Gathering Evidence in the Great White North:
It's not just the weather that will surprise you! [i]

The relationship between Canada and the United States is one of the closest and most extensive in the world. This partially results from sharing the world's longest undefended border[ii] and the daily bilateral trade of over $1.5 billion.[iii] It is also a result of sharing a legal regime anchored in the tradition of common law. Despite this shared anchor, a number of differences exist between the two nations' legal systems. One of the major ways that the Canadian system diverges from the U.S. system is in the discovery process. This is compounded by the fact that, unlike many other countries, there is no treaty which governs the taking of evidence as between the two countries.

Understanding the Canadian System

The vast majority of civil claims in Canada are pursued through the provincial courts because the federal courts have very limited jurisdiction. As a result, the Canadian discovery process is generally governed by provincial rules of civil procedure. Although each of the Provinces has its own set of rules, they are very similar to one another. The only Province with substantially different rules is Quebec, which is governed by a civil code and follows a discovery process more similar to that of other civil law jurisdictions.

A few of the more significant differences between the U.S. and Canadian discovery processes are:

- Only one representative of a corporate party can be examined.
- An individual being examined must undertake to make inquires in order to provide answers to relevant questions asked at the examination.
- Although written interrogatories are not typically utilized, the answers to undertakings provided at the examination are provided in writing (in a manner similar to written interrogatories).
- Once answers to undertakings have been provided, a party has a right to re-examine on those answers.

There is an implied undertaking that none of the evidence or information disclosed during the discovery process can be used "for any purposes other than those of the proceeding in which the evidence was obtained."[iv]

Obtaining Discovery in Canada

The taking of evidence for use in a foreign proceeding is different in Canada than in most other jurisdictions. This is because, unlike many other nations (including the United States), Canada is not a party to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention").[v] Accordingly, parties seeking to compel Canadian evidence for use in a U.S. proceeding must utilize Letters of Request (also known as Letters Rogatory). This process involves two steps:

- *First*, the party seeking the evidence must bring a motion in a U.S. court for a Letter of Request seeking judicial assistance from Canada (for ease of reference, the "U.S. Motion").
- *Second*, the party must then bring an application in a Canadian court for an order enforcing the Letter of Request, and to require the witness to produce documents and attend examinations under oath in Canada (for ease of reference, the "Canadian Application").

Canada's provincial and federal Evidence Acts contain specific provisions allowing for the enforcement of Letters of Request. Canadian courts promote the comity of nations and are generally deferential to the decisions of foreign courts. The good news, therefore, is that Canadian courts will order the enforcement of Letters of Request in most cases. However, the decision to enforce Letters of Request is completely discretionary in Canada, and some Canadian courts have refused to enforce Letters of Request in certain circumstances.

The remainder of this section will set out the process for successfully utilizing Letters of Request in Canada, and will discuss some of the common pitfalls that may catch U.S. litigants off-guard. Unless otherwise specified, the process for obtaining documents is the same as for oral testimony.

The U.S. Motion

Procedure

A U.S. litigant seeking to compel a Canadian to provide evidence must start by bringing an interlocutory motion or application before the court in which the U.S. litigation is pending. Though Canadian law does not specifically require that the U.S. Motion be made on notice to other parties to the lawsuit, it does require that the Letter of Request be issued through a hearing.

Contents and Scope

The Letter of Request, together with the accompanying affidavit filed in support of the U.S. Motion, should reflect the factors that later will be considered by the Canadian court when it is asked to enforce the Letter. The affidavit is an important component of the U.S. Motion for two reasons.

- *First*, it will itself contain useful evidence that will be referred to by the Canadian court.
- *Second*, although the Canadian court will show deference to the U.S. court, the Canadian court will likely "look behind" the Letter to see what supporting evidence was before the issuing U.S. court.[vi]

Where the affidavit relies on the knowledge or belief of the swearing party, the source of that knowledge or belief must be explicitly stated – otherwise, a Canadian court will be wary of accepting the evidence contained in the affidavit.[vii]

While the exact information included in the Letter of Request and affidavit will depend on the particular circumstances of each case, there are some general principles that provide a helpful starting point when thinking about how to craft the U.S. Motion.

- In view of the factors that will be considered by a Canadian court (which are described below), both the Letter and affidavit should be as specific as possible about the Canadian evidence sought.
- The Letter and affidavit should establish that the assistance of the Canadian court is necessary in the interests of justice. In particular, the Letter should state that the issuing U.S. court was shown that justice cannot be served between the parties unless the Canadian evidence is made available.
- It is also necessary for the Letter and affidavit to establish that the Canadian evidence cannot be obtained without the assistance of the Canadian court, which often requires establishing that the proposed witnesses will not voluntarily submit to examination. It is not sufficient to make a bare assertion that evidence sought is otherwise unavailable.[viii]
- The Letter and affidavit should state that the Canadian evidence is intended for use in a pending U.S. litigation.
- The Letter and affidavit should also establish that there is a substantial likelihood that the Canadian evidence will be obtained in the manner proposed by the Letter.

The contents of the U.S. Motion necessarily conveys the scope of the requested discovery. U.S. and Canadian laws on the scope of discovery vary considerably. The rules of civil procedure governing each Province require that the requested discovery be relevant to a matter at issue in the case.

"Relevance" is not interpreted as broadly under the Canadian provincial rules as under the U.S. Federal Rules, and Canadian courts will generally refuse to enforce discovery requests that are overly broad or general in nature on the basis that they constitute a mere "fishing expedition."[ix]

The Canadian Application

Procedure

Once the U.S. litigant has obtained a Letter of Request from a U.S. court, the U.S. litigant must then bring an enforcement application to a Canadian court located in the Province where the requested witness resides. The Canadian Application, including a notice of application and supporting affidavit, must be prepared and served by a lawyer licensed in that Province.

Relevant Law

Enforcement of Letters of Request is governed principally by each Province's *Evidence Act*. Canadian judges are not required to enforce a Letter, and Canadian courts have commented that Canadian Applications should not be granted "routinely."[x] For instance, Section 60 of Ontario's Evidence Act provides that an Ontario Court "may" – not "shall" – order the examination of a witness in Ontario (and order that witness to appear for examination) whenever:

> *it is made to appear…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 letters of request could be issued under the Rules of Civil Procedure, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal.*[xi]

Nevertheless, judicial authority indicates that legislation like Section 60 will be read broadly with the aim of fulfilling, wherever possible, foreign requests for the gathering of evidence.[xii] As a result, there is a rebuttable presumption that foreign courts acted responsibly in issuing Letters of Request.[xiii]

The law governing enforcement of Letters of Request also has been influenced by provincial civil procedure rules governing the examination of non-party witnesses by Canadian litigants. As an example, Rule 31.10 of the Ontario *Rules of Civil Procedure* provides that a Canadian court will not grant a Canadian litigant's request for an order compelling the examination of a non-party witness unless the court is satisfied that:

- The moving Canadian party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the non-party witness he or she seeks to examine;
- It would be unfair to require the moving Canadian party to proceed to trial without the opportunity of examining the non-party witness; and
- The examination will not result in unfairness to the non-party witness the moving Canadian party seeks to examine.

Ontario courts have held that the requirements of Rule 31.10 need not be strictly complied with in the context of an application to enforce Letters of Request brought by non-Canadian litigants, but there is case law suggesting that Letters of Request may not be enforced where no attempt has been made first to obtain the voluntary testimony of the requested witness.[xiv]

Contents and Scope

To satisfy the test under Canadian law for enforcing a Letter of Request, the applicant must establish through an affidavit that:

- The evidence sought is relevant;
- The evidence sought is necessary for trial and will be adduced at trial, if admissible;
- The evidence is not otherwise obtainable;

- The order sought is not contrary to public policy;
- The documents sought are identified with reasonable specificity; and
- The order sought is not unduly burdensome, bearing in mind what the relevant witnesses would be required to do were the action to be tried in Canada.[xv]

The applicant must also show that:

- The U.S. proceeding is already pending or underway before a court or tribunal of competent jurisdiction;
- The Letter of Request was granted at a hearing of the U.S. court;
- Enforcement of the Letter of Request is absolutely necessary to do justice in the U.S. litigation; and
- The evidence sought is relevant to a substantial issue in the U.S. litigation (*i.e.,* is not required just to corroborate existing evidence or to attack witness credibility).

With respect to the relevancy requirement, care should be taken to ensure that the requested evidence is squarely related to the allegations set out in the U.S. complaint. In *Pecarsky v. Lipton Wiseman Altbaum & Partners*, the Ontario Superior Court of Justice refused to enforce a Letter of Request when there was considerable uncertainty as to whether the documents requested were properly related to the issues in the U.S. litigation. The Court found that the addition of the words "among other things" to the U.S. complaint was insufficient to justify the enforcement in Canada of such a broad document request[xvi] Canadian courts have discretion to enforce a Letter of Request only in part, such as by limiting the scope of questions to be asked during examination or documents ordered to be produced in accordance with Canadian laws of evidence and civil procedure.[xvii] If a Canadian court finds the request too broad, it is likely to – but will not always – order more restricted discovery than that requested (but may also reject the request in its entirety).

Conclusion

Despite the similarities between the U.S. and Canadian legal systems, it is far from simple for a U.S. litigant to obtain discovery in Canada. It is important that U.S. lawyers be well-informed about the process of obtaining and enforcing Letters of Request. It is equally important to involve Canadian counsel early in the process to ensure that the evidence sought is gathered as quickly and efficiently as possible.

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[i] This section is based on a paper by Brett Harrison entitled "International Discovery: Around the World in Ninety Minutes" presented at the 2008 ABA Annual Meeting.

[ii] International Boundary Commission at <http://www.internationalboundarycommission.org/ibcpg2.htm>.

[iii] Government of Canada, "The Canada – U.S. trade and investment partnership" available online at <htpp://geo.international.gc.ca/can-am/Washington/trad_and_investment/trade_partnership-en/asp>.

[iv] Ontario Rules of Civil Procedure, Rule 30.1.01.

[v] Formally, Hague Conference on Private International Law, Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, (Entered into force 7 Oct. 1972), U.N.T.S. 37/1976.

[vi] *Presbyterian Church of Sudan v. Rybiak*, (2006) 215 O.A.C. 140, 33 C.P.C. (6th) 27, 275 D.L.R. (4th) 512 (Ont. C.A.) at para.32.

[vii] *EchoStar Satellite Corp. v. Quinn*, [2007] 11 W.W.R. 522, 71 B.C.L.R. (4th) 172, [2007] B.C.W.L.D. 649 (B.C.S.C.) at para.50.

[viii] *Internet Law Library Inc. v. Matthews*, [2003] O.J. No. 1139 (Ont. S.C.J.).

[ix] *Presbyterian Church of Sudan v. Rybiak*, (2006) 215 O.A.C. 140, 33 C.P.C. (6th) 27, 275 D.L.R. (4th) 512 (Ont. C.A.) at para. 32.

[x] *Advance/Newhouse Partnership v. Brighthouse Inc.*, (2005) 38 C.P.R. (4th) 559 at para. 6.

[xi] *Evidence Act*, R.S.O. 1990, c. E. 23, s. 60(1). *See also the Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 46-47.

[xii] *Zingre, Wuest and Reiser v. The Queen et al.* (1981), 127 D.L.R. (3d) 223 at p. 230, 61 C.C.C. (2d) 465, [1981] 2 S.C.R. 392 and pp.400-1, per Dickson J.: "Thus the Courts 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."

[xiii] Advance/Newhouse, (2005) 38 C.P.R. (4th) 559 at para. 15.

[xiv] *Republic of France v. DeHavilland Aircraft* (1991), 1 C.P.C. (3d) 76 (Ont. C.A.)

[xv] *Friction Division Products Inc. v. E.I. DuPont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722 at p. 732, 32 D.L.R. (4th) 105 (H.C.J.).

[xvi] *Pecarsky v. Lipton Wiseman Altbaum & Partners*, (1999) 38 C.P.C. (4th) at para. 10.

[xvii] *Advance/Newhouse*, (2005) 38 C.P.R. (4th) 559 at para. 15.