Obtaining Evidence in Canada for United States Civil Actions: What American Counsel and Clients Need to Know

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DOCUMENTS or testimony from Canadian witnesses may be crucial in United States litigation or arbitration proceedings. However, American courts and arbitration tribunals lack jurisdiction over documents and witnesses located in Canada. This article discusses the means to obtain this evidence through letters rogatory (also called letters of request). While Canadian courts adhere to the principle of comity and will lend assistance for U.S. proceedings, there are important differences in the discovery processes in Canada and the U.S. that can impact the scope of documentary and oral discovery available in Canada. While the procedures to obtain letters rogatory are broadly similar across Canada, there are local differences within Canadian provinces and territories.

This article sets out the bases for enforcement of letters rogatory in Canada and provides an overview of the procedure. To maximize the chances of success and the scope of discovery sought (whether broad or narrow), it is important to involve Canadian counsel at the earliest stage, when the form of the letters rogatory are being drafted for the application to the American court.

I. Letters Rogatory

The letters rogatory process begins with an application to the relevant American court. Most applications are supported by an affidavit or declaration as to why the evidence sought is relevant and necessary for the United States proceeding. The form of the letters rogatory are generally prepared by counsel. If this application is successful, the American court actually issues the letters rogatory. Once obtained, Canadian counsel brings the letters rogatory to a Canadian court, by way of an application, for enforcement in Canada. In the case of U.S. arbitration proceedings, the application should still be made through a U.S. court.

The enforcement of letters rogatory is rooted in the principles of comity and a mutual desire for courts to assist one another in the administration of justice. Although enforcement is discretionary, Canadian courts are generally content to give effect to requests for judicial assistance from United States courts, subject to certain considerations set out in statute and case law and reviewed below.

II. Statutory Bases

Canada has both a federal court system, as well as a unique court system for each of ten provinces and three territories. The superior courts of each province have inherent jurisdiction and handle most litigation matters (these courts go by different names, for instance the Ontario Superior Court of Justice, the Superior Court of Québec, the Supreme Court of British Columbia, and the Court of King's Bench of Alberta). The Federal court system hears certain matters within the purview of the Federal Government, such as tax, immigration, and patents, but these courts do not have inherent jurisdiction. The Federal courts have no jurisdiction in respect of matters within the jurisdiction of the courts of a province, except where specifically provided.[1]

Letters rogatory will therefore typically be directed to the superior court in the relevant province or territory. Provincial and federal legislation in Canada both govern the enforcement of letters rogatory, as shown in the table below. Newfoundland and Labrador, and Prince Edward Island, which do not have province-specific provisions on letters rogatory, rely on the provisions found in the *Canada Evidence Act*.[2]

Jurisdiction	Statute	Section(s)
Federal	*Canada Evidence Act*, R.S.C. 1985, c. C-5 ("Canada Evidence Act")	46-51
Ontario	*Evidence Act*, R.S.O. 1990, c. E23 ("Evidence Act (Ontario)")	60
Québec	*Code of Civil Procedure*, C.Q.L.R. c. C-25.01 ("Québec CCP")	504, 505
	Business Concerns Records Act, C.Q.L.R. c. D-12	2
British Columbia	*Evidence Act*, R.S.B.C. 1996, c. 124 ("Evidence Act (BC)")	53
Alberta	*Alberta Evidence Act*, R.S.A. 2000, c. A-18 ("Alberta	56

[1] Federal Courts Act, R.S.C. 1985, c. F-7 at Section 17(6); per the Canada Evidence Act, R.S.C. 1985, c. C-5 at Section 44, jurisdiction for enforcement of letters rogatory is vested only in the superior courts of the provinces, though each territorial superior court has similar jurisdiction in practice.

[2] *See* Multifeeder Technology, Inc. v. British Confectionary Co. Ltd., 2011 N.L.T.D. 111 (NL TD); Prince Edward Island (Health) (Re), 2008 CanLII 67685 (PE IPC)).

	Evidence Act")	
	Alberta Rules of Court, Alta. Reg. 124/2010	6.24

Though each jurisdiction's statute is unique, the core elements of this statutory authority are similar across the common law jurisdictions. Québec's civil law is unique in Canadian law, but the statutory provisions authorizing enforcement of letters rogatory yield a similar result. The Superior Court of Québec has also confirmed that the principles Québec courts use to assess foreign requests for judicial assistance are similar to those applied in common law provinces.[3]

III. The Approach of Canadian Courts

A Canadian court hearing an application for enforcement of letters rogatory will consider first whether it *may* grant such enforcement, and then whether it *should* grant enforcement, and under what conditions.

The first test involves reviewing the statutory basis for enforcement, which generally requires establishing that a foreign court of competent jurisdiction desires the evidence of a resident within the jurisdiction of the Canadian court for use in a pending civil, commercial, or criminal action.[4] In Québec, the *Business Concerns Records Act*[5] may pose an additional barrier to removing business records from within the province, which should be considered. Section 2 of the *Business Concerns Records Act* prevents the removal of certain business records from Québec, which poses obvious problems to parties attempting to compel business records from within Québec; applicants should assess, as early as possible, whether they come within one of the exceptions as set out in Section 3(a) of the that Act, for example where a document has been sent out of Québec "by an agency, branch, legal person or firm carrying on business in Québec, to a principal, head office, affiliated legal person or firm, agency or branch situated outside Québec, in the ordinary course of their business."[6] Ontario has a similar act,[7] though the Court of Appeal for Ontario has confirmed that letters rogatory are

[3] Rossetti Associates Incorporated c. Canam Group Inc., 2021 QCCS 5363 at ¶¶35-43 (hereinafter, "Rossetti").
[4] *See* Riverview-Trenton Railroad Company v. Michigan Department of Transportation, 2018 Ont. S.C. 2124 at ¶33.
[5] C.Q.L.R. c. D-12.
[6] *See* Advanced Magnesium Alloys Corporation (Amacor) c. Dery, 2023 QCCS 297 at ¶¶115-118; Rossetti Associates Incorporated c. Canam Group Inc., 2021 QCCS 4846.
[7] The *Business Records Protection Act*, R.S.O. 1990, c. B.19.

excepted from the application of that act under its own terms.[8]

The second hurdle focuses on whether the court should exercise its jurisdiction to enforce the letters rogatory. Generally, following the guidance *Zingre v. The Queen et al.*, letters rogatory should be "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."[9] In *Liu v. Zhi*,[10] the British Columbia Court of Appeal held that an American court is presumed to have "acted reasonably and responsibly" in issuing letters rogatory. That said, Canadian courts are alive to the possibility that letters rogatory are sometimes issued in a perfunctory manner and will take it upon themselves to review the requests carefully.[11] This analysis may be informed by whether the application for issuance of the letters rogatory was contested before the issuing U.S. court.[12]

Subsequent cases have expanded on *Zingre*. Following the Ontario case of *Friction Division Products, Inc. and E.I. Du Pont de Nemours & Co. (No. 2) (1986)*,[13] most Canadian courts now consider the following factors:

1. The relevance of the evidence sought;

2. The necessity of the evidence sought;

3. The availability of the evidence sought from other sources;

4. The precision with which the evidence sought has been requested;

5. Canadian public policy; and

6. The possibility of an undue burden being imposed on a proposed witness or witnesses.[14]

With the exception of the public policy consideration, these factors are only "useful guideposts", not "rigid pre-conditions,"[15] and, in practice, considerations under one

[8] *See* Actava TV, Inc. v. Matvil Corp., 2021 ONCA 105 at ¶¶58-61.
[9] Zingre v. The Queen et al., [1981] 2 SCR 392, 401 (SCC).
[10] 2019 BCCA 427 at ¶18.
[11] *See id.* at ¶20; *Rossetti*, *supra* note 3, 2021 QCCS 5363 at ¶57.
[12] Q3 Networking LLC v. Siemens Canada/Commscope v. Siemens Canada, 2021 ONSC 2808 at ¶¶41-43; Aker Biomarine AS et al. v. KGK Synergize Inc., 2013 ONSC 4897 at ¶26.
[13] 1986 CanLII 2827 (Ont. S.C.).
[14] *See, for example*, Perlmutter v. Smith, 2020 ONCA 570 at ¶24; Golo c. Goli Nutrition Inc., 2023 QCCS 347 at ¶10; Monster Energy Company v. Craig, 2016 BCCA 290 at ¶13; Richardson v. Shell Canada Ltd., 2012 ABQB 170 at ¶26.
[15] Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd., 2013 ONCA 264 at

factor often blur into another. Given the discretionary nature of enforcing such requests, Canadian courts have several options. In order of decreasing preferability for the applicant, they may enforce the request without modification; enforce only certain parts of a request or adjust the parameters of what will be enforced; grant leave to obtain revised letters rogatory from a United States court; or refuse the request outright. The following points should be helpful when seeking the assistance of a Canadian court in compelling evidence for use in the United States.

Demonstrate relevance. Relevance is considered in relation to the United States litigation and is defined by the pleadings in that action.[16] Canadian courts have confirmed that considering the relevance of the evidence requested is within their own purview, though deference should be afforded to the United States court making the request; the scope of such deference has ranged from significant, as in the Alberta case of *King County (a Washington Municipal Corp.) v. Gelhaus*[17] or the British Columbia case of *B.I. Incorporated v Au*,[18] to cursory, as in the Ontario case of *Cunix v. Sol Global Investment Corp*.[19] Canadian courts have narrowed down requests in light of the narrower view of relevance in the Canadian discovery process[20] and have denied applications so broad they constituted a "fishing expedition."[21]

Speak to the necessity of the evidence sought to the United States litigation. This factor is closely tied to both relevance and the (in)ability to obtain the evidence elsewhere. A Canadian court will not order one of its citizens to produce evidence that is not necessary for the underlying U.S. action.[22] The court may also read-down a request for the same reason.[23] While some older cases have held that only evidence obtained for use at trial should be ordered, this restriction is no longer recognized, though it may still be a consideration.[24]

Show steps taken to get the evidence elsewhere. Parties making applications in United States and Canadian courts have generally

¶61; *see also Perlmutter*, 2020 ONCA 570 at ¶25.

[16] *Actava TV*, 2021 ONCA 105 at ¶69; *Liu* at ¶28; *Rossetti* at ¶97; *Richardson*, 2012 ABQB 170 at ¶38.

[17] 2022 ABQB 2 at ¶¶11-35.

[18] 2017 BCSC 2476 at ¶17.

[19] 2023 ONSC 4845 at ¶¶22-23.

[20] *Id.* at ¶¶22-39; *see also Golo*, 2023 QCCS 347 at ¶18.

[21] Hospira Healthcare v. Rotsztain, 2023 ONSC 4283 at ¶51; *see also* Presbyterian Church of Sudan v. Rybiak, 2006 CanLII 32746 at ¶3 (Ont. C.A.); *Liu* at ¶60-62.

[22] *Aker Biomarine*, 2013 ONSC 4897 at ¶28.

[23] *See* Presbyterian Church of Sudan v. Talisman Energy, 2005 ABQB 920 at ¶¶58-69.

[24] *Lantheus Medical Imaging*, 2013 ONCA 264 at ¶63; Duryea v Matsumoto, 2023 BCSC 2061 at ¶56; *Richardson* at ¶29.

made substantive efforts at obtaining the evidence they seek, and it is important to show the Canadian court that such evidence cannot be otherwise obtained without an order.[25] This does not mean any evidence on the same issue, but rather evidence of the same value.[26]

Be specific. Canadian courts are not receptive to vague, boilerplate, or overly broad requests for evidence. Documents sought should be reasonably specified, though specific classes of documents may be acceptable.[27] Although the oft-quoted "reasonable specificity" factor in *Friction Division Products* speaks directly to documents, this point can also apply to other types of evidence sought. In *Third Point LLC v. Fenwick*, an Ontario court refused to enforce letters rogatory (which only sought oral discovery, not documents), in part because its scope was overbroad, stating that the "areas to be explored should not be the subject of guesswork. The letters of request should outline the topics to be covered with reasonable clarity."[28]

In a similar vein, it is important to be specific in respect of the other factors discussed in this article. The letter should explain why the evidence is relevant and necessary for the United States litigation and why it cannot otherwise be obtained. Canadian courts have rejected applications that spoke to the factors courts typically consider, but with no more than bald assertions, unsupported by reasons or evidence.[29]

Consider Public Policy Arguments. Canadian courts will not enforce letters rogatory that violate public policy and will impose the protections afforded to witnesses testifying within their home jurisdiction on any testimony they provide for a foreign proceeding.[30] This factor is conceptually simple but difficult to encapsulate comprehensively, as it is very flexible and fact-dependent. The court will consider the respondent's constitutional rights, other procedural rights, and the rights of

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[25] *See Lantheus Medical Imaging*, 2013 ONCA 264 at ¶¶60-65; *Rossetti*, *supra* note 3, at ¶109.

[26] *Rossetti*, *supra* note 3, at ¶109; Connecticut Retirement Plans and Trust Funds v. Buchan, 2007 ONCA 462 at ¶19.

[27] *See Dery*, 2023 QCCS 297 at ¶88.

[28] 2011 ONSC 2068 at ¶45; *see also Presbyterian Church of Sudan*, 2005 ABQB 920 at ¶13.

[29] *Aker Biomarine*, 2013 ONSC 4897 at ¶¶16-18.

[30] *See* EchoStar Satellite Corporation v. Quinn, 2007 BCSC 1225 at ¶79; Lafarge Canada Inc. v. Khan, 2008 CanLII 6869 (Ont. S.C.) at ¶63-73; *Rossetti*, *supra* note 3, at ¶110; *see also* Canada Evidence Act, Section 50; Evidence Act (BC), Section 53(4); Alberta Evidence Act, Section 56(4)-(5); Evidence Act (Ontario), Section 60(3)).

other parties that may be affected.[31] Canadian courts have declined to enforce letters rogatory on policy grounds, for instance, in *Glegg v. Glass*,[32] where the Ontario Superior Court of Justice noted that the underlying cause of action in the United States case would not be permitted in Canada, and that it would interfere with the core concepts of solicitor-client privilege and lawyer-client confidentiality.

Canadian courts may impose conditions on enforcement of letters rogatory, or narrow their application, based on public policy considerations. In *Pecarsky v. Lipton Wiseman Altbaum & Partners*,[33] an Ontario court directed that letters of request would be enforced subject to the applicants signing and filing an undertaking that "they will not use any documents produced pursuant to this order and the letter of request for any purpose other than the prosecution of their claims against the existing defendants in the U.S. action unless they first obtain leave to otherwise use such documents from a judge of this court, all as contemplated by rule 30.1 of the Rules of Civil Procedure."[34]

Consider the burden imposed, and prepare to be flexible. Courts will assess whether granting the relief sought will be unduly burdensome to the respondent and consider both practical and financial burdens,[35] though financial burdens may be more easily compensable. Imposing an undue burden on a party within the court's jurisdiction is considered counter to Canadian sovereignty.[36] That said, a burden must truly be "undue" to be objectionable.[37] This is another highly fact-specific exercise.[38] Courts will generally be sympathetic to the unique circumstances of respondents when considering what is truly burdensome, so consider in advance what other options may work if, for instance, a witness lacks a stable internet connection to testify remotely or has a compelling reason that prevents them from producing certain documents in the form requested.

In Canada, except in the province of Québec, litigants are required to produce all relevant and material documents at the outset of discovery, subject only to a right to withhold privileged documents (the existence of which are still

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[31] *See* Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612 at ¶59.
[32] 2019 ONSC 6623 at ¶122, ¶134.
[33] 1999 CarswellOnt 1775 (Ont. S.C.).
[34] *Id.* at ¶41; *see also* AstraZeneca LP v. Wolman, 2009 CanLII 69793 (Ont. S.C.) at ¶¶60-61; Morgan, Lewis & Bockius LLP v. Gauthier, 2006 CanLII 63727 (Ont. S.C.) at ¶84-88.
[35] *See* Coface North America Insurance Company v. Sampson, 2024 ONSC 331 at ¶39-46.
[36] *See* Intelsat USA Sales LLC v. Hyde and Majic, 2015 ONSC 5680 at ¶55.
[37] *Rossetti*, *supra* note 3, at ¶111.
[38] *See* Ludmer c. Ludmer, 2008 QCCS 3967 at ¶42, upheld in 2009 QCCA 1414.

disclosed). However, the Canadian system makes up for this seemingly liberal process by limiting deposition to relatively few individuals; for instance, Ontario Civil Procedure Rule 31.03(2) allows a party to question only one representative of a corporation, only one time (subject to leave of the court for further questioning sessions or witnesses, which is sparingly granted). In Québec, litigants produce the relevant and material documents on which they rely in their pleadings and can then be asked to produce additional material by way of undertakings during the discovery process. Courts will consider the burden of discovery in the context of what would be allowed in their own jurisdictions,[39] but such considerations are not necessarily fatal.

IV. Additional Procedural Considerations

An application seeking enforcement of letters rogatory typically attaches an affidavit, often sworn by the applicant's United States counsel. Because counsel for the Canadian party resisting an application to enforce letters rogatory can cross-examine a deponent on anything within their affidavit, as well as any topics relevant to the underlying application, it is especially important to avoid including anything that could waive solicitor-client privilege. The law of privilege in Canada is similar to that in the U.S. to the extent that communications for the purpose of obtaining legal advice between a client and their counsel are privileged. In Canada, such privilege can be waived where the content of privileged discussions is disclosed. Care should be taken to preclude waiver of privilege.[40] In *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*,[41] a case involving a jurisdictional contest, the court found a limited waiver of privilege with respect to an affidavit sworn by a legal clerk.

In Canada, a party is typically entitled to costs for successful contested applications. However, costs awards are discretionary, and in Québec even nominal. When a court does award costs, it is rarely for the full amount of costs actually incurred.[42] However, parties seeking enforcement of letters rogatory are more likely to have substantial costs awarded against

[39] *See, for example*, *Aker Biomarine*, 2013 ONSC 4897 at ¶32.

[40] *See Intelsat USA Sales LLC*, 2015 ONSC 5680 at ¶51.

[41] 2019 BCSC 1536 at ¶¶44-45.

[42] *See, for example*, Trustees of the Ontario Public Service Employees Union Pension Trust Fund v. Clark, 2005 CanLII 38895 (Ont. S.C.).

them if unsuccessful.[43] Courts have also ordered parties to bear their own costs, in cases of both successful and unsuccessful applications.[44] Aside from any costs award for the application itself, courts typically require an applicant to pay at least some, if not all, of the respondent's reasonable costs for their efforts in complying with the letters rogatory, including disbursements and legal fees.[45]

In Québec, new requirements that were supposed to come into force on September 1, 2022 aimed to create an obligation for legal persons to submit to a Québec court a pleading or a foreign judgement, which would include, in our view, letters rogatory, in French.[46] If the original document is in English, it would need to be accompanied by a certified French translation, paid for by the legal person submitting the document to a Québec court. Bill 96, through which the Québec government introduced these new requirements, is, at the time of writing, being contested in the courts. Its application has been temporarily suspended since August 12, 2022, awaiting a final decision on the matter.[47]

[43] j2 Global v. B.C. et al, 2010 ONSC 3868; Oticon v. Gennum Corp., 2010 ONSC 1638; *Aker Biomarine*, 2014 ONSC 1401.

[44] *See, for example*, Monster Energy Company v. Craig, 2016 BCCA 484; *Perlmutter*, 2020 ONCA 570 at ¶69-76.

[45] *Cunix* at ¶75-88; *Richardson* at ¶47; *Rossetti*, *supra* note 3, at ¶112; *see also* Canada Evidence Act at Sect. 48; Québec CCP at Art. 505; Alberta Evidence Act at Section 56(4); Evidence Act (BC) at Section 53(3); Evidence Act (Ontario) at Section 60(2).

[46] Section 9 of the Charter of the French language, C.Q.L.R. c. C-11 (hereinafter, the "Charter") as amended by Section 5 of Bill 96, and Section 208.6 of the Charter as amended by Section 119 of Bill 96.

[47] *See* Mitchell c. Procureur général du Québec, 2022 QCCS 2983.