendant resisted on the ground that such production would compel it to contravene Swiss bank secrecy laws. However, the defendant did not adduce evidence proving such laws, but rather sought a preliminary determination as to whether such laws, if proven, would—on the authority of the decision in *Frischke*—constitute a basis upon which the court would dismiss the plaintiff's motion. The court distinguished *Frischke* on the basis that the party from whom documents were sought in that case was not genuinely a party to the proceedings. In the result, the court held that the proper approach was to grant the plaintiff's motion for documentary production; the content and effect of Swiss banking laws was a matter to be considered in the event that the defendant failed to make production, and sought to rely on the foreign law as a justification for such non-compliance.

The defendant in *Comaplex* did, in fact, raise such a defence when its representative subsequently sought to be relieved of the obligation to produce documents and answer certain questions on his examination for discovery.[8] That defence was rejected, however, because the expert evidence of the foreign law demonstrated that (1) Swiss courts had consistently regarded evidence necessary in civil proceedings as constituting an exception to the obligations of secrecy, and (2) there had never been a prosecution of a Swiss bank or bank employee for disclosing information or documentation for use in foreign proceedings.

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[5] *Spencer* at para 5.

[6] *Spencer* at paras 7, 9.

[7] [1990] OJ No 318 (Master).

[8] *Comaplex Resources International Ltd. v Schaffhauser Kantonalbank*, [1991] OJ No 1643.

Laxton v Coglon[9] involved matrimonial proceedings in which the plaintiff wife alleged that the defendant husband had hidden certain family assets through the use of a number of foreign entities and accounts, including a corporation incorporated under the laws of British Virgin Islands by the name of Benures Investment Ltd. Benures was part of a complex corporate and trust structure which, the defendant argued, made it subject to the laws of Liechtenstein; those laws allegedly made it an offence to "provide any documents or information which may reveal the identity of the economic beneficiaries or the financial affairs" of the company. The court held that the *Frischke* principle could not be invoked by a party to the litigation that had assumed the risk of having to make disclosure in litigation by doing business in the jurisdiction.[10]

In *TD Bank, NA v Lloyd's Underwriters*[11] the Ontario Superior Court considered the issue in a case arising out of a Ponzi scheme by which investors in Florida had been defrauded. The perpetrators of the scheme held bank accounts at a Florida-based subsidiary of TD Bank, and a number of the investors brought claims alleging that the subsidiary was vicariously liable for the acts of the fraudsters. After an adverse jury verdict in one of those cases, TD Bank decided to settle the remaining claims. It thereafter brought proceedings in Ontario seeking indemnification from its fidelity insurers. The defendant insurers sought production of certain records, but TD Bank argued that such disclosure was prohibited under US federal and Florida state law.

The parties were largely in agreement that the plaintiff could face significant repercussions if it produced documents in contravention of the American legal restrictions. Further, they agreed that the types of restrictions in issue were similar to those imposed on financial institutions under Canadian law. However, the defendants argued that, having elected to commence proceedings in an Ontario court, the plaintiffs had willingly assumed the obligation to comply with Ontario's *Rules of Civil Procedure*, including the obligation to produce all relevant documents.

The court rejected those arguments. Citing the decision in *Frischke*, the court reaffirmed the proposition that a Canadian court should generally refrain from making any order that would require someone to contravene a foreign law. The foreign law evidence filed by the parties demonstrated that, while disclosure of the subject documents was presumptively prohibited, there existed in each case mechanisms by which consent could be sought and obtained from third parties.

B. The European Union's General Data Protection Regulation (EU) 2016/79 as a Partial Blocking Statute

The GDPR protects personal data collected by organizations and companies operating in the European Union. Personal data includes any information relating to an identified or identifiable natural person, including any information that would permit the direct or indirect identification of an individual. The GDPR applies to personal data of *any person* regardless of her/his relationship to the organization or her/his citizenship.

Under the GDPR, disclosure of any personal data is prohibited, unless the disclosing party can establish that the disclosure is permitted under one of the prescribed exemptions. For EU entities

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[9] 2006 BCSC 1458.

[10] Ibid at para 35.

[11] 2016 ONSC 4188.

doing business outside of the EU, and therefore subject to potential litigation processes outside of the EU, this raises questions about (a) what the European entity is permitted by GDPR law to produce in a documentary discovery process in a non-EU jurisdiction, and (b) in the event of a conflict between the GDPR obligations an the production obligations under the foreign court rules, the consequences of breaching the GDPR requirements versus the consequences of breaching the foreign court's rules.

Exercise of Defence of Legal Claims Can Ground an Exemption Under the GDPR

Under EU law it is generally accepted that the use of personal data for the purpose of advancing or defending a legal action may constitute a "legitimate interest" to justify an exemption from the disclosure restrictions, pursuant to article 6(1)(f) of the GDPR.

This exemption is subject to (a) a "necessity" requirement – the personal data being disclosed is necessary to advance the entity's legitimate interest where there is no other reasonable alternative to full disclosure of the personal data – and (b) a "balancing of interests" requirement – where the legitimate interest is weighted against the interests of the affected data subjects.

The strictness of these requirements is the reason why GDPR may be characterized as a partial blocking statute. Only personal data that meets the necessity and balancing requirements may be produced in litigation, and this assessment must be made on a datum point by datum point basis.

Canadian Treatment of the GDPR in the Discovery Process

There have been few reported decisions in Canadian jurisprudence on the subject of the interplay between the strict requirements for data transfers under the GDPR and the requirement of parties in Canadian legal proceedings to produce all relevant documents. What decisions there are reflect the approach (described above) taken by the Canadian Courts to blocking statutes generally – an inclination to respect the requirements of the GDPR without compromising the fact-finding ability of the Canadian Courts.

The first comprehensive analysis of the effect of the GDPR on the discovery process in Canada occurred recently in *Harris v Bayerische Motoren Werke* Aktiengesellschaft[12] ("**BMW**"). BMW brought a motion for a declaration that it be permitted to produce its documents in that proceeding in accordance with what its expert on European law called the "Layered Approach" as a means of avoiding breaching its GDPR obligations. The Layered Approach contemplated that BMW would initially produce its documents with all personal data redacted, and then would "unredact" some of the personal data in the documents if it was determined that that personal data in a given document were necessary for either party to conduct its case in the legal proceeding.

The motion judge considered the requirements of the GDPR and EU data protection regime and the needs of the parties to the litigation in Ontario. The judge found that the necessity and balancing requirements to the Legitimate Interest Exception were "baked into" Ontario's court rules (the "Rules of Civil Procedure"):

[12] 2022 ONSC 6435 ["BMW"], aff'd 2024 ONSC 2341 (Div. Ct.).

> I am persuaded that having regard to the totality of the Rules of Civil Procedure, which is designed to provide a procedure that is fair to all the parties to a proceeding and to facilitate the court's truth seeking function and its function administering justice having regard to procedural, evidentiary and substantive law, the factors that would satisfy the three-part test for the Legitimate Interests Exception are ingrained or baked into the Rules of Civil Procedure.[13]

The motion judge accepted that, under the GDPR, a Legitimate Interest Exception was satisfied only if personal data were relevant to the litigation. If the personal data were not relevant, the data should be redacted in order for BMW to comply with its GDPR obligations.[14] The motion judge also noted that the balancing of interests, such as that required by the Legitimate Interest Exception, is something that is already done in practice in Ontario, noting that under the Rules of Civil Procedure, redactions, when they can be justified, are possible:[15]

> In practice, as discussed above, litigants frequently redact privileged material from composite documents that contain relevant material, irrelevant material, and privileged material. Redaction is often on consent or unopposed, but redaction can be reviewed by the court. The court has the authority to seal documents, to make redaction orders, and to allow pseudonyms to be used.[16]

Ultimately, the motion judge held that BMW could produce documents with certain personal data redacted provided it could establish: (a) the redacted information was irrelevant to the issues in the litigation; and (b) disclosure of the information would cause significant harm to the producing party or would infringe public interests deserving of protection (which includes the interests of the person whose personal data is being disclosed).[17]

The plaintiff appealed that decision to the Ontario Divisional Court (an intermediate appellate court). The Divisional Court upheld the motion decision. Consistent with the *Frischke* and *TD Bank* decisions, described above, the Divisional Court opined that:

> ---this is a matter of international comity; while foreign laws cannot dictate the procedures to be followed by Canadian courts, a foreign litigant should not be compelled to contravene the laws of its jurisdiction if domestic fact-finding process can accommodate compliance with foreign laws.[18]

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[13] BMW at para 132.

[14] BMW at para 144.

[15] BMW at para 143.

[16] BMW at para 145.

[17] BMW at para 144.

[18] 2024 ONSC 2341 (Div. Ct.) at para 52.

The BMW decision was followed by the Federal Court of Canada in *Boehringer Ingelheim (Canada) Ltd. v Pharmascience Inc*.[19] There, the Federal Court held that compliance with foreign privacy laws, such as the GDPR, constitute a legitimate reason to permit redactions of irrelevant information from otherwise relevant documents:

> Having regard to all of the above, I do not perceive a real conflict between the Court's general approach to redactions based on relevance, and what would be required for compliance with the GDPR and BDSG. If a party can establish that information proposed to be redacted from a document serves no legitimate purpose in resolving the issues, and disclosure of the information would cause significant harm to the producing party or would infringe public interests deserving of protection, that would justify a redaction for both relevance and compliance with the GDPR and BDSG.
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> If I was to paraphrase the test for redactions based on relevance, it would be that if a document is relevant, there has to be a really good reason to conceal part of it. The Federal Court should, as a matter of comity, permit European litigants to discharge their documentary disclosure obligations in a manner that will not result in a contravention of foreign privacy law if it is reasonably possible to do so. If personal information may not be clearly irrelevant, but is of such trivial relevance that it would not assist in the determination of the issues and redaction would not prejudice the receiving party, the Court should flexibly apply the clearly irrelevant standard to permit compliance with the GDPR and BDSG.[20]

C. Conclusion

Comity has long been a guiding judicial principle of Canadian courts, and it has been the primary guide for Canadian courts when faced with foreign blocking statutes. Where reasonably possible, Canadian courts will try to accommodate the foreign law, by giving the foreign party time and opportunity to seek relief from the obligations imposed by the foreign law from the courts/tribunals of the foreign jurisdiction, or by crafting a solution within the available framework of Canada's rules of court. Canada's courts appear primed to continue this focus on comity in striving to strike a fair balance between foreign parties' legal obligations respecting document production and personal data protection and the litigation rights of opposing parties in Canadian legal proceedings.

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[19] 2023 FC 584.

[20] 2023 FC 584 at paras 42-43.