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Obtaining of evidence from witnesses in the Province of Quebec

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The present is to provide a general overview of the principles governing the obtaining of evidence from witnesses residing in the Province of Quebec.

First, it is important to note that Quebec is not a signatory to the *Hague Convention on the Taking of Evidence Abroad*. Additionally, Quebec has implemented a certain blocking statute as a direct consequence of a particular U.S. civil antitrust case. This blocking statute applies to the removal of any document relating to a “business concern” from the Province of Quebec.

To obtain evidence from witnesses or parties in the Province of Quebec, one must comply with Sections 504 to 506 of the *Code of Civil Procedure* which provide for the right of a foreign party to apply to the Superior Court of Quebec for the execution of a rogatory commission at the request of the foreign Court before which the civil or commercial case is pending. More particularly, the foreign party who wishes to obtain evidence from witnesses or parties in the Province of Quebec must first and foremost obtain from the foreign Court an Order (also referred to as “Letters Rogatory”) requesting the discovery of a party or witness, and/or the filing and

production of documents. In essence, the Order justifies the necessity of the evidence sought, provides background information on the litigation and requests assistance from the Superior Court of Quebec.

In order to determine whether it will grant the foreign Court’s request, the Superior Court of Quebec exercises its discretionary powers when taking into account various factors including the relevancy of the evidence sought, whether such evidence is otherwise obtainable, and the time constraints imposed upon the witness as a result of the obligation to produce documents. In essence, the Superior Court of Quebec ascertains whether the foreign Court’s request is contrary to the local laws of civil procedure including those rules in connection with the sound administration of justice. Finally, the Court also ensures that the foreign party has provided a bond to secure the payment of all costs associated with the deposition and/or the production of documents, including the indemnity normally paid to witnesses.

On the assumption that the above formalities have been respected and the Order has been issued by the Superior Court of Quebec and served, the deposition of the party or witness may take place and such party or witness may be examined under oath, either by means of questions in writing or otherwise. Such examination may take place before any person mentioned in the Order. Pursuant to Section 505 of the *Code of Civil Procedure*, the deposition is executed in accordance with the rules included in the *Code of Civil Procedure* unless the foreign authority has requested a different procedure. The depositions can take place pursuant to the rules applicable in the foreign jurisdiction except to the extent that such rules are incompatible with Quebec law.

Objections can also be raised based on the violation of fundamental rights such as the rights provided for in the *Canadian Charter of Rights and Freedoms* and in the *Charter of Human Rights and Freedoms*.

In the event the Court has ordered the witness to file certain documents, the *Business Concerns Records Act* (CQLR c D-12) (the “Act”) must be considered.

The relevant provisions of the Act are contained in its first three sections:

“1. In this Act, the following words mean:

- (a) “document”: any account, balance sheet, statement of receipts and expenditure, profit and loss statement, statement of assets and liabilities, inventory, report and any other writing or material forming part of the records or archives of a business concern;
- (b) “concern”: any business concern in Québec;
- (c) “requirement”: any demand, direction, order, subpoena or summons.

“2. Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec, remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any concern.

“3. The prohibition enacted in section 2 shall not apply in the case of the removal or sending of a document out of Québec

- (a) by an agency, branch, legal person or firm carrying on business in Québec, to a principal, head office, affiliated legal person or firm, agency or branch situated outside Québec, in the ordinary course of their business;
- (b) by or on behalf of a natural or legal person, a partnership or an association that is not a legal person carrying on business in Québec, to a territory subject to another political jurisdiction in which the sale of the securities of such person, partnership or association has been authorized;
- (c) by or on behalf of any such person, partnership or association carrying on business in Québec as a broker, security issuer or salesman within the meaning of the Securities Act (chapter V-1.1), to a territory subject to another political jurisdiction in which any such person, partnership or association has been registered or is otherwise authorized to carry on business as broker, security issuer or salesman, as the case may be;

(d) whenever such removal or sending is authorized by any law of Québec or of the Parliament of Canada, in accordance with their respective jurisdictions.”

At a first glance, these provisions of the Act forbid the removal of any document relating to a “business concern” from the Province of Quebec. The term “document” has been broadly defined in section 1. The objective of the Act, adopted in 1958, is to protect Quebec businesses from foreign judicial interference such as anti-trust prosecutions. In many cases, Canadian Courts have protected Canadian businesses from what was considered to be excessive requests from foreign Courts who disapprove of Canadian public policy. Because of the nature and extent of the Act’s objectives, it is normally qualified as a blocking statute. Although Courts have repeatedly attempted to reduce or minimize some of its effects, the Courts have prohibited even consulting any document or summary thereof (including correspondence) relating to any business situated in Quebec.

We wish to point out, however, that the Act does not give complete immunity to witnesses residing in Quebec; as such, it does not prohibit the examination of witnesses nor the verification of matters of their personal knowledge. However, questions raised in the discovery process may be illegal to the extent that a witness would be prompted to consult business records in order to respond. Simple questions relating only to the existence of a document, its date, place of signature and signatories have been considered illegal.

On the other hand, the Court of Appeal of Quebec has in certain cases attempted to reduce the effects of the Act by declaring that the prohibition does not apply to documents already in possession of a party or witness residing outside of Quebec (in cases where such documents have been transferred outside of Quebec in the normal course of business).

In summary, although the *Business Concerns Records Act* constitutes an obstacle where documents pertaining to business concerns are sought from Canadian witnesses in the context of foreign proceedings, every situation of this nature must be evaluated on a case-by-case basis. As in many circumstances, with an appropriate strategic approach developed by attorneys who have experience with these types of requests from the foreign Courts, it is possible to obtain documents from Canadian witnesses and parties notwithstanding this legislation.

The content of this article is intended to provide general commentary only and should not be relied upon as legal advice.