EVIDENCE OF THE ABSENT WITNESS

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1. Introduction

It happens more frequently than any trial lawyer would like: while preparing for trial the lawyer discovers that a key witness is unavailable to attend at trial for reasons such as death, infirmity or serious illness, or that the witness is simply unwilling/unable to travel from a foreign jurisdiction to testify at trial. A thorny issue facing the trial lawyer is how to obtain the absent witness' evidence and have it admitted at trial.

This paper aims to answer this important question by surveying different types of absent witnesses and discussing the applicable law to assist trial lawyers in tendering the evidence of the absent witness. By way of overview, we will review:

(i) procedures for obtaining a witnesses' evidence before trial for the purpose of tendering it at trial;

(ii) procedures for obtaining evidence of witnesses residing out of Ontario through the use of commissions and letters of request;

(iii) use of sworn and unsworn statements as exceptions to the hearsay rule;

(iv) tendering of evidence by teleconference or videoconference;

(v) use of discovery evidence at trial;

(vi) use of evidence from prior proceedings at trial;

(vii) use of affidavits at trial; and

(viii) obtaining evidence from persons who are incarcerated.

2. Pre-trial taking of evidence to be used at trial

In cases where a witness is available to testify before - but not on - the date of trial, the Ontario *Rules of Civil Procedure* specifically allow the taking of the witness' evidence before trial ("Pre-Trial Testimony") either in or outside Ontario. For this to occur, under Rule 36.01, the party who wishes to tender Pre-Trial Testimony must first try to obtain the consent of the other parties to examine the witness on oath or affirmation.

If the other parties refuse to grant consent, the interested party must bring a motion under Rule 36.01(1) to seek leave of the court. In determining whether to allow an out-of-court examination for trial evidence, the court is expected to take into account the following six factors, which are enumerated under Rule 36.01(2):

(a) the convenience of the person whom the party seeks to examine;

(b) the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness;

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;

(d) the expense of bringing the person to the trial;

(e) whether the witness ought to give evidence in person at the trial; and

(f) any other relevant consideration.

2.1 Procedures for obtaining Pre-Trial Testimony

If the court grants leave after balancing the above six factors, the other steps that the examining party must take depend on (1) whether the witness is a party to the proceeding; (2) whether the witness resides in or outside Ontario, and (3) whether the out-of-court examination will be conducted in or outside Ontario. Where the proposed witness resides outside of Ontario, the court has the discretion under Rule 34.07 to determine the location of the examination.

The following table shows the procedural steps that the examining party must take under different circumstances.

	Resides and is examined in Ontario	**Resides Outside Ontario**	
		Examined in Ontario	**Examined outside Ontario**
Party witness	Serve a Notice of Examination: Rule 34.04(1) (Form 34A), personally or by an alternative to personal service	If the witness is in another Canadian jurisdiction other than Quebec, serve a Summons to Witness: Rules 34.04(7), 53.05 (Form 53C), under the *Interprovincial Summonses Act*	Move under Rules 34.07 and 36.03 for a Commission and a Letter of Request (Forms 34C, D, E) and if the requested order is granted, apply to the foreign court having jurisdiction over the witness for recognition of the Commission and Letter of Request
Non-party witness	Serve a Summons to Witness: Rule 34.04(4) (Form 34B), personally and not by an alternative to personal service	If the witness is in another Canadian jurisdiction other than Quebec, serve a Summons to Witness: Rules 34.04(7)(2), 53.05 (Form 53C), under the *Interprovincial Summonses Act*	Same as above

Once a pre-trial examination is allowed to proceed, pursuant to Rule 36.02(2), the witness may be not only examined but also cross-examined and re-examined in the same manner as a witness at trial. Furthermore, by consent or court order under Rule 34.19, the examination may be recorded by videotape or other similar means, so that the tape or other recording may be filed for the use of the court along with the transcript. However, under Rule 36.04(7), the transcript or the tape need not be read or played at trial unless a party or the trial judge requires it.

If the witness resides outside of Canada, it will be necessary to obtain a commission and letter of request.

In deciding whether to issue a commission and letter of request, Ontario courts have asked whether the commissioned evidence is "material and important" to the issue to ensure a full and fair trial.[1] In addition, necessity is a key consideration. If the testimony sought is unnecessary, the court may decline to issue a commission and letter of request.[2] Once a letter of request is directed to be issued by a court of a Canadian province, its recognition in another Canadian province is expected following the Supreme Court of Canada decision in *Morguard Investments Ltd. v. De Savoye*[3] which held that a court in one province should give "full faith and credit" to a judgment given by a court in another province or territory so long as that court has properly or appropriately exercised jurisdiction in the action.

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[1] *Simpson v. Vanderheiden*, 1985 CarswellOnt 449 (Ont. H.C.T.) (WLeC).

[2] *Proietti v. Raisauda*, 1992 CarswellOnt 11 (Ont. Gen. Div.) (WLeC). The court declined to issue a commission because the defendant's evidence on discovery could be used at trial.

[3] 1990 CarswellBC 283 (S.C.C.) (WLeC).

In the past, Canadian courts have given effect to letters of request issued by the courts of sister provinces for examinations.[4]

Attached as Schedules "A" and "B" to this paper are precedents commission and letter of request respectively.

2.2 Use of Pre-Trial Testimony at trial

Even when an order has been made under Rule 36.01 authorizing a party to obtain Pre-Trial Testimony, the right of that party to tender the Pre-Trial Testimony at trial is not automatic.

If the Pre-Trial Testimony has been obtained from a party to the action (or a director, officer or party of a partner), the party who wishes to introduce such evidence must seek leave of the trial judge or the consent of the parties under Rule 36.04(4). In deciding whether to grant leave, pursuant to Rule 36.04(5), the court shall take into account three factors:

(a) whether the party is unavailable to testify by reason of death, infirmity or sickness;

(b) whether the party ought to give evidence in person at the trial; and

(c) any other relevant consideration.

In the case of non-party witnesses Rule 36.04(2) provides that Pre-Trial Testimony may be used at trial unless the court orders otherwise on the ground that the

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[4] *Mulroney v. Coates* (1986) CarswellOnt 560 (Ont. H.C.J.) (WLeC); *Binder v. Royal Bank* 1997 CarswellNB 30 (Q.B.).

witness ought to give viva voce evidence at trial or for any other sufficient reasons. Furthermore, a non-party witness cannot be called to give evidence at trial without the leave of the trial judge under Rule 36.04(3).

3. Tendering trial evidence through telephone or videoconference

In cases where a witness is unable to appear physically before the court to give his or her evidence but is otherwise willing and able to testify at the time of the trial, Rule 1.08(1) allows oral evidence of the witness to be received via telephone or video conference subject to the availability of the facilities.

If a party wishes to adduce evidence via telephone or videoconference, it should first seek consent from all involved parties. If all of the parties do consent, the requesting party then needs to complete a Videoconference Confirmation Form, a copy of which is attached as Schedule "C" to this paper.

If the parties do not consent, the party seeking to introduce the evidence through telephone or videoconference may move under Rule 1.08(3) for an order directing a telephone or videoconference on such terms as just. In deciding whether to permit or to direct a telephone or videoconference, the court will consider the following seven factors:

(a) the general principle that evidence and argument should be presented orally in open court;

(b) the importance of the evidence to the determination of the issues in the case;

(c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(d) the importance in the circumstances of the case of observing the demeanour of a witness;

(e) whether a party, witness or solicitor for a party is unable to attend because of infirmity, illness or any other reason;

(f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and

(g) any other relevant matter.

In addition to balancing the above factors, in *Archambault v. Kalandi*,[5] Manton J. held that in a Rule 1.08 motion, the court should also determine whether the advantage of using videoconference outweighs the possible prejudice that might arise. He also suggested that the intention of the party objecting to videoconference testimony may be an additional factor, especially where that party makes issue of the other party's reasons for requesting videoconference.

It is the authors' belief from their experience that courts are becoming more accepting of receiving evidence by videoconference and are more likely to grant this form of relief if there is a good reason for it, such as a non-party being out of the jurisdiction and refusing to attend in person. Attached as Schedule "D" to this paper are precedent motion materials to admit evidence by way of videoconference.

[5] *Archambault v. Kalandi Anstalt*, 2007 CarswellOnt 356 (Ont. S.C.J.) (WLeC).

4. Where Witness is dead or otherwise unable to give Pre-Trial Testimony

Rule 36 may be of assistance where the person whose evidence you wish to obtain is alive and locatable. However, it will be of no assistance if the person has died before you have had the opportunity to obtain Pre-Trial Testimony or if the person simply cannot be located. In such circumstances, it may be possible to introduce a prior sworn or unsworn statement under one or more exceptions to the hearsay rule.

The Supreme Court has recently revisited the principled exception to the hearsay rule and its underlying rationale in *R. v. Khelawon*.[6] According to Charron J., who was writing for the unanimous Court, hearsay statement is presumptively inadmissible because the circumstances in which it comes about does not provide reasonable assurances of inherent reliability. However, she recognized that such danger may not exist in all hearsay statements.

Thus, Charron J. set out a staged approach for hearsay admissibility analysis. First, it should be determined whether the proposed evidence constitutes hearsay. The Court defined an out-of-court statement as hearsay when (1) it is adduced to prove the truth of its contents, *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.[7] Second, an out-of-court statement that is hearsay is presumptively inadmissible unless it falls within a recognized exception to the hearsay rule and is thus admissible, or it

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[6] [2006] 2 S.C.R. 787 (S.C.C.) [*Khelawon*].

[7] *Ibid.* at para. 56.

can be admitted on a case-by-case basis applying a principled approach if criterion of reliability and necessity are otherwise met.[8]

In cases where a witness is unavailable at a civil trial but has given an out-of-court statement, such statement may be admissible as evidence of the truth of its content if it falls under one or more of the following traditional exceptions to the hearsay rule.

- Written or oral declarations against pecuniary or proprietary interest at the time when the declarations were made, assuming that the declarant had complete knowledge of the facts he stated.[9]

- Written declarations made in the course of a business duty provided that they were made contemporaneously with the facts stated and with respect to objective facts.[10]

- Statements as to reputations of public or general rights, marital relationships and ancient historical matters.[11]

- Declarations by deceased individuals as to pedigree and family history.[12]

- Statements contained in ancient document as evidencing a proprietary interest in land.[13]

- Statements in public documents.[14]

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[8] *Ibid.* at paras. 60-66.

[9] John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) [Sopinka] at p.201.

[10] *Ibid*. at pp. 211-234.

[11] *Ibid*. at pp. 235-240.

[12] *Ibib*. at pp. 240-245.

[13] *Ibid.* at pp. 245-247.

- Out-of-court admission made by a party, which can only be tendered as evidence by an adverse party in order to avoid the risks against self-serving statements. [15]

Another traditional exception to the hearsay rule is the admissibility of testimony given in a former adjudicative proceeding.[16] Canadian courts would permit evidence given at a former proceeding by a witness who has since died or become incapacitated to be available at trial, provided that three conditions are met:

- Opportunity to cross-examine: the adverse party has had the opportunity to cross-examine the witness in the earlier proceeding;

- Substantially same issue: the questions in issue at the later trial are substantially the same as those in the earlier proceeding; and

- Same parties: the later trial is between the same parties as the earlier proceeding or between persons claiming under them.[17]

If an out-of-court hearsay statement does not fall into any of the exceptions, it may still be admitted under the principled approach of hearsay admissibility. Although it is an established principle that necessity is not to be equated with the unavailability of the witness,[18] a witness' unavailability to testify at trial will certainly help establish necessity. However, in addition to necessity, an out-of-court hearsay statement must also be reliable,

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[14] *Ibid.* at pp. 247-250.

[15] *Ibid.* at pp. 286-307.

[16] *Ibid*. at pp. 278-282.

[17] *Walkerton (Town) v. Erdman* (1894), 23 S.C.R. 352 (S.C.C.); *Aujla v. Hayes*, 1997 CarswellOnt 1824 at para. 14 (Ont. C.A.) (WLeC).

[18] *Khelawon, supra* note 6 at para. 78.

which can be established either because of the way in which it came about or because the circumstances permit the ultimate trier of fact to sufficiently assess its worth.[19]

Some Canadian provinces have codified the common law exception of testimony given in a former adjudicative proceeding in their rules of civil procedure and expressly permit such evidence to be used even when one or two of the above three conditions are not satisfied.

In Ontario, Rule 31.11(8) enables the evidence taken on discovery in a former proceeding to be read into or used in evidence at the trial of a subsequent action if the two actions involve the same subject matter and the same parties. It is obvious that the Ontario rule dispenses with the element of cross-examination as required under the common law, which can be explained by the procedural reform of 1985 in Ontario that allows questions of cross-examination to be asked on discovery. This is also an express exception to the deemed undertaking rule under Rule 30.1. Furthermore, Rule 51.06(1) also enables a party to obtain such an order as the party may be entitled to on an admission made in an affidavit filed by a party or in the examination for discovery of the party in the same or another proceeding.

Unlike the Ontario rule, Rule 40(4) of the *British Columbia Supreme Court Rules* expressly dispenses with the same-parties requirement and allows a party to rely on a transcript of the evidence of an unavailable witness taken under oath in any proceeding. Rule 40(4) states:

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[19] *Khelawon, supra* note 6 at para. 2.

> 40 (4) Where a witness is dead, or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction or his or her attendance cannot be secured by subpoena, the court may permit a transcript of any evidence of that witness taken in any proceeding, hearing or inquiry at which the evidence was taken under oath, whether or not involving the same parties to be put in as evidence, but reasonable notice shall be given of the intention to give that evidence.

In New Brunswick, Rule 33 of the Rules of Court codifies the same-parties requirement for the testimonial evidence of any witness given at a former trial to be used at a subsequent action when the witness becomes unavailable.

> 33. On the trial of a cause the testimony of any witness given on a former trial may, subject to all legal exceptions, be given in evidence between the same parties or those claiming under them, either from the judge's notes or from the evidence taken, reported and certified by a stenographer, under and as provided by the statutes respecting shorthand reporting in the courts, if the judge on the subsequent trial is satisfied that the witness is dead or out of the Province or from sickness or inability is unable to attend.

The equivalent rules in Alberta and Saskatchewan allow the use of any evidence taken at a trial in any subsequent proceedings of the same cause or matter, whether or not the witness is available or the parties are the same.

> **Alberta Rules of Court**
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> **262** Any evidence taken at the trial may be used in any subsequent proceedings in that cause or matter.

Saskatchewan (Queen's Bench Rules)

304 All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the cause or matter.]

5. Use of evidence taken on discovery

Another alternative to consider when a person is not available to testify at trial is the use of discovery evidence if that person has been examined for discovery either in a personal capacity or as a representative of a party.

Since 1985, the scope of examination for discovery was broadened in Ontario to allow for cross-examination, as long as the question is not directed solely to the credibility of the witness. This change, as reflected in Rule 30.06, improves trustworthiness of discovery transcripts and makes it possible for the parties to use discovery evidence at trial. Whether certain discovery evidence can be read in at trial depends on its admissibility under the law of evidence and the applicable rules.

First of all, for the discovery evidence to be used at trial, it must be admissible evidence. As a deponent is required to answer discovery questions according to his "knowledge, information and belief", it is inevitable that the discovery transcripts may contain inadmissible hearsay evidence. In *Esson v. A.M.S. Forest Products Ltd.,*[20] at examination for discovery, the defendant's solicitor named a potential witness for the defendant who had been contacted. The defendant's solicitor provided a statement of the possible evidence that might be adduced by that witness. At trial, the plaintiff's counsel sought

[20] 1993 CarswellOnt 431 (Ont. Gen. Div.) (WLeC).

directions with respect to whether he could read into evidence this excerpt from the discovery. Justice Chapnik held that such evidence could not be read in as the alleged evidence of those independent third-party potential witnesses is hearsay and clearly "otherwise inadmissible."

If the discovery evidence is admissible under the law of evidence, its use at trial is governed by the applicable rules, depending on whether the deponent is that of an adverse party and whether the evidence will be read in as the evidence of the deponent or as part of the party's own case.

5.1 Deponent as a party witness

If the deponent of a party has been previously examined for discovery but is unavailable at trial due to death, infirmity, illness or is otherwise non-compellable, any party may seek leave of the trial judge under Rule 31.11(6) to read into evidence all or part of the evidence given on the examination for discovery as the evidence of that person examined, to the extent that such evidence is admissible if the person were testifying in court.

In deciding whether to grant leave, the trial judge shall consider factors listed in Rule 31.11(7).

(a) the extent to which the person was cross-examined on the examination for discovery;

(b) the importance of the evidence in the proceeding;

(c) the general principle that evidence should be presented orally in court; and

(d) any other relevant factor.

This rule can be used by a party whose own witness was examined but subsequently becomes unavailable at trial. In *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of),*[21] the defendant GEC was allowed to read in as part of its case the transcript evidence given on the examination for discovery of its deponent, who was discovered but later died before the trial, as would otherwise have been admissible at trial.

Once a trial judge exercises his or her discretion to admit discovery evidence under Rule 31.11(6), it is within the power of the trial judge to determine the weight that should be given to it bearing in mind the circumstances under which the evidence was obtained and considering the inherent shortcomings of such evidence such as the absence of cross-examination. It is also within the trial judge's prerogative to even prefer it to oral testimony given by witnesses appearing at the trial.[22]

5.2 Deponent as the witness of an adverse party

In cases where the deponent who is unavailable at trial is an adverse party or was examined on behalf of an adverse party, the party who wishes to read in the discovery evidence has two options: Rule 31.11(6) and Rule 31.11(1).

First, the party interested in the read-in can rely on Rule 31.11(6) to read in the discovery evidence as the evidence of the person examined.

Second, the party can also rely on Rule 31.11(1) to read in the discovery evidence as part of the party's own case against the adverse party. Under Rule 31.11(1), a

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[21] 1998 CarswellOnt 718 (Ont. Comm. List) (WLeC) [*Leigh*].

[22] *Aujla, Supra* note 17 at paras. 23-24.

party may read into evidence as part of his or her own case against the adverse party any part of the evidence given on the examination of the adverse party, if the evidence is otherwise admissible, unless the trial judge orders otherwise. The case law has interpreted the "evidence given on discovery" to include answers to undertakings.[23]

It is unclear whether the party is allowed to read in the discovery evidence of an adverse party against a third party adverse in interest. In Alberta, Rule 214(1) of the Alberta Rules of Court expressly limits the use of examination evidence of an opposite party to being used in evidence as against that opposite party.[24] Such clear guideline is absent in the Canadian common law. There are cases where such use is not allowed, *Cain v. Peterson*. *Besse v. Simpson*, *Bennett v. Fraser,* and *Soroka v. Skioth*,[25] however, there is also a line of cases where courts did allow a read-in of the discovery evidence of a defendant for use against another defendant. For example, in *Oishi (Guardian of) v. Brown,*[26] the Court held that the evidence of one defendant obtained on an examination for discovery may be read in at trial as against another defendant, subject to it being admissible at trial in the first place. The Court, however, has an overriding discretion to exclude evidence if admitting it would work an injustice on a party. In another case, *Robinson v. Dick,*[27] the plaintiff's experts were entitled to rely on the discovery evidence of one co-defendant in forming their opinions about the conduct of other co-defendant. In yet another Ontario decision, *Tri-Con Concrete*

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[23] *Leigh*, *supra* note 21.

[24] *Soroka v. Skjoth*, 1997 CarswellAlta 521 (Alta. Master) (WLeC) [*Soroka*].

[25] 2005 CarswellOnt 5134 (Ont. S.C.J.) (WLeC).; 1985 CarswellBC 301 (B.C.C.A.) (WLeC); 1936 CarswellBC 32 (B.C. S.C.) (WLeC); *Soroka*, *supra* note 23.

[26] 1991 CarswellBC 121 (B.C.S.C.) (WLeC).

[27] (1986), 6 B.C.L.R. (2d) 330, 1986 CarswellBC 263 (B.C.S.C.) (WLeC).

Finishing Co. v. Caravaggio,[28] the court held that at common law, discovery evidence of one party is admissible against other parties with joint interest.

Although the second line of cases may be sound, it is very hard to reconcile with the general rule that admissions, whether on examination for discovery or otherwise, bind only the party who made them.[29] An application of this general rule has led Canadian courts to conclude that an admission by one party is not evidence against a co-defendant. *Chote v. Rowan*, *Tembro Truck & Auto Services Ltd. V. Brown*.[30]

5.3 Deponent as a non-party witness

In Ontario, leave from the court is required in order for a party to examine a non-party witness for discovery, Rule 31.10. Even when such leave is granted to a party to examine a non-party witness, if the non-party witness is not available to testify on the date of trial, Rule 31.10(5) expressly prevents such evidence from being read in at trial under Rule 31.11(1), the effect of which is that the party may not read in the non-party witness' evidence as part of the party's own case.

However, if the non-party witness has died, is unable to testify because of infirmity or illness, or for any other reasons cannot be compelled to attend at the trial, the Rule 31.10(5) prohibition does not prevent a party from relying on Rule 31.11(6) and (7) to

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[28] 2002 CarswellOnt 2379 (Ont. S.C.J.) (WLeC).

[29] *Sopinka*, *supra* note 9 at p.307.

[30] 1943 CarswellOnt 294 (Ont. C.A.) (WLeC); 1995 CarswellOnt 4298 (Ont. Gen. Div.) (WLeC).

seek leave and read into evidence at trial all or part of such evidence as the evidence of the non-party witness.[31]

6. Use of affidavit evidence at trial

Affidavit evidence may be used at trial under some limited circumstances. Affidavits used in a prior interlocutory proceeding of the same action may be used at trial if the deponent becomes unavailable at trial. Furthermore, the rules allow courts to receive trial evidence in the form of affidavits where there is no request for cross-examination or when the deponent is unavailable at trial.

6.1 Affidavit used in a prior interlocutory proceeding of the same action

If a party has prepared an affidavit in support of an interlocutory proceeding and the action subsequently proceeds to trial, the party may wish to refer to the affidavit as evidence at trial, especially when the deponent of the affidavit is no longer available to testify. There are cases suggesting that such an affidavit may be admissible under some circumstances.

In *Robb Estate v. St. Joseph's Health Care Centre*,[32] the plaintiff brought motion for summary judgment against the Canadian Red Cross Society, the defendant. The former defendant's assistant director swore an affidavit in response to the motion. The summary judgment motion was subsequently dismissed. At trial, the plaintiff sought to admit into evidence the documents contained as exhibits to the affidavit as proof of their contents.

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[31] *Transcon Recycling Inc. v. London Assurance*, 1998 CarswellOnt 2165 at para. 8 (Ont. Master) (WLeC).

[32] 1999 CarswellOnt 175 (Ont. Gen. Div.) (WLeC) [*Robb Estate*].

In rejecting the request, the court held that the exception to hearsay rule where evidence of testimony given in former proceedings might be admissible was not applicable because there was no evidence that the director was unavailable at trial.

Implicit in *Robb Estate* is a possibility that if the deponent of the affidavit used in the interlocutory proceeding is unavailable at trial, and there is no other way of rendering the same evidence, an argument can be made based on exceptions to hearsay for the admissibility of such affidavit evidence. This is reasonable as in such circumstances the affidavit would satisfy the twin requirements of the principled exceptions to the hearsay rule: necessity and reliability.

In fact, in *Eastern Trust Co. v. Hume*,[33] an affidavit made in support of an interlocutory injunction motion was admitted as evidence at the trial where the deponent had died before the trial date. The court held that such affidavit evidence should be admitted especially in cases where the deponent could have been cross-examined on his affidavit and where there is no strong evidence of prejudice or likelihood of it.

In a more recent decision, *Leclerc v. St-Louis*,[34] the court considered the admissibility of an affidavit at trial after the affiant had died. Labrosse J. held that since the affiant was dead, the affidavit should be accepted into evidence at trial, the admissibility and weight of which were left to the trial judge.

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[33] 1964 CarswellBC 109 (B.C.S.C.) (WLeC).

[34] (1984), 47 O.R. (2d) 584 (Div. Ct.).

Labrosse J's decision was followed by Justice McMurtry in *3173763 Canada Inc. v. Kemp*[35] in accepting and considering the evidence in the affidavit that the deceased third party had sworn prior to her death.

6.2 Trial evidence adduced by affidavit

Pursuant to Rule 53.02(1), courts have discretionary powers to grant leave to allow the evidence of any witness at trial to be given by affidavit or any fact or facts to be proven at trial by affidavit. However, under Rule 53.02(2), such leave shall not be granted where an adverse party reasonably requires the attendance of the deponent at trial for cross-examination.

If an affidavit has been prepared in the context of a court proceeding and the deponent has since died or otherwise becomes unavailable to be cross-examined, it is possible that the affidavit may be admissible as evidence at trial because it would also satisfy the criteria of necessity and reliability under the principled exception to the hearsay rule. In *Johnson Estate v. Nagy*,[36] the original plaintiff passed away before the trial and his estate trustee replaced the deceased as the plaintiff to the proceeding. The trustee brought a motion for leave to introduce the deceased's sworn affidavit as evidence at trial. In granting leave, Henderson J. applied the principled approach to hearsay evidence and took note of the several "badges of reliability" in connection with the sworn affidavit of the deceased. Although the deceased was not cross examined on the affidavit, Henderson J. noted that the defendant had plenty of opportunity to cross examine but failed to do so. After considering the context

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[35] 1996 CarswellOnt 379 (Div. Ct.) (WLeC).

[36] 2006 CarswellOnt 1589 (Ont. S.C.J.) (WLeC).

within which the affidavit was prepared, the court found that the affidavit was reliable enough to be admitted into evidence at trial.

7. Witnesses in custody

In Ontario, if a party wishes to bring a witness held in custody to a trial, it can move under Rule 53.06 and Rule 34.04(8) for an order for attendance of the witness if that witness' evidence is material to the action. In such an order, the court would direct the officer having custody of the witness to produce him or her as a witness at the trial. However, in *McGuire v. McGuire*,[37] the court held that as an Ontario court, it only has jurisdiction to compel attendance of a witness who is in custody in Ontario, as "no court had any jurisdiction or powers over persons outside the territorial jurisdiction of the Court."[38] This interpretation is aligned with the territoriality of provincial courts in Canada.

Therefore, if a witness is incarcerated outside of Ontario, the party who wishes to rely on the witness' evidence could move under Rule 34.07(2) for a Commission and a Letter of Request to have the witness examined by a named commissioner in the jurisdiction in which the witness is held.

Other Canadian provinces also have in their rules of civil procedure a provision similar to Rule 53.06 in Ontario that allows the courts to order the production of a witness in custody for any examination: Rule 296 (Order to produce prisoner) of Alberta Rules of Court, Rule 40(4) (Order for attendance of witness in custody) of British Columbia Supreme Court Rules; Rule 53.06 of Manitoba Court of Queen's Bench Rules; Rule 55.04

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[37] 1953 CarswellOnt 9 (Ont. C.A.) (WLeC).

[38] *Ibid.* at para. 11.

(Compelling attendance of witness in custody) of New Brunswick Rules of Court; Rule 366(1) (Production for examination) of Northwest Territories Rules of the Supreme Court; and Rule 53.06 of the P.E.I. Rules of Civil Procedure.

Although a similar provision is absent in Saskatchewan, in a recent decision, *Bergen v. Davey*, [39] Currie J. found assistance in the Ontario practice and held that the court has the jurisdiction under s.9 of the *Queen's Bench Act*, 1998 to make an order on an *ex parte* application to direct the Director of the Saskatoon Correction Centre to allow the prison witness to be produced for an examination for discovery.

If the prisoner witness is held in a foreign country, it is necessary to first ascertain what the local procedural rules will allow. In *Penty v. Law Society (British Columbia),*[40] the Law Society of British Columbia in disciplinary proceedings took advantage of section 1782 of the *United States Code* which expressly provides assistance, either through a letter rogatory or upon an application of any interested person, to foreign and international tribunals and to litigants to obtain evidence for use in a foreign proceeding. In that case, the witness was incarcerated in a penitentiary in Oklahoma. The Law Society moved under section 1782 to have the incarcerated witness' evidence taken by a named commission in Oklahoma, including video-taped depositions. The British Columbia Court of Appeal in *Penty* endorsed the appropriateness of this measure for the purpose of taking evidence from a witness incarcerated in a foreign jurisdiction.

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[39] 2006 CarswellSask 253 (Sask. Q.B.) (WLeC).

[40] 1999 CarswellBC 2367 (B.C.C.A.), leave to appeal refused 2000 CarswellBC 1757 (S.C.C.) (WLeC).

I N D E X

SCHEDULE "A"

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

xxxx

Plaintiff

- and –

xxxx

Defendant

COMMISSION

TO: Such a person as might be nominated by the Chief Justice of the

YOU HAVE BEEN APPOINTED A COMMISSIONER for the purpose of taking evidence in this proceeding now pending in this court by order of the court made on xxx, 200x, a copy of which is attached.

YOU ARE GIVEN FULL AUTHORITY to do all things necessary for taking the evidence mentioned in the order authorizing this commission.

You are to send to this court a transcript of the evidence taken, together with this commission, forthwith after the transcript is completed.

In carrying out this commission, you are to follow the terms of the attached order and the instructions contained in this commission.

THIS COMMISSION is signed and sealed by order of the court.

Date January , 2007 Issued by _____

Local registrar

Address of court office
393 University Avenue
Toronto, Ontario
M5G 1E6

INSTRUCTIONS TO COMMISSIONER

1. This commission is to be conducted in accordance with Rules 34 and 36 of the Ontario Rules of Civil Procedure, a copy of which is attached, to the extent that it is possible to do so. The law of Ontario applies to the taking of the evidence.

2. Before acting on this commission, you must take the oath set out below. You may do so before any person authorized by section 45 of the *Evidence Act* of Ontario, a copy of which is attached, to take affidavits or administer oaths or affirmations outside Ontario.

I, «name» , swear that I will, according to the best of my skill and knowledge, truly and faithfully and without partiality to any of the parties to this proceeding, take the evidence of every witness examined under this commission, and cause the evidence to be transcribed and forwarded to the court.

Sworn before me at the City of Toronto, in the Province of Ontario, on January «day» 2007

_____

(Signature of commissioner)

_____

(Signature and office of person before whom oath or affirmation is taken)

3. The examining party is required to give the person to be examined at least «no. of days» days notice of the examination and, where the order so provides, to pay attendance money to the person to be examined.

4. You must arrange to have the evidence before you recorded and transcribed. You are to administer the following oath to the person who records and transcribes the evidence:

> You swear that you will truly and faithfully record and transcribe all questions put to all witnesses and their answers in accordance with the directions of the commissioner.

On consent of the parties, or where the order for this commission provides for it, the examination may be recorded by videotape or other similar means.

5. You are to administer the following oath to each witness whose evidence is to be taken:

> You swear that the evidence to be given by you touching the matters in question between the parties to this proceeding shall be the truth, the whole truth, and nothing but the truth.

6. Where a witness does not understand the language or is deaf or mute, the evidence of the witness must be given through an interpreter. You are to administer the following oath to the interpreter:

> You swear that you understand the «name of language» language and the language in which the examination is to be conducted and that you will truly interpret the oath to the witness, all questions put to the witness and the answers of the witness, to the best of your skill and understanding.

7. You are to attach to this commission the transcript of the evidence and the exhibits, and any videotape or other recording of the examination. You are to complete the certificate set out below, and mail this commission, the transcript, the exhibits and any videotape or other recording of the examination to the office of the court where the commission was issued. You are to keep a copy of the transcript and, where practicable, a copy of the exhibits until the court disposes of this proceeding. Forthwith after you mail this commission and the accompanying material to the court office, you are to notify the parties who appeared at the examination that you have done so.

certificate of commissioner

I, «name», certify that:

1. I administered the proper oath to her person who recorded and transcribed the evidence, to the witness the transcript of whose evidence is attached and to any interpreter through whom the evidence was given.

2. The evidence of the witness was properly taken.

3. The evidence of the witness was accurately transcribed.

Date January «day» 2007

_____

(Signature of commissioner)

xxx

Plaintiff

and

xxx

Defendants

Court File No: xxx

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

COMMISSION

McMillan Binch Mendelsohn LLP
BCE Place, Suite 4400
Bay Wellington Tower
181 Bay Street
Toronto, ON, Canada M5J 2T3

xxx LSUC# xxx
Tel: 416-865-7286

xxx LSUC# xxx
Tel: 416-865-7186
Fax: 416-865-7048
Solictors for the Plaintiffs

SCHEDULE "B"

Court File No. xxx

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

xxx

Plaintiff

- and -

xxx

Defendant

LETTER OF REQUEST

TO THE JUDICIAL AUTHORITIES OF the (name of the jurisdiction):

A PROCEEDING IS PENDING IN THIS COURT at the City of Toronto, in the Province of Ontario, Canada, between xxx and xxx.

THE PENDING CASE is an action by the plaintiff claiming xxx. The plaintiff alleges that ● (brief description of the litigation).

IT HAS BEEN SHOWN TO THIS COURT that it appears necessary for the purpose of justice that a witness, John Smith, residing in your jurisdiction be examined there. The plaintiff wish to lead evidence from John Smith with respect to whether ● (brief description of the issue at stake).

THIS COURT HAS ISSUED A COMMISSION to ● (name of the designated commissioner), providing for the examination of the witness John Smith.

YOU ARE REQUESTED, in furtherance of justice, to cause John Smith to appear before the commissioner by the means ordinarily used in your jurisdiction, if necessary to secure attendance, and to answer questions under oath or affirmation.

YOU ARE ALSO REQUESTED to permit the commissioner to conduct the examination of the witness in accordance with the law of evidence and *Rules of Civil Procedure* of Ontario and the commission issued by this court.

AND WHEN YOU REQUEST IT, the courts of Ontario are ready and willing to do the same for you in a similar case.

THIS LETTER OF REQUEST is signed and sealed by order of the Court made on xxx, 2007.

January , 2007

Issued by: _____

Local Registrar

Address of local office: 393 University Avenue
Toronto, Ontario
M5G 1E6

xxx

Plaintiff

and

xxx

Defendant

Court File No: xxx

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

LETTER OF REQUEST

McMillan Binch Mendelsohn LLP
BCE Place, Suite 4400
Bay Wellington Tower
181 Bay Street
Toronto, ON, Canada M5J 2T3

xxx LSUC#xxx
Tel: 416-865-7000

xxx LSUC# xxx
Tel: 416-865-7000
Fax: 416-865-7048
Solictors for the Plaintiff

SCHEDULE "D"

Court File No. CV-07-000001

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ABC

Plaintiff

- and -

XYZ

Defendant

NOTICE OF MOTION

The Defendant, XYZ., will make a motion to the Court on September 20, 2007 at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard

_ in writing under subrule 37.12.1(1)on consent;

__ in writing as an opposed motion under subrule 37.12.1(4)

X orally.

THE MOTION IS FOR:

(a) If necessary, abridging the time for service;

(b) Leave to allow evidence of a witness and proof of facts and documents to be given by affidavit;

(c) Leave to have witnesses give evidence at trial by video conference;

(d) Granting a commission and letter of request authorizing the taking of evidence before a commissioner outside of Ontario; andAn Order dismissing the action, including crossclaims, with prejudice and without costs.

(e) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

All of the proposed witnesses reside in the United Sates of America and cannot be compelled to attend at trial by the Ontario Court;

(f) The evidence of these witness is important to proving the plaintiff's case;

(g) There are no issues of credibility regarding the evidence being provided by the witnesses;

(h) Rules 1.08, 34.07, 36 and 53.02 of the Ontario *Rules of Civil Procedure*; and

(i) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

Affidavit of John Smith, sworn ;

Draft orders for commission and letter of request; and

Such further and other material as counsel may advise and this Honourable Court may permit

McMILLAN BINCH MENDELSOHN LLP
Barristers and Solicitors
BCE Place, Suite 4400
Bay Wellington Tower, 181 Bay Street
Toronto, Ontario
M5J 2T3

LSUC#:
Tel: 416.865.
Fax: 416.865.7048

Solicitors for the Defendant

ABC Plaintiff	and	XYZ Defendant	Court File No: CV-07-000001

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

NOTICE OF MOTION

McMILLAN BINCH MENDELSOHN LLP
Barristers and Solicitors
BCE Place, Suite 4400
Bay Wellington Tower, 181 Bay Street
Toronto, Ontario
M5J 2T3

LSUC#:
Tel: 416.865.7145
Fax: 416.865.7048

Solicitors for the Defendant

Court File No. CV-07-000001

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ABC

Plaintiff

- and -

XYZ

Defendants

AFFIDAVIT OF JOHN SMITH
(sworn)

I, John Smith, of the City of Toronto, MAKE OATH AND SAY:

1. I am a at the firm of McMillan Binch LLP, counsel for ●, and as such I have knowledge of the facts and matters to which I hereinafter depose. Unless I indicate to the contrary, these facts are within my own personal knowledge and are true. Where I have indicated that this information comes from other sources, I verily believe it to be true.

Background

2. This action was commenced by ABC on or about ●. Since this action was commenced ABC has obtained judgment against ● and both ● have become bankrupt. Copies of the Judgment, Certificate of Assignment and Bankruptcy Assignment are attached as Exhibit's "A", "B" and "C" respectively.

3. By way of assignment agreement, dated ●, ● assigned, among other things, all right, title and interest in a portfolio of loans, including the loan (the "Loan") to ● to the FL Receivables Trust 2002-A (the "Trust"). Pursuant to an Administration Services Agreement, ● was appointed the administrator of the Trust.

4. On or about April 4, 2003, an Order to continue was issued (the "Order to Continue"), ordering that this proceeding be continued by ● as administrator of the Trust.

5. By Order of Master Dash dated September 11, 2003 (with addition reasons released September 29, 2003 (collectively, the "September Orders") Master Dash ordered, *inter alia*, that ● re-attend for discovery in Toronto. A copy of the September Orders are attached as Exhibit "D" hereto.

6. By letter dated November 25, 2003 to ●, Brett Harrison ("Harrison"), a lawyer at McMillan Binch LLP, arranged to re-examine ●on December 5, 2003. By letter dated December 2, 2003, Harrison confirmed to ● that he would agree to adjourn the ●re-attendance. I am informed by Harrison that the reason for this agreement is that he had spoken to ● who had informed him that ● intended to file a consumer proposal under the *Bankruptcy and Insolvency Act*. Copies of Harrison's letter confirming the December 5, 2003 examination and his letter confirming the adjournment are attached as Exhibit "E" hereto.

7. By letter dated March 19, 2004 from ●, a lawyer at Karry and Laba, counsel for ●, to Harrison, ● confirmed that ● had an appointment with Mr. Frank Kisluk, Trustee in Bankruptcy, on March 26, 2004 and requested that, in light of that fact, a further adjournment of ●'s re-examination be granted. By letter dated March 25, 2004 ● confirmed the further adjournment of the re-examination of ●. Copies of these letters are attached as Exhibit "F" hereto.

8. The full re-examination of ● was never completed. By letter dated July 5, 2004, copied to ●, counsel for ●, Harrison confirmed to ● that for over six months ● had assured the plaintiff that he intended to file a consumer proposal under the *Bankruptcy and Insolvency Act*. He also confirmed that for the first time, ● had now indicated that ● might not be filing a consumer proposal and may instead be defending this action at trial. Harrison also requested the following information immediately in order to prepare for trial:

9. Does ● intend to defend this action at trial?

10. If so, who will be representing him at trial?

11. At ●'s continued examination ● indicated that he was in the process of filing a consumer proposal and on that basis only a partial examination was complete. If ● intends to defend this matter at trial Harrison requested ● to attend for examination within the next three days in Toronto, in accordance with the order of Master Dash.

12. In addition, Harrison attached a draft affidavit of ●, which he advised ● he intended to introduce at trial in order to avoid having ● attend. A copy of the July 5, 2004 letter is attached as Exhibit "G" hereto.

13. By letter faxed at 4:30 pm on July 7, 2004 ● advised Harrison that:

14. ● now intended to defend this action at trial.

15. ● was in discussions with a number of solicitors and he expected to be able to confirm who would represent him by the end of the week.

16. ●'s new counsel would have to address the issue of the ● affidavit.

A copy of the July 7, 2004 letter is attached as Exhibit "H" hereto.

17. By e-mail dated July 6, 2004 to ●, copied to ●, ● that it appeared that ● might be defending the action, and as a result, the plaintiff would be required to call additional witnesses, all of whom resided in the United States. Therefore, Harrison asked ● to consent to allow them to testify by way of video conference. By response dated July 7, 2004, ● refused to consent to this request. A copy of these e-mails is attached as Exhibit "I" hereto.

18. By letter date July 9, 2004, ● advised Harrison that his client was not willing to permit ●'s evidence in paragraphs 4-16 to be given by way of affidavit. A copy of this letter is attached as Exhibit "J" hereto.

Video/Affidavit Evidence

19. All of the plaintiff's witnesses reside in the United States. For the reasons described below, the plaintiff takes the position that it would be just and convenient for the following

witnesses to provide evidence by way of affidavit or video conference. In the alternative the plaintiff requests that it be granted commissions and letters of request in order to obtain their evidence.

20. I have been informed by ●, an administrative assistant at McMillan Binch LLP, that she has contacted the following organizations and has confirmed that they have video conference facilities available during the trial of this action:

21. Detroit, Michigan: Chapa & Giblin General Court Reporters, 40 ½ East Ferry, Detroit, MI 48202.

22. Atlanta, GA: Brown Reporting, Inc., 1740 Peachtree Street, N. W., Atlanta, GA 30309.

23. New York, NY: Regency Reporting, Inc., 575 Madison Avenue, New York, NY 10022.

I have also been advised by ● that she has been in contact with the Trial Co-ordinator for the Toronto courts and she has been advised that there is a court equipped with video conference technology available during the trial of this action.

●

24. ● executed the loan commitment, the promissory note and the security agreement between Cobrand and Captec on behalf of Captec.

25. I have been advised by ● that:

26. he resides in Livonia, Michigan in the United States of America;

27. he has not been an employee of Captec for over a year;

28. he is very busy in his current job as Vice-President at The Hayman Company, a real estate investment company, and that due to the fact that he has a number of projects under development, he does not have the time to, and does not intend to, attend at the trial in this matter;

29. if compelled by letter of request, he would attend in Detroit to provide evidence by way of video conference.

30. In order to reduce the likelihood that ●'s evidence will be necessary at trial, the plaintiff has prepared an affidavit of his evidence on the loan documents. A copy of his proposed affidavit, without exhibits, is attached as Exhibit "K" hereto. The exhibits have not been included as they are voluminous and are in the possession of the defendants, but if required they can be provided to the court.

31. To the best of my knowledge, the evidence of ● does not raise any issues of credibility and he will simply be verifying facts and documents proving the loan.

●

32. To the best of my knowledge, the evidence of ● does not raise any issues of credibility and ● was the credit analyst involved in the loan. By e-mail dated July 12, 2004 ● advised Harrison that:

33. he works as the Vice-President of 1st State Bank in Saginaw, Michigan;

34. he is on vacation July 17-25, 2004;

35. his wife works evenings and they do not have a babysitter for their 3 and 5 year olds;

36. he does not have a passport and does not believe that he could travel to Canada, and that even if he can, he does not intend to take that risk.

A copy of his e-mail is attached as Exhibit "L"

●

37. ● is the Portfolio Manager of GMAC Commercial Mortgage Corporation ("GMAC"), in connection with the portfolio of loans owned by FL Receivables Trust 2002-A which include the Loan. Hollis resides in Atlanta, Georgia.

38. Prudential takes the position that the debt of ● has been proven by way of the ● Judgment, but to the extent the defendants require further proof, Prudential seeks leave to provide it by way of an affidavit from ●. ● evidence in this matter is restricted to the current value of the Loan. Attached as Exhibit "M" is a copy of his affidavit which the plaintiff is requesting be admitted into evidence.

39. To the best of my knowledge, the evidence contained in the ● affidavit is uncontested by the defendants as it is simply a calculation of the value of the loan.

●

40. ● is the President of Prudential. He resides in New York, New York.

41. Prudential takes the position that the debt of ● has been proven by way of the Order to Continue, but to the extent the defendants require further proof, Prudential seeks leave to provide it by way of an affidavit from ●. His evidence in this matter is restricted to the assignment of the Loan to Prudential. In the event that it is necessary to establish the assignment at trial the plaintiff is requesting that the evidence be adduced by way of affidavit. A copy of ●'s affidavit, without exhibits, is attached as Exhibit "N" hereto. The exhibits have not been included as they are voluminous and are in the possession of the defendants, but if required they can be provided to the court.

42. To the best of my knowledge, the evidence contained in the ● affidavit is uncontested by the defendants as they have indicated they have no knowledge of the assignment of the loan by Captec to Prudential.

43. I make this Affidavit in support of the Defendant's motion to admit affidavit/video conference evidence and for no other purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on July 12, 2004.

Commissioner for Taking Affidavits

●

ABC Plaintiff	and	XYZ Defendant	Court File No: CV-07-000001

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AFFIDAVIT OF ●
(sworn July 12, 2004)

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M5J 2T3

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