

**Protecting the Right Against Self-Incrimination in Cross-Border
Investigations by Securities Regulators**

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“History teaches us that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”

-Thurgood Marshall¹

I. Introduction

In response to the new cross-border challenges faced by securities regulators as a result of the credit crisis, the International Organization of Securities Commissions (IOSCO) recently released a Policy Statement urging its members to augment their international cooperation efforts:

The transformative nature of this crisis may call for new approaches in the cross-border enforcement sphere. At a minimum, this crisis requires IOSCO members to strive to meet the highest standards of enforcement cooperation on an expedited basis.²

This sentiment was echoed by the Chair of the Ontario Securities Commission in a recent speech.³ It seems that in the wake of the credit crisis, regulators are under additional pressure to work together in order to combat inter-jurisdictional abuse in the capital markets. However, while regulators are eager to break down the barriers that hinder such cooperation, it must be remembered that in some cases those barriers serve an important purpose. In Canada and the United States the laws that protect the rights of individuals who are subject to regulatory investigation are different; respondents who are being jointly investigated in both jurisdictions face the danger that the gaps between the two regimes could be exploited to circumvent those protections. This is particularly true of

¹ From Justice Marshall’s dissenting opinion in *Skinner v. Railway Labor Executives’ Assoc.* 109 S. Ct. 1402 (1989).

² In the “IOSCO Open Letter to G-20 Meeting”, November 12, 2008.

³ David Wilson. “The Role of Securities Regulation in the Fight Against Economic Crime”. Delivered to the 2009 McMaster World Conference, January 14, 2009.

the right to be free from self-incrimination. In this paper, we will examine the risk that is posed to an individual's right to be free from self-incrimination in cross-border securities investigations and consider some possible solutions that may address this risk.

II. Cooperation with the SEC: Statutory Provisions.

The *Securities Act*⁴ gives the OSC the authority to make two different types of investigation orders. The first, a section 11(1)(a) order, allows the Commission to appoint one or more persons to conduct an investigation “for the due administration of Ontario securities law or the regulation of the capital markets in Ontario”. The second, a section 11(1)(b) order, allows the Commission to appoint one or more persons “to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction”. Thus, when the OSC and the SEC are contemplating a cooperative investigation in Ontario, the Commission may issue both a section 11(1)(a) and a section 11(1)(b) order.

In some cases, the scope of the SEC's involvement under a section 11(1)(b) order will be relatively restricted; for example, it may be sufficient to appoint a single SEC investigator for the purposes of liaising with OSC Staff, allowing Staff to maintain control of the flow of information across the border. In other cases, a team of SEC investigators is appointed to participate directly in the investigation. As we shall see, this scenario can pose significant problems for respondents who are compelled to give testimony in a cross-border regulatory investigation.

⁴ R.S.O. 1990, c. S. 5 as amended.

III. Cooperation with the SEC: Memoranda of Understanding

In January of 1988, the OSC entered a *Memorandum of Understanding* (“1988 MOU”)⁵ with the SEC in 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 1988 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.⁶

The 1988 MOU contemplates mutual assistance in an enumerated list of matters:

- (i) Insider trading;
- (ii) Misrepresentation or the use of fraudulent, deceptive or manipulative practices in connection with the offer, purchase or sale of any security;
- (iii) The duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control;
- (iv) The duties of persons, issuers, or investment businesses to make full and fair disclosure of information relevant to investors;
- (v) The duties of investment businesses and securities processing businesses 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
- (vi) The financial and other qualifications of those engaged in, or in control of issuers, investment businesses, or securities processing businesses.⁷

The MOU stipulates that the testimony of persons is taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the requested authority. As stated in the MOU, any person giving testimony as a result of a request made under the MOU is entitled to all of the rights and protections of the laws of the jurisdiction of the requested authority. Assertions regarding other rights and privileges

⁵ (1988) 11 OSCB 114.

⁶ Ibid. at Article 2(1) and 2(2).

⁷ Ibid. Article 1(h).

arising exclusively pursuant to the law of the jurisdiction of the requesting authority are preserved for consideration by the courts in the jurisdiction of the requesting authority.⁸ However, the MOU arguably permits information obtained by a request, including compelled testimony, to be used in civil, administrative, or self-regulatory enforcement proceedings, or to assist in a criminal prosecution.⁹

In December of 2002, members of IOSCO including the OSC and the SEC executed a Multilateral Memorandum of Understanding (“IOSCO MMOU”).¹⁰ The assistance available under the IOSCO MMOU and the procedures for gathering evidence are substantially the same as in the 1988 MOU.

IV. The Dilemma: Differing Rights Against Self-Incrimination

The MOUs do not establish a complete code for cross-border cooperation in enforcement matters. In essence, they are intended to complement domestic legislation and demonstrate the commitment of international securities regulators to mutual assistance. Unfortunately, this means that the MOUs are not specific enough to help resolve disputes where there is conflict between the domestic laws of cooperating jurisdictions. The most troublesome example of such a conflict arises from the differing protections against self-incrimination in Canada and the United States.

(a) US Protection:

In the United States, witnesses are entitled to assert the Fifth Amendment privilege against self-incrimination, which allows them to avoid testifying where the requested

⁸ *Ibid.* at Article 5(3).

⁹ *Ibid.* at Article 6(1)(b).

¹⁰ (2002) 25 O.S.C.B. 7157

testimony would be incriminating. In other words, the state has no power to compel such testimony from the accused. A witness may assert the Fifth Amendment whether the request for testimony comes from a law enforcement agency, a regulator, or other judicial authority.¹¹

(b) Canadian Protection:

In Canada, section 11(c) of the *Charter of Rights and Freedoms* also prevents the state from compelling incriminatory testimony, but its protection is reserved for persons who have been “charged with an offence”.¹² If an individual has not yet been charged with an offence, for instance where he or she is being examined pursuant to an investigation order under the *Securities Act*, section 11(c) of the *Charter* does not apply and his or her testimony can be compelled. However, an individual in this situation is still protected by “use immunity”.¹³ 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.

Thus, while the testimony may be used in the proceeding for which it was given, it may not be used subsequently to incriminate the witness in a separate proceeding. The witness will also be protected against “derivative use” of the testimony in a subsequent

¹¹ For instance, Fifth Amendment rights have been found to extend to witnesses called to testify during formal SEC investigations: *S.E.C. v. Dunlap*, 253 F.3d 758 (4th Cir. 2001).

¹² *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [*Charter*].

¹³ As confirmed in *Branch v. British Columbia Securities Commission* [1995] 2 SCR 3.

proceeding; this prevents the state from adducing evidence that would not have been obtained “but for” a witnesses’ testimony in the earlier proceeding.¹⁴

(c) *Interaction between the Canadian and US regimes:*

Given that the 1988 MOU provides that investigations conducted at the behest of a requesting authority will be conducted pursuant to the laws of the requested authority, it would seem that where the OSC is conducting a section 11(1)(b) investigation pursuant to a request from the SEC, the investigation must proceed according to Canadian law. While section 13 of the Charter protects witnesses from having their testimony used to incriminate them in a subsequent Canadian proceeding, there is no decision that the authors are aware of that confirms that this protection would be respected in a proceeding brought in the United States. Counsel should therefore be on their guard when the OSC asks to examine a client who is of interest to the SEC. This concern is especially pressing given that the 1988 MOU, at least on its face, indicates that it is permissible for information obtained through cooperation between the regulators to be used to “assist in a criminal prosecution”. The ultimate question is whether incriminating testimony that comes into the hands of the SEC will remain subject to the protections of Canadian law once it is in the United States. In other words, will United States courts be prepared to apply and respect Canadian law in dealing with evidence compelled from witnesses in Canada? Under United States law, it appears that once a witness answers questions, those answers may be used against them. One can readily see the dangers that a respondent would face if United States law was ever applied to evidence compelled in Canada.

¹⁴ *R. v. R.J.S.*, [1995] 1 S.C.R. 451

A related question is whether a witness who is compelled to give testimony pursuant to an investigation order under the *Securities Act* is entitled to plead the Fifth Amendment in Canada. According to the MOU, assertions of rights that arise exclusively under the law of the requesting jurisdiction are preserved for consideration by the courts of the requesting jurisdiction. If the witness is a United States citizen being examined in Ontario pursuant to a section 11(1)(b) order at the express request of the SEC, a United States court may hold that the protection of the Fifth Amendment applies. In the case of *U.S. v. Phillips*, a Florida District Court confirmed that a United States citizen who is searched by Canadian authorities can invoke the Fourth Amendment protection against unlawful seizure, but only where it is shown that American agents are “in privity with the search through direct participation or procurement”.¹⁵

The treatment of non-resident aliens is less certain. In one case where a non-resident alien was questioned abroad in advance of United States criminal proceedings, the Federal Court for the Southern District of New York held that statements given to law enforcement personnel were inadmissible during a criminal trial.¹⁶ However, when an Illinois District court had the opportunity to consider whether a non-resident foreigner could plead the Fifth Amendment in civil proceedings where no criminal proceedings were pending, it held that it was “not self-evident that the Fifth Amendment’s privilege against self-incrimination is available to non-resident aliens”.¹⁷ Finally, it seems to follow from *U.S. v. Phillips* that, unless American authorities have participated in or

¹⁵ 479 F.Supp 423 (M.D. Fla. 1979) at p. 431.

¹⁶ *U.S. v. Bin Laden*, 132 F. Supp. 2d 168, 181 (S.D.N.Y. 2001)

¹⁷ *Bear Stearns & Co. v. Wyler*, 182 F. Supp. 2d 679 (N.D. Ill. 2002).

procured a witnesses' testimony, the witness cannot plead the Fifth in Canada, regardless of the witness' citizenship. This would mean that where the witness is being examined pursuant to a section 11(1)(a) order, he or she may be unable to assert the Fifth Amendment privilege against self-incrimination. Because the likely outcome is still unclear, even in the context of a section 11(1)(b) order, a respondent should seek advice from a United States lawyer in connection with asserting a Fifth Amendment privilege in any investigation where the SEC may be involved or interested in the respondent.

V. Constitutional Exemption from Compulsion in Canada

In circumstances where a respondent can be compelled to testify by law, but doing so would ultimately prejudice his or her right against self-incrimination, it may be possible for the respondent to obtain a “constitutional exemption” from testifying. The exemption follows from the guarantee in section 7 of the *Charter* that an individual shall not be deprived of his life, liberty or security of the person except in accordance with the principles of fundamental justice.¹⁸ In *Branch v. British Columbia Securities Commission*, the Supreme Court of Canada held that while it is appropriate for the courts to take a more flexible approach to the compellability of witnesses in regulatory proceedings given the valid public purpose that those proceedings serve, if the attempt to compel the witness represents a colourable attempt to obtain incriminating evidence against him, it may be appropriate to exempt him from testifying:

The Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. [...] Where evidence is sought for the purpose of an inquiry,

¹⁸ *Supra*, note 10.

we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative.

[...]

If it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use.¹⁹

Defence counsel have tried, mostly without success, to obtain constitutional exemptions for their clients in several cases where the clients were facing possible criminal sanctions in the United States in addition to ongoing civil or regulatory investigations in Canada. In *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, an Inspector had been appointed an officer of the court pursuant to section 230 of the *Canada Business Corporations Act* to inquire into the affairs of Hollinger.²⁰ When the Inspector tried to examine three former executives of the company, they resisted the request on the basis that they were subject to “potentially criminal investigation” in the US, and that if incriminatory evidence were to be obtained by US authorities through the Mutual Legal Assistance Treaty, it would disqualify them from pleading the Fifth Amendment in any US criminal proceeding.

Lacking any US precedent to support this argument, the respondents had obtained an affidavit from US counsel that spoke to the gap in the protections offered against self-incrimination in Canada and the US. The Court quoted the following passage from the affidavit: “It is highly unlikely that any protective order entered by this Court will suffice

¹⁹ [1995] 2 S.C.R. 3

²⁰ [2005] O.J. No. 2191 (SCJ).

to protect the testimony or documents provided and...the practical consequence of such compelled testimony will be that...privilege under the Fifth Amendment to the United States Constitution will be effectively eviscerated". Justice Campbell disagreed with this opinion insofar as it implied that a Canadian court would be unable control its own processes. He responded that a Canadian court is obliged to uphold Canadian *Charter* values and is capable of doing so.²¹

Applying the *Branch* test, Campbell, J. held that the "predominant purpose" of the Inspector's examination was to provide information to the public shareholders of Hollinger. He noted that none of the respondents had been charged with a criminal offence in the US. Even if the possibility of foreign prosecution were to materialize, the report of the Inspector is nevertheless "cloaked with a privilege subject to a Court order"; moreover, the respondents were at liberty to seek directions from the Court as to how the examination should be conducted. The Court of Appeal agreed with Campbell, J.'s analysis, noting in particular that a constitutional exemption is not appropriate where the purpose of an examination is fact-finding only and not prosecutorial.²²

V. Self-incrimination in Inter-jurisdictional Securities Investigations

The same argument the respondents tried to make in *Hollinger* was considered anew by Campbell, J. in *Mr. A v. Ontario Securities Commission*, this time in the context of a cross-border securities investigation.²³

²¹ *Ibid.* at para.

²² [2005] O.J. No. 4666 (OCA) at para. 7.

²³ [2006] O.J. No. 1768 (SCJ). The lacuna in constitutional protections against self-incrimination was first addressed in the context of securities regulation in a decision of the Investment Dealers Association, *Re Gruson* [2004] I.D.A.C.D. No. 61. Gruson refused to attend an interview with the IDA when he learned

Mr. A held executive positions with a major company until his termination for cause in April of 2004. His termination was the result of an internal investigation within the company concerning inaccuracies in its financial statements. In June of 2004 OSC Staff were appointed pursuant to s. 11(1)(a) of the Securities Act to investigate a number of matters pertaining to the company, including the inaccuracies in the financial statements and the termination of Mr. A. Thereafter, the Company received a subpoena from the SEC for the production of financial records and other documents relating to Mr. A., who was also named in the subpoena. The subpoena was followed by a letter from the SEC to the Director of Enforcement of the OSC in aid of an investigation to determine whether there had been a violation of the regulatory fraud provisions of US securities legislation.

In February of 2006, the OSC issued two additional investigation orders. The first, a section 11(1)(a) order, authorized an investigation by OSC staff for the due administration of Ontario securities law. The second, a section 11(1)(b) order, authorized a joint investigation between OSC Staff and certain staff members of the SEC pursuant to the Commission's power to appoint investigators to assist in the due administration of the securities laws of another jurisdiction.

In the course of the investigations, the OSC issued a Summons to Witness that required Mr. A to attend an examination. The Summons relied upon the section 11(1)(a) order.

Mr. A applied to the Ontario Superior Court of Justice for a declaration that he was

that a representative from the SEC was to be present. He was subsequently charged under the IDA by-laws for failing to attend the interview. At the disciplinary hearing, the panel members determined that Gruson had been justified in his refusal to attend, since there were legitimate questions about whether Gruson would be subject to proceedings in the US, and if so, whether he would be able to assert the Fifth Amendment privilege in those circumstances.

constitutionally exempt from being compelled to testify. His argument was that the primary purpose of the examination was to obtain evidence to incriminate him, and that compelling his testimony would put him in jeopardy in any US prosecution. Counsel for Mr. A distinguished the *Hollinger* case on the basis that the OSC is a government agency; thus, unlike the Inspector who had been appointed an officer of the Court in *Hollinger*, the OSC was not subject to the same level of court control and oversight.

All parties agreed, and Campbell, J. accepted, that Mr. A's *Charter* rights were engaged, and that OSC's power to compel his testimony had the potential to put those rights at risk.²⁴ However, the parties differed as to how a US court would hypothetically deal with testimony that was subject to use- and derivate-use immunity under the Canadian *Charter*, with each party submitting an affidavit from a reputable US expert to support their respective positions. Justice Campbell found that the disagreement between these two experts only highlighted the nature of the problem. Further, he noted that no US decisions speak to the matter. Still, his inclination was to accept the OSC's submission that Mr. A's *Charter* rights would be respected in a US proceeding:

*It would be surprising indeed, given the need for cross-border securities enforcement, if a US Court did not pay attention to, let alone honour, a Canadian process designed to preserve derivative use immunity of validly taken testimony in Canada.*²⁵

²⁴ See, however, *Alberta (Executive Director of Securities Commission) v. Brost* [2008] A.J. No. 250 at paras. 43-44, where the Court of Queen's Bench appears to have accepted the Attorney General's argument that no breach of a respondent's *Charter* rights is possible under comparable circumstances: "If prosecutors in the US were to use testimony obtained in Canada against the Respondents, and do something that would infringe their *Charter* rights, they are not Canadian prosecutors. Therefore, no *Charter* breach is possible in the circumstances of this case".

²⁵ *Supra*, note 22 at para.53.

Applying the *Branch* test, Campbell J. ultimately held that, at the current stage of the proceeding, he was unable to determine that the predominant purpose of the examination was to incriminate Mr. A, and that Mr. A should therefore be required to attend the examination. However, his reasons suggest that one of the decisive factors in his decision was the OSC's submission that the risk of Mr. A's *Charter* rights being infringed was mitigated by protective measure that are built in to the *Securities Act*.

The *Securities Act* does provide its own set of protections that could prevent the disclosure of potentially incriminatory evidence. Investigations under the *Act* are confidential, and disclosure of the content of an investigation by the Commission to law enforcement officials in Canada or the United States is strictly prohibited.²⁶ If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure of information pertaining to an investigation to other parties, including the SEC and such disclosure could include the testimony of a witness as well as any document that has been produced.²⁷ As a protective measure, section 17(2) of the *Act* requires the Commission to give the witness whose testimony is subject to the order an opportunity to object.²⁸ In *Mr. A Campbell*, J. reached the conclusion that the effect of section 17(2) is that, if a witness objects to the disclosure of testimony that was obtained in the course of a section 11(1)(a) investigation, the OSC cannot turn information over to US authorities without first obtaining an order:

²⁶ *Supra* note 3, sections 16 and 17(3). Note that the latter provision explicitly prohibits the OSC from disclosing testimony to law enforcement. It does not explicitly address the case where the OSC discloses to a foreign regulator, who then discloses to its own law enforcement agencies, but the authors submit that this must also be prohibited by this section.

²⁷ *Ibid.* section 17(1)

²⁸ *Ibid.*

*I am far from satisfied that the OSC could simply turn over material or testimony to US authorities without an Order of the Commission on notice to Mr. A or alternatively an Order of this Court. To speculate how otherwise this might happen without legal redress I do not find helpful.*²⁹

VII. The Use of Separate Investigative Teams: A Proposal from the Judiciary

In the *Mr. A* case, Campbell, J. initially expressed confidence in the OSC's ability to oversee its own processes, which includes the responsibility of protecting the *Charter* rights of individuals who are being investigated under the *Securities Act*. As such, he suggested that the OSC might wish to adopt procedures that would fulfill that goal. To address the concerns of the case at bar, he proposed a separation of the OSC's investigative teams, such that the team members who were privy to Mr. A's examination would not communicate the information they obtained to the team members who were conducting the joint investigation with the SEC. The proposed procedure would allow the investigators to pursue both the domestic and foreign aspects of the investigation concurrently while ensuring that the constitutional protections offered by the respective jurisdictions remained intact. For the purposes of the application, however, Campbell, J. declined to make an order to this effect, and left it to the OSC to determine and implement a proper procedure.

Justice Campbell's expectation that the OSC would act to protect Mr. A's *Charter* rights was not fulfilled.³⁰ Instead, counsel for the OSC took the position that the procedure proposed by Campbell J. was not practical. The same individuals had been appointed to both the foreign and the domestic investigations, and the investigations had reached such

²⁹ *Supra* note 22 at para. 52.

³⁰ See the "Addendum to Reasons for Decision", [2006] O.J. No. 2647 (SCJ).

an advanced stage that it would have been difficult to separate them. Moreover, counsel denied that the Court had the authority to intervene absent a demonstrable *Charter* breach.

Addressing the OSC's argument that the proposed procedure was impractical, Campbell, J. noted that this did nothing to allay Mr. A's concerns about self-incrimination. He suggested that the OSC had failed to recognize that

*a statutory body that is regulatory, investigative and adjudicative and which can and does operate (quite properly) in a high degree of confidentiality and secrecy, would have an interest in transparently and efficiently dealing with a recognized risk [that a respondent's Charter rights will be breached].*³¹

Furthermore, he established that the presence of such a "risk" is all that is required in order for a Court to intervene and provide ongoing supervision of the investigation, even where it is being conducted in strict compliance with the *Securities Act*.

Going further, Campbell J. raised the possibility that, absent the type of protective procedure he had suggested, information that has been obtained from the testimony of a witness might come into the hands of a foreign regulator despite the fact that it had not been "directly conveyed". Presumably, he was referring to the possibility that information could be exchanged between regulators in a manner other than as provided by the MOUs. He was careful to emphasize that he was not suggesting that an investigator would purposely do so; even so, he found that the risk of inadvertent disclosure was "more than illusory" and was therefore sufficient to warrant *Charter*

³¹ Ibid. at para. 7.

protection. Without a procedural mechanism to ensure transparency, no one outside the OSC would ever know whether information was conveyed inappropriately.

These comments are significant, because, in his original reasons, Campbell, J. had maintained that he did not consider it helpful to speculate about how self-incriminatory testimony could be disclosed other than through the proper legal channels.³² His change in approach seems to have been the result of a heightened concern that the same cloak of administrative secrecy that is so vital to many aspects of the investigative process can also prevent meaningful oversight of procedures that directly engage a respondent's *Charter* rights. Ultimately, Campbell, J. ordered that the investigators who had been appointed to conduct the joint investigation with the SEC would be excluded from Mr. A's examination and would not be informed about its results. In doing so, he effectively forced the OSC to adopt the very procedure he had merely proposed earlier in the proceedings.

VIII. Unresolved Issues in the Wake of *Mr. A*

The *Mr. A* case raises questions about the extent to which a regulatory body with statutory powers of investigation should be allowed to make its own decisions in selecting policies and procedures that will best protect an individual's *Charter* rights. It remains to be seen whether and to what extent the procedural protections suggested by Campbell, J. will be adopted by the OSC in future cases involving cross-border cooperation. As yet, the courts have been unwilling to take a more interventionist role in exempting respondents from being compelled to testify in circumstances that place their

³² *Supra* note 22 at para. 52.

Charter rights in jeopardy. Accordingly, in cases where the OSC and the SEC are conducting a joint investigation, it falls to counsel to ensure that the procedures being employed to obtain a respondent's testimony provide meaningful protection of those rights.

While Campbell, J.'s solution of restricting communication between the team conducting the section 11(1)(a) investigation and the section 11(1)(b) investigation is promising, it raises new questions that have yet to be addressed by the courts. For instance, if the OSC begins to use separate teams to handle section 11(1)(a) investigations and section 11(1)(b) investigations, will this affect a respondent's right to obtain disclosure of relevant information? In other words, if a hearing is held in Ontario dealing exclusively with a respondent's activities in Ontario's capital markets, will the respondent be entitled to disclosure of information that has been gathered by the team that has been appointed to investigate his activities in the foreign jurisdiction as well? It is arguable that the respondent should be so entitled, as either team may have discovered potentially exculpatory evidence that could assist the respondent in preparing his defence in the Ontario hearing. It can be argued that the principle behind the separation of the two investigations is the protection of the respondent's right to be free from self-incrimination; as such, it would be a perverse outcome if the very procedure that was meant to protect that right simultaneously limited a respondent's disclosure rights.

A second issue involves the timing of the separation between the investigative teams. We suggest that where the OSC issues concurrent orders under section 11(1)(a) and 11(1)(b), two distinct investigative teams should be constituted from the outset.

Establishing boundaries between the two investigations as early as possible will only enhance the public's confidence in the OSC's ability to conduct fair investigations.

Finally, as an added layer of protection, counsel will want to consider obtaining written assurance from the SEC or other foreign regulators that the respondent's compelled testimony will not be passed on to the United States Department of Justice or any other law enforcement agencies, or that if it is passed on, the regulator will first obtain assurances from those agencies that it will not be used to incriminate the respondent.

Recall that one of the major factors preventing Campbell, J. from granting Mr. A a constitutional exemption was that he had trouble believing that Mr. A's Charter rights would not be protected in the US, given the SEC's need to ensure an ongoing cooperative relationship between the jurisdictions. If counsel can demonstrate that the SEC will not provide such assurances, then it may go a long way towards supporting the conclusion that the respondent should be granted a constitutional exemption from testifying.

IX. More Complete Protections on the Horizon?

In January of 2009, the Expert Panel on Securities Regulation chaired by Tom Hockin released its final report entitled "Creating an Advantage in Global Capital Markets". The report recommended the creation of a single national securities regulator that would replace the current system of provincial regulators. One of the supplemental research papers on enforcement issues noted that one of the advantages of a national regulator would be that the regulator could make use of the federal government's treaty-making power to codify a cooperative regime that would "crystallize" the rights of individuals

who are subject to enforcement proceedings.³³ Unlike the MOUs, which do not have the force of law and are generally too imprecise to provide meaningful protection, this solution could allow Canada and the US to agree on appropriate protections in advance, eliminating the uncertainty involved in leaving these issues to be determined by the courts.

X. Conclusion

Just as a person's reasonable expectation of privacy is lowered when they are going through Customs at the airport, participants in heavily regulated sectors like the capital markets must accept certain necessary incursions on their rights. When the intervention of securities regulators goes beyond such necessary incursions and an individual's right to be free from self-incrimination is put at risk, there must be procedural and constitutional protections to check the regulator's authority. While the *Securities Act* contains internal mechanisms that lessen the risk of such abuses, counsel should be aware of the risk that compelled testimony could nevertheless be disclosed inadvertently. With the regulators focusing their attention on the need for cooperative efforts in light of the credit crisis, it falls to counsel to ensure that the rights of respondents are not prejudiced in the process.

³³ Poonam Puri. "A Model for Common Enforcement in Canada: The Canadian Capital Markets Enforcement Agency and the Canadian Securities Hearing Tribunal". On-line at <http://www.expertpanel.ca/eng/reports/research-studies/index.html>.