

**Keep Calm and Carry On*: Strategies For Dealing with
Joint OSC/SEC Investigations**

February 21 & 22, 2008

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"Everything that needs to be said has already been said. But since no one was listening, everything must be said again . . ."

Andre Gide

Cooperation between the Ontario Securities Commission (the "OSC") and the Securities and Exchange Commission (the "SEC") is now the norm rather than the exception.¹ The scandals that have plagued the securities industry in recent years have become increasingly internationally by nature, and in response, so too have the regulators. This paper will discuss the enabling legislation and case law that allows the SEC and the OSC to cooperate during investigations; as well as addressing the impact that cooperation between these regulators has on respondents; factors for defence counsel to consider in determining whether or not to cooperate with regulators on either side of the border; the differing rights regarding self-incrimination in Canada and the United States; and the enforcement of judgments on either side of the border, once they have been obtained.

In the 1980's the SEC began forming international units and through a combination of memorandums of understanding and good fortune, the SEC made considerable progress in their ability to detect, investigate and prosecute violations of their laws.² On January 7, 1988, the OSC signed its first *Memorandum of Understanding* ("MOU")³ with the SEC that was a recognition of the "*increasing international activity in securities markets and the corresponding need for mutual cooperation in matters relating to the administration and enforcement of United States and Canadian securities laws*". Under the terms of the

¹ Joseph Groia and Colleen Olesen, *Taking Stock: An Inventory of Enforcement Issues on the Trans-Border Securities Highway*" (Presented at Insight 95-Securities Forum: Toronto, February 14 & 15, 1995).

² Ibid.

MOU, the signatories agreed to provide one another the “fullest mutual assistance” by providing access to information in agency files, taking evidence of persons and obtaining documents for investigations.⁴

Assistance under the MOU is available to the OSC and the SEC in the following instances:

- insider trading;
- misrepresentation or the use of fraudulent, deceptive or manipulative practices in connection with the offer, purchase or sale of any security;
- the duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control;
- the duties of persons, issuers or investment businesses to make full and fair disclosure of information relevant to investors;
- the duties of investment businesses and securities processing business pertaining to both their financial, operational or other requirements and their duties of fair dealing in the offer and sale of securities and the execution of transactions; and
- The financial and other qualifications of those engaged in, or in control of issuers, investment businesses, or securities processing businesses.⁵

The MOU between the OSC and the SEC was not expected to supersede domestic laws, and section 5(3) of the MOU sets out the expectations of the OSC and the SEC regarding this matter:

“The testimony of persons will be taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the Requested Authority. Notwithstanding any other provision of this Memorandum of Understanding, any person giving testimony as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the jurisdiction of the

³ (1988) 11 OSCB 114.

⁴ Ibid at Article 2(1) and 2(2).

⁵ Ibid. at Article 1 (h)(i)-(iv).

Requested Authority. 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.”

Assistance requested under the MOU may be refused on public interest grounds of the Requested Authority.⁶

On December 5, 2002, the OSC and the SEC, along with a number of other international securities regulators, also executed the International Organization of Securities Commissions Multilateral Memorandum of Understanding (“IOSCO MMOU”) (the 1988 MOU and the IOSCO MMOU collectively referred to as the “MOUS”). The assistance available under the IOSCO MMOU is intended as a commitment to cooperation between international securities enforcement agencies and is very similar to that of the MOU between the OSC and SEC.⁷

The MOUS are intended to complement statutory schemes and demonstrate the commitment of international securities regulators to communicate and cooperate with one another.⁸

⁶ Ibid. Article 3(4).

⁷ Johanna Superina, *Section 11 Investigation Powers under the Ontario Securities Act: Cross-Border Issues* (Presented at the Law Society of Upper Canada’s “Twelve Minute Securities Lawyer”: Toronto, May 31, 2006)(“Superina”).

⁸ Ibid.

Domestic Enabling Legislation in Canada and the United States

Under Section 21 (a) of the *Securities and Exchange Act*⁹ the SEC has the authority to provide assistance to a foreign securities authority (the “Requesting Authority”) if the Requesting Authority advises that it is conducting an investigation and requires assistance to determine whether any person has violated, is violating or is about to violate any laws or rules in relation to securities matters that the Requesting Authority administers or enforces. Section 24 (c) of the *Exchange Act*¹⁰ authorizes the SEC to make nonpublic records available to foreign officials upon a showing of need and a promise of confidentiality.

While Canadian securities laws generally provide that the details of an investigation will be kept confidential, SEC investigations, though “non-public”, allow for disclosure to third parties in certain instances.¹¹ Section 24 (e) of the *Exchange Act* addresses the concerns of foreign regulators, such as the OSC, that may be reluctant to share non-public information with the SEC because their investigations are not confidential by allowing the SEC to keep information obtained from a foreign regulator confidential, even where the SEC is confronted with a third-party subpoena or *Freedom of Information Act* request.¹²

⁹15 U.S.C. § 78 et seq. (the “*Exchange Act*”).

¹⁰ *Ibid.*

¹¹ J. Groia & P. Hardie, *Securities Litigation and Enforcement* (Toronto: Thomson Carwell, 2007) at 62 (“Groia & Hardie”). SEC witnesses are permitted to discuss their evidence with third parties and “non-public” information may also be shared in response to a third -party subpoena or under the *Freedom of Information Act*.

¹² *Ibid.*

Section 11(1)(b) of the *Ontario Securities Act*¹³ allows the OSC to issue “Investigation Orders” appointing authorized persons to assist in the enforcement of securities laws in other jurisdictions. The Supreme Court of Canada upheld the constitutionality of a section similar to section 11(1)(b) of the OSA¹⁴ (under British Columbia’s *Securities Act*), in its decision in *Global Securities Corp. v. British Columbia (Securities Commission)*.¹⁵ In so doing, the Supreme Court of Canada found that the dominant purpose underlying the section was to ensure cooperation from other jurisdictions and to discover the wrong doings of British Columbia Registrants in other jurisdictions, and that the extra provincial aspects of the section were merely incidental.¹⁶

Strategies for Dealing with Cross-Border Regulatory Cases

Regardless of any protections that may be in place in either the United States or Canada, if a client with a cross-border presence has regulatory or criminal problems, defence counsel should assume that regulators and authorities on both sides of the 49th parallel are sharing all information.¹⁷ Defence counsel should also consider the following strategies;

- Assist client in obtaining the necessary legal advice and/or representation in the corresponding jurisdiction;
- Once the client has obtained both United States and Canadian counsel, it is important to ensure that both counsel work together to assess which regulators and which authorities will pursue which players as targets of regulatory or criminal action;

¹³ *Ontario Securities Act*, R.S.O. 1990, c. S.5 (“OSA”).

¹⁴ *Ibid.*

¹⁵ [200] 1 SCR 494 (*Global Securities*).

¹⁶ *Ibid* at paragraphs 27-34.

¹⁷ Andrew G. Klevorn & Gavin Smyth, *Cross-Border Securities Enforcement: Issues Raised in Coordinating Defences*, (Presented at The Canadian Institute’s 4th Annual Advanced Forum on Securities Litigation: Toronto, November 29 &30, 2004) (“Klevorn & Smyth”).

- United States and Canadian defence counsel need to be aware of the fact that given the amount of media scrutiny on securities litigation, regulators are very concerned about the optics of the situation: neither side will want to be seen to be lagging behind the other in their investigation. In the settlement context, for example, counsel can work to keep their home regulator in the loop on efforts to resolve matters on the other side of the border. This will help gain goodwill and prevent rash formal action by the home regulator;
- Counsel should be aware that information and documents disclosed in responding to civil actions, including oppression actions and class actions will be collected and sent to the other side of the border without any concern for internal policies of cross-border sharing of evidence, since this evidence is public once it has been filed with the court; and
- Counsel should also be aware of the self-incrimination issues that arise as a result of the differing rights on each side of the border.¹⁸

Factors to Consider in Cooperating with the SEC

The SEC has the power to compel the production of books, papers, correspondence, memoranda and any other relevant records in connection with SEC investigations, and in the post-Enron era, the SEC places an even higher premium on document retention preservation than it did previously.¹⁹ Failure to preserve and produce required documents will result in harsh penalties (the SEC fined a company \$10 million, in part, for failing to adequately search for the documents requested by the SEC).²⁰

Accordingly, when a corporation receives a subpoena for documents from the SEC, it should send a red alert letter to anyone likely to have records relating to the subpoena to ensure that the corporation's records are preserved.²¹ The corporation should also advise

¹⁸ Ibid.

¹⁹ Ibid at note 17 (Klevorn & Smyth).

²⁰ *Am. Int'l Group, Inc., Re. Release 34-28277* (September 11, 2003) as cited in Groia & Hardie at 64. See also *U.S. v. Arthur Andersen LLP*, 374 F. 3d. 281 (5th Cir. 2004).

²¹ Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp & Fin. L. 721, 727 (2003).

employees that the destruction of relevant documents is a federal crime. Corporations wishing to benefit (or least not be punished) from cooperating with the SEC should conduct a thorough search of its records before responding to an SEC subpoena.

Going the Extra Mile or Just Squeaking By? The *Seaboard* Factors

Although the *Seaboard* decision²² in the United States was initially hailed as a business-friendly approach to cooperation with the SEC that would encourage self-reporting from public companies, it has raised the standard that the corporations are now held to in the United States and has worked, in part, to increase fines levied by the SEC for companies that do not follow its strict recommendations.²³

The Seaboard recommendations include thirteen factors that (might) earn reporting companies credit for good behaviour, including:

1. The nature of the misconduct involved;
2. How the misconduct arose;
3. Where in the organization the misconduct arose;
4. The duration of the misconduct;
5. The degree of harm the misconduct has inflicted upon investors and other corporate constituencies;
6. How the misconduct was detected and by whom;

²² *United States (Securities and Exchange Commission) v. The Seaboard Corporation, etc., et al.* 677 F.2d 1301. (“*Seaboard*”). In October 2001 the Seaboard Corp. was able to avoid charges and fines when it reported the accounting fraud of one of its subsidiaries. Within one week of finding out about the fraud, the company took immediate steps to advise its board, make internal investigations, and inform the SEC and the investing public that its financial statements would have to be restated.

²³ Tim Reason, “*The Limits of Mercy: the Cost of Cooperating with the SEC is High. The Costs of Not Cooperating is Even Higher*”(2005) *CFO Magazine* (online:http://findarticles.com/p/articles/mi_m3870/is_6_21/ai_n15783657).

7. How long after the discovery of the misconduct before the company implemented an effective response;
8. The steps taken by the company to respond to the misconduct, including whether the company cooperated with the appropriate regulatory and law enforcement bodies;
9. The process followed by the company to ferret out the necessary information;
10. Whether the company committed to learn the truth, fully and expeditiously;
11. Whether the company promptly made available to the SEC the results of its review and provided sufficient documentation reflecting its response to the situation;
12. Whether the conduct is unlikely to recur; and
13. Whether the company is the same company in which the misconduct occurred, or has changed through a merger or bankruptcy reorganization.²⁴

The kind of credits available to those that follow the Seaboard recommendations 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.²⁵ Ultimately, what the Seaboard recommendations reward are companies that seek out offenders, self-report, rectify illegal conduct and otherwise cooperate with the SEC, thereby saving the SEC and shareholders the large expenditures of a full investigation.²⁶

Defence counsel should be aware that the extraordinary level of cooperation required to benefit from the Seaboard recommendations often requires companies to hand over to the

²⁴ *Seaboard Report* at 2-4 (online: <http://www.sec.gov/litigation/investreport/34-44969.htm>).

²⁵ *Supra* at note 17(Klevorn & Smyth).

SEC the results of their internal investigations, despite the fact that those documents may be covered by solicitor-client privilege. While sharing the results of internal investigations with the SEC shows cooperation and good faith, and aids the SEC in its investigations (all good things under the Seaboard guidelines), it may also make corporations vulnerable to civil litigation by private parties.²⁷ It is important, therefore, for defence counsel to consider the ramifications of waiving solicitor-client privilege against the potential benefits of full and open form of cooperation with the SEC required by the Seaboard recommendations.²⁸

Obstruction of Justice and Cooperating with the OSC

While there are criminal and quasi-criminal prohibitions regarding the destruction of documents in Canada, offenders are rarely pursued in the context of securities litigation.²⁹ Section 139 (2) of the *Criminal Code* is the most relevant criminal provision regarding obstruction of justice. Section 139 of the *Criminal Code* provides that: “*Every one who willfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.*”³⁰ The Supreme Court of Canada in *R. v. Wijesinha* held that section 139(2) extends to the operations of tribunals

²⁶ William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago: University of Chicago Press, 2006) at 131.

²⁷ Nick Morgan, “*SEC Enforcement: Current Issues*” (Presentation to the Directors Roundtable, March 29, 2006) [unpublished].

²⁸ Note: the SEC does not view the provision of privileged information to the SEC staff as an outright waiver of privilege to third parties, although there is the risk that such disclosure may occur. Also the provision of privileged information does not constitute a subject matter waiver that would entitle the SEC to receive further privileged information.

²⁹ *Supra* at note 11 at 64-65 (Groia & Hardie).

³⁰ R.S.C. 1985, c. C-46.

(in that case the Law Society of Upper Canada).³¹ Pursuant to the OSC Staff Notice 15-702 (*Credit for Cooperation*), Ontario market participants will not receive credit for cooperation if they “*destroy documents in an attempt to avoid production of the records*”, which perhaps demonstrates how far the OSC is from the SEC on this issue.³²

Lawyers in Ontario also need to be aware that the reach of the OSC may extend from their clients to them. In *Wilder v. Ontario (Securities Commission)*³³, Mr. Wilder, a securities lawyer acting in his professional capacity, filed a preliminary prospectus with the OSC on behalf of a client.³⁴ Mr. Wilder also wrote to the OSC Staff referring to a series of due diligence reviews conducted by independent parties, which Staff later claimed was misleading. Staff then sought an order reprimanding Mr. Wilder under section 127 of the *Ontario Securities Act*³⁵ and Mr. Wilder applied to the Divisional Court for Judicial Review on the grounds that the OSC lacked the statutory authority to reprimand him. It was argued that the allegations should be dealt with by way of a quasi-criminal proceeding under section 122 of the OSA or by the Law Society of Upper Canada in its capacity as a regulator. The Divisional Court dismissed the application, holding that there was nothing inconsistent between the Law Society’s role in regulating the legal profession and the OSC’s role in defending the public interest, and on appeal, the Ontario Court of Appeal agreed. This case is a caution to lawyers that they must exercise extreme caution in dealing with the OSC.³⁶

³¹ (1995) 32 CRR (2d) 57 (SCC).

³² OSC’s Staff Notice 15-702, *Credit for Cooperation*.

³³ (2001), 24 OSCB 1953 (Ont. C.A.).

³⁴ *Supra* at note 11 at 65 (Groia & Hardie).

³⁵ *Ontario Securities Act*, R.S.O. 1990, c. S.5, s. 127 (“OSA”).

³⁶ *Supra* at note 11 at 65 (Groia & Hardie).

Evaluating the Costs of Cooperation

As is evident from the credit for cooperation factors in both Canada and the United States, the decision of whether or not to cooperate with regulators often arises very early in the life of a file, and counsel should be prepared early on to advise clients about this very important decision. In cross-border cases, counsel should consult with defence counsel on the other side of the border in making these decisions. As the regulators have learned, a coordinated approach based on shared intelligence assists in providing the best advice to a common client.³⁷

In particular, defence counsel should put their minds to the issue of full disclosure and the waiver of solicitor-client privilege that may result. If defence counsel wait to deal with these issues after subpoenas (or summonses) have been issued by the regulators, it may be too late.³⁸ Both United States counsel and Canadian counsel need to consider the benefits and risks of cooperating with the regulators early on, especially if the client is considering sharing the results of an internal investigation. At the time the request to share the information from an internal investigation is made by the regulator, defence counsel is not likely to know what the results of the investigation will reveal. If the client decides to cooperate with regulators on a cross-border matter, it is important to coordinate the effort to cooperate both in Ontario in the United States because as noted earlier in this paper, regulators are very concerned with the optics of the situation.³⁹ Counsel should be careful not to leave one regulator out of the loop, especially on a

³⁷ *Supra* at note 17 (Klevorn & Smyth).

³⁸ Joel Androphy, *White Collar Crime Database* (June 2007) (Westlaw).

significant matter that is likely to be reported in the media: you do not want them to read about your efforts to cooperate with the *other* regulator in the newspaper.⁴⁰

Differing Rights Against Self-Incrimination

Witnesses appearing before the SEC can claim the protection of the Fifth Amendment and remain silent, where the OSC can compel the testimony of witnesses.⁴¹ The Ontario Court of Appeal, in the decision in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* summarized the problem facing persons under simultaneous investigation by the OSC and SEC as follows:

“In both Canada and the United States, 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 in the United States 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 a 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 United States, 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.”⁴²

The United States: The Fifth Amendment

As virtually anyone who has ever seen an episode of *Law and Order* knows, witnesses called to the testify in the United States in criminal matters are entitled to assert the Fifth Amendment right, under the United States Constitution, to privilege against self-

³⁹ *Supra* at note 17 (Klevorn & Smyth).

⁴⁰ *Supra* at note 17 (Klevorn & Smyth).

⁴¹ *Supra* at note 11 at 63 (Groia & Hardie).

⁴² (2005), 79 OR (3d) 70 (Ont. C.A.) at para. 4 (QL). This passage was also cited by the Justice C.L. Campbell of the Ontario Superior Court of Justice in his 2006 decision in *Mr. A v. Ontario (Securities Commission)*, [2006] OJ No. 1768 (cited below).

incrimination. This right extends to witnesses called to testify during formal SEC investigations as well.⁴³ A corporation, however, may not assert the Fifth Amendment.⁴⁴

Canadian Rights Against Self-Incrimination & Derivative Use Immunity

Persons accused of crimes in Canada also have the right to protect themselves from incrimination. Section 11 (c) of the *Canadian Charter of Rights and Freedoms*⁴⁵ (the “Charter”) states that: “*any person charged with an offence has the right not to be compelled to be a witness in a proceeding against that person in respect of the offence*”.

More importantly, for our purposes, Section 13 of the *Charter* states:

“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.”

These *Charter* rights ensure that persons that are the subject of a criminal prosecution in Canada cannot be compelled to give evidence against themselves where the person is being prosecuted in Canada, but these rights are not automatically available when that person is in Canada but facing criminal investigations in the United States.⁴⁶

Similarly, the *Canada Evidence Act*⁴⁷ and the *Ontario Evidence Act*⁴⁸ provide that testimony may not be used in any subsequent proceeding for the purpose of incriminating the witness. In other words, while the testimony of a witness may be used by the court in

⁴³ *SEC v. Dunlap*, 253 F. 3d 758 (4th Cir. 2001), as cited in Klevorn & Smyth.

⁴⁴ *George Campbell Painting Corp. v. Reid*, 392 US 286, 288-89 (1968) as cited in Klevorn & Smyth.

⁴⁵ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴⁶ *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2005] OJ No. 4666 (Ont. C.A.) at para. 7 (QL).

⁴⁷ RSC 1985, c. C-5, s. 5.

the instance in which it was given, it will not be able to be used in subsequent proceedings, which may incriminate the witness (“use immunity”).⁴⁹ Additionally, a person compelled to testify in Canada is provided with “derivative use immunity”, which prevents the admission of evidence that could not have been obtained but for the compelled testimony in a prior hearing from being used in a later hearing. The test for the exclusion of derivative evidence is whether the evidence could have been obtained but for the witness’s testimony and requires an inquiry into logical probabilities and not mere possibilities.⁵⁰ The onus is on the defendant to demonstrate that the proposed evidence is derivative evidence deserving of a limited immunity protection.⁵¹

Witnesses & Regulatory Investigations - *A. v. Ontario Securities Commission*

In *A v. Ontario Securities Commission*⁵², the Ontario Superior Court of Justice considered whether testimony compelled in Ontario pursuant to investigation orders authorizing the OSC to investigate certain matters on behalf of itself and the SEC violated Mr. A’s *Charter* rights.⁵³ Mr. A was also the subject of ongoing criminal investigations in Canada and the United States. Mr. A. argued that, amongst other things, if the OSC were able to obtain his testimony under oath in Ontario, they would hand over his compelled

⁴⁸ RSO 1990, c. E.23, s. 9.

⁴⁹ *British Columbia (Securities Commission) v. Branch*, [1995] 2 SCR 3. (“*Branch*”) This rule applies to a proceeding leading to a penal consequence and more generally to any proceeding which engages Section 7 of the *Charter*. In *Branch*, the BCSC sought to compel the testimony of directors of a corporation. The directors brought a motion to the court to seek an exemption from compulsion because they felt that criminal or quasi-criminal charges were imminent. The Supreme Court of Canada found that the predominant purpose of the compelled testimony was to regulate the securities industry through the inquiry and testimony of the directors, and not to incriminate the directors of the company. Furthermore the Court found that any testimony would be protected under the use and derivative use immunity principles and the directors were compelled to testify (at para. 9).

⁵⁰ *Supra* at note 15 (Klevorn & Smyth).

⁵¹ *R. v. RJS*, [1995] 1 SCR 451.

⁵² [2006] OJ No. 1768 (Ont. SCJ) (“*Mr. A*”).

⁵³ *Supra* at note 11 at 63-64 (Groia & Hardie).

testimony to SEC for the investigation in the United States, thereby preventing him from objecting to its use to incriminate him since he would be unable to claim the right to silence under the Fifth Amendment.⁵⁴

Mr. A argued that, if the OSC could act as agent of the SEC, the OSC had disqualified itself as an authority which could be given permission to examine him. The OSC argued that it would not hand over testimonial evidence to the SEC without giving Mr. A notice of a request for disclosure (pursuant to s. 17 of the OSA⁵⁵) and an opportunity to be heard before the Commission on the matter. The OSC offered to review any determination by a judge of the Commercial List in a supervisory capacity to avoid the Divisional Court appeal process.⁵⁶

Mr. Justice Campbell did not accept Mr. A's contention that the OSC "*cannot be trusted or that the investigative regime following on the s. 11 (a) Order directed to Mr. A. will necessarily result in his testimony under oath being "given" to the U.S. authorities in circumstances where he would lose Fifth Amendment protection.*" The Court noted that the procedure under section 17 of the OSA, which would allow Mr. A to speak to the issue before any disclosure was made to the SEC, was sufficient. The Court did however acknowledge that there were differing legal opinions as to the use by American courts of derivative use evidence. Ultimately the Court found that Mr. A's rights were not being violated at that early stage of the investigation, but also ordered the parties to seek the

⁵⁴ Ibid.

⁵⁵ *Supra* at note 13.

⁵⁶ Mr. A. as cited in *Allen/Akbar Securities Law NetLetter*TM, June 1, 2006, Issue No. 66 (QL).

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

Impact of Differing Rights Regarding Self-Incrimination on Defence Counsel

Following on from the situation at hand in Mr. A's case, what if the OSC seeks to compel the examination of an individual pursuant to s. 11(1)(b), where both the OSC and SEC will be present at the examination? In this situation, there is little doubt that the SEC will obtain a copy of the transcript of the testimony. Defence counsel must be alive to the differences between Canadian rights and U.S. rights and clarify as much as possible which law will apply to the examination before it begins. If Canadian law is to apply, one of the questions to consider is what will that mean when the SEC has a copy of the transcript in its office in the U.S. There does not appear to be a case yet that has squarely dealt with the use that may be made in the U.S. of evidence obtained in Canada, pursuant to Canadian law and our *Charter* protections. Until we have some clear guidance from the courts, defence counsel should be very cautious.

As Mr. Justice Campbell noted in the *Mr. A* case, there does not appear to be a clear cut solution to the problem facing defence counsel on this issue. Defence counsel need to be aware that potentially self-incriminating testimony obtained in Canada, which could not have been gathered in the United States if the Fifth Amendment were invoked, may be obtained by the US regulators or authorities. Your clients' rights to the protections of "use immunity" or "derivative use immunity" may not apply in the United States. In this regard, Canadian defence counsel needs to ensure that their counterparts on the other side

of the border are made aware of this potential so that the client is properly advised of the risks. Before recommending any court action to maintain rights against self-incrimination, counsel should advise the client of the potentially strong and negative reaction of the regulators and authorities to such efforts.

Same Defendants, Multiple Proceedings: OSC Proceedings against Hollinger Inc.

In the fall of 2005, the OSC had a hearing in *Re Hollinger Inc*⁵⁷, to set the date for a hearing on the merits of the case.⁵⁸ Several of the respondents in that matter argued that it would be unfair for the OSC to proceed with the hearing on the merits as a criminal proceeding in the United States on the same matter was already underway. The Respondents were mainly concerned that they would be put in the unfortunate position of having to choose between the right against self-incrimination in the United States criminal proceedings on the matter and defending the allegations put forth by the Staff of the OSC.

The OSC adjourned the hearing on the merits until June 2007, subject to the Respondents (Conrad Black, David Radler, John Boulton and Peter Atkinson) agreeing to execute undertakings that imposed heavier than usual restrictions on their participation in the market.⁵⁹ In considering whether or not to adjourn the matter the Commission noted the following:

“The practical reality is that all of the individual Respondents have been criminally indicted in the U.S. and face the possibility of incarceration if convicted. Additional indictments were recently issued against the Respondent

⁵⁷ *Re Hollinger Inc.* (2006), 29 OSCB (“*Re Hollinger*”).

⁵⁸ *Supra* at note 7 (Superina).

⁵⁹ *Ibid.*

Black which includes charges of racketeering and obstruction of justice. There is significant overlap in the nature of the allegations in the two proceeding albeit they are not identical. In these circumstances, we find compelling the submission that common sense and judicial economy argue in favour of allowing the U.S. criminal proceedings to take place in advance of this hearing provided, however, that the latter proceeds in a reasonably expeditious fashion as currently contemplated.”⁶⁰

In this sense, defence counsel for clients that are facing concurrent proceedings should consider requesting the adjournment of one matter, so that each matter can be dealt with in turn and to avoid duplication of proceedings where possible.

Enforcement of Canadian Judgments in the United States

Once the OSC receives a judgment in Canada against a resident of the United States, the OSC must then seek to have it enforced. The OSC can file its decisions with the Ontario Superior Court of Justice and once filed, the OSC decision is deemed to be an order of that Court and can be enforced in the same manner as any other order of that court.⁶¹ As United States courts will not enforce foreign penal or tax judgments, a judgment that the OSC seeks to enforce in the U.S. would likely have to be in the form of a foreign money judgment.⁶² In general foreign judgments are enforced in the United States and Canada based on reciprocity or participation in a treaty. In the United States, enforcement of a Canadian money judgment is based on "*full faith and credit*", which compels a court in the United States to give effect to a Canadian judgment as if it were local. Enforcement

⁶⁰ *Supra* at note 52 (*Re Hollinger*).

⁶¹ *Supra* at note 35, s. 151 (OSA).

⁶² Kathleen M. Kundar, *Enforcement of Foreign Money Judgments in New York State: Non-Recognition Grounds and Expedited Court Procedures* (Presented to the Hamilton Law Association, May 5, 2006) ("Kundar").

of a foreign judgment in the United States is usually accomplished by way of a summary judgment proceeding.⁶³

Much like in Canada, the United States court will consider a number of factors in deciding whether or not to enforce a foreign judgment, including:

- whether the foreign court had proper jurisdiction over the matter that produced the judgment;
- whether the defendant was properly served with notice of the proceedings;
- whether or not the proceedings and the decision adhered to general principles of natural justice (i.e. was the decision just);
- whether the proceedings were tainted by fraud;
- whether enforcement of the judgment in the United States would offend American public policy.⁶⁴

The public policy exception is a discretionary ground for refusing to enforce a foreign judgment in the United States, but is almost never accepted by a court in the United States as the reason for not enforcing a judgment.⁶⁵ In *Greschler v. Greschler* the New York Court of Appeals considered this ground of non-recognition and noted that the public policy exception will only apply “*where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought*”.⁶⁶ In any event it is unlikely that this exception will apply to a Canadian judgment obtained by the OSC. For all of these reasons the OSC is likely to be

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ *Supra* at note 46 (Kundar).

⁶⁶ 51 NY 2d 368, 377 (1980) as cited in Kundar.

successful in enforcing its judgment unless it can be shown that it was a penal judgment or that the defendant was not properly served.⁶⁷

Enforcement of Civil United States Judgments in Canada

Although a civil judgment from a foreign court has no direct effect in Canada, in general, Canadian courts will do whatever they can to enforce a complete judgment from a United States court; failing which they will sever only the parts of the judgment enforcement of which cannot be justified under Canadian law.

If the SEC wishes to enforce a judgment in Ontario on a resident of Ontario they need satisfy an Ontario court that:

- (i) The judgment was not obtained through fraud;
- (ii) The judgment is not contrary to natural justice;
- (iii) The judgment is not contrary to Ontario public policy;
- (iv) The judgment debtor was given notice of the original proceeding; and
- (v) The judgment is not for the enforcement of a foreign penal law.

Additionally, because of the frequency of cross-border issues and the proximity of the United States to Canada, the Ontario court will consider the importance of recognizing and enforcing United States judgments in Canada and whether or not the principle of comity requires the enforcement of the judgment.

⁶⁷ A civil judgment obtained by the OSC is not likely to qualify as a “penal judgment”.

Absent extraordinary facts, the SEC is not likely going to have difficulty satisfying an Ontario court of factors (i) – (iv) (above); the only option is likely going to be to argue that the enforcement of a judgment from the SEC would amount to the enforcement of foreign penal law. Under Canadian law, a “penal law” has been defined as a law that imposes a punishment for a breach of duty to the states as opposed to a remedial law, which secures compensation for the breach of duty owed to a private person.⁶⁸

Non-Enforcement of Foreign Penal Judgments

As a general rule, Canadian courts will not recognize or enforce foreign judgments, which seek to enforce penal judgments, or revenue laws of a foreign jurisdiction. As penal laws are thought to be sovereign acts, the enforcement of those laws in Canada would amount to permitting a foreign government to exercise its jurisdiction in the (Canadian) domestic forum. In the absence of an international treaty granting reciprocity from the United States, the SEC has no right to have penal judgments enforced in Canada.⁶⁹ However, if a judgment enforces both civil and criminal (penal) laws, liability may be severed, with the part of it which is not penal still being enforceable in Canada.⁷⁰

In Ontario, the onus is on the defendant seeking to establish that the judgment is penal to demonstrate that it is in fact a “penalty” in the international sense. In the classic case of *Huntington v. Attril*, a plaintiff sued a defendant in New York under a statute that

⁶⁸ Castel & Walker ed., *Canadian Conflicts of Laws* (6 ed.) (Toronto: Butterworths, 2007). (“Castel & Walker”).

⁶⁹ Although there are agreements between the OSC and the SEC that allow cooperation during investigations, there are no international treaties between Canada and the United States relating to the enforcement of penal orders.

provided liability on the part of officers of a corporation for making false representations in a certificate or report of a New York corporation.⁷¹ The Privy Council in that case distinguished between a “*suit for penalty by a private individual in his own interest*” which was recognizable as being in its nature protective and remedial in favour of creditors, and a “*suit brought by the government or people of a state for the vindication of public law*” which was penal in the “international sense” and therefore not enforceable. A defining characteristic of a penal judgment is that the vindication of the right rests with the state itself.⁷² However, it is important to note that not all suits brought at the instance of the state will be considered penal, and that Canadian courts have not tended to characterize SEC civil judgments as a penalty.

United States (Securities and Exchange Commission) v. Cosby

In 2000 the British Columbia Supreme Court (a trial court) in its decision in *United States (Securities and Exchange Commission) v. Cosby* (“*Cosby*”) held that an SEC disgorgement order was not penal.⁷³ In that instance, the SEC was seeking an order for enforcement of the disgorgement portion of the relief granted in a default judgment of the Southern District of New York.

The defendant in *Cosby* argued that the judgment could be distinguished from a civil judgment because the purpose of securities legislation in the United States was to

⁷⁰ *Raulin v. Fischer*, [1911] 2 KB 93; *Canadian Imperial Bank of Commerce v. Coupal* (1995), 38 CPC (3d) 98 (Ont. Gen Div.) as cited in Markus Koehnen and Nicole Vaz “*The Recognition and Enforcement of Foreign Judgments in Canada*” (Centre for International Legal Studies: February 2002).

⁷¹ [1893] AC 150 (PC).

⁷² *Ibid* at 155-158.

⁷³ [2000] BCJ No. 626, 2000 BCSC 338.

regulate securities transactions by providing, in part, for punitive sanctions for breaches, thereby protecting the national public interest; and, was not to reimburse or compensate an individual for damages. The defendant further objected on the basis that there was a concurrent criminal indictment for the same offence, wherein the United States Attorney General had sought a forfeiture order that would supersede any disgorgement order requiring the SEC to turn over funds it obtained to the authorities prosecuting the criminal complaint.

The Court in *Cosby*, in following another decision from the British Columbia Supreme Court in *United States of America (Securities and Exchange Commission) v. Shull* (“*Shull*”) held that the criminal proceedings initiated by the United States Attorney General were distinct from the civil proceedings brought by the SEC.⁷⁴ In *Cosby*, the existence of concurrent criminal proceedings based on the same events did not prevent the SEC from pursuing enforcement remedies in British Columbia. Additionally, the fact that the SEC judgment in the US District Court also imposed “civil penalties” did not prevent the disgorgement order from being enforced, even if a portion of the judgment ordering “civil penalties” was not enforceable.⁷⁵

In considering the enforcement of foreign judgments in either the United States or Canada, defence counsel need to be aware that judgments obtained by the OSC and the

⁷⁴ [1999] BCJ No. 1823. In *Shull* the Court found that the SEC was an independent regulatory agency of the United States of America whose role was to administer US federal securities laws. The Court also found that the disgorgement order was neither penal nor a taxation measure, and noted that disgorged funds may be distributed to creditors, investors and others pursuant to a plan of distribution approved by the court and administered by a Receiver appointed by the Court.

⁷⁵ *Supra* at note 7 (Castel & Walker).

SEC will likely be enforceable in the other jurisdiction. While it may seem that in the absence of proof of compensation for investors, the judgments obtained by the OSC and the SEC should be characterized as penal, it is clear that decisions from regulators are likely to be considered remedial rather than penal in this context, unless and until courts are presented with compelling evidence that suggest these judgments are penal or they take a different approach.

Conclusion

Regulators in both Canada and the United States have recognized that they need to cooperate on investigations and prosecutions if they are to be successful in fulfilling their regulatory mandates. Furthermore, in response to ever-increasing globalization, courts in both jurisdictions are similarly inclined to enforce cross-border judgments. The issues and solutions discussed in this paper lead to the natural conclusion that defence counsel on both sides of the border must also work together and communicate when a client faces a cross-border investigation or enforcement.

** The slogan “Keep Calm and Carry On” first appeared on a World War II-era British propaganda poster. The poster was never officially issued.*