

not be made unless there is already an action, suit or proceeding pending in or before a foreign court or tribunal. The evidence which it is desired to obtain abroad must be absolutely necessary for the purposes of justice.

- (5) that the documents in support of such application be under the seal of the issuing court or judge (unless it be certified they have no seal). This is to ensure that the foreign court or tribunal has "duly authorized" the obtaining of the testimony.

In addition, the following elements must be established:

- (1) No witness is required to undergo a broader form of inquiry than he would if the litigation were being conducted locally.
- (2) The evidence could not be secured except by the intervention of the courts. In other words, if the witness is prepared to give evidence voluntarily by affidavit or otherwise, there is no need to apply to the courts, and the application would normally be denied.

The foreign letters rogatory must be filed with the court on an application for an order pursuant to section 43 of the Evidence Act.

It has also been held that since the enforcement of letters rogatory is based upon international comity or courtesy, this comity cannot be exercised in violation of the public policy of the state to which the request is made or at the expense of injustice to its citizens.

Many non-treaty countries customarily employ diplomatic channels although there is no requirement to do so. Where letters of request are received by the Department of External Affairs, they are transmitted to the provincial Attorney-General's Department, and the Department of External Affairs will arrange to return the documents to the foreign court, using the same channels. As the services of a Canadian lawyer will be required for the necessary court application, the requesting authority will usually have to give an undertaking to pay all costs incurred.