International Judicial Co-operation in Civil, Commercial, Administrative and Criminal Matters

External Affairs Canada
Affaires extérieures Canada

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*This study is merely descriptive and does not purport to set forth the law in any definitive manner or particular case.

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ROLE OF THE DEPARTMENT OF EXTERNAL AFFAIRS

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Introduction

The purpose of this study is to provide guidance on procedures for international judicial co-operation in civil and criminal matters for the use of law enforcement officers and legal practitioners seeking to serve documents, or to obtain evidence *abroad*, in connection with Canadian court proceedings. This study is also intended to provide information on such matters for the use of Canadian diplomatic and consular representatives abroad, and for foreign diplomatic and consular representatives in *Canada*, as required, for the purpose of legal proceedings in foreign and Canadian jurisdictions.

The Department of External Affairs is prepared to assist in facilitating international judicial co-operation, including service of documents and the taking of evidence, consistent with Canadian law and with international law and practice, while giving due consideration to the legal requirements of the foreign jurisdictions.

The courts of this country *can* lend their assistance to a foreign court in criminal, as well as in civil, commercial and administrative proceedings. Only rarely would a court refuse such co-operation. One exception might involve those cases which are political in nature.

It should be noted that under the Canadian constitution the administration of justice in the provinces is a matter falling within their jurisdiction. Thus, the service of judicial documents in Canada and the obtaining of evidence in Canada are matters primarily governed by provincial law. Besides treaties entered into by Canada that relate to judicial assistance in civil and commercial matters, there also exist certain informal arrangements between the provinces and some foreign countries. An example of this is the *Entente entre le Québec et la France sur l'entraide judiciaire en matière, civile, commerciale et administrative*, signed in 1977 (see Appendix A).

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I. *Service of Judicial Documents in Canada*

This procedure involves the formal service of legal documents in Canada.

A. Treaty and Entente Countries

Canada is bound by nineteen treaties, mainly with European states, regarding Legal Proceedings in Civil and Commercial Matters, which provide for the transmission and the service of documents on a reciprocal basis, between Canada and the states concerned (a list is attached as Appendix B). Such treaties and the entente on judicial assistance between France and the Province of Quebec do not extend to criminal proceedings. (These treaties are published in the Canada Treaty Series. For details on ordering copies of them, see Note on Appendix B). The procedures described in the treaties and the entente are not always mandatory.

Canada is not a party to any multilateral treaty providing for the service abroad of judicial and extra-judicial documents, such as the 1965 Hague Convention.

The Request for Service in civil and commercial matters which usually accompanies a duplicate set of the documents to be served, need not be in a particular form but should contain:

(a) the name of the authority from whom the documents emanate;
(b) the names and descriptions of the parties;
(c) the address of the recipient; and
(d) the nature of the documents in question.

According to the treaties, the Request for Service and the documents accompanied by a translation into English (or preferably French in Quebec) also in duplicate, certified as correct by a diplomatic or consular officer of the country from whose territory the documents emanate, are to be sent directly to the Attorney-General in the province where service is intended to take place. The competent officials then serve the documents in the usual way according to the provincial rules. Service by a

diplomatic or consular officer of the requesting states or by the legal agent appointed for that purpose by a judicial authority of the requesting states or by the party on whose application the document was issued, is also authorized under the treaties, provided no compulsion is used. A few treaties also permit service through the postal channel, or by any other method not contrary to local provincial law, or which is recognized by the law existing at the time of service in the requesting states, so long as no compulsion is used.

Although the treaties provide for transmission of legal documents directly from the foreign missions in Canada to the Department of the Attorney-General of the province concerned, this procedure is not always followed and the Department of External Affairs receives a large volume of documents under cover of diplomatic notes, from both treaty and non-treaty states. In these cases, the documents are transmitted by letter to the Attorney-General's Department in the province concerned, with the request that they be served in accordance with local rules, and that the originals with affidavits of service and the account for service be returned to the Department of External Affairs for transmission to the foreign diplomatic mission in Ottawa.

In general, the authority by whom the request for service is carried out must furnish a certificate proving the service or explaining the reason which has prevented such service and setting forth the fact, the place, the manner and the date of such service or attempted service (and must send the certificate to the diplomatic or consular officer by whom the request for service was made). The certificate of service or of attempted service is placed on one of the duplicates or attached thereto. Proof of service is based on certification rather than a sworn affidavit since many countries do not recognize the common law method of proof by statements made under oath.

Finally, all the treaties stipulate that although there is to be no special fee for complying with a foreign request, the requesting state is obliged to pay for the service according to the local tariff in the state of execution.

B. Non-Treaty and Non-Entente Countries

There are no restrictions with respect to the service of documents for the purpose of foreign legal proceedings. Service can be effected either through Canadian public officials, the sheriff (or, in Quebec, the bailiff) in the judicial district in which

the service is to be effected, or by private process-servers retained by a party to the litigation. Foreign legal documents may therefore be served in all the provinces by forwarding duplicate sets of the documents with English translations attached (or preferably French in the Province of Quebec) directly to the sheriff or bailiff in the judicial district where service is to be effected *without involving the Department of External Affairs*. The cost varies, depending on the number of attempts at service that are required before the documents can be served. The names and addresses of these provincial officials may be found in the *Canadian Law List*, which is a legal directory published by the Canada Law Book Limited, 80 Cowdray Court, Agincourt, Ontario, M1S 1S5. This legal directory may be found in most law libraries.

Whether a sheriff's officer (*i.e.* a government employee) or a private process-server is to be used is a matter of choice for the party to the litigation or the foreign diplomatic mission acting on his behalf that is seeking to effect the service in Canada. Where there is no urgency, the sheriff's services may be used as his charges are generally lower provided there is no difficulty in locating or serving the person to whom the documents are addressed. However, where the addressee may be evading service, it is usually more effective and may cost less to retain a private process-server. If the whereabouts of the person to be served are unknown, a private tracing service may be used. Firms providing such a service are listed in the telephone directory and can often direct enquirers to a private process-server if required.

Most provinces serve documents directly by the methods described above, or serve by post, depending on their legislation, and the Department of External Affairs rarely sees such documents. On the other hand, some diplomatic missions in Ottawa use the services of the Department of External Affairs exclusively for this purpose, even where no treaty for service of documents exists between Canada and the countries concerned.

Informal delivery of foreign judicial documents in Canada by members of diplomatic or consular missions, through the mails, or by private persons, is not prohibited, provided no compulsion is used. For compulsory service of documents, the services of a Canadian sheriff or bailiff must be sought.

In the Province of Quebec, Article 136 of the Code of Civil Procedure provides that the Attorney General may, on request made through diplomatic channels, direct a bailiff to serve upon a person in Quebec any proceeding issued by a tribunal foreign

to Canada. Such service is made by leaving with the party in the ordinary way a true copy of such proceeding, certified by an officer of the court by which such proceeding was issued. If such copy is not drawn in the French or English language, a certified translation thereof must be annexed thereto. The return of service is also made in the ordinary way, but with the notation, where necessary, of the fact that a translation was annexed to the copy served. The capacity and the signature of the serving officer must be attested by the prothonotary of the Superior Court of the district where he resides. The Lieutenant Governor may attest the signature of and the declaration by the prothonotary, and have the original proceeding with the return of service and the taxed bill of costs transmitted to the Department of External Affairs.

In the Province of Ontario, Rule 31 of the Rules of Practice provides that where in a civil or commercial matter pending before a court or tribunal of a foreign country, a letter of request from such court or tribunal for service on a person in Ontario of any process or citation in such matter is transmitted to the Supreme Court of Ontario, the following procedure shall be adopted:

(1) The letter of request for service shall be accompanied by a translation thereof in the English language and by two copies of the process or citation to be served, and two copies thereof in the English language.

(2) Service of the process or citation shall, by a direction of a judge, be effected by any sheriff or his authorized agent.

(3) Such service shall be effected by delivering to and leaving with the person to be served one copy of the translation thereof, or may be effected in such other manner as is directed by the letter of request.

(4) After service has been effected, the process shall be returned to the Registrar of the Supreme Court, together with the evidence of service by affidavit of the person effecting the service, sworn before a notary public and verified by his seal, and particulars of charges for the cost of effecting such service.

(5) The Registrar of the Supreme Court shall return the letter of request for service, together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the said court.

(6) Nothing in this rule prevents service from being effected in any other manner in which it may now be made.

Similar provisions exist in other provinces in Canada.

As with the treaty countries, "letters of request" (also referred to as letters rogatory) need not follow a prescribed form, provided that they contain the essential information needed to identify and serve the intended recipient. The documents will be forwarded by the Department of External Affairs to the provincial Ministry of Justice or Department of the Attorney-General for service by the sheriff or bailiff in the jurisdiction concerned, as the Department of External Affairs does not employ the services of private process-servers. Proof of service, if effected, will be by sheriff's or bailiff's Affidavit of Service which will accompany the original or certified true copy of the documents; the duplicate set being left with the person served. The documents are returned to the Department of External Affairs, together with the sheriff's or bailiff's account for service for transmission to the foreign diplomatic mission or consular officer. Service through the diplomatic channel takes considerably longer than making a direct request to the sheriff in the jurisdiction concerned. Whichever method is employed, the foreign diplomatic mission is responsible for the payment of the sheriff's account for service or for attempted service.

To summarize, when documents for service are received in the Department of External Affairs, either from treaty or non-treaty countries, they are transmitted to the competent provincial authorities for action. The served documents are returned to the foreign embassy with proof of service and the sheriff's account for service or attempted service. The Department of External Affairs strives to ensure that these accounts are settled promptly so that provincial judicial co-operation will not be impaired.

It should be noted that formal service of foreign judicial documents as set forth above does not *per se* require the recognition or enforcement in Canada of any ensuing judgment, decree or order, which may be rendered by a foreign tribunal. Foreign judgments, decrees or orders cannot be enforced in Canada by means of a request for judicial assistance, and the Department of External Affairs will return any such request received, together with the explanation that an individual seeking to enforce a foreign judgment, decree or order must institute an action for that purpose before a competent court of one of the provinces or territories. As with most legal proceedings, it is necessary to retain counsel to conduct the suit. The Department of External Affairs does not involve itself in the

recognition and enforcement of foreign judgments as they are matters outside the scope of letters rogatory.

II. *Service of Judicial Documents Outside Canada*

Persons who have documents to be served abroad must, in having that service carried out, ensure that it will satisfy the requirements of the Canadian court and be consistent with the law of the place where it is to be effected. Even when a treaty permits several forms of service in a foreign country, the mode of service must conform to the requirements of the Canadian court which ordered it.

The service of court documents is possible as well in countries with which Canada has no treaties; but there are some countries (e.g. Switzerland) that require documents to be served within their borders by their own state officials. In such cases, a request must be made to the judicial authorities for assistance in effecting the service.

A. Treaty and Entente Countries

Canada is bound by several bilateral treaties which apply to civil and commercial matters, including non-contentious matters. The provisions of these treaties are generally quite similar. (For a list see Appendix B).

A request for service of judicial or extrajudicial documents must be sent by a Canadian diplomatic or consular officer to the competent authority of the state where the documents are to be served, requesting that service of the documents be effected. The request for service must be drawn up in the language of the state where service is to be effected. It must indicate the names and descriptions of the parties, the name, description and address of the recipient, and the nature of the documents to be served, and must enclose the documents to be served in duplicate. In this connection, it is important to provide the Department of External Affairs with complete instructions as to the manner of service, i.e., which documents are to be left with the person who is served and which are to be returned, and which documents must be completed by the server to furnish proof of service. These documents are either to be drawn up in the lan-

guage of the country of execution or to be accompanied by a translation in such language in duplicate. Such translation must be certified as correct by a diplomatic or consular officer of the state from whose territory the documents emanate. The translation should be done prior to forwarding the documents to the Department of External Affairs for onward transmission to the Canadian Embassy, as the Department is not able to provide translation facilities for private cases. The public translator should attach a formal certificate identifying the documents, stating his qualifications to produce a true and correct translation so that the Canadian consular representative may be assured that the official consular certification concerning translation of the documents is acceptable.

Each state specifies to whom the request should be forwarded. Service is effected according to the local laws of the state of execution, but the latter may comply with special Canadian requests where these are not incompatible with its own law. Some treaties also allow the following methods of service without any request to, or intervention of, the authorities of the state of execution: (1) service by a diplomatic or consular officer of the requesting state; (2) service by an agent appointed for that purpose either by a judicial authority of the requesting state, or by the party on whose application the document was issued; (3) service by mail; (4) any other method of service which is not contrary to the law existing at the time of service in the state of execution or which is recognized by the law existing at the time of service in the state from which the documents emanate.

Compulsion cannot be used, and the validity of the service is a matter to be determined by the respective courts of the parties to the treaties.

Due to staff limitations and distances involved, the Department of External Affairs is not in a position to provide the services of a consular officer to effect service. Also, because of the difficulty of retaining a private agent who would be willing to accept the task of effecting service, and the inability of such a private agent to produce anything more than a personal certificate of service, the most satisfactory method of proceeding is through official channels by local authorities following transmission through the Canadian Embassy.

If the person to be served is prepared to attend at the Canadian Embassy in the foreign country in order to accept service, Canadian consular officers may be willing to make the necessary arrangements for this purpose.

Most treaties provide that a requested state may refuse assistance if the authenticity of the request is not established or the sovereignty or safety of the requested state may be compromised by executing the request.

In every instance where a request for service is not executed by the authority to whom it has been sent, the latter is required to promptly inform the Canadian diplomatic or consular officer who has forwarded the request, stating the grounds on which the execution of the request has been refused or the competent authority to whom it has been forwarded for service.

The authority executing the request for service must provide a certificate proving the service or explaining the reason why such service has been prevented, and setting forth the fact, the manner, the place and the date of such service or attempted service; and shall send the certificate to the Canadian diplomatic or consular officer by whom the request for service was made. The certificate of service or of attempted service is placed on one of the duplicates or attached thereto. As noted previously, proof of service is based on certification rather than a sworn affidavit. It is probable that a Canadian court will accept such a certificate as evidence that the service was carried out in accordance with the required procedure under the local foreign law.

Finally, Canada is obliged to pay for the service according to the local tariff in the state of execution. Thus, when forwarding the documents to the Department of External Affairs, it is important to include an undertaking to reimburse the Department for these charges together with any expenses which might be incurred in carrying out the request.

Service of Quebec judicial documents in France may be made in accordance with the provisions of the 1977 *Entente entre le Québec et la France sur l'entraide judiciaire en matière civile, commerciale et administrative* (see Appendix A). The methods provided for in the entente are not exclusive.

B. Non-Treaty and Non-Entente Countries

1. Civil and Commercial Matters

In the absence of a civil procedure treaty or entente, the question of service of documents and the facilities provided for such procedure are based on the customary courtesies granted under the comity of nations. Thus, service of court documents

abroad is possible provided the law of the place where the service is to be effected is followed.

From past experience, the Department of External Affairs has found that it is more satisfactory for the Canadian law firm requiring service of documents to contact a lawyer in the locality of the required service who will advise on procedure and, if necessary, assume the responsibility of carrying out such service.

Service by a Canadian diplomatic or consular officer is effected without any request to or intervention by the local authorities. While a local bailiff can employ measures of compulsion if needed, neither the diplomatic or consular officer nor the local legal agent has this authority. Moreover, some states restrict the activities of diplomatic or consular officers in this field to serving their own nationals, or nationals of a third state. If service by a Canadian officer is possible, this method is easier and quicker, as translations of the documents are not required. Furthermore, as these officers are *ex-officio* Commissioners for Oaths under provincial and federal evidence statutes, they can complete the necessary Affidavit of Service. However, as noted previously, Departmental policy provides that Canadian diplomatic or consular officers may serve legal documents only on the premises of the Canadian mission. Thus, the persons to be served *must* be willing to attend at the Canadian mission to accept service, or this method cannot be used.

In the United States, the United Kingdom and other common law countries, there are usually no prohibitive rules in force, and, as in Canada, the local law permits the service of legal documents to the fullest extent without any intervention by the competent authorities. Canadian lawyers can simply contact the sheriff or a local lawyer practising in the jurisdiction for assistance. Translations are not normally required and proof of Affidavit of Service is the usual practice. Names and addresses of local sheriffs and law firms can be found in *Martindale & Hubbell* or any other international legal directory.

2. Criminal Matters

Foreign jurisdictions often do not extend assistance for service of certain kinds of legal documents in criminal matters. States which refuse to serve criminal judgments regard them as part of penal execution for which no judicial assistance is rendered except by Agreement. Excluded from service are, as a rule, orders to a convicted person to serve his sentence, or to pay fines or costs of proceedings.

Conclusion

In the case of all countries other than common law countries, in which a document is to be served, the Canadian lawyer should address his request to the Department of External Affairs, Legal Advisory Division. The lawyer should include in his letter an undertaking to defray the costs of service, and any special instructions he may have. When service has been ordered by a court, a copy of such an order should accompany the document. Of course, complete information as to the name and address of the person to be served must be provided. The requirements as to the number of copies and translations vary in different countries. The Department of External Affairs has found that it is most expedient to have two sets of documents, one marked Set "A", and the other Set "B", each set having attached to it a translation into the language of the country concerned. Instructions can then be provided to Canadian missions to advise the local authority effecting service to serve Set "B" personally on the addressee, and to return Set "A" with proof of service. In cases of uncertainty regarding procedures to follow, the Department of External Affairs is prepared to make enquiries through the Canadian mission in the country concerned.

III. *Evidence to be Obtained in Canada*

Obtaining evidence in the form of testimony or statements or the production of documents for use in proceedings in a foreign tribunal is the second category of judicial assistance afforded to foreign tribunals and to litigants before such tribunals by Canadian federal or provincial authorities. Because there are no prohibitive rules in force in Canada with regard to the taking of evidence in civil or in criminal cases, an application to a Canadian court is required only where compulsion of the witness is necessary. In these circumstances, the services of a Canadian lawyer are needed.

A. Treaty and Entente Countries

The treaties and entente referred to in section I above also provide for the taking of evidence on a reciprocal basis between Canada and the states concerned in non-penal matters.

The treaties indicate the procedures under which letters of request issued in the requesting state should be transmitted to the competent Canadian authority. If it is determined that the authority to whom the letters have been addressed is without jurisdiction, they will be forwarded without any further request to the competent authority in Canada. The letters of request must be drawn up in the language of the authority to whom the request is addressed (English in the common law provinces, English or preferably French in the Province of Quebec) or be accompanied by a translation in such language certified as correct by a diplomatic or consular officer of the state making the request or by an official or sworn translator in Canada or the other country concerned. The requested authority can apply its own procedure in this regard. However, it may give effect to special demands in the letters of request if not incompatible with its own law.

Letters of request shall state the nature of the proceedings for which the evidence is required, and the full name and descriptions of the witnesses. They shall either be accompanied by

a list of interrogatories and a translation thereof or shall request the competent authority to allow such questions to be asked *viva voce* if the parties or their representative so desire.

A universal provision in these treaties states that the judicial authority to which letters of request are addressed must give effect thereto by the use of the same compulsory measures as are employed in the execution of a commission or order emanating from the authorities of its own state.

Certain situations may arise where Canada will refuse to execute the request:

(a) if the authenticity of the letters of request is not established;

(b) if the execution of the letters in question does not fall within the function of the judiciary;

(c) if it is considered that Canada's sovereignty or safety would be compromised thereby.

The diplomatic or consular officer by whom the letters of request are transmitted shall, if he so desires, be informed of the date and place where the proceedings will take place in order that he may inform the interested parties who shall be permitted to be present in person or be represented if they so desire.

Most treaties provide that evidence may also be taken, without any request to or intervention of the Canadian authorities, by a person in Canada directly appointed for that purpose by the court of the state of origin. A consular officer acting for the state of origin or any other suitable individual may be so appointed. Of course, such a person lacks any compulsory powers in Canada. The evidence may be taken in accordance with the procedure recognized by the law of the state of origin.

A person appointed by Canada may exercise compulsory powers where needed. In such a situation the local laws of procedure apply.

The treaties provide a right to counsel for those examined.

With regard to costs, the requesting state does not pay a fee for the execution of the letters of request, but is required to pay the expenses and fees of witnesses and translators, and the costs of obtaining documents and other fees and charges if applicable, according to the tariff in the requested province.

In every instance where the letters of request are not executed by the authority to whom they are addressed, the latter will promptly inform the diplomatic or consular officer by whom they were transmitted stating the grounds on which the

execution has been refused, or the judicial authority to whom they have been forwarded.

Although the treaties permit the transmission of the letters of request direct from the foreign embassy or consulate to the provincial Attorney-General's Department, a practice has developed of transmitting them through the Department of External Affairs to the provinces. In a number of cases the foreign lawyer transmits the documents directly to the provincial authority designated in the treaty as a matter of expeditious procedure.

The 1977 entente between France and the Province of Quebec contains elaborate provisions for the transmission and execution of rogatory commissions in civil, commercial and *administrative* matters (see Appendix A).

Canada is not a party to any multilateral treaty on the taking of evidence abroad in civil or commercial matters, such as the 1965 Hague Convention.

B. Non-Treaty and Non-Entente Countries

An application for an order to have evidence taken in Canada can be made under the Canada Evidence Act (Revised Statutes of Canada, 1970, c. E-10) for criminal and civil matters or under the provincial Evidence Acts for civil matters. (For instance, Ontario Evidence Act, Revised Statutes of Ontario, 1970, c. 151, s. 60.)

According to section 43 of the Canada Evidence Act:

> "Where upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in the Commonwealth and Dependent Territories, or in any foreign country, before which any civil or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of a party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, the court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in the order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writ-

ings or documents relating to the matter in question that are in the possession or power of such party or witness."

It should be noted that the words "court" and "judge" include the Supreme Court of Canada and any of its judges.

Most often a counsel for the applicant is appointed by the court to take the evidence. He has the authority to compel attendance of witnesses and production of documents, and his orders may be enforced in the same manner as those made by the court or judge authorizing the taking of evidence. It is also customary for the Department of the Provincial Attorney-General to act as the local solicitor for the foreign prosecutor.

Although, in criminal matters, in principle Canadian courts will not give assistance for proceedings prior to the taking of the actual evidence for trial, such assistance has been given through letters rogatory at the request of an investigating magistrate.

There are two forms in common usage, and either is acceptable to Canadian courts — letters rogatory or letters of request. (A sample form of a letter of request is attached as Appendix C.)

If the charges which are the subject of the rogatory commission are criminal and the Crown in right of Canada does not object, the Canadian counsel representing the requesting state will make application for an order that the request from the competent foreign tribunal contained in the letters rogatory be granted. In a civil action, it is customary for the foreign parties to retain counsel in Canada. Such counsel will make application under the appropriate Evidence Act to the competent provincial court to allow the establishment of proceedings requested in the letters rogatory.

Section 44 of the Canada Evidence Act provides that:

"Upon the service upon the party or witness of an order referred to in section 43, and of an appointment of a time and place for the examination of such party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, then by one of the persons named, and upon payment or tender of the like conduct money as is properly payable upon attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a case pending in such court or before such judge."

Upon any examination of parties or witnesses under the authority of an order made pursuant to the Canada Evidence Act, the oath must be administered by the person authorized to

take the examination or, if more than one, then by one of such persons. Any person so examined has the like right to refuse to answer questions tending to incriminate himself, or other questions, as a party or witness would have in any case pending in the court by which the order is made. No one can be compelled to produce under any such order, any writing or other document that he could not be compelled to produce at a trial involving a criminal matter. In the absence of any order in relation to such evidence, letters rogatory from any foreign tribunal in which the criminal matter is pending are to be deemed to be sufficient evidence in support of such application.

An application for an order to take evidence of witnesses within the jurisdiction may also be made under section 60 of The Evidence Act of Ontario, and similar provincial statutes depending upon the requested province. In the Province of Quebec, the Special Procedures Act governs the procedure to be followed (Revised Statutes of Quebec, 1977, chap. 27, art. 9-20).

As under the federal statute, a local lawyer makes application for an order for the obtaining of the testimony of a witness within the jurisdiction, and usually has himself appointed commissioner for the purpose. The production of every kind of document may also be ordered and the person appointed has all necessary powers to compel the attendance of witnesses and production of documents.

In considering letters rogatory the Canadian court must be satisfied that the essential elements of the application are present, namely:

(1) that the letters constitute a formal request from a court in a foreign jurisdiction to a Canadian court. A request by a foreign embassy or consulate is not sufficient.

(2) that the foreign court is a competent tribunal before which a matter is pending. This means that it must be a court of law or equity rather than an administrative tribunal and must be "of competent jurisdiction", *i.e.*, be a tribunal with all the sanctions possessed by a court of law to enforce its orders.

(3) that the foreign court is desirous of obtaining testimony from witnesses within the local jurisdiction.

(4) that the evidence to be taken will be used at the foreign trial and is not to be used in the nature of discovery to determine whether it is sufficient to support the initiation of a foreign suit or action. This means that an order will

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.

IV. *Evidence to be Obtained Outside Canada*

A. Treaty and Entente Countries

In all of Canada's bilateral treaties on civil procedure, there are provisions on how and to whom letters of request issued in Canada should be addressed (a list is attached as Appendix B). They may also be transmitted through diplomatic channels and must be accompanied by a translation that is certified correct by the Canadian diplomatic or consular officer abroad before they are forwarded to the local authority for execution. The procedures to be followed in taking evidence vary from treaty to treaty. The requested authority may follow its own procedure, a list of interrogatories may accompany the letters, or the local authority may allow such questions to be asked *viva voce* as the parties or their representatives may wish to ask.

Most treaties provide that evidence may also be taken without any request to or intervention of the state of execution by a person in that state directly appointed by the court of the state of origin. Any other suitable person may be so appointed. In exceptional circumstances, a diplomatic or consular officer may, with the approval of the Department of External Affairs, be authorized to take evidence. Of course, such a person lacks any compulsory powers, but the evidence may be taken in accordance with the procedures of the state of origin. On the other hand, a person appointed by the requested authority may exercise compulsory powers when needed.

In Quebec, the 1977 *Entente entre le Québec et la France sur l'entraide judiciaire en matière civile, commerciale et administrative*, deals with the transmission and execution of rogatory commissions. This entente is not exclusive and other methods may be used.

B. Non-Treaty and Non-Entente Countries

1. Civil and Commercial Matters

The requirements of states for the taking of evidence on their territories vary greatly. Some states, *e.g.* common law states, tend to facilitate the taking of evidence by foreign courts with little formality. If the witness is prepared to testify voluntarily, there is often no obstacle to the taking of his evidence, and the intervention of the host state need not be sought. This system is sometimes called passive judicial co-operation. If compulsion is required, however, an application to the local courts is necessary. Other states, (*e.g.* certain civil law jurisdictions) have stringent requirements in this regard and reserve evidence-taking activities exclusively to their own government or court officials.

In Canada the rules of practice and the Evidence Acts of the various provinces apply. In Quebec, the Code of Civil Procedure is relevant. These rules of practice and statutory enactments render possible the taking of evidence in most foreign states from unwilling witnesses, through the use of the compulsory powers of the courts of execution.

An application for a commission to take the testimony of a person outside the jurisdiction can be obtained at the discretion of the court concerned. In Ontario, application is made pursuant to Rule 276(1) of the Ontario Supreme Court Rules. The application must be supported by affidavit evidence which establishes that the witness is material and necessary, that the applicant cannot properly proceed to trial without his evidence, and the reasons why the witness cannot attend the trial. The practice and procedure for the examination are found in the Ontario Supreme Court Rules 279-289 inclusive.

It is worth repeating that in common law as well as civil law countries, if the witness must be compelled to give his testimony, the Canadian litigant must not only obtain authority from his own courts to take testimony outside the jurisdiction, but he must also obtain authorization from the foreign court before he can proceed. This latter authority is most often sought by use of letters of request addressed from the Canadian court to the foreign court or "competent authority".

There are normally three methods available for the taking of evidence abroad:

METHOD I: Taking of evidence by a person appointed and

authorized *by the courts of the state of origin* — usually by commission or by appointment as an examiner to take evidence abroad;

METHOD II: Taking of evidence *by the courts of the state of execution*, pursuant to letters of request;

METHOD III: Taking of evidence by an examiner appointed and authorized *by the courts of the state of execution*, pursuant to letters of request.

If it is intended to have evidence in a particular state taken by a Commissioner or by appointment of a Special Examiner (Method I), the Department of External Affairs should be consulted to ascertain whether this procedure is authorized in that state. Normally its use is confined to cases where the witness is willing to testify voluntarily. It is an effective method for use when it is desired that the witness should be examined and cross-examined by legal representatives of the parties. In states where the taking of evidence by any person appointed by the courts of the state of origin is not permitted by the domestic law, the procedure of Letters of Request must be used.

In principle, letters of request (Method II) can normally be used in nearly every state of the world. The letters are addressed to the "competent authorities" of the state of execution rather than to a named court. The Department of External Affairs then ensures that the documents are transmitted by its Embassy to the proper tribunal in the state of execution. The documents should be transmitted with at least one extra copy thereof, together with an undertaking to pay costs to the Department of External Affairs. If the parties are represented by legal agents in the state of execution, their names and addresses should also be provided. Where they are not so represented, the documents should be accompanied by complete interrogatories and cross-interrogatories. The authorities in the state of execution exercise compulsory powers and the testimony may be subject to local perjury laws. It may be difficult to ensure that evidence taken by this method will be taken in accordance with the procedural rules of a particular province. It may also involve considerable delay. Thus, the use of this method is confined to cases where a witness may need to be compelled to testify.

Method III combines the advantages of the first and second procedures. If it is available, and if there is doubt as to the willingness of the witness to testify, it should be adopted.

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.

V. *Miscellaneous Requests*

The Department of External Affairs cannot assist foreign tribunals in compelling a witness found in Canada to attend a hearing or to submit to an investigation outside of Canada.

It must also be pointed out that a distinction must be drawn between executive assistance and judicial assistance. In Canada, no court order is needed to obtain access to public records such as motor vehicle registration, birth and death and real property registration records. The courts are not involved and the investigator can simply apply to the municipal, provincial or federal authority concerned for the information required, subject to section 54 of the Canadian Human Rights Act (Statutes of Canada 1976-77, Chapter 33). This is usually available on payment of the requisite fee. In the same way, Canadian and foreign law enforcement agencies exchange a wide variety of information under various liaison agreements, without involving the courts.

To summarize, the courts of Canada can lend their assistance to a foreign court in criminal, as well as in civil and commercial proceedings. Only rarely would a court refuse to co-operate. One exception might involve those cases which are political in nature. Canadian courts have also declined to entertain applications for orders to enforce foreign penal, fiscal, confiscatory, or other public laws or judgments of a foreign state.

In all cases, the Department of External Affairs' primary consideration will be the furtherance of the administration of justice through effective co-operation with the judicial authorities of other states, subject to the condition of reciprocity and the limitations imposed by Canadian law and international treaties.

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APPENDIX A

SCHEDULE

ENTENTE BETWEEN QUÉBEC AND FRANCE REGARDING JUDICIAL MUTUAL AID IN CIVIL, COMMERCIAL AND ADMINISTRATIVE MATTERS [TRANSLATION]

TITLE I

DESIGNATION OF CENTRAL AUTHORITIES

The ministries of justice of France and Québec are designated as the Central Authorities in charge of receiving applications for judicial mutual aid in civil, commercial and administrative matters and of dealing with them.

For that purpose, these Central Authorities communicate directly with each other.

Applications for judicial mutual aid and the documents attached thereto, as well as the documents attesting to their execution are exempt from authentification or any similar formal procedure. However, such documents must be so drawn up as to make their authenticity apparent and, in particular, must bear the official seal of the authority qualified to issue them.

TITLE II

TRANSMISSION AND DELIVERY OF JUDICIAL AND EXTRAJUDICIAL WRITTEN PROCEEDINGS

1. Applications for service and notice of judicial and extrajudicial written proceedings in civil, commercial and administrative matters, intended for natural or artificial persons residing in France or in Québec, are forwarded through the Central Authorities who are entrusted with dealing with them.

2. The application indicates the authority issuing the proceeding, the name and capacity of each party, the name and address of the person for whom it is intended and the nature of the proceeding.

The proceedings to be notified or served that are attached to the application are sent in duplicate. The application and the proceedings are drawn up in the French language or accompanied with a translation in that language.

3. The petitioned authority confines itself to delivering the proceeding to the person for whom it is intended by such means as it considers most appropriate. Delivery or the attempt to make delivery does not give entitlement to the reimbursement of costs, even if the address of the person for whom the proceeding is intended is insufficient, incomplete or inaccurate.

The petitioning authority may ask the petitioned authority to undertake or order the service or notice of the proceeding in a particular form consistent with the legislation of the petitioned authority. The payment of the costs incurred by the use of a particular form, especially by the intervention of a law official, is incumbent on the petitioning authority.

4. Delivery is proved either by a receipt, dated and signed by the person concerned, or by an attestation or certificate from the petitioned authority. The receipt or attestation may appear on one of the copies of the proceeding to be served or notified. The attestation states the form, place and date of delivery, the name of the person to whom the proceeding was delivered and, where that is the case, the refusal of the person to whom it is addressed to accept the proceeding or the fact that prevented the delivery from being made.

The receipt or attestation, together with a copy of the proceeding to be served or notified, may be addressed directly to the applicant by the authority that drew it up, without the intervention of the petitioning Central Authority.

5. The petitioned authority may refuse to act on an application for notice or service if it considers that it might entail interference in its public order or jurisdiction. If it refuses to act, the petitioned authority informs the Central Authority without delay, giving its reasons therefor.

6. In civil, commercial and administrative matters, the preceding provisions do not impede

(*a*) the faculty of using diplomatic or consular channels to carry out directly and without restraint the service of judicial and extrajudicial written proceedings in keeping with the usages obtaining between France and Québec;

(*b*) the faculty of giving notice of proceedings directly by mail to persons in France or in Québec;

(*c*) the faculty of the persons interested in a judicial suit, of having proceedings served or notified by law officials, civil servants or other qualified persons in France or in Québec;

(*d*) the faculty of law officials, civil servants or other qualified persons in France or in Québec of having proceedings served or notified directly by law officials, civil servants or other qualified persons in France or in Québec. For such purpose, the proceeding may be transmitted directly, in France, to the Chambre nationale des huissiers de justice in Paris and, in Québec, to the Bureau de l'administration de la Loi des huissiers at the ministry of justice in Québec, with instructions to send them to a territorially competent bailiff. In this case, the applicant must either pay the costs of service in advance, in a lump sum, or make a written undertaking to pay them.

7. Where, for the purposes of service or notification, it has been necessary to transmit a writ of summons or an equivalent proceeding to France or to Québec and where the defendant does not appear, the judge may suspend his decision until it is established that the proceeding has been served or notified.

TITLE III

TRANSMISSION AND EXECUTION OF ROGATORY COMMISSIONS

1. In civil, commercial and administrative matters, the French and Québec judicial authorities, in conformity with the provisions of their legislation, may give each other a rogatory commission for the purpose of instituting the trial and judicial proceedings they consider necessary, except proceedings for execution or measures of conservation.

Such provision does not impede the faculty of executing rogatory commissions through diplomatic or consular channels in keeping with the usages obtaining between France and Québec.

2. A trial proceeding may be applied for so as to enable the persons concerned to obtain grounds of proof in a future proceeding, in conformity with the law of the petitioned judicial authority.

3. Rogatory commissions are forwarded through the Central Authorities in conformity with Title I hereinabove.

Where the rogatory commission has not been executed, wholly or partly, the petitioned authority informs the peti-

tioning authority thereof through the same channels, giving the reasons therefor.

4. Rogatory commissions are drawn up in the French language.

They contain the following indications, to facilitate their execution:

(*a*) the petitioning authority and, if possible, the petitioned authority;

(*b*) the identities and addresses of the parties and, as the case may be, of their representatives;

(*c*) the nature and object of the suit;

(*d*) the trial proceedings or other judicial proceedings to be carried out;

(*e*) the names and addresses of the persons to be heard;

(*f*) the questions to be asked of the persons to be heard or the facts on which they must be heard;

(*g*) the documents or other objects to be examined;

(*h*) as the case may require, the application for receiving a sworn or solemnly affirmed deposition and, where that is the case, the indication of the formula to be used;

(*i*) where that is the case, the special form the use of which is required.

5. The rogatory commission is executed by the petitioned judicial authority in conformity with its law unless the petitioning judicial authority has asked that it be proceeded with in a particular form.

If requested in the rogatory commission, the questions and answers are integrally transcribed or recorded. The judge may ask and authorize the parties and their defendants to ask questions; such questions must be drawn up in or translated into the French language. The same holds true for the answers to these questions.

The appointed judge informs the appointing jurisdiction, if it so requests, of the place, day and time fixed for the execution of the rogatory commission.

6. The execution of a rogatory commission may be refused by the petitioned authority if it considers it to be beyond its powers or that it might entail interference in its public order or jurisdiction.

7. The execution of the rogatory commission takes place without costs or tax for the services rendered by the petitioned judicial authority.

However, the amounts due to witnesses, experts and interpreters are to be paid by the petitioning authority. The same holds true for the costs resulting from the use of a special form required by the petitioning authority.

In such cases, the reimbursement of the costs of execution is guaranteed by the applicant in the form of a written undertaking attached to the rogatory commission.

8. The documents evidencing the execution of the rogatory commission are forwarded through the Central Authorities.

TITLE IV

JUDICIAL AID AND "JUDICATUM SOLVI" SURETY

1. French residents in Québec and Québec residents in France may receive judicial aid, in Québec and in France, respectively, in conformity with the law of their place of residence.

2. The certificate attesting to the insufficiency of the resources of the applicant is issued to him by the authorities of his place of residence.

The authority in charge of ruling on the application for judicial aid may ask the authorities of the place of origin of the applicant for supplementary information. Such supplementary inquiries are forwarded through the Central Authorities.

3. No surety or deposit, under any appellation whatever, may be required, in virtue of any law of France or Québec, of French residents in Québec or Québec residents in France, by reason of either their foreign nationality or their lack of domicile or residence.

TITLE V

ACTS OF CIVIL STATUS

The competent authorities of the civil status in France and the prothonotaries in Québec issue, free of charge, copies of or extracts from acts of civil status.

TITLE VI

APPLICATIONS FOR INQUIRY — PROTECTION OF MINORS AND OF ALIMENTARY CREDITORS

1. The Central Authorities may, as an act of judicial mutual aid, if nothing prevents it, address to each other requests for information or applications for inquiry within the scope of civil or commercial proceedings of which their judicial authorities are seized and, in particular, transmit to each other, free of charge, copies of judicial decisions.

2. Within the scope of proceedings respecting the custody or protection of minors, the Central Authorities

(*a*) communicate to each other, at each other's request, any information concerning measures taken for the custody or protection of minors, the carrying into effect of such measures and the material and moral situation of such minors;

(*b*) lend each other mutual aid in locating in their territory and obtaining the voluntary return of displaced minors, where the right of custody has simply been ignored;

Where the right of custody is disputed, the Central Authorities refer it urgently to their competent authority to take the necessary measures of protection and to decide the application for the return of the minor, taking into account all the elements of the case, particularly the decisions and measures already taken by the French or Québec judicial authorities;

(*c*) cooperate with a view to arranging visiting rights for the benefit of the parent who does not have custody, and to insuring respect of the conditions imposed by their respective authorities for the carrying out and free exercise of these visiting rights, as well as the undertakings of the parties in regard to that parent.

3. Within the scope of proceedings concerning the recovery of maintenance abroad, the Central Authorities lend each other mutual aid in locating and hearing alimentary debtors staying in their territory and in obtaining the voluntary recovery of alimentary pensions.

TITLE VII

RECOGNITION AND EXECUTION OF DECISIONS REGARDING THE STATUS AND CAPACITY OF PERSONS AND PARTICULARLY THE CUSTODY OF CHILDREN AND ALIMENTARY OBLIGATIONS

1. Decisions regarding the status and capacity of persons and particularly the custody of children and alimentary obligations handed down by jurisdictions sitting in France and in Québec, respectively, have *pleno jure* the authority of *res judicata* in France and in Québec, if they meet the following conditions:

(*a*) the decision is issued by a competent jurisdiction according to the rules regarding concurrent jurisdictions obtaining in the territory of the authority where the decision is executed;

(*b*) the decision has applied the law applicable to the dispute under the rules of solution of conflicts of laws obtaining in the territory of the authority where the decision is executed;

(*c*) the decision, according to the laws of the political entity in which it was handed down, is not subject to any further ordinary recourse or appeal;

(*d*) the parties have been regularly summoned, represented or declared in default;

(*e*) the decision does not include anything contrary to public order under the responsibility of the authority in whose territory it is invoked;

(*f*) a dispute between the same parties, based on the same facts and having the same object,

— is not pending before a jurisdiction of the petitioned authority;

— has not given rise to a decision rendered by a jurisdiction of the petitioned authority;

— has not given rise to a decision rendered in a third political entity, meeting the conditions necessary for its recognition in the territory of the petitioned authority.

2. No decision regarding the status and capacity of persons and particularly the custody of children and alimentary obligations may give rise to any forced execution by the authorities having recognized them in accordance with the preceding paragraph until it has been declared executory.

3. *Exequatur* proceedings in respect of the decision are governed by the law of the authority of the place where the decision is executed. The petitioned judicial authority confines itself to verifying whether the decision which is the subject of the application for execution meets the conditions set forth in paragraph 1 of this title, without making any examination of the case on its merits.

4. The party to an action who invokes the authority of a judicial decision or demands its execution must file:

(*a*) a properly authenticated transcript of the decision;

(*b*) the original of the writ of service of the decision or of any other proceeding in lieu of service;

(*c*) a certificate of the clerk establishing that no opposition or appeal is pending against the decision;

(*d*) where that is the case, a copy of the summons of the party who failed to appear at the trial, certified true by the clerk of the jurisdiction having rendered the decision.

5. Applications to obtain the execution of a judicial decision handed down in France or Québec dealing with the custody of children or alimentary obligations may be forwarded through the Central Authorities.

APPENDIX B

COUNTRIES WITH WHICH CANADA HAS A CIVIL PROCEDURE CONVENTION

Austria	Canada Treaty Series, 1935, No. 16
Belgium	Canada Treaty Series, 1928, No. 16
Czechoslovakia	Canada Treaty Series, 1928, No. 17
Denmark	Canada Treaty Series, 1936, No. 4
Finland	Canada Treaty Series, 1936, No. 5
France	Canada Treaty Series, 1928, No. 15
Germany	Canada Treaty Series, 1935, No. 11
Greece	Canada Treaty Series, 1938, No. 11
Hungary	Canada Treaty Series, 1939, No. 6
Iraq	Canada Treaty Series, 1938, No. 12
Italy	Canada Treaty Series, 1935, No. 14
Netherlands	Canada Treaty Series, 1936, No. 2
Norway	Canada Treaty Series, 1935, No. 15
Poland	Canada Treaty Series, 1935, No. 18
Portugal	Canada Treaty Series, 1935, No. 17
Spain	Canada Treaty Series, 1935, No. 12
Sweden	Canada Treaty Series, 1935, No. 13
Turkey	Canada Treaty Series, 1935, No. 19
Yugoslavia	Canada Treaty Series, 1939, No. 4

NOTE: Copies of the above treaties can be ordered by mail at a cost of approximately $2.20 each from the following office:

Publishing Center,
Department of Supply and Services,
45 Sacred Heart Blvd.
HULL (Quebec), K1A 0S9.

Order Desk: (613) 994-3475

APPENDIX C

LETTER OF REQUEST
(TO TAKE EVIDENCE)

To the competent judicial authority of _____
(Name of Country)
in the

Whereas a Civil (Commercial) action is now pending in the _____
(Name of Court)
in _____ in Canada, in which _____ is
(Country of Origin)
Plaintiff; and _____ is Defendant, and in the said action the Plaintiff claims _____ ;

And Whereas, it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say _____
(Names and addresses of witnesses).

And it is appearing that such witnesses are resident within your jurisdiction, _____ (The Chief Justice or other presiding judge of the Court in question) have the honour to request, and do hereby request, that for the reasons aforesaid, and for the assistance of the said Court, you will be pleased to summon the said witnesses _____ (and such other witnesses as the agents of the said Plaintiff and Defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint, before you or such other person as according to your procedure is competent to order the examination of witnesses, and that you will order such witnesses to be examined (upon the Interrogatories which accompany this Letter of Request) viva voce, touching the said matters in question, in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will permit the agents of both the said plaintiff and defendant or such of them as shall be present to be at liberty to examine (upon interrogatories and viva voce upon the subject-matter thereof or arising out of the answers thereto) such witnesses as may, after due notice in writing, be produced on their behalf, and give liberty to the other party to cross-examine the said witnesses (upon cross-interrogatories and viva voce) and the party producing the witness for examination, liberty to re-examine him viva voce.

And I further have the honour to request that you will be pleased to cause (the answers of the said witnesses and all additional viva voce questions, whether on examination, cross-examination, or re-examination) the evidence of such witnesses to be reduced into writing and all books, letters, papers, and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal or in such other way as is in accordance with your procedure and to return the same together with the interrogatories and cross-interrogatories, and a note of the charges and expenses payable in respect of the execution of this request, through the Canadian Consul from whom the same was received for transmission to _____
(Name of the Court)

And I further beg to request that you will cause me, or the agents of the parties if appointed, to be informed of the date and place where the examination is to take place.

Dated the _____ day of _____ 19 _____


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