

# It's a Small World After All: Obtaining Evidence from Persons Outside Ontario

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In this global marketplace, where business across borders has become commonplace, it is to be expected that some parties to a business dispute that is litigated in Ontario, or key witnesses in relation to such dispute, may reside outside Ontario. In some instances, the evidence of such persons residing outside Ontario may be crucial to the case. It is therefore important for Ontario lawyers to know the tools that are available to obtain evidence outside Ontario, and the criteria that apply to each of them.

Rule 34.07 of the *Rules of Civil Procedure* is the starting point. This Rule applies to pre-trial examinations and the taking of evidence before trial where the person to be examined resides outside Ontario.

Rule 34.07(1) provides as follows:

*Where the person to be examined resides outside Ontario, the court may determine,*

- (a) whether the examination is to take place in or outside Ontario;*
- (b) the time and place of the examination;*
- (c) the minimum notice period;*
- (d) the person before whom the examination is to be conducted;*
- (e) the amount of attendance money to be paid to the person to be examined; and*
- (f) any other matter respecting the holding of the examination.*

In applying Rule 34.07, important factors to take into consideration include whether the person to be examined is a party or a person under the control of a party (such as an employee, officer or director of a party), and whether the proposed witness is in Canada or outside Canada.

## **The Person to Be Examined is a Party or a Person Under the Control of a Party**

The court may only order that the examination of a non-Ontario resident take place in Ontario if the person is a party to the action or a person under the control of a corporate party, and typically only for the examination for discovery of the party or for the cross-examination on an affidavit proffered by a party.[\[1\]](#) If the proposed witness is under the control of a party, the court would make an order against the party, not against the proposed witness, and the order would require the party to produce the witness in Ontario. If the witness fails to appear and answer proper questions, the court can make an appropriate order against the party under Rule 60.12

of the *Rules of Civil Procedure* for failure to comply with an interlocutory order of the court. The sanction for such a failure can include, for instance, the dismissal of the party's motion.

Even if the proposed witness is a party or a person under the control of a party, it is not a foregone conclusion that the examination will take place in Ontario. The test for determining the location of an examination is what is just and convenient for both parties, based solely on the circumstances in each particular case. There is no *prima facie* right of either party with respect to the place of examination.[\[2\]](#)

Rule 34.07(1)(f) (reproduced above) gives a court jurisdiction to order that the examination of a person who resides outside Ontario be held by videoconferencing. In *Midland Resources Holding Ltd. v Shtaiif*, approximately ten years ago, Newbould J. stated the following about the use of videoconferencing:

*Examinations of witnesses by video conferencing are a normal process in modern international litigation or arbitration. The reason, of course, is that often the time and expense involved in travelling to far distant places is not warranted if there is an alternative. In my view, taken the high costs of modern litigation, it should be encouraged rather than discouraged, so long as the discretion of the judicial officer in deciding whether to order video conferencing is exercised judicially. I see no purpose in starting from the position that it should be ordered rarely and only in exceptional circumstances. There is no basis, in my view, for any such presumption. Each case should be decided on its own facts with a view to determining what is the most just and convenient result in the particular case.*

Subsequent cases have endorsed the use of videoconferencing and stated that examinations by videoconference should be encouraged to help address the high costs of litigation, in furtherance of the objectives of Rule 1.04 of the *Rules of Civil Procedure*.[\[3\]](#) In some cases, the court has given the parties the option of proceeding either in person or by videoconference. [\[4\]](#) When an examination is to proceed by videoconference, a number of issues need to be addressed by the court and the parties, including whether all counsel will appear by videoconference or some counsel can be present in the room with the witness, and who will bear the costs of videoconferencing and any travel costs.[\[5\]](#)

#### **The Person to Be Examined is Not a Party or a Person Under the Control of a Party and Resides Outside Canada**

If the proposed witness is not a party to the action or a person under the control of a party, and resides outside Canada, the process for compelling the attendance of such a witness involves the issuance of a commission and letter of request. The process is set out in Rule 34.07(2), which provides:

*Where the person is to be examined outside Ontario, the order under subrule (1) shall be in (Form 34E) and shall, if the moving party requests it, provide for the issuing of,*

- (a) a commission (Form 34C) authorizing the taking of evidence before a named commissioner; and
- (b) a letter of request (Form 34D) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before a commissioner.

The attendance of a witness outside Canada can only be compelled by a court in the witness's jurisdiction, with the foreign court providing assistance by giving effect to a letter of request issued by an Ontario court. Letters of request are not a means by which a foreign witness can be compelled to come to Ontario to testify in an Ontario court. Aside from requests for extradition, Ontario courts would not honour a request from a foreign court to require an Ontario resident to cross an international border to attend as a witness at a civil trial in a foreign country. As a result, Ontario courts decline to make similar requests of another country. [\[6\]](#) Thus, letters of request can only be used to compel a foreign witness to submit to an examination in the witness's own jurisdiction.[\[7\]](#)

Before issuing a commission and letter of request:

- there must be proper evidence before the court of what the moving party believes the evidence of the proposed witness will be such that the proposed examination is not simply a fishing expedition;
- the anticipated evidence must be material to an issue in the action, as opposed to a collateral matter, and it must not only corroborate the evidence of other witnesses;
- the request must be *bona fide*; and
- there must be good reason why the witness cannot attend personally at trial.

However, the overriding principle in the granting of a commission is a fair and full trial. The determination is a matter of judicial discretion to be exercised according to the circumstances of each case.[\[8\]](#)

When issuing a commission and letter of request, the court can order that the examination be videotaped for replay at the trial. If the credibility of the witness becomes an important issue at the trial, the fact that a videotape of the examination is available, and not just a written transcript of the evidence, should assist the trier of fact in assessing the credibility of the evidence given by the witness on his or her examination.[\[9\]](#)

Based on a liberal interpretation of Rules 1.08 and 34.07 of the *Rules of Civil Procedure*, the court can also make an order to compel the oral evidence of a non-resident witness at trial by videoconferencing. This can be done by issuing an order for a commission and letter of request to the judicial authorities in the jurisdiction where the witness resides, and including in the order a request that the witness attend in the jurisdiction where she resides to give her evidence during the trial in Ontario by two-way videoconferencing facility.[\[10\]](#) This type of order can sometimes be the most appropriate and expeditious means to present the witness's evidence to the trial court and enhance the determination of the action on its merits.

For instance, the giving of evidence live at trial by videoconference may be preferable in circumstances where a witness is adverse to the examining party and rulings may have to be made by the trial judge as to relevance and admissibility. Having the evidence live at trial prevents interruptions for rulings and the delays caused by such interruptions, and it allows the trial judge to rule on questions of admissibility based on the issues that have arisen and evidence given during the trial.[\[11\]](#)

A foreign court will usually give letters of request full effect as a matter of judicial comity, unless they are contrary to public policy, but it is not obligated to do so. As a practical matter, a lawyer who requires a letter of request should plan for this many months in advance because executing a letter of request can take several months.

#### **The Person to Be Examined is Not a Party or a Person Under the Control of a Party and Resides in Canada (Outside Ontario)**

If a non-party witness lives outside Ontario but in Canada, letters of request can be used for the purpose of an examination of the witness outside Ontario.

However, such a person can also be compelled to attend as a witness at a trial, hearing or examination in Ontario, or to produce documents or other things pursuant to [section 5](#) of the [Interprovincial Summonses Act](#).[\[12\]](#)

Section 5 provides that a party to a proceeding in Ontario can cause a summons to be issued for service in another province. The party has to attend before a judge of the Superior Court of Justice to have him or her sign the required certificate under the *Act*. Section 5 provides that the judge shall hear and examine the party or the party's counsel if any, and, before signing the certificate, has to be satisfied that the attendance in Ontario of the person required in Ontario as a witness:

- (a) is necessary for the due adjudication of the proceeding in which the summons or other document has been

issued; and

(b) in relation to the nature and importance of the proceeding, is reasonable and essential to the due administration of justice in Ontario.

Once satisfied that the criteria are met, the judge can sign the certificate, which will be attached to or endorsed on the summons.

## Conclusion

As the foregoing shows, there are many tools available to lawyers who seek to obtain evidence outside Ontario.

Before moving in Ontario for an order to obtain evidence from persons outside Ontario, it is often helpful to consider two additional matters:

(1) The rules governing the enforcement of letters of request in the relevant jurisdiction. This knowledge can be used to tailor the motion material and the request so as to ensure that the letters of request will be given full effect in the specific jurisdiction.

(2) Other evidence-gathering tools available in the foreign jurisdiction. Some countries allow foreign parties to take evidence within their jurisdiction under certain circumstances.[\[13\]](#)

Given how small our world is becoming, and the fact that the need to gather evidence outside Ontario will inevitably arise more frequently, knowing about the evidence-gathering options that are available to a party in a case can provide a strategic advantage.

[\[1\]](#) *Moore v Bertuzzi*, 2014 ONSC 1318 at para. 23; *1632842 Ontario Ltd. v Great Canadian Gaming Corp.*, [2008] OJ No 3079 at paras. 13-14 (SCJ). The complete list of the types of examinations to which Rule 34.07 applies is found in Rule 34.01.

[\[2\]](#) *Midland Resources Holding Ltd. v Shtaiif* (2009), 99 OR (3d) 500 at para. 9 (SCJ).

[\[3\]](#) See, e.g., *Ali v Gibbons*, 2017 ONSC 5013 at para. 16, and *Alves v Gaughran*, 2016 ONSC 5645 at paras. 41-42.

[\[4\]](#) See, e.g., *Midland Resources Holding Ltd. v Shtaiif* (2009), 99 OR (3d) 500 at para. 32 (SCJ); *Ali v Gibbons*, 2017 ONSC 5013 at para. 31.

[\[5\]](#) See, e.g., *Humphrey v Canada (Attorney General)*, 2016 ONSC 2659 at para. 23, and *Ali v Gibbons*, 2017 ONSC 5013 at paras. 27-31.

[\[6\]](#) *Moore v Bertuzzi*, 2014 ONSC 1318 at para. 62.

[\[7\]](#) *Goldhar v Haaretz.com*, 2016 ONCA 515 at para. 67.

[\[8\]](#) *Moore v Bertuzzi*, 2014 ONSC 1318 at para. 30.

[\[9\]](#) *Ibid.* at paras. 52-53.

[10] *Ibid.* at paras. 68-81.

[11] *Ibid.* at paras. 65-67, 80.

[12] [Interprovincial Summonses Act](#), RSO 1990, c I.12. See also *1632842 Ontario Ltd. v Great Canadian Gaming Corp.*, [2008] OJ No 3079 at paras. 19-25 (SCJ).

[13] However, a party should not use such tools to circumvent the *Rules of Civil Procedure*: see *Mancinelli v RBC*, 2018 ONSC 1844 at paras. 26-33 (Div Ct).

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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