JEOPARDY TO THE PRIVILEGE AGAINST SELF-INCRIMINATION IN CROSS-BORDER PROCEEDINGS

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The risk

One of the little-known risks to officers and directors of public companies carrying on business in both Canada and the United States is the potential for the loss of the constitutionally-enshrined privilege against self-incrimination where these individuals face criminal or regulatory [Ontario Securities Commission ("OSC") or United States Securities and Exchange Commission ("SEC")] investigations or charges and civil litigation involving the same allegations of misconduct. Recent high-profile examples include proceedings involving Karlheinz Schreiber, the former officers and directors of Live Entertainment Corporation of Canada (Livent), the Hollinger-related corporations, and the B.C. reference into the constitutionality of the polygamy provisions of the *Criminal Code*.

Under the constitutions of Canada and the United States, an individual has the right not to be compelled to incriminate himself or herself; however, that privilege can be lost entirely where the individual is involved in legal proceedings that engage that right in both countries. This may occur for two reasons. Firstly, the same constitutional right is protected differently in the two countries, which raises the risk that evidence given in Ontario could be used against an individual in the United States. Secondly, courts have frequently determined that these circumstances do not actually engage a Canadian constitutional right for which an Ontario court can fashion a remedy. Citing principles of comity, Ontario courts have offered few solutions to ameliorate the risk of the loss of the privilege, opining that to do so would be to apply the *Charter* extra-territorially to make

up for “perceived deficiencies” in the manner in which the privilege against self-incrimination is protected under U.S. law. Other courts have expressly taken comfort from concepts relating to the inherent power of the court to control its own processes, the implied undertaking rule, and protective orders. However, to date there has been little consideration of what happens to the person at risk if those measures fail.

The Constitutional protection

The United States approach: the right to silence

The Fifth Amendment to the United States Constitution provides that, "a witness shall not be compelled...to be a witness against himself".[1]

The protection operates by allowing a witness to refuse to answer any question or give any evidence on the basis that the answer may tend to incriminate the witness; however, a court in a civil action or regulatory proceeding may draw an adverse inference against the witness for a failure to give evidence. A witness cannot pick and choose what evidence to give, as answering some questions may result in a waiver of the privilege.

The Canadian approach: testimony with use protection

The United States approach was the common law position in Canada until it was changed by the *Canada Evidence Act*[2] and the Ontario *Evidence Act*.[3] The protection

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[1] *The Constitution of the United States*, Amendment 5
[2] R.S.C. 1985, c. C-5, as amended
[3] R.S.O. 1990, c. E. 23, as amended

against self-incrimination is now enshrined in sections 7 and 13 of the Canadian *Charter of Rights and Freedoms.*[4]

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> …
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> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Under the *Charter*, the witness need not specifically claim the privilege, as was formerly required under the *Canada Evidence Act* and Ontario *Evidence Act*. Where the individual's evidence is compelled, that evidence cannot be used against him or her. The protection offered is both use immunity and derivative use immunity, which means that there is protection for the evidence itself as well as evidence that could not have been obtained or the significance of which could not have been appreciated but for the evidence given.[5]

The Canadian approach represents a balancing of the right of the state to compel evidence of a witness in its search for truth against the right of an accused to have the state prove its case against him or her without the use of the accused's own evidence. The Supreme Court of Canada has described this as a *quid pro quo*:

> When a witness who gives evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his full and frank testimony; if the testimony is not full and frank, the witness is

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[4] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.) 1982, c. 11
[5] *R. v S. (R.J.),* [1995] 1. S.C.R. 451

> subject to prosecution for perjury or for the related offence of giving contradictory testimony.[6]

The Canadian approach also differs from that in the United Kingdom, where the common law right remains unchanged. The manner in which the privilege against self-incrimination is protected in the U.K. was summarized by the Supreme Court of Canada in *R. v. Noel*, as follows:

> In the United Kingdom, the state of the law that existed in Canada prior to 1893 is the current state of the law, subject to some modifications. A witness in the United Kingdom is afforded the full right of silence granted by virtue of the common law privilege against self-incrimination. The privilege is best summed up in a passage of Goddard L.J., *in Blunt v. Park Lane Hotel, Ltd.*, [1942] 2 K.B. 253 (C.A.), at p. 257:
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> > . . . the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.
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> In England, the privilege against self-incrimination is set out in a series of rules, including the rule that an accused cannot be compelled to testify at his or her own hearing, the voluntary confessions rule, and the prohibition on questioning suspects without providing a caution: see *R. v. Hertfordshire County Council*, ex parte Green Environmental Industries Ltd., [2000] 1 All E.R. 773 (H.L.), at pp. 777-78, per Lord Hoffmann. The other rule falling under this rubric is the one conferring a right of silence on any witness. As Lord Hoffmann observes in *Hertfordshire County Council*, at p. 778, these rules are "prophylactic rules designed to inhibit abuse of power by investigatory authorities and to preserve the fairness of the trial".
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> The absolute nature of these rules can best be understood as a response to the abusive practices of the prerogative courts of the sixteenth and seventeenth centuries, including the Star Chamber. Fearing such abuse, absolute prohibitions were set up by judges in the eighteenth and nineteenth centuries. These absolute prohibitions are the ones that survive in England to this day. As can be seen, the principle of self-incrimination is, at its core, a principle animated by trial fairness and the

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[6] *R. v. Noel,* [2002] 3 S.C.R. 433 at para. 21 and 22 and see also *R. v. Henry*, [2005] 3 S.C.R. 609

> prevention of abuse. These principles are given greater emphasis under the common law rule than that of seeking out the truth.[7]

Also, in the U.K., unlike in Canada and the United States, the right against self-incrimination can be invoked by a corporation.[8] The right also allows a person to refuse to produce documents that incriminate, and this has been codified in the *Civil Evidence Act*.[9]

The effect of the two approaches

The practical effect is that the constitutionally-protected privilege against self-incrimination can be eviscerated because of these two different approaches to the manner in which this right is protected. There is surprisingly little jurisprudence in Canada on this issue, particularly at the appellate level, and the jurisprudence to date provides little comfort to those facing this jeopardy.

Therefore, lawyers advising persons at risk cannot assure them that the privilege will be protected. There are all sorts of strategic and tactical issues that will have to be considered, perhaps in consultation with counsel in several jurisdictions. For example, an individual may choose to refuse to respond to civil litigation with the risk that judgment will be ordered against him or her, in order to preserve the privilege in respect of criminal or regulatory proceedings. However, a significant adverse judgment in civil litigation has the potential to bankrupt an individual, who may then lack the financial resources to defend criminal/regulatory proceedings.

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[7] *R. v Noel, supra*, at paras. 112 to 113
[8] *Triplex Safety Glass Co. Ltd. v. Lancegaye Safety Glass (1934) Ltd.*, [1939] 2 All E.R. 613 and *Federal Trade Commission Pacific First Benefit, LLC*, 361 F. Supp. 2d 751
[9] *Civil Evidence Act*, 1968, c. 64

How the risk arises: case studies

The issue has so far arisen most frequently in Canadian courts in two scenarios. The first and less common scenario is where the person is a party to criminal or regulatory proceedings in Canada and civil litigation in the United States. The second is where the person is a party to criminal or regulatory proceedings in the United States and civil litigation in Canada. Each of these scenarios is considered below.

Scenario 1: criminal/regulatory proceedings in Canada and civil litigation in the United States

In *King v Drabinsky*[10], the defendant accused persons, officers and directors of public corporation Livent, were facing criminal prosecution in both the United States and Canada in respect of the same allegations of wrongdoing. These allegations were that the defendants had made material misrepresentations in financial information filed with the SEC on behalf of Livent. They had chosen not to appear in the U.S. criminal proceedings. The Canadian criminal proceedings had not yet gone to trial. In addition, there was a class action commenced by shareholders of Livent in the United States.

In the U.S. class action, the defendants sought the protection of the U.S. Constitution's Fifth Amendment by refusing to answer questions at depositions taken, as a result of which the U.S. court granted judgment against them (without drawing an adverse inference). The U.S. class action plaintiffs then brought an action and motion in Ontario for an order enforcing the U.S. judgment in the amount of U.S. $36,617,696.

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[10] 2008 ONCA 566 (CanLII)

In response to the Ontario motion, the defendants claimed that their *Charter* rights had been violated and that they had been denied full opportunity to defend the U.S. class action. They argued that the extant Canadian criminal proceedings had prevented them from defending the U.S. civil and criminal proceedings because, had they agreed to be deposed in the U.S., their evidence would be used to assist the Crown in gathering evidence in the Canadian criminal prosecution against them.

The motion was granted. The Ontario Court of Appeal also rejected these arguments and upheld the motions court's decision for several reasons. Firstly, a Canadian court will consider *Charter* principles at the time the evidence is sought to be used against an accused, which is at trial, not at the time it is taken outside the jurisdiction. Section 13 of the *Charter* would likely protect the defendants from the use of incriminatory statements made in the U.S. At the Canadian criminal trial, the defendants would be permitted to seek an exclusion of their U.S. deposition evidence under section 7 of the *Charter*, or under the trial judge's residual discretion to exclude evidence to ensure a fair trial. Secondly, any evidence given by the accused persons voluntarily would likely be exculpatory, not incriminatory. Thirdly, the court balanced the principles of order and fairness articulated by the Supreme Court of Canada in *Beals v Saldanha*[11] and concluded that the U.S. judgment should be enforced and would not operate unfairly in these circumstances. The court considered it relevant that the U.S. action had been brought against Canadian citizens doing business in both the United States and Canada.

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[11] [2003] 3 S.C.R. 416

Scenario 2: criminal or regulatory proceedings in the United States and civil litigation in Canada

(i) Risk arising from Canadian discovery evidence

One of the two leading Ontario cases is *Gillis v Eagleson*,[12] a 1995 decision of the Ontario Court (General Division). The plaintiff former hockey player alleged as against his former lawyer deceit, breach of contract, and breach of fiduciary duty arising out of a settlement of an insurance claim following a career-ending injury to the plaintiff. The defendant also faced criminal charges in the United States and Law Society of Upper Canada disciplinary proceedings arising out of the same allegations. The defendant sought a temporary stay of the Ontario action on the ground that it would prejudice him in the criminal and disciplinary proceedings.

The court started the analysis with a consideration of *Stickney v Trusz*[13], which was the then-leading (and pre-*Charter*) case on the test to be applied when a stay is sought on the grounds of parallel civil and criminal proceedings in Canada: a stay would be granted only in exceptional and extraordinary circumstances if the accused's right to a fair trial will be prejudiced in a manner specific and peculiar to that party. That prejudice is to be balanced against the right of the plaintiff to have a conclusion to his litigation.

The court applied these same principles to circumstances in which the defendant faced parallel criminal proceedings in the United States and civil proceedings in Ontario and granted a temporary stay of proceedings. The court concluded that there was

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[12] (1995), 23 O.R. (3d) 164 (Gen. Div.)
[13] (1973), 2 O.R. (2d) 469 (H.C.J.); aff'd (1974), 3 O.R. (2d) 538 (Div. Ct.); aff'd (1974), 3 O.R. (2d) 538 (C.A.); leave refused 28 C.R.N.S. 125 at 127n (S.C.C.)

significant prejudice to the defendant. There was uncontroverted expert evidence that the defendant would receive no *Charter* protection in the U.S. criminal proceedings and that he would not have the ability to invoke the U.S. Constitution's Fifth Amendment to prevent any discovery or trial evidence in the Ontario civil proceedings from being used against him in the United States criminal trial. The court found that there was no procedure that an Ontario court could fashion to prevent that evidence from being used against him in the United States. An Ontario court sealing order might not be honoured by a U.S. court, for example. This prejudice to the defendant was balanced against the prejudice and inconvenience to the plaintiff, which prejudice was minimized because the defendant had posted significant security for the plaintiff's costs, documentary discovery had already taken place, and the stay sought was short and temporary. The court found that it would be "anomalous to deprive a Canadian resident of the protections he would have been afforded if he had been charged in Canada in respect of conduct committed in part in Canada against a Canadian resident."

Those facts have since proven to be unique.

In subsequent cases there has be conflicting expert evidence on the extent to which a defendant's privilege against self-incrimination will be protected in the United States in these circumstances and no security has been offered by a defendant to offset the prejudice to the plaintiff which a delay would cause. In addition, many subsequent courts have been more optimistic that a U.S. court will enforce a Canadian court protective order.

The next significant case was a decision of the British Columbia Supreme Court, *National Financial Services Corp. v Wolverton Ltd.*[14] It was alleged in this action that the defendants had engaged in a conspiracy to manipulate the share price of a public company. In the United States, a grand jury had been struck to investigate the same matters and, therefore, there was a possibility of criminal charges in the future. Unlike in *Gillis v Eagleson*, there was conflicting expert evidence on the use that could be made of the defendants' Canadian discovery evidence in the U.S. The defendant sought a stay of the British Columbia action on the basis of the court's inherent jurisdiction to stay civil proceedings in exceptional or extraordinary circumstances. The stay was denied on the ground that the possibility that the defendants' evidence in Canada could be used against them in a future criminal prosecution was not an "exceptional circumstance" that justified a stay of proceedings. The B.C. court determined that it would be up to the U.S. court to determine if the evidence given in B.C. would be admissible and it was not up to Canadian courts to make up for a "presumed deficiency" in the U.S. law arising out of the different operation of the self-incrimination protection in the two countries.

Interestingly, leave to appeal to the British Columbia Court of Appeal was granted on the basis that "the defendants were likely to face prosecution in the U.S. and will be compelled to give evidence in Canada without the use or derivative use immunity under the *Charter*". Whether the Court of Appeal would have reversed the B.C. Supreme Court and ordered a stay of proceedings will never be known. The matter was apparently settled before the appeal.

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[14] [1998] 7 W.W.R. 664 (B.C.S.C.); leave granted (1998), 160 D.L.R. (4th) 688 (B.C. C.A.)

The second leading Ontario case, which led to a different result than *Gillis v Eagleson*, is *Royal Trust Corporation of Canada v Fisherman,* a decision of the Ontario Superior Court of Justice in 2000.[15] The defendant, Bogatin, was an officer and director of an Alberta public company which had pleaded guilty in the United States to a criminal conspiracy. Bogatin was under U.S. criminal investigation and, although no charges had been laid, they were anticipated. In Ontario, shareholders of the corporation brought a class action in respect of alleged misrepresentations contained in a prospectus and other conduct which appeared to also form part of the criminal investigation. Bogatin requested a stay of the Ontario class action on the ground that any evidence he would give in Canada would be used against him in the anticipated criminal proceedings in the United States. There was conflicting expert evidence on that issue. (The expert retained by Bogatin was also his U.S. counsel and the Ontario court held that his evidence did not have sufficient independence to allow him to be accepted as an expert.) The court denied the stay, stating that it is not for the Canadian courts to frustrate Canadian litigants in order to remedy so-called "deficiencies" in the United States Constitution. To do otherwise would be to give the *Charter* extra-territorial effect, which was not desirable.

The court distinguished *Gillis v Eagleson* on a number of grounds: Bogatin had posted no security; no criminal charges had been laid; there had been no discovery; and Bogatin was not a Canadian citizen. The court articulated a number of policy considerations in denying the stay. The risk to Bogatin arose from the application of

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[15] (2000), 49 O.R. (3d) 187 (S.C.J.); leave refused, [2000] O.J. No. 4245 (Div. Ct.); leave refused, [2001] S.C.C.A. No. 11

U.S. Constitutional principles, not Canadian *Charter* principles. Therefore, no Canadian constitutional right was engaged. Further, the U.S. is a recognized democracy governed by the rule of law. Principles of comity require that the matter of the evidence to be admitted in a U.S. proceeding must be decided by a U.S. court. Finally, the risk was speculative, since Bogatin had not been charged. (As predicted, he was later charged.)

Most cases since then have preferred the analysis in *Royal Trust Corporation of Canada v. Fisherman* over that in *Gillis v. Eagleson*.

In United *States of America v Levy*[16], the defendant faced criminal charges and civil litigation in the United States, based upon allegations that he was involved in a telemarketing scheme targeting U.S. residents. Although he had defended the U.S. action, Levy had asserted his Fifth Amendment rights and refused to testify, as a result of which the U.S. court had made an adverse inference against him and granted judgment in favour of the plaintiff. The plaintiff then sought enforcement of that judgment and brought an action and a summary judgment motion in Ontario.

The Ontario court recognized that, in Ontario, Levy could have given evidence in the civil proceeding without fear that his evidence could be used against him in Canadian criminal proceedings. The risk arose only because he also faced criminal prosecution in the U.S. The issue was whether the court should enforce a U.S. judgment made against Levy in circumstances in which he declined to testify at all in order to protect his privilege against self-incrimination.

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[16] [2002] O.J. No. 2298 (S.C.J.); affirmed, [2003] O.J. No. 56 (C.A.). See also *State Street Research Income Trust v. Wagner* 2007, Carswell Ont 9284 (S.C.J.); aff'd, [2007] O.J. No. 3466 (C.A.)

The court considered the fact that Supreme Court of Canada jurisprudence has shown a broadening of the recognition and enforcement of foreign judgments.[17] Further, the court concluded that no public policy defence was available to Levy; he had made the choice not to testify in a civil proceeding in the United States in which the plaintiff had met its evidentiary burden in respect of conduct which was also illegal in Canada. The court postulated that had Levy's evidence been exculpatory, it would not have prejudiced him in the criminal proceedings and engaged the privilege against self-incrimination. Further, there was no natural justice defence available to Levy under section 7 of the *Charter*, since the fact that the privilege is protected differently in the United States does not constitute a natural justice concern. This is a very significant conclusion. Ultimately, the court made an order enforcing the U.S. judgment, concluding that there was no violation of a Canadian constitutional right.

In *Hallstone Products Ltd. v Canada (Customs and Revenue Agency)*[18], the plaintiffs (one of whom was an individual) brought an action against the Canadian Revenue Agency ("CRA") for malicious prosecution. There was an ongoing CRA and Internal Revenue Service investigation, as well as *Competition Act* proceedings. The plaintiffs brought a motion in the Ontario action for an order sealing the discovery transcripts on the basis that they could be used as evidence against them in a U.S. court. The facts in this case are unique in that it was a plaintiff in Ontario civil proceedings, rather than the defendant, who sought relief against the potential prejudice to his privilege against self-incrimination.

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[17] *Morguard Investments Ltd v. DeSavoye*, [1990] 3 S.C.R. 1077; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; and *Beals v. Saldanha*, *supra*.

[18] [2005] O.J. No. 5296 (Master)

The Master granted a confidentiality and sealing order, after balancing the risks to the plaintiffs in the litigation against the public's right of access to the courts and concluding that the individual plaintiff's *Charter* rights were of super ordinate importance. The Master's order tracked the language of the deemed undertaking rule in the Ontario *Rules of Civil Procedure*. The Master expressed the view that if the plaintiff's evidence were to find its way into the United States, an Ontario court order would likely have more significance than the deemed undertaking rule to a U.S. court considering whether the evidence should be admitted in a U.S. proceeding. Further, the Master held that the existence of a confidentiality order might affect the Canadian response to a request by a U.S. criminal authority for the taking of evidence in Ontario under the *Canada-U.S. Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT")* and the resulting *Mutual Legal Assistance in Criminal Matters Act.*[19] Interestingly, the Master favoured the reasoning in *Gillis v Eagleson* over that in *Royal Trust Corporation v Fisherman*.

The order was set aside on appeal.[20] The appeal judge approved of the Master's analysis in balancing the various interests at stake and found that there was some basis for finding that section 13 *Charter* rights are of super ordinate importance, however, the court found that the order was premature because there was no clear intention on the part of the defendant to file the plaintiff's discovery transcript and thereby make it available to the public. In the meantime, the deemed undertaking rule prevented any other use being made of the transcript. Therefore, the court ordered the defendant to

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[19] R.S.C. 1995, C-30 (4th Supp.)
[20] [2006] O.J. No. 3096 (S.C.J.)

provide advance notice of any intention in future to file the transcript to give the plaintiff the opportunity to seek a sealing order. The court offered some helpful *obiter*, which seems to challenge the view expressed in earlier cases that no Canadian constitutional right is engaged in these circumstances:

> 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.

(ii) Risk arising from evidence pursuant to a statutory investigation

These same issues arose in *Catalyst Fund General Partner I Inc. v Hollinger Inc.*[21] in a different context. The applicant had commenced proceedings under the oppression remedy provisions of the *Canada Business Corporations Act ("CBCA")*[22], and obtained an order removing certain officers and directors of Hollinger Inc. and the appointment of an inspector to investigate certain payments made to those officers and directors, which the applicant alleged were improper. At the same time, there was a U.S. criminal investigation against some of those individuals (which ultimately led to the laying of criminal charges), an SEC investigation, and OSC proceedings involving the same allegations of misconduct. The court-appointed inspector later sought to examine the former officers and directors under oath, as permitted under section 229 of the *CBCA.* The officers and directors resisted the examination on the basis that there was a risk of jeopardy to their privilege against self-incrimination if they were required to give evidence in Ontario about such matters in light of the U.S. criminal investigation.

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[21] [2005] O.J. No. 2191 (S.C.J.); affirmed [2005] O.J. No. 4666 (C.A.)
[22] R.S.C. 1985, c. C-44, as amended.

The court approved of the analysis in the *Royal Trust Corporation v Fisherman* case. It permitted the examinations, finding that they were relevant and necessary and in furtherance of a proper purpose, which was the *CBCA* investigation, rather than incrimination of the individuals. Further, the court found that it was not necessary for the inspector to demonstrate that it had exhausted all other means to obtain the evidence sought. Finally, the court found that it could impose effective safeguards to protect against self-incrimination concerns as part of its ability to control its own process: firstly, the inspector was not a compellable witness under the *CBCA* and his report would not be producible in litigation; secondly, the examination was ordered to proceed *in camera*, so that the transcript would not form part of the public record without a court order; thirdly, the court could impose a protective order; and, finally, the court agreed to review potentially incriminating questions before they were required to be answered by the officers and directors. The court found that these circumstances were not appropriate for a constitutional exemption under section 7 of the *Charter* pursuant to *R v S (R.J.).*[23] Ultimately, the inspector did not proceed with the examinations and so the effectiveness of this two-step court- supervised process was never tested.

Nor does this procedure appear to have been tested in *Nortel Networks Corp. v Dunn,*[24] in which the defendant sought a stay of three civil actions brought against him in Ontario. The defendant was also subject to investigations by the RCMP and the U.S. Attorney's Office for the Northern District of Texas, proceedings against him brought by the OSC and the SEC, as well as three civil actions against him in the United States

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[23] [1995] 1 S.C.R. 451
[24] [2008] O.J. No. 369 (S.C.J.)

and one civil action which he was prosecuting in Ontario. He argued that the cumulative effect of these wide ranging and complicated proceedings put him in a position in which he was unable to adequately focus his efforts, and those of his counsel, on properly responding to all the claims, which constituted a denial of his fundamental right to participate in proceedings that would have a profound impact upon his freedom, reputation, financial security, and future employability. He argued that this multiplicity of proceedings was oppressive and contrary to fundamental notions of fairness, access to justice, and right to a fair trial. He also argued that compelled testimony given during examinations for discovery in the Ontario civil actions could be used against him and vitiate his constitutional right against self-incrimination.

The motion was denied. The court found that the court could properly manage the litigation to avoid oppression, duplication, risk of inconsistent findings and protection against self-incrimination, and relied upon the deemed undertaking rule. The court did not expressly consider those proceedings outside the jurisdiction of the Ontario court. Further, the court held that a mechanism such as was imposed in *Catalyst Fund General Partner I Inc v Hollinger Inc.* could be crafted to protect the defendant's privilege against self-incrimination.

In *A v Ontario Securities Commission*[25], A was the subject of pending OSC and SEC proceedings. A brought a motion to quash a subpoena issued by the OSC to examine him as part of its investigation. He argued that the OSC and the SEC were cooperating and that, therefore, there was a risk that any evidence he would give in the

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[25] [2006] O.J. No. 1768 (S.C.J.)

OSC investigation could be used against him by the SEC in the United States. There was conflicting evidence on the extent to which a U.S. court would admit A's OSC evidence to incriminate him in the U.S. proceeding. The court denied the motion to quash the subpoena on the ground that there was a legitimate purpose to the examination, namely, an investigation under the Ontario *Securities Act*[26]. Further, the *Act* provides some safeguards to protect A. In particular, a transcript of the examination of a target of an OSC investigation cannot be given to the SEC without the consent of the person examined or a court order, on notice to the target. Therefore, the prejudice to A could be considered at a later date if and when the OSC sought to provide the transcript to the SEC. The court also decided that a two-step process of the kind ordered in *Catalyst Fund Limited Partnership I v Hollinger Inc.* was not appropriate, since the OSC was not an ordinary litigant and had its own adjudicative and supervisory role.

Similar issues arose in *Sun-Times Media Group, Inc. v Black.*[27] The plaintiff brought a motion, on notice, in an Ontario action for a stand-alone *Mareva* injunction in respect of an action brought in the United States and for an examination of the defendants under oath. There was conflicting expert evidence on the jeopardy to the defendants in the United States if they were required to give evidence in Canada. One of the defendants faced criminal charges. The *Mareva* injunction was denied and the summonses quashed for two reasons. The first was that despite Rule 39, which allows an examination of a witness on a pending motion, there is no right to examine a party in

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[26] R.S.O. 1990, c. S. 5, as amended
[27] [2007] O.J. No. 795 (S.C.J.)

aid of a pending motion for a *Mareva* injunction; the right arises only after the order is granted. There are public policy reasons for this, since if it were permitted, plaintiffs would move for judgment before a defendant has had an opportunity to defend an action. The second reason the summons was quashed was because of the risk that one of the defendant's compelled testimony in Canada would be admissible in a U.S. court. There was no public purpose to the examination which could be weighed against this risk of prejudice.

Similarly, in *R v Eurocopter Canada Ltd.*[28], a witness, Karlheinz Schreiber, brought an application to quash a subpoena compelling him to testify at the Ontario preliminary inquiry concerning Eurocopter Canada Ltd., which faced criminal charges relating to commissions paid on the sale of helicopters to the Canadian government. Schreiber himself was facing fraud charges in Germany relating to the same matters and had not (yet) been extradited. He was both a Canadian and German citizen. The German self-incrimination rule is apparently similar to that in the United States and the former Canadian common law position, so there was a risk that evidence given by him at the Ontario preliminary inquiry could be used against him at his own criminal trial in Germany. Schreiber's motion to quash the subpoena was dismissed and the court had this to say:

> ...the success of [the] application depends upon whether or not his rights under the *Canadian Charter of Rights and Freedoms* will be violated if he is compelled to testify at the preliminary inquiry. Whether or not his *Charter* rights are violated depends in turn on whether or not evidence given by him at the preliminary inquiry will be used against him in criminal proceedings in Germany.

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[28] [2004] O.J. No. 2120 (S.C.J.)

Interestingly, these *dicta* seem to be directly in conflict with the decisions of *Royal Trust* Corporation *v Fisherman* and *National Financial Services Corp. v Wolverton Securities*, which hold that no Canadian constitutional right is engaged in these circumstances and that, in any event, the *Charter* should not be applied extra-territorially. After hearing conflicting expert evidence, the court ultimately found that Schreiber had refused to prove that his evidence in Canada could be used against him in Germany. Curiously, the court found that there was a high probability that Schreiber would be protected in Germany:

> From a logical point of view, it does not seem likely that a country that would go to great lengths to protect against self-incrimination would effectively turn its back on that protection and use compelled self-incrimination evidence simply because it was obtained in a foreign jurisdiction.

In the fall of 2010, this issue came before the Supreme Court of British Columbia by way of an application in the proceedings referred to as *Reference re Criminal Code*, *s. 293*,[29] with respect to the constitutionality of the polygamy provisions of the *Criminal Code*.[30] The applicants were members of the Fundamentalist Church of Jesus Christ of Latter Day Saints and Interested Persons in the reference proceedings. (Some of them were from the community of Bountiful.) They wished to tender the evidence of a number of current and former members of the church living in both the United States and Canada to challenge the case put forward by the Attorneys General of Canada and British Columbia. Those proposed witnesses were persons who were then participating in or were closely related to persons who were participating in what might later be

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[29] 2010 BCSC 1351
[30] R.S.C. 1985, C. C-46

determined to be criminally polygamous relationships. They therefore had a fear of criminal retribution in both the United States and Canada and a jeopardy to the derivative use immunity of their evidence, which is protected under section 7 of the *Charter*. They would not give their evidence without certain protections. Those protections included terms that allowed the witness to testify without identifying his or her name or information that might lead to his or her identification and that the witness could testify behind a screen.

The Attorneys General opposed the application on the basis that the relief sought would fundamentally degrade the integrity of the proceedings and unjustifiably violate the open court principle. In addition, they argued that the applicants were seeking to frustrate the administration of justice by immunizing individuals who may have committed criminal offences from possible future investigation and prosecution.

The court accepted that *Charter* protections provided insufficient assurances to the proposed witnesses that their evidence will not be used against them and, therefore, broader protections must be considered. The court applied both the tripartite test for an injunction set out in *RJR-MacDonald v Canada (Attorney General)*[31] and the framework in the leading case for determining when confidentiality orders are appropriate, *Dagenais v Canadian Broadcasting Corp.,*[32] which it determined led to the same conclusion. The court made an important distinction between these reference proceedings and ordinary litigation, which was determinative of the decision to grant the application:

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[31] [1994] 1 S.C.R. 311
[32] [2001] 3 S.C.R. 835

> This is not a criminal proceeding in which the rights of the accused are paramount. Nor is it a civil proceeding engaging the Court in a disposition of rights. It is a reference in which the Court has been called upon to provide an advisory opinion on the two questions referred.
>
> ...
>
> There is, as well, a general public interest in a reference opinion informed by a complete record and full argument on both sides.
>
> ...
>
> The risk of harm is not the possibility of prosecution for criminal conduct if the witnesses testify without the benefit of an anonymity order. The Attorneys General appear to have so characterized the risk and then submit that the Court should not be party to shielding potentially criminal conduct. That concern is quite beside the mark. The fact is that in all likelihood if the order does not go, the proposed witnesses will not testify. No shield is necessary. The order is needed so as to ensure that the evidence of these witnesses is before the Court... If I were to conclude that the applicants' fears were groundless that would certainly affect the analysis in which I am engaged.
>
> The risk of losing the evidence of the proposed witnesses gives rise to at least two distinct harms: that to the public and the Court who will be denied a complete record upon which to have these important social and legal issues tried properly; and that to these Interested Persons who will be denied the full entitlement to be heard assured them under s. 5 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.
>
> I further conclude that alternative measures will not prevent the risk.

The court decided that the balancing exercise required a consideration of the effects of anonymity orders (ensuring a full record and facilitating the applicants' right to be heard) which outweighed the deleterious effects (compromise of the open court principle, effects on the right to free expression and the limitation on the ability of persons who are adverse in interest to fully cross-examine the anonymous witnesses).

How the risk arises: inter-jurisdictional information sharing

There are a variety of ways in which evidence may flow from Canada into the United States, raising self-incrimination concerns:

(b) Formal cooperation between securities regulators through OSC and SEC Memoranda of Understanding.

(c) An inspector appointed under s. 231(2) of the *Canada Business Corporations Act* and s. 163(2) of the Ontario *Business Corporations Act*[33] is permitted to cooperate with any public official in Canada or elsewhere.

(d) A party to Ontario litigation may enter into a cooperation agreement with a U.S. authority.

(e) The Ontario *Evidence Act*[34] and the *Canada Evidence Act*[35] allow for letters rogatory/letters of request. Where a foreign court or tribunal has authorized the taking of evidence of a witness in Ontario in relation to a proceeding pending before the foreign court or tribunal and requests the Ontario Superior Court of Justice to order the examination, the court may do so before the person and in manner and form requested.

(f) Under treaties, for example, *MLAT* and the *Mutual Legal Assistance in Criminal Matters Act (MLACMA)*[36], pursuant to which U.S. officials may

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[33] R.S.O. 1990, c. B. 16, as amended
[34] Section 60
[35] Section 5
[36] S.C. 1988, ss. 17, 18, and 20. See, for example, *United States of America v. Orphanou*, [2004] O.J. No. 622 (S.C.J.) and [2010] O.J. No. 1739 (S.C.J.)

> obtain an order in Canada to permit evidence (testimony or documents) taken from a witness in Canada for use in a criminal prosecution in the United States, and the Ontario court may place conditions on the use to which the evidence may be made. The Ontario court must be satisfied that there are reasonable grounds to believe that an offence has been committed and that evidence of the commission of the offence will be found in Canada.

A good example of the risks associated with these kinds of proceedings is *U.S. v Conrad Black*[37], in which the Ontario Attorney General brought an application, pursuant to a request by the U.S. Department of Justice under *MLAT*/*MLACMA*, for the gathering and sending of 13 boxes of documents which were the subject of a pending criminal charge against Black for obstruction of justice. There were threatened contempt proceedings in Ontario in relation to the same activity, since it was alleged that Black had removed these boxes from his Toronto office in violation of an Ontario court order. The documents were not in the possession of Black at the time of the application but, rather, were in the hands of a court-appointed officer. Therefore, the interesting question of Black's standing to even appear on the application arose. Ultimately, standing was granted because of privilege concerns. The court ordered that all documents in the 13 boxes, save those protected by privilege, were to be sent to the U.S. for purpose of the criminal prosecution against Black. The court expressed concern that one of the documents relied upon in support of the request by the U.S. government was a document that was subject to an Ontario sealing order, but there was

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[37] [2007] O.J. No. 1304 (S.C.J.)

no evidence about how that document got into the hands of the U.S. government and, therefore, no consequences for the apparent breach.

This issue has arisen occasionally also in applications by the U.K. under *MLAT/MLACMA* for assistance in its criminal prosecutions.

In *United Kingdom v Ramsden*[38], there were investigations ongoing in the U.K. and in Canada relating to the conduct of a U.K. stockbroker named Ramsden, who was alleged to have committed serious offences of bankruptcy fraud. The U.K. brought an *ex parte* application under *MLACMA* for an order requiring a Toronto stockbroker, Hrynyk, to attend to be examined under oath and to produce relevant documents. Hrynyk brought various proceedings to avoid having to testify. He argued that the treaty provisions compelling him to answer questions with respect to the investigation infringed his constitutional right of silence and that his answers could incriminate him. The court rejected the argument, noting that he was not the target of the investigations and that the specific terms of the Ontario order compelling him to answer questions assured him use and derivative use immunity. Those terms included that a judge of the Ontario Superior Court of Justice was appointed to take the evidence and could impose such terms and conditions upon the sending of the evidence to protect him. The court referred to the privilege against self-incrimination not being absolute and requiring a balancing of various rights.

Also, in *United Kingdom v Wilson-Smith & Co.*[39], the respondent was the subject of a search warrant authorized under the treaty. The respondent later cooperated with

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[38] [1996] O.J. No. 1839 (Ont. Gen. Div.)
[39] [2002] O.J. No. 5342 (S.C.J.)

the U.K. authorities, including providing a sworn deposition on the understanding that he would be granted immunity from prosecution in the U.K. On the motion for the sending order, the respondent argued that the documents seized by the authorities should not be sent unless the U.K. government honoured its agreement to grant the respondent prosecutorial immunity. The court agreed, and placed a condition on the sending order that the documents not be released until the government fulfilled its undertaking.

Where a Canadian court is considering a request from a foreign court for assistance in procuring evidence for civil trials, the court may weigh in the balance the risk that criminal charges may be laid and fashion a remedy to protect a person at risk. In *Echo Star Satellite Corporation v Quinn*,[40] the court started from the position that letters of request from a foreign government should be granted unless it would be contrary to Canadian public policy. The court also expressed the view that an undertaking from the requesting party in California with respect to the use of the evidence obtained in Ontario for the purpose of a California action might not be sufficient to protect the respondents from the use of their answers against them in the U.S. criminal proceedings if transcripts, videotapes or information did come into the possession of U.S. prosecutors. On the other hand, the court was not prepared to assume that a U.S. court would admit the evidence on the basis that it did not “shock the judicial conscience” or “violate baseline due process requirements”. The court made an order with the terms which included the following: the parties were prohibited from disclosing the documents or transcripts of evidence obtained under the order to any party outside the California action; the evidence was to be used only for the

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[40] 2007 BCSC 1225

purposes of the California action and not for any other purpose; and the evidence would be "deemed" to be compelled and therefore subject to the protections of compelled testimony under the *Charter*.

In *Morgan, Lewis & Bokius LLP v Gauthier*,[41] the court denied the letter of request issued by a Pennsylvania court on public policy grounds having nothing to do with self-incrimination, even though that was a risk identified by the party resisting the letter of request. He asserted that he believed that he would be exposing himself to prosecution in the United States. The court indicated that it was inclined to refuse to enforce the letter of request for public policy reasons and reasons of comity:

> ...the Request would be contrary to Canadian law and public policy.... [and]...because of the failure of the United States authorities to comply with accepted international conventions relating to comity of nations, and their avowed intent instead to doggedly pursue alleged extraterritorial application of their embargo of Cuba, a position they take in the face of the views of most of the world community, which in the result leaves a Canadian citizen...at risk of prosecution under a law which Canadian law requires that they disobey.

Ultimately the court expressed sympathy for the party which had obtained the letter of request, which was a U.S. law firm trying to defend itself against allegations that it had given negligent advice, and asked the parties to come to an agreement on a form of order that could provide that all U.S. sources of evidence were to be exhausted first and to protect the anonymity of the responding Canadian to the greatest extent possible.

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[41] [2006] O.J. No. 4936 (S.C.J.)

The need for certainty: relevant considerations and unanswered questions

To date these issues have arisen almost always in circumstances in which the individual affected conducts business in both the United States and Canada and, therefore, the courts consider both the United States Constitution's Fifth Amendment and the *Charter*. The Schreiber case is an exception, since German law was in issue. U.S. experts giving evidence in Canada have disagreed to date on the admissibility in U.S. criminal or regulatory proceedings of evidence taken in Canada under the protection of the *Charter*. Therefore, there remains a risk that a party's constitutionally protected privilege against self-incrimination will be infringed. The only guidance offered is that a U.S. court will not admit evidence if it will "shock the conscience of the court".

This rule provides little comfort, however. For example, there are a variety of cases in the United States in which bounty hunters have kidnapped accused persons located outside the United States against whom arrest warrants have been issued and brought them to the United States to stand trial.[42] This activity apparently does not shock the conscience of the U.S. court, despite the fact that it raises concerns about principles of comity and may be in violation of extradition treaties.

In addition, despite the assurances in several of the decisions cited above that the Ontario court can craft a remedy to protect a person who faces this jeopardy, the risk remains. Typically, there is also expert evidence on these motions on the issue of

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[42] For example, *United States v Alvarez-Machain*, 504 U.S. 655 (1992), *Sosa v Alvarez-Machain et al.*, 542 U.S. 692 (2004), *United States v Noriega*, 117 F. 3d (1997), Court of Appeals, 11th Circuit, *Jaffe v Smith*, 825 F. 2d (1987) Court of Appeals, 11th Circuit.

whether a U.S. court will honour an Ontario protective order or sealing order or confidentiality order. The evidence is conflicting and, therefore, there is a risk that it will not. In *U.S. v. Black*, referred to above, such an order appears to have been violated and the evidence flowed to U.S. prosecutors. Absent evidence of who was responsible for the breach, there were no consequences, except to Black, who lost the protection of the Ontario court order. Further, there appears to be little teeth to the deemed undertaking rule, nor real consequences for its breach if, for example, evidence which is subject to it finds its way south of the border to the prejudice of an Ontario litigant. In any event, by that time the consequences of the party in breach may be insignificant compared to the evisceration of the affected party's privilege against self-incrimination.

The courts appear to consider the following considerations relevant to their determination of matters which raise a concern that a party's privilege against self-incrimination is in jeopardy:

- whether the defendant is a Canadian citizen/resident and/or a citizen/resident of the United States;
- whether there is expert evidence on the issue of the extent to which evidence given in Canada may be used to incriminate the defendant in the United States;
- whether a United States court would honour an Ontario confidentiality or sealing order;
- whether a confidentiality or sealing order should be granted at all based upon the balancing of the prejudice to the defendant (which may be

considered speculative) against the right of the public to open access to the courts;

- whether the order sought constitutes application of the *Charter* extra-territorially and whether this can be justified based upon principles of comity;

- whether the circumstances give rise to a right on behalf of the defendant to obtain a Constitutional exemption from the requirement to testify based upon fairness principles;

- a balancing of the prejudice to a defendant in being required to defend civil proceedings against the right of a plaintiff to have its action determined; and

- whether there is a public purpose to the Ontario examination of a defendant which is sought.

Unfortunately, none of these factors allows individuals facing this risk to ensure that they are protected either before or after they give evidence. Perhaps there will only be real development in the Canadian law once the United States jurisprudence is clear on how such evidence will be treated in a U.S. proceeding. If there is no protection afforded, it may be that the Ontario courts will re-evaluate their reluctance to do what they have characterized as "applying the *Charter* extra-territorially" or acting to make up for a “deficiency” in U.S. law. At the moment, the conflicting evidence of experts shows that there is only a risk that the evidence may be used against a defendant. The weight of authority is that this potential prejudice does not arise from Canadian constitutional

principles and does not give rise to fundamental justice concerns. Canadian citizens and residents may lose their constitutional rights in both countries solely because they conduct business in both places if they are unfortunate enough to face parallel proceedings in both jurisdictions. Ultimately, this issue will have to be considered by the appellate courts. In light of the trend of recent Supreme Court jurisprudence to recognize the increasingly global nature of business and the economy while still recognizing matters of comity, this issue is ripe for appellate consideration.