

Response From Canada to the Questionnaire relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

1. Do you have at your disposal recent precedents delivered pursuant to the 1970 Convention and which would be relevant for the Special Commission? If so, can you provide them to us?

Canada is not party to the Convention.

Quebec: Title III of the *Entente Between Quebec and France Regarding Judicial Mutual Aid in Civil, Commercial or Administrative Matters*¹ provides that the designated authorities mutually assist one another in executing rogatory commissions. Moreover, under the *Special Procedures Act*,² at the request of a court of another province of Canada or a foreign country, the court or a judge may order that a witness who is in Quebec be examined under oath, by means of questions in writing or otherwise, and may summon this witness to appear for examination and order this witness to produce any writing or document mentioned in the order, or any other writing or document relating to the matter that may be in the witness's possession. However, the *Business Concerns Records Act*³ may, in cases where it applies, limit the removal of documents from Quebec.

2. Do you have at your disposal statistics relating to the number of requests to obtain evidence addressed to your State from different States Party to the Convention?

Ontario: No information for requests from Convention or non-convention States. Probably not voluminous though.

Quebec: See Annex. The States Parties from which we receive requests are Germany, Argentina, Spain, France, Italy, Mexico, Norway, Portugal, Romania, Slovakia, Switzerland, the Czech Republic, Turkey and Venezuela.

3. Have you encountered practical difficulties connected with application of the Convention?

Canada is not a party to the Convention.

¹ Voir : Entente annexée à la *Loi assurant l'application de l'entente sur l'entraide judiciaire entre la France et le Québec*, L.R.Q., c. A-20.1.

² *Loi sur certaines procédures*, L.R.Q., c. P-27, art. 9; voir généralement concernant cet article : *Abenheim c. American Home Products Corporation*, J.E. 2000-1714 (C.A.); *Ram Laminating Products Inc. c. Unit Structures Inc.*, [1990] R.D.J. 330 (C.A.); *Asbestos Corp. Ltd. c. Eagle-Picher Industries Inc.*, [1984] C.A. 151; [1984] R.D.J. 253 (C.A.); *Somerset Pharmaceuticals Inc. c. Clayman*, [1994] R.D.J. 254 (C.S.); *Société Asbestos Limitée c. Rodrigue*, [1985] C.S. 840.

³ *Loi sur les dossiers d'entreprises*, L.R.Q., c. D-12.

Quebec: We sometimes experience problems in executing rogatory commissions, the most common ones being that the addresses of witnesses are incorrect and that it takes a long time for us to be reimbursed fees.

4. In light of the terminology used in the Practical Handbook for Service Convention, do you have at your disposal precedents determining whether the Convention is considered as “mandatory” by your State? Do you have at your disposal caselaw determining whether the Convention is considered “exclusive” by your State?

Canada is not a party to the Convention.

5. If your State has stated a reservation under Art.23 of the Convention, has that reservation been asserted to deny performance of requests to obtain evidence from abroad?

Canada is not a party to the Convention.

6. At the Special Commission of 1989, it was recommended that priority be granted to the procedures provided for under the Convention for their requests to obtain evidence located abroad, and that States having made or proposing to make the reservation under Art.23 should limit its scope. Do you consider this recommendation to have been helpful? Has it been applied in practice?

Canada is not a party to the Convention.

7. The Permanent Bureau has been faced on several occasions with the issue whether the Convention applies to arbitration proceedings. This issue was discussed at the Special Commission in May 1985, but the Commission had considered at the time that there was no need to adopt a Protocol in this respect. For its part, the 1989 Special Commission stated that the law of certain countries provided for legal assistance to obtain evidence in arbitration matters, in which case the Convention might be used in order to seek evidence abroad.

The position advised by the Permanent Bureau is that the benefit of the Convention may extend to arbitration proceedings insofar as the arbitration panel sends its request to obtain evidence abroad to a judicial authority of its State, which will then assume forwarding to the State addressed of the request to obtain evidence: as the arbitration panel cannot be treated as a judicial authority for the purposes of the Convention, it cannot itself forward the request to obtain evidence directly to the State addressed.

Have you had occasion to deal with such requests to obtain evidence in the course of arbitration proceedings? Do you share the view of the Permanent Bureau?

Ontario: I doubt that a foreign arbitral panel would be considered a "tribunal of competent jurisdiction in a foreign country", so the Evidence Act provisions would not

apply, even if a foreign court was the intermediary between the arbitrator(s) and Ontario's courts, as proposed by the Secretariat's note. I would not object in principle to such a request coming in such a manner, but I don't think our present law allows it.

Quebec: Not to our knowledge.

8. What is the average time elapsing between receipt of the request to obtain evidence and its performance?

Ontario: No information.

Quebec: A few weeks, a few months and sometimes years. This depends on the difficulty in locating the persons to be examined, the deadlines for fulfilling the request (translation of documents and the specific questions indicated) and the time it takes to obtain an undertaking from the requesting party to reimburse us for the costs incurred.

9. Do you allow the representatives of a requesting Court to take part in the execution pursuant to Art.8 of the Convention?

Ontario: Execution is fairly flexible here. The answer might be Yes, depending on what the question means by "take part in". They could observe some kinds of execution in person.

Quebec: The requesting party has sometimes been represented by counsel during the taking of evidence.

10. Do your Central Authorities accept to receive requests by electronic means to obtain evidence from abroad?

Ontario: Doubtful at present, but likely in the future. The main question would be authentication - how can we be sure where / who the request is coming from? A fax would be less problematic than an electronic transmission, though some court rules require seals that are not readily apparent on faxes.

Quebec: We have not received any to date.

11. Have your authorities received or forwarded requests to obtain evidence requiring the use of new information technology? If so, were these requests fulfilled?

Ontario: I doubt it.

Quebec: We have never received or sent any to date.

12. Would you consider it useful to have a recommendation adopted for the promotion of the use of modern communication technologies? Do you consider that

development of a new instrument ought to be considered in order to deal more specifically with these issues?

Ontario: Possibly - it depends on how specific the resolution was. We would like to hear more discussion before knowing if a new instrument would be needed, or merely a guide to interpreting the present Convention in the light of new technologies.

Quebec: Although Quebec is not a party to the Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters, the Government of Quebec is generally receptive to promoting the use of the new communication technologies. In the particular area in question here, the committee to review the civil procedure, which made its report public on August 28, 2001, stated that it favoured the use of information technologies whose reliability can be assured particularly in exchanging and communicating certain procedural documents.

Additional Comments:

Ontario: Section 60 of the Evidence Act (R.S.O. 1990 c. E.23) provides authority for an Ontario court to respond to a request from a foreign court to gather evidence for it. In particular, it authorizes the court to compel attendance of a witness before a commissioner named in the originating court's request, or before the Ontario court, and to compel production of documents named in the request. A person attending to give evidence is entitled to conduct money (i.e. expenses) on the same scale as in an Ontario action (i.e. not very generous) and to refuse to give evidence that would incriminate him or her, to the same extent as in an Ontario action, and is subject to being examined under oath if that is requested by the foreign court. This probably would go some way towards satisfying our obligations under the Convention if Canada acceded to it, though obviously we would want to examine that in more detail.

STATISTICS

LETTERS ROGATORY

Special Procedure Act (R.S.Q., c. P-27)

An Act to secure the carrying out of the Entente between France and Quebec respecting mutual aid in judicial matters (R.S.Q., c. A-20.1)

Year	Germany	Argentina	Austria	Belgium	Chile	Spain	United States	France	Italy	Mexico	Norway	Portugal	Czech Republic	Slovakia	Romania	Switzerland	Turkey	Total
1987								N/D				1						1
1990	2		12		1			N/D								5		20
1991			1					N/D								3		4
1992	1			3	1	1		N/D			1	3				5	1	16
1993						1		N/D			1	3				6		11
1994			1			3		N/D				2				3		9
1995								N/D	1	1						5		7
1996	2	1	3				2	3				1					1	13
1997	1	1	2					0		1								5
1998								0		1		2			1	6		10
1999	2				1			5				1				2	1	12
2000	1					2		2				2	2			1	1	11
2001	2							1					3			2		8
2002						2	1	1				3	1	1		4		13
Total	11	2	19	3	3	9	3	12	1	3	2	18	6	1	1	42	4	140