

# Service and Examination of Canadians: The Hague Is Not the Answer

BY BRETT HARRISON, ESQ.

With the growth of globalization and the geographic proximity of Canada and the United States, it is not surprising that there has been an increase in U.S. disputes with a Canadian element. Two issues that frequently arise in such disputes are serving process on Canadian residents and obtaining oral and/or documentary evidence from a Canadian nonparty. Below is a brief outline of how to address these issues.

## Serving Process in Canada

### *The Hague Convention*

Both Canada and the United States are signatories to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereafter, the "Hague Convention"). In the context of U.S.-Canadian cross-border litigation, the Hague Convention allows U.S. litigants either to serve process through a central authority, present in each Canadian province and territory as well as at the federal level, or to serve process in accordance with the rules of civil procedure of the Canadian jurisdiction.

### *Service Through a Central Authority*

The Hague Convention process is complicated, time-consuming, and just plain difficult. Requests for service through a signatory's central authority must be forwarded in a specified format with the documents to be served. The destination's central authority then performs the requested service either by informal delivery to an addressee on a voluntary basis or in accordance with the method that the foreign state's local law prescribes. This process has some limited benefits when you expect locating and effecting service to be difficult, but otherwise, use of a central authority is not recommended.

### *Canadian Rules of Service*

In Canada, an originating process—basically any document that starts legal proceedings, such as a complaint—must be served personally. In the case of a corporation, a copy of the document may be left with a corporate officer, director, or agent, or with someone who appears to be in control or management at the corporation's place of business. If a party cannot be located, the serving party may bring a motion to allow another form of service or to dispense with service entirely.

Most Canadian jurisdictions allow all documents that are not originating processes to be served by delivery or fax to the party's lawyer, by delivery to the person's last known address, or by delivery to a corporate party's registered address.

## Obtaining Oral or Documentary Evidence

Despite that Canada is a signatory to the Hague Convention, it is not a party to the Hague conventions on civil procedure, including the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which

the United States is a party. This convention governs the procedure by which lawyers can facilitate the compulsion of evidence for use in cross-border civil and commercial proceedings. Therefore, when evidence is neither publicly available nor voluntarily offered by a Canadian nonparty, it must be compelled. Evidence is usually compelled by securing letters of request, or letters rogatory, from a domestic U.S. court and applying to a Canadian court to enforce them.

Both the Canada Evidence Act<sup>1</sup> and the Ontario Evidence Act<sup>2</sup> provide for the recognition of letters of request and the authority to give effect to such a request when it is established that a foreign court wants to obtain the evidence of a witness within the jurisdiction of the Ontario court. The Supreme Court of Canada specified this principle of mutual recognition when it stated, "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."<sup>3</sup> The court also stated, "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."<sup>4</sup>

There are four preconditions that establish the minimum threshold before Canadian courts will grant an order enforcing a letter of request:

1. The U.S. court must request the evidence sought.
2. The witness or document must be within the Canadian court's jurisdiction.
3. The evidence sought must relate to a civil, commercial, or criminal matter that has commenced.
4. The U.S. court seeking a letter's enforcement must have the power to grant the relief sought from the Canadian court in its own U.S. jurisdiction.

When these conditions have been met, Canadian courts are entitled to go behind the letter of request to examine precisely what the U.S. court seeks and to give effect to only those requests that satisfy the requirements of the law of the Canadian jurisdiction.<sup>5</sup> In exercising this discretion, Canadian courts will consider the following factors:<sup>6</sup>

- The evidence must be relevant, not potentially relevant: any request must identify the facts that establish the relevance of the evidence to the U.S. action.
- The evidence must be necessary for pretrial discovery or trial of the foreign action. When necessity is established, admissibility remains subject to the rules of evidence of the U.S. and Canadian jurisdictions. Some Canadian jurisdictions' rules are more restrictive than those of U.S. jurisdictions (e.g., most Canadian jurisdictions allow deposition of only one representative of a party).

- Letters of request must demonstrate beyond mere assertion that the evidence is not otherwise obtainable; thus, they should specify that the Canadian deponent's cooperation has been requested and refused.
- The order sought must not be contrary to Canadian public policy. The bottom line is that the request must not be unjust; in most cases, this is not an issue.
- Documents must be identified with reasonable specificity, and at least by class.
- Orders must not be unduly burdensome. Courts will measure the scope of the request against what the witness's obligations would have been were the litigation conducted in Canada.

In short, to enhance the likelihood of success, letters of request should include as much of the following information as possible:

- The parties' full names
- The witness's full name and address
- A description of the proceeding
- Why the evidence falls within the requested court's jurisdiction
- Facts establishing the evidence's relevance to the proceedings
- How the evidence is needed for either pretrial discovery or trial
- When and how the witnesses' cooperation was requested and refused
- An outline of questions to be asked or a request to take the evidence orally
- All requested documents identified as precisely as possible, at least by class

Given that the Canadian courts have ultimate discretion, there are no guarantees of success. To ensure the greatest chances of obtaining recognition from a Canadian court, it is recommended that you consult a Canadian lawyer before you seek a letter of request from a U.S. court. ■

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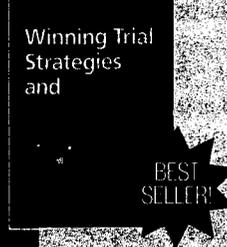
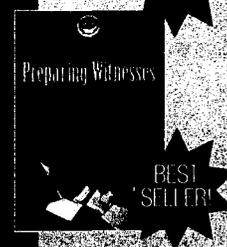
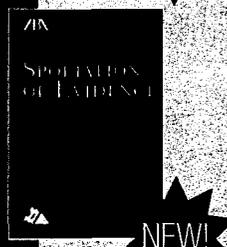
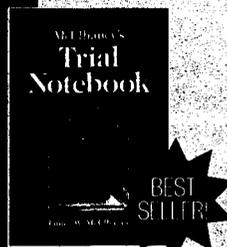
1. R.S. 1985, ch. C-5, § 46 (Can.).
2. R.S.O. 1990, ch. E. 23, § 60 (Can.).
3. Zingre v. R., [1981] 127 D.L.R.3d 230 (Can.).
4. Gulf Oil Corp. v. Gulf Canada Ltd., [1980] 111 D.L.R.3d 74 (Can.).
5. MAN Aktiengesellschaft v. Valentini, [2006] O.J. No. 2822 (Can.).
6. See Advance/Newhouse P'ship v. Brighthouse, Inc. (c.o.b. Brighthouse Branding Group), [2005] O.J. No. 566 (Can.).

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