

2. Criminal Matters

Sections 637-642 of the Criminal Code provide that a party to a criminal proceeding may apply for an order appointing a commissioner to take the evidence of a witness who is out of Canada. As in civil cases, letters of request (or letters rogatory as they are sometimes called) may be issued to assist a commission where the assistance of a foreign court is necessary to compel the attendance of the witnesses. Finally, it should be noted that because of differences in judicial systems, assistance in criminal matters will almost invariably have to be sought from the foreign authority which will usually also insist that the interrogation be conducted by the courts of the state of execution.

Conclusion

The Department of External Affairs is of the opinion that from past experience the most satisfactory method available for taking evidence abroad (both for treaty and non-treaty jurisdictions) is described as Method II above. This requires the applicant to secure a letter of request from the appropriate Canadian court addressed to the appropriate foreign court, asking that the desired evidence be secured by summoning the witness for questioning, and returning the answers to the Canadian court conducting the trial.

Although there is provision in the treaties for a diplomatic or consular officer to be appointed to take such evidence, the Department is only able to offer this service in exceptional circumstances and with its express approval. Moreover, such an officer has no compulsory powers to summon witnesses or secure answers to questions. If witnesses in a civil action are willing to visit the Embassy to give voluntary evidence, and they are accompanied by the parties' legal representatives, the Department of External Affairs is prepared to consider the appointment of one of its officers as commissioner, providing the performance of this function will not unduly disrupt the normal activities of the mission.