

CROSS-BORDER LITIGATION BULLETIN

Spring 2005

SO YOU WANT TO DEPOSE A CANADIAN, EH?

INTRODUCTION

With the boom in cross-border trade between the US and Canada, there has also been an increase in disputes based in the US which have a Canadian element. Two issues that frequently arise are serving process on, and obtaining oral and/or documentary evidence from, a Canadian resident.

SERVING IN CANADA

The Hague Convention

Both Canada and the US are signatories to the *Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters*, which allows signatories to follow the Canadian rules of service when serving documents in Canada. The Convention also allows service through a Central Authority, but the process is complicated, time consuming and just plain difficult.¹

Canadian Rules

In Canada, an originating process – basically any document, such as a Complaint, that starts legal proceedings – 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 dispense with service entirely.

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

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¹ Requests for service through a member state's Central Authority must be forwarded in a specified format accompanied by the documents to be served. The Central Authority in the destination state performs the requested service either by informal delivery to an addressee on a voluntary basis or in accordance with the method the foreign state's local law prescribes.

NOW THAT YOU'VE SERVED THEM, HOW TO MAKE THEM TALK?

Letters of Request

Canada and the US have no convention on taking evidence from each other's residents. So, when evidence is neither publicly available nor voluntarily offered by a Canadian resident, it can be compelled. Evidence is usually compelled by securing letters of request, or letters rogatory, from a domestic US court and applying to a Canadian court to enforce them.

Threshold Test

Although Canadian courts have discretion, four preconditions establish the minimum threshold that must be met before they will grant an order enforcing a letter of request:

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

Additional Factors

Once this threshold is met, Canadian courts retain discretion to grant or deny a request from a US court. In exercising this discretion, Canadian courts will consider the following factors.²

1. *The requested evidence must be relevant to the foreign action.* This means any request must identify the facts that establish the evidence's relevance to the US action. Potential relevance is not enough.
2. *The evidence must be necessary for pre-trial discovery or trial of the foreign action.* Once the evidence's necessity is established, admissibility remains subject to the US and Canadian jurisdiction's rules of evidence. Some Canadian jurisdictions' rules are more restrictive than US jurisdictions. For instance, most Canadian jurisdictions allow only one representative of a party to be deposed.
3. *The evidence must not be otherwise obtainable.* By more than mere assertion, letters of request must demonstrate that the requested evidence is not otherwise available. So, the letter should include that the Canadian deponent's cooperation has been requested and refused.
4. *The order sought must not be contrary to Canadian public policy.* The bottom line is the request must not be unjust. In the majority of cases this is not an issue.
5. *Documents must be identified with reasonable specificity.* Because broad general requests are not likely to succeed, requested documents should be specifically described at least by class.
6. *Orders must not be unduly burdensome.* The request's scope will be measured against what the witnesses' obligations would have been were the litigation conducted in Canada.

² *Advance/Newhouse Partnership v. Brighthouse Inc.*, {2005} O.J. No.566.

³ *This bulletin was written with the assistance of Brett Stewart, Student-at-Law*

Maximizing the Odds

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

- the parties' full names,
- the witnesses' 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 pre-trial 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, and
- all requested documents identified as precisely as possible at least by class.

Using this checklist will not guarantee success, but it will sure get you a whole lot closer.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

WHO WE ARE



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Brett is an associate in the firm's Commercial Litigation and Corporate Restructuring Groups. He has a general corporate commercial litigation practice with an emphasis on insolvency and cross-border disputes. Brett regularly acts for a variety of US based corporations and financial institutes and is the editor of the firm's cross-border litigation bulletin.

CROSS-BORDER LITIGATION

McMillan Binch LLP has cultivated a "north-south" orientation for many years. As America's Canadian Law Firm we recognized early on the cross-border legal challenges posed by economic integration in North America. Whether you are being sued or thinking of suing in Canada, or choosing to sue in Canada rather than the United States for strategic reasons, knowing the differences between commercial litigation in the two countries allows you to avoid surprises.

We have extensive experience resolving commercial, trade, transfer pricing, procurement and other cross-border disputes through arbitration, litigation and mediation. Our expertise includes conflict of laws disputes, jurisdiction issues, anti-suit injunctions, negative declarations, enforcement of foreign judgments, and enforcing letters rogatory.

For more information please contact your McMillan Binch lawyer or one of the members of the

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