

The *Hallstone Products* Decision: A Further Look at Self-Incrimination in Transnational Business Cases

The issue of cross border self-incrimination recently arose in the civil context in *Hallstone Products Ltd. v. Canada Customs and Revenue Agency*, [2005] O.J. No. 5296 (S.C.J), per Master Dash [*Hallstone*]. The decision of Master Dash was recently reversed in *Hallstone Products Ltd. v. Canada Customs and Revenue Agency*, [2006] O.J. No. 3096 (S.C.J.) per Lederman J. [*Hallstone*]. These decisions are reviewed below.

Background of the Case

The plaintiffs in this case had previously been charged by the CCRA with tax evasion in 1998 arising out of the solicitation for sale of participation units in Spanish lottery tickets, charges which were subsequently dropped 2½ years later. The plaintiffs in *Hallstone* claimed that the CCRA's investigation and charges were done for the collateral purpose of assisting American and Canadian regulatory authorities and providing them with information not related to the tax evasion charges. The plaintiffs brought action for malicious prosecution, abuse of process and violation of their *Charter* rights. At the time of judgment, the U.S. Attorney's Office in New York was conducting a criminal investigation, although no charges had been laid. There were however parallel Canadian proceedings under the *Competition Act*. The *Hallstone* plaintiffs were seeking a confidentiality order and sealing order with respect to their discovery testimony and productions until trial for the purpose of protecting against the use of such evidence in an investigation and possible criminal charges in the United States. If a sealing order were not granted, the plaintiffs were seeking a stay of proceedings in the alternative.

The Decision of Master Dash

In the reasons for his decision, Master Dash acknowledged the potential jeopardy which Ontario civil litigants face in having their discovery testimony used against them in American criminal proceedings, notwithstanding the numerous protections availed to such evidence in Canadian proceedings.¹ Master Dash noted that this potential jeopardy arises out of the very different rules respecting self-incrimination in the United States and Canada.²

1 For example, the deemed undertaking rule 30.1 of the *Ontario Rules of Civil Procedure*, section 13 of the *Charter*, section 9 of the *Ontario Evidence Act*, and section 5 of the *Canada Evidence Act*.

2 The court notes the discussion of this issue contained in: *Ritter v. Hoag*, [2004] A.J. 398 (Q.B.); *Gillis v. Eagleson* (1995), 23 O.R. (3d) 164 (Ont. Ct. (G.D.)) [*Eagleson*]; *Royal Trust Corporation of Canada v. Fisherman* (2000), O.R. (3d) 187 (S.C.J.) [*Fisherman*]; and the case examined in this article, *Catalyst Fund General I Inc. v. Hollinger Inc.* [*Hollinger*].

While the information obtained through the oral and documentary discovery is subject to the deemed undertaking of Ontario Rule 30.1 and as such is not to be used for any purpose other than the defence of the action, Master Dash accepted that an actual order of a Canadian court may have more significance to a U.S. court considering whether to admit such evidence. On that basis, Master Dash found the court to have sufficient justification to grant a confidentiality order.

Although the confidentiality order was granted, Master Dash acknowledged that such an order did not guarantee that the incriminating evidence would not be used in American courts, but instead: 1) that such an order may be an additional factor for the American courts to consider when determining whether such admissibility would shock the judicial conscience; 2) such an order may also affect the decision of American prosecutors on whether to call discovery participants to give oral testimony as to the contents of the protected testimony; and 3) such an order may affect the response of any Canadian authorities to any requests for information under MLAT. To ensure that the confidentiality order did not provide the plaintiff with greater protections than litigants not facing possible U.S. charges, the order should be limited in accordance with the exceptions found in the deemed undertaking rule.³

The court then considered the second ground of relief sought, being the sealing order of the plaintiff's examination for discovery and any exhibits filed with the court. The rationale of this request, as noted by the court, was: 1) that the deemed undertaking rule does not apply once materials are filed with the court; and 2) that once those materials became part of the public record they would be accessible to American prosecutors who might use them in U.S. criminal proceedings, or indeed to parties of Canadian civil, criminal or administrative proceedings. The relief of a stay was only sought in the alternative, seemingly because the plaintiffs wanted the matter to proceed, even in light of the fact that a sealing order would not prevent oral evidence of their contents from being compellable in U.S. proceedings.⁴ Master Dash presumed that the plaintiffs hoped that the sealing order, in conjunction with the confidentiality order, would be sufficient to avoid such an occurrence.

Master Dash acknowledged the different effects of the primary remedy sought (a sealing order) versus the alternate remedy sought (a stay of proceedings), and noted that sealing orders do not affect the rights of the parties to the proceeding, but instead the right of the public to open

³ Master Dash noted, however, that if a sealing order were also granted, rule 30.1.01(5)(a) would not apply being the exception that allows the use of evidence filed with the court (see para. 5).

⁴ As was noted by Lang J. in *Eagleson*, *supra*.

access to court proceedings and documents. Cases where a sealing order was justified⁵ included those, “where it is necessary to protect the social values of superordinate importance.” Master Dash found the protection of the plaintiff’s section 13 *Charter* rights to be such a value. Master Dash went on to state:

Without some protection in place [the plaintiff] runs serious risk of losing the protection granted to him under the Charter and the *Canada Evidence Act*. In my view this court, by virtue of the compulsory nature of oral and documentary discovery under Canadian law, and the corresponding protection against use of that evidence in other Canadian proceedings, and in light of the statutory and Charter rights against such use, should ensure that such rights are protected, to the extent this court can do so, from extra-territorial use, provided it does not unduly interfere with the rights of other parties to this action.⁶

The court noted this point to be particularly salient due to the nature of the allegations in this action. This was further buttressed by the fact that on a disclosure motion, documents seized from the plaintiff had been filed with the court, and therefore already in the public domain. Further, in response to a request by the U.S. authorities a defendant divulged that such documents were filed as part of a Canadian court record and that the records “contain[ed] evidence that would be useful to the USA.” Master Dash acknowledged that without the protection of the confidentiality and sealing orders, the compelled documentary testimony and productions would remain part of the public record and exacerbate the alleged improper disclosure which formed part of the plaintiff’s claim.

Counsel for the defence argued that instead of granting a prospective sealing order over any future transcripts, that the court should instead craft a protective mechanism whereby before any further evidence is filed at an interlocutory proceeding, the moving party would give notice of what was intended to be filed and the court could consider whether a sealing order was appropriate in light of the precise questions and answers and whether they were incriminating of the plaintiff in the matters under investigation in the U.S. In refusing this suggestion, the court noted that although it had some merit, it would create a two-step process to every motion dealing with such testimony, increasing the cost and complexity of those motions. Further, such a process would fail to give any assurance to the plaintiff before continuing his discovery testimony as to whether it would be sealed or form part of the public record.

⁵ The court cites *Lederer v. 372116 Ontario Ltd.* (2000), 50 O.R. (3d) 282 (S.C.J.); and *Towers, Perrin, Forster & Crosby Inc. v. Cantin* (2000), 50 O.R. (3d) 476 (S.C.J.).

⁶ *Hallstone, supra* at para. 9.

In light of the above noted factors, the court found the sealing order requested by the plaintiffs appropriate and ordered it accordingly.

Although the court was not required to rule on whether a stay was appropriate, the court, in *obiter*, disagreed with the defendants' suggestion that the principles in stay cases are similar to those of sealing orders. Master Dash viewed the test for a stay as more stringent to that of a sealing order because of its direct affect on the rights of the parties to the proceeding. The cases considered by the court⁷ all dealt with stays of proceedings, a relief which was not necessary to consider in light of the sealing order. In *obiter*, however, Master Dash commented that between *Fisherman* and *Eagleson*, the circumstances favoured the *Eagleson* analysis. While both parties had claimed *Hollinger* supported their position, Master Dash found it to be even further removed from the issue of a sealing order, but to the extent it was relevant he found it "supports the proposition that a protective order may be made to deal with the conflicting Canadian and U.S. legal positions, but at an appropriate time."⁸

The Decision on Appeal

On appeal, Lederman J.⁹ reversed the decision made by Master Dash, and the corresponding order mandating the transcripts from the examination for discovery of the plaintiffs be treated as confidential and sealed until trial.

The appellants argued the confidentiality order was invalid, to the extent that it negated the exception found in rule 30.1, thereby precluding public access to these records and violating the important *Charter* right of open justice. The appellants advanced two arguments: (1) that Canadian Courts do not have jurisdiction to determine the propriety of the American Rules of Evidence¹⁰; and (2) that the factual basis underpinning the alleged *Charter* violation was insufficient.¹¹ The respondents argued that there is a gap between rules of the admissibility of evidence in Canadian and American courts.¹²

In his analysis, Lederman J. examined the jurisprudence as to whether Canadian courts should be concerned with the admissibility of evidence in American proceedings. Justice Lederman noted that:

⁷ *Eagleson, supra; Fisherman, supra* and *Hollinger, supra*.

⁸ *Hallstone, supra* at para. 20

⁹ *Hallstone Appeal, supra*.

¹⁰ *Ibid.* at para. 14.

¹¹ *Ibid.* at para. 15.

¹² *Ibid.* at para. 17,

...it cannot be said categorically that the Canadian court can never find sufficient grounds for a stay of a Canadian civil proceeding where at the same time a party is subject to a foreign proceeding where there is a lack of protection ordinarily provided by Canadian Constitutional and Evidentiary Law.¹³

Justice Lederman noted the two competing charter rights that must be balanced in this case: (1) the interest of the public in open court records; and (2) the interest of a party against being compelled to self-incriminate.¹⁴ In balancing these interests, Lederman J. noted that there was some basis “for the Master Dash to have concluded that section 13 *Charter* rights can constitute a value of ‘super ordinate importance’ and would merit protection in these circumstances”.¹⁵

Lederman J. noted that it would be premature and unfair to use the alleged violation of one *Charter* right to override another *Charter* right, in cases where a factual basis had not been demonstrated.¹⁶

The court concluded that Master Dash erred in principle by granting a sealing order on the basis of the facts before him, but provided that an order would require, “the appellants to provide an appropriate notice of any intention to file discovery material on any pre-trial motion that is brought and affording an opportunity to the plaintiffs to seek a sealing order in the context of that proceeding.”¹⁷

13 *Ibid.* at para. 26.

14 *Ibid.* at para. 28.

15 *Ibid.* at para. 32.

16 *Ibid.* at para. 35.

17 *Ibid.* at para. 42.