"Not in Kansas Any More"

Enforcing American Letters of Request in Canada

By Sandra L. Corbett and Ryan Krushelnitzky

The nature of complex litigation is such that it often does not remain confined within one jurisdiction. Complex matters often cross jurisdictional and even international boundaries. Cross-border issues can arise when proceedings take place in one jurisdiction yet witnesses, parties, and records may be located in another.

For example, a party involved in a complex dispute may want to obtain the testimony and records of a witness located outside of the local jurisdiction hearing the dispute. While the local court does not have the authority to compel a party outside of its jurisdiction to comply with its orders, it does have the option of requesting assistance from the foreign court that does have that authority. Canadian courts are often willing to provide judicial assistance to foreign courts with respect to discovery and document production requests.

The superior trial court of the Canadian province of Alberta—the Court of Queen's Bench—recently dealt with the request of an American court for international judicial assistance in *Richardson v. Shell Canada Ltd.*, 2012 ABQB 170 (Can.). This case decision, written by the chief justice of the Alberta Court of Queen's Bench, J.C. Wittmann, excellently summarizes the state of the law pertaining to enforcing letters of request, also referred to as letters rogatory, within Alberta.

In *Richardson*, the United States District Court for the District of Kansas sent a letter of request for international judicial assistance to the Alberta Court. The American court asked the Alberta court to direct and to order a party to produce a corporate representative to answer oral questions.

Justice Wittmann explained that an Alberta court will consider six factors when it assesses the proper response to a letter of request from a foreign court:

1. Whether the evidence sought is relevant;
2. Whether the evidence sought is necessary for a trial or for discovery;
3. Whether the evidence is otherwise available through some other source;
4. With documents, whether they have been identified with reasonable precision;
5. Whether there is any public policy reason to refuse the request; and,
6. Whether the request would place an undue burden on a proposed witness or witnesses.

The court will examine relevancy "through the lens" of what an Alberta court would consider relevant, with the potential for refinement based on the foreign definition of relevancy. Evidence is relevant and material in Alberta if the information can reasonably be expected significantly to help determine one or more of the issues raised in the pleadings or can help ascertain other evidence that could do so.

If a foreign letter of request is not specific enough or is too broad and burdensome, the Alberta court will modify it on its own motion. Justice Wittmann observed that the Alberta court "is not reluctant to narrow the scope" of a letter of request, "nor is it inclined to require a revised [letter of request] before it considers the merits of what is being requested."

Litigants considering using a letter of request should contact counsel in the Canadian jurisdiction early for assistance. The more closely the letter of request complies with the Canadian rules of procedure concerning letters of request, the higher the probability of success with that request.

In sum, options exist to enable litigants involved in cross-border disputes to obtain discovery or document production from Canadian jurisdictions. When doing so, a litigant should seek assistance from counsel in those Canadian jurisdictions to ensure that a letter of request issuing from the local court will meet the factors that the Canadian court will require before enforcing the request.

■ Sandra L. Corbett is a partner and Ryan P. Krushelnitzky is an associate in Field LLP's Edmonton, Alberta, Canada, office. Ms. Corbett's practice focuses on resolution of complex tort and liability matters in the civil litigation area. She is a former member of the DRI Board of Directors and a past president of Canadian Defence Lawyers. She currently serves as the North American membership chair of DRI International. Mr. Krushelnitzky's practice focuses on insurance defense and product liability and construction litigation.