

# **Cross Border Securities Investigations: Some Pressing Problems Surrounding Self- Incrimination**

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*It is dangerous to be right when the government is wrong.*

- Voltaire 1694-1778

## Introduction

Perhaps more than in any other subject of provincial authority, securities regulation has cross-border or extra-provincial implications. Securities dealers operate in an international market in which shares, commodities and funds move instantly from place to place, and brokers are able to communicate with clients far beyond provincial boundaries. In this context, cross-border cooperation between securities regulators is both necessary and desirable.<sup>1</sup>

With securities transactions becoming increasingly international, securities counsel are more frequently confronted with questions of law that go beyond our borders. For the purpose of this small paper we will focus on some of the issues related to self-incrimination during securities investigations in Canada and the United States (U.S.). We will also attempt to address certain specific issues regarding both testimonial and documentary discovery during cross-border securities investigations.

## Background

### Assistance between US and Canadian Securities Commissions

The Supreme Court of Canada has upheld the constitutionality of provincial securities commissions assisting in the administration of securities laws in foreign jurisdictions.<sup>2</sup> In doing so the Court has also endorsed cooperation, including the sharing of information, between securities commissions to promote effective securities regulation.<sup>3</sup> Moreover the Ontario Securities Commission (OSC), along with the British Columbia and Quebec Securities Commissions, has entered into a Memorandum of Understanding (MOU) with the United States Securities and Exchange Commission (SEC) to provide the “fullest

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<sup>1</sup> *Global Securities Corp. v. British Columbia (Securities Commission)* (1998), 162 DLR (4<sup>th</sup>) 601 (BCCA), rev'd [2000] 1 SCR 494.

<sup>2</sup> *Ibid.*

<sup>3</sup> Rueter Scargall Bennett “Cross-Border Securities Litigation: Two Heads are Better than One” (The Canadian Institute’s 6<sup>th</sup> Annual Advanced Forum on Securities Litigation: November 28 & 29, 2006).

mutual assistance” to each other.<sup>4</sup> This assistance entails taking testimony of persons and obtaining documentary evidence.<sup>5</sup> Similar types of assistance are also provided for in the more recent International Organization of Securities Commissions Multilateral Memorandum of Understanding (MMOU)<sup>6</sup>. The SEC and OSC are among the twenty seven signatories of this assistance arrangement. Although these MOU’s do not supersede domestic laws or treaties, they have aided in enhancing the sharing of information by setting a formal mechanism for sharing information.<sup>7</sup>

### Testimonial Evidence

In the U.S., some witnesses called to testify at an SEC investigation are entitled to assert the Fifth Amendment and remain silent.<sup>8</sup> On the other hand, in Canada, securities regulators can compel testimony even where it will be shared with the SEC, but there are use and derivative use protections against the subsequent use of the testimony in another proceeding.

The MOU between the OSC and the SEC provides that witnesses are entitled to all of the rights and protections of the laws of the authority that has been asked to take evidence and obtain documents.<sup>9</sup> Thus, if you are testifying in the U.S., you are presumably able to plead the Fifth Amendment, and in Canada you will presumably be able to rely on the derivative use immunity granted to your testimony. However, this clarity of protection against self -incrimination does not apply in instances where testimony is taken in one country and then later provided to the securities commission across the border. These

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<sup>4</sup> Memorandum of Understanding for Mutual Cooperation, the Exchange of Information and Investigative Assistance (1988), 11 O.S.C.B. 114. (MOU).

<sup>5</sup> Memorandum of Understanding for Mutual Cooperation, the Exchange of Information and Investigative Assistance (1988), 11 O.S.C.B. 114. (MOU).

<sup>6</sup> International Organization of Securities Commission (“IOSCO”) Multilateral Memorandum of Understanding (MMOU); effective December 5, 2002.

<sup>7</sup> Ethiopis Tafara, “Speech by SEC Staff: Remarks Presented at the IMF Conference on Cross-Border Cooperation and Information Exchange.” (Washington: July 7-8, 2004).

<sup>8</sup> *SEC v Dunlop* 253 F.3d 758

<sup>9</sup> Joseph Groia and Pamela Hardie, “Securities Litigation and Enforcement”, Thomson Carswell 2007, p 63.

issues are to be canvassed more thoroughly by Jim Hodgson in his paper on the *Charter* issues arising in cross-border investigations.<sup>10</sup>

### The Conflict between the Canadian and U.S. Regimes

These differences in dealing with the issue of self-incrimination were recently summarized by the Ontario Court of Appeal in *Hollinger*<sup>11</sup>:

In both Canada and the U.S., the right to protection from self-incrimination is an important right that is safeguarded. The difference between how that right is protected in Canada and the U.S. lies at the heart of this appeal. In Canada, a person has the right not to have any incriminating evidence that the person was compelled to give in one proceeding used against him or her in another proceeding except in prosecution for perjury or for the giving of contradictory evidence. Thus, in Canada, a witness cannot refuse to answer a question on the grounds of self-incrimination, but receives full evidentiary immunity in return. In the U.S., a witness can claim the protection of the Fifth Amendment and refuse to answer an incriminating question. Once the answer is given, however, there is no protection.<sup>12</sup>

In *A. v. Ontario (Securities Commission)*<sup>13</sup> the Ontario Superior Court considered whether evidence compelled in Ontario to aid in both an OSC and SEC investigation, violated the individuals *Charter* rights. More generally, the Court considered whether individuals should be compelled to give testimony where there is an acknowledged risk that the evidence could be used against them in U.S. proceedings.<sup>14</sup> Mr. A. was also the subject of ongoing criminal investigations in Canada and the U.S. It was argued by Mr. A.'s counsel that testimony under oath in Ontario would be obtained for the use of evidence for prosecutions in the U.S. and he would no longer be able to plead his Fifth Amendment right to remain silent. The Court ultimately concluded that Mr. A.'s *Charter* rights were not violated at the initial stage of the process, but ordered that the parties seek

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<sup>10</sup> Memorandum: Jim Hodgson "Use Immunity and Derivative Use Immunity in Multi-Jurisdictional Investigations" April 4, 2008.

<sup>11</sup> *Catalyst Fund General Partner Inc. v. Hollinger Inc.*, [2005] OJ No. 4666 (CA).

<sup>12</sup> *Ibid*, at para 4.

<sup>13</sup> [2006] OJ No. 1768 (Sup.Ct)

<sup>14</sup> Rueter Scargall Bennett "Cross-Border Securities Litigation: Two Heads are Better than One" (The Canadian Institute's 6<sup>th</sup> Annual Advanced Forum on Securities Litigation: November 28 & 29, 2006).

direction from the court going forward if they could not jointly agree on a regime for the OSC to provide *Charter*-like protections for the use of the evidence gathered.

Ultimately, in both *A. v. Ontario (Securities Commission)* and *Hollinger* the Courts chose to defer the ultimate constitutional issue until a later date. As a result, there is no clear judicial statement that decides how to fill in the gap between the differing Canadian and U.S. approaches to self -incrimination. Consequently, several practical questions remain unanswered. We set out some of the more interesting ones below.

### Can you plead the Fifth Amendment as a Canadian Citizen in an SEC investigation?

Any person giving testimony pursuant to an MOU or MMOU will be entitled to all of the rights and protections of the laws of the jurisdiction of the requested authority.<sup>15</sup> Unless the Authorities arrange otherwise, the documents and information, including testimony, will be gathered in accordance with the procedure applicable in the jurisdiction of the Requested Authority and by persons designated by the Requested Authority.<sup>16</sup> Any assertions regarding other rights and privileges arising exclusively pursuant to the law of the jurisdiction of the Requesting Authority shall be preserved for consideration by the courts in the jurisdiction of the Requesting Authority.<sup>17</sup> However, this is not as clear as it may appear for Canadians giving testimony in the U.S., but it is reasonably clear that Canadians cannot take the Fifth in Canada.

In the case of *Balsys*<sup>18</sup> the Supreme Court of the United States held that a resident alien who had been living in the U.S. for nearly forty years had no constitutional protection under the Fifth Amendment because he did not face criminal proceedings in the U.S.. As such, it would follow that a Canadian would not be able to plead the Fifth in the U.S. on a matter that was not being prosecuted in the United States. Therefore, presumably the U.S.

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<sup>15</sup> Andrew G Klevorn & Gavin Smyth, Cross-Border Securities Enforcement: Issues Raised in Coordinating Defences, (Presented at The Canadian Institute's 4<sup>th</sup> Annual Advanced Forum on Securities Litigation: Toronto, November 29 &30, 2004). (Klevorn and Smyth)

<sup>16</sup> Ibid. Article(9d), MMOU)

<sup>17</sup> Ibid, Article (5(3)), MOU)

<sup>18</sup> *United States v. Balsys*, 199 F.3d 122 (2<sup>nd</sup> Cir. 1997)

courts can force testimony from anyone, including Canadians, that can then be used later against them in the foreign jurisdiction.<sup>19</sup>

Oddly, however, under the MMOU and MOU entered into between the OSC and SEC, a Canadian might have been able to plead the Fifth Amendment as a Canadian citizen residing in the U.S. who was testifying in an investigation by the SEC carried out at the request of the OSC, except that in the U.S. all accused are unable to rely on the Fifth Amendment where the threat of the criminal proceeding relates to a foreign prosecution, in this case prosecution by the OSC.

It could be argued that one way to circumvent this gap in the law would be to assert that the Requested Authority is really acting as an agent of the Requesting Authority.<sup>20</sup> This was alluded to in the *dicta* of the Supreme Court of the United States in *Balsys*, where Souter J. stated:

If it could be said that the United States and its allies had enacted substantially similar codes aimed at prosecuting offences of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as ‘foreign’. The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence-gathering and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of criminal case brought by the government itself.<sup>21</sup>

However, in *Re Impounded*, the United States Court of Appeal for the Third Circuit disagreed with this argument that ‘international cooperation’ filled the gap in the law. The Supreme Court of Canada has taken a similar approach regarding the accountability

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<sup>19</sup> Christopher R Preston, *In re Impounded: When will the right against self incrimination protect witnesses from foreign prosecution?* (Brigham Young University Law Review; online at findartiles.com)

<sup>20</sup> Joseph Groia and Alyssa Yufe, “Cross-Border Corporate Crimes: A Short Paper on Recent Trends in International Securities Enforcement” May 9, 2001.

<sup>21</sup> *United States v. Balsys*, 199 F.3d 122 (2<sup>nd</sup> Cir. 1997)

of American authorities under the Charter in the context of mutual assistance between the U.S. and Canada in criminal matters.<sup>22</sup>

What if there are pending or threatened Criminal proceedings during an investigation by a Securities commission?

An example of the gap in the law regarding the Fifth Amendment and the Canadian protection against self-incrimination arises in cases where the individual is being investigated or may be prosecuted on both sides of the border. This was considered by the Ontario Superior Court in *Gillis v. Eagleson*<sup>23</sup>. In that case expert witnesses agreed that in Eagleson's U.S. criminal proceedings he would not be entitled to the benefit of derivative use immunity, or an other protections provided by Canadian evidentiary and constitutional law. Furthermore, if Eagleson was tried in the U.S. he would not be able to invoke the Fifth Amendment right to render his civil discovery inadmissible against him at trial on the grounds of self-incrimination. This is because Fifth Amendment protections are waived if the accused gave prior testimony in a civil case. Therefore, if Eagleson testified at examinations for discovery or at trial in the Ontario civil proceedings then he would not be able to invoke the Fifth Amendment or rely on Canadian self-incrimination protections in the U.S. criminal proceedings. The Court concluded that they would grant a stay of nine-months in the Ontario proceeding because there was no procedure that an Ontario court could invoke to ensure that the civil trial proceeded in a manner that would prevent evidence from being used against Eagleson in the U.S. criminal trial.

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<sup>22</sup> See for example, *R. v. Terry* [1996] 2 SCR 207 where the Court held, "[t]he officers were bound by the laws of California. Even if one could somehow classify them as 'agents' of the Canadian police, so long as they operated in California they would be governed by California law".

<sup>23</sup> *Gillis v. Eagleson*, [1995] OJ No. 1160.

Can a Canadian plead the Fifth if they are being investigated for a U.S. criminal case?

In *United States v. Bin Laden*<sup>24</sup> the Federal Court of the Southern District of New York allowed the extension of the Fifth Amendment protection to a non-resident foreigner overseas where the individual was subject to a U.S. criminal investigation. In this case the Court held that statements given abroad to a U.S. enforcement agent were inadmissible during a later criminal trial conducted in the U.S.

The U.S. courts have not yet extended the *Bin Laden* dicta to civil cases. As such, non-residents foreigners cannot plead the Fifth Amendment in civil cases. For example, in *Bear Stearns & Co. v. Wyler*<sup>25</sup> the Court allowed a subpoena to stand served upon a Dutch businessman that subpoenaed bank, wire transfer and phone records. In dictum, the court examined the businessman's purported Fifth Amendment rights as a citizen and resident of the Netherlands, and while deciding the issue on other grounds, noted that it "was not self evident that the Fifth Amendment's privilege against self-incrimination is available to non-resident aliens".<sup>26</sup>

As was demonstrated by Conrad Black in *Hollinger*, a foreigner can plead the Fifth Amendment if they are already part of a U.S. criminal proceeding. If the foreigner is not yet a part of a criminal proceeding at the time they plead the Fifth Amendment then the protection offered by the privilege is less certain. The Ninth Circuit held that the mere possibility of criminal prosecution is all that is needed to invoke the Fifth Amendment.<sup>27</sup> However, the Seventh Circuit held that when there is only "but a fanciful possibility" of criminal prosecution, the allowance of the Fifth Amendment privilege is improper.<sup>28</sup> Therefore, the mere threat of criminal proceedings may not be enough to invoke the Fifth

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<sup>24</sup> *United States v. Bin Laden*, 132 F. Supp. 2d 168, 181 (SDNY 2001).

<sup>25</sup> *Bear Stearns & Co. v. Wyler*, 182 F. Supp. 2d 679 (ND Ill 2002).

<sup>26</sup> *Ibid* at 680-681; cited in Andre Castaybert and Victoria Loughery, "Proskauer on International Litigation and Dispute Resolution".

<sup>27</sup> *In re Seper*, 705 F.2d 1499, 1501 (9<sup>th</sup> Cir. 1983).

<sup>28</sup> *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7<sup>th</sup> Cir. 1983).

Amendment.<sup>29</sup> Arguably, until a parallel proceeding is actually initiated, the defendant should be compelled to respond to a complaint or discovery.<sup>30</sup>

However, there are several instances where defendants have pled the Fifth Amendment in securities investigations prior to parallel criminal cases being commenced. In *In re Lernout & Hauspie Sec Lit*<sup>31</sup> the defendant, and former CEO of the technology firm, asserted the Fifth Amendment privilege when answering the complaint and responding to discovery requests. Moreover, in *In re Symbol Techs. Litig*<sup>32</sup> the defendant and former CEO asserted his Fifth Amendment rights when filing his answer to the plaintiff's complaint even though, at the time, no criminal case had been brought against the defendant individually.

#### Can you plead the Fifth Amendment in Canada?

Pursuant to the MOU and MMOU, if you are under investigation by the OSC at the request of the SEC, you will be compelled to testify and can subsequently assert the use immunity protections afforded to you by Ontario law, but unless you are a U.S. citizen you cannot plead the Fifth.

#### Will a Canadian citizen receive any cooperation for going to the United States?

The SEC encourages cooperation with their investigations and is willing "to credit [cooperative] behaviour in deciding whether and how to take enforcement action".<sup>33</sup> By way of an investigation conducted in the U.S. the "Seaboard Report" was formulated and

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<sup>29</sup> See footnotes 4 and 5.

<sup>30</sup> Glen DeValerio, Kathleen Donovan-Maher, Julie Richmond "Implications of Pleading the Fifth Amendment in a Securities Fraud Class Action" (2004 ALI-ABA Securities Litigation Program: Boston.)

<sup>31</sup> *In re Lernout & Hauspie Sec. Lit.*, No. CIV.A. 00-11589-PBS (D. Mass).

<sup>32</sup> *In re Symbol Techs. Litig.*, No. 02-CIV-1383-LDW (EDNY).

<sup>33</sup> Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on Relationship of Cooperation to Agency Enforcement Decisions, Release No. 44969, 6 SEC Docket 220-18, at 2 (Oct. 23, 2001) (the "Seaboard Report").

states the factors to be considered by the SEC in determining whether to grant credit for cooperation. These factors are:

- The nature of the misconduct involved;
- How the misconduct arose;
- Where in the organization the misconduct arose;
- The duration of the misconduct;
- The degree of harm the misconduct has inflicted upon investors and other corporate constituencies;
- How the misconduct was detected and by whom;
- How long after the discovery of the misconduct before the company implemented an effective response;
- The steps taken by the company to respond to the misconduct, including whether the company cooperated with the appropriate regulatory and law enforcement bodies;
- The process followed by the company to ferret out the necessary information;
- Whether the company promptly made available to the SEC the results of its review and provided sufficient documentation reflecting its response to the situation;
- Whether the conduct is unlikely to recur; and
- Whether the company is the same company in which misconduct occurred, or has changed through a merger or bankruptcy reorganization.<sup>34</sup>

The types of credits that the SEC will grant, depending on the analysis of the factors above, are: (i) the SEC may decline to bring enforcement action; (ii) the SEC may chose to bring reduced charges; (iii) the SEC may seek lighter sanctions; or (iv) include mitigating language in the documents used by the SEC to announce and resolve enforcement actions.<sup>35</sup>

The factors and credits referred to in the Seaboard Report will apply to Canadians who chose to cooperate with the SEC. It should be noted however, that an extraordinary level of cooperation is needed to benefit from the credit policy of the SEC. Moreover,

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<sup>34</sup> Seaboard Report at 2-4 (online: <http://www.sec.gov/litigation/investreport/34-44969.htm>).

<sup>35</sup> Supra at note 15 (Klevorn & Smyth)

cooperation with the SEC often involves turning over results of internal investigations, which may make companies more vulnerable to civil litigation by private parties.<sup>36</sup>

### What is the scope of Derivative Use Immunity after the Branch Decision?

In Canada, where testimony has been compelled in the process of a regulatory proceeding, section 13 of the *Charter* will protect the witness from having the evidence used to incriminate them in later proceedings.<sup>37</sup> Moreover, in addition to subsequent use immunity there is also the protection of derivative use immunity in Canada which excludes evidence that is discovered as a result of the testimony and which would not have been discovered but for that testimony.

In *British Columbia Securities Commission v. Branch* (“*Branch*”)<sup>38</sup> the Supreme Court of Canada discussed the constitutionality of the investigative powers of the B.C. Securities Commission. More specifically, in *Branch* the Court dealt with an instance where a subpoena was issued requiring a company to produce all information and records in their possession relating to the company. The Court found that this request for documents did not violate section 7 of the *Charter*.

If a witness is compelled then they have the right to claim subsequent derivative use immunity with respect to the compelled testimony. In their decision the Court stated that the accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established the Crown will have to prove on the balance of probabilities that that the authorities would have discovered the impugned derivative evidence absent the compelled testimony.

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<sup>36</sup> Nick Morgan, “SEC Enforcement: Current Issues” (Presentation to the Directors Roundtable, March 29, 2006) [unpublished].

<sup>37</sup> The Honourable Peter de C. Cory, CC and Marilyn Pilkington, “Study: Critical Issues in Enforcement” (Commissioned by the Task Force to Modernize Securities Legislation in Canada: September 2006).

<sup>38</sup> [1995] 2 SCR 3 (SCC).

The Court held that documentary compulsion may also entail jeopardy regarding a person's rights under section 7 so far as it engages the appellant's liberty interests. There were two main issues that the Court discussed regarding documentary compulsion: (i) the identity of the person facing the prospect of self-incrimination; and (ii) most significantly, the nature of the compulsion, that is, whether the documents contain a compelled answer merely reduced to writing, or exist separately and apart from the compelled person. Therefore, the Court found that documents are properly compellable unless they are excluded on the basis of the principles applicable to testimonial compulsion.

What happens when the SEC and a Self-Regulatory Organization (SRO) are both involved in the obtaining of testimony?

In the case of *Re Gruson*<sup>39</sup>, the conduct of a broker was being investigated by the Investment Dealers Association (IDA). The IDA is an SRO under the umbrella of the OSC. The conduct that was the subject of the IDA's probe was relating to trading involving an American company. The SEC was also conducting an investigation relating to Mr. Gruson and had previously asked him to provide information to them on a voluntary basis, Mr. Gruson refused. As part of the IDA's investigation they sought to interview Mr. Gruson. However when Mr. Gruson became aware that a representative of the SEC was going to be present and participate during the IDA's interview he refused to attend. The three-member panel of the IDA that heard the matter regarding Mr. Gruson's refusal to be interviewed decided that the SEC was not allowed to participate in, or be present at, the IDA's interview. The reasoning behind the IDA's decision was that they accepted Mr. Gruson's argument that there were legitimate concerns as to what use the SEC, or other courts or tribunals in the U.S., might make of the evidence obtained by the SEC's participation in the interview. There was also a concern about what rights of

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<sup>39</sup> *Re Gruson*, [2004] IDAC No 61.

protection under the Fifth Amendment would be available at the IDA interview and later in possible proceedings in the U.S.<sup>40</sup>

## Document Production

The SEC can compel the production of books, papers, correspondence, memoranda, and other relevant records in connection with an SEC investigation. In the U.S. there is a much higher premium placed on document retention and preservation than in Canada. For example, failure to preserve and produce required documents will result in harsh penalties (the SEC has fined a company \$10 million, in part, for failing to adequately search for the documents requested by the SEC).<sup>41</sup> In *Zubulake v. UBS Warburg*<sup>42</sup> the court affirmed that a party must take reasonable steps to suspend its routine document retention by putting a “litigation hold” in place when a party reasonably anticipates litigation, but went on to hold that counsel have a positive ongoing duty to ensure that the client issues, communicates and enforces the “litigation hold” throughout the life of the litigation.<sup>43</sup> As such it is imperative that these stricter U.S. laws pertaining to documents are considered from the outset in cross-border investigations.

### What Process does the SEC have to follow to obtain documents in Canada?

Once the SEC has issued a formal order of investigation they may compel regulated and non-regulated entities and individuals by subpoena to produce books, records and other relevant documents.<sup>44</sup> The scope of document discovery in the U.S. is roughly the same as in Canada, although the courts in the U.S. tend to permit broader document discovery from non-parties. In Ontario a civil party seeking documents from a non-party must apply for a court order. Conversely, in the U.S. there is generally a *prima facie* right in civil

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<sup>40</sup> *The Investment Dealers Association of Canada v. Brian Gruson*, Decision released December 24, 2004.

<sup>41</sup> *Am. Int'l Group, Inc., Re.* Release 34-28277 (September 11, 2003) as cited in Groia & Hardie, 64.

<sup>42</sup> *Zubulake v. UBS Warburg*, 220 FRD 212 (SDNY 2003).

<sup>43</sup> Mendy Chernos, Paul Morrison, Robert Cooper and Simon Potter, “Canada: Corporate Commercial Litigation- Recent Developments of Importance” (McCarthy Tetrault: July 3, 2006.)

<sup>44</sup> Ethiopis Tafara, “Speech by SEC Staff: Remarks Presented at the IMF Conference on Cross-Border Cooperation and Information Exchange.” (Washington: July 7-8, 2004).

cases to secure documents directly from non-parties. Furthermore, parties to litigation in the U.S. are not required to produce documents automatically, instead after serving the pleadings, the parties must serve document requests.<sup>45</sup>

The SEC also has the ability to gain access of documents through the MMOU. In order to obtain documents the SEC, as the Requesting Authority, will make a written request to the OSC (or other body) for documents. In this written request, the following specifications must be included<sup>46</sup>: (i) a description of the facts underlying the investigation that are the subject of the request and the purpose for which the assistance is sought; (ii) a description of the assistance sought by the Requesting Authority and why the information sought will be of assistance; (iii) any information known to, or in the possession of, the Requesting Authority that might assist the Requested Authority in identifying either the Persons believed to possess the information or documents sought or the places where such information may be obtained; (iv) an indication of any special precautions that should be taken in collecting the information due to investigatory considerations, including the sensitivity of the information; (v) the Laws and Regulations that may have been violated and that relate to the subject matter of the request.

#### Are there any protections against document production?

The Supreme Court of Canada has held that the nature of seizure of document provided for under the *Securities Act* is “one of the least intrusive of the possible methods which might be employed to obtain documentary evidence.”<sup>47</sup> Moreover, documents produced in the course of a business which is regulated, such as the securities market, have a lesser privacy right attached to them than do personal documents.<sup>48</sup> During the investigation stage of proceedings documents are compellable subject to a possible claim against their

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<sup>45</sup> Steven Schoenfeld, Michael Penny and John Terry, “Understanding Litigation in the United States” North American Corporate Lawyer, Vol. VII, No. 4, 2003.

<sup>46</sup> MMOU (Article 8(b)).

<sup>47</sup> *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3 (SCC) at para 60.

<sup>48</sup> *Ibid*, para 62.

subsequent use under the “but for” test.<sup>49</sup> That test is not applicable in determining their compellability. The Court in *Branch* distinguished between the more stringent protections needed regarding document production in criminal cases in comparison with the more flexible approach that is reasonable in a regulated industry such as the securities market.<sup>50</sup>

Currently Canada has a long policy of granting unfettered access to court documents.<sup>51</sup> There is presently a case going through the Ontario courts that may change some of this openness in instances dealing with cross-border litigation. In *Marvin Neil Silver and Cliff Cohen v. Imax Corporation et al* proceedings have been started against the Defendant in both Canada and the U.S. states. During the Canadian proceeding Affidavits of several Imax executives, obtained during the discovery process have become public court documents. Though the U.S. action is presently stayed until the conclusion of the Canadian one, Imax counsel fears that allowing U.S. plaintiffs to have access to these documents would be unjust. The motion was to be heard at the end of March and no decisions have been released yet.

## Conclusion

Securities Commissions in both Canada and the U.S. have recognized the need to cooperate in investigations if they are going to be successful in fulfilling their mandates. There is little doubt that sharing testimony and documents across borders is a fundamental part of regulating an increasingly global market place. Undoubtedly there is a need for clarification from the courts to allow counsel to fully understand the risks that underlie the arguably open exchange of information between U.S. and Canadian Securities Regulators. As seen by *A v. Ontario Securities Commission* and *Hollinger*, the OSC and the courts are still grappling with the issues surrounding self-incrimination in cross-border investigations. Until the law is clear, counsel must be wary of the varying

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<sup>49</sup> Ibid, para 42.

<sup>50</sup> *A. v. Ontario Securities Commission*, [2006] OJ No. 1768, at para 32.

<sup>51</sup> Jim Middlemiss, “Cloud over court document access” Financial Post, March 26, 2008.

rights of self-incrimination and must ensure that they use their best efforts to protect the rights of their client on both sides of the border.