

OBTAINING JUDICIAL ASSISTANCE IN THE UNITED STATES: THE PROBLEM OF IMMUNITY

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With crime and civil litigation becoming increasingly transnational, parties often need the assistance of other countries in obtaining documentary evidence and testimony from reluctant witnesses. This is accomplished by letters rogatory, in which a foreign government is asked to provide assistance. Problems may arise where a government's policy of assistance conflicts with a person's constitutional rights against self-incrimination. Canadian courts will compel a witness to testify, even though his answers may incriminate him in a foreign jurisdiction. In the United States, if a witness pleads the Fifth Amendment and the court grants immunity, the witness will normally be required to testify. But if such testimony may incriminate him in a foreign jurisdiction, American courts must first determine whether the Fifth Amendment extends to protect a United States resident who fears foreign prosecution, and assuming that it does, then decide whether in fact the witness' testimony will place him in jeopardy. In this article the author calls for Canadian legislative change approximating that in the United States.

A l'heure actuelle les procès civils et criminels contiennent de plus en plus d'éléments étrangers. Aussi, il est souvent nécessaire d'avoir recours à l'entraide judiciaire internationale pour obtenir des preuves sous forme de dépositions soit écrites, soit orales lorsqu'ils s'agit de témoins récalcitrants. Pour obtenir ces preuves, on utilise les commissions rogatoires. Des problèmes peuvent se poser lorsque la politique d'entraide judiciaire d'un gouvernement s'oppose au droit d'un inculpé de ne pas être contraint de témoigner contre lui-même qui est garanti par la constitution. Les tribunaux canadiens peuvent obliger une personne à témoigner même si ses réponses peuvent l'incriminer à l'étranger. Aux Etats-Unis, si un témoin plaide le cinquième amendement et le tribunal lui octroie l'immunité contre toute poursuite, le témoin sera normalement obligé de faire sa déposition. Mais si son témoignage peut l'incriminer à l'étranger, les tribunaux américains doivent tout d'abord déterminer si le cinquième amendement protège un résident des Etats Unis qui craint une poursuite à l'étranger, et dans ce cas, si en fait son témoignage peut le compromettre. Dans cet article l'auteur demande une réforme législative s'apparentant à la pratique en vigueur aux Etats Unis.

Introduction

In today's mobile and complex world, where people and corporations carry on operations all over the globe, it is inevitable that more and more frequently the courts of one country will need the assistance of courts of

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other countries in order to hold fair and complete hearings.¹ A good example of a situation in which such assistance proved necessary is provided by the international bribery scandals in which executives of an American aircraft company bribed officials of several other nations in an effort to persuade them to purchase American aircraft.² Charges were laid against the foreign officials in their own countries; in order to carry out successful prosecutions, it was necessary to obtain evidence from the American executives. Where an executive refused to co-operate, the foreign country had to rely on courts in the United States to assist in obtaining the needed evidence. Another example of a situation involving courts in more than one country arises where fraud is carried out in one country and funds are hidden in another. Assistance may be necessary to obtain documentary evidence from financial institutions in the country where the funds have been lodged. Cases involving the international drug trade or the fraudulent sale of foreign land and stocks can also give rise to a need for the assistance of foreign courts.

The assistance of foreign courts is obtained by the way of "letters rogatory" or "letters of request",³ which can be defined as the medium whereby one country, speaking through its courts, requests another country, acting through its courts, to assist it in the administration of justice.⁴ The power to provide assistance to foreign courts is inherent in the court and rests upon the principle of comity between states.⁵ Its exercise, however, is by no means automatic.⁶ Those seeking to obtain evidence from foreign courts face a number of problems. These problems involve the definition of a court or tribunal that may request the assistance of a foreign court,⁷ the procedure to be followed when obtaining evidence in a foreign

¹ *Re Request for International Judicial Assistance* (1980), 102 D.L.R. (3d) 18, at p. 27 (Alta Q.B.).

² *In re Letters Rogatory From the Tokyo District, Tokyo Japan* (1976), 539 F.R. Supp. 2d 1216 (U.S.C.A., 9 Cir.).

³ Wigmore on Evidence (1961, McNaughton Rev.), Vol. VIII, para. 2195(a). See also S.A. Williams and J.-G. Castel, *Canadian Criminal Law: International and Transnational Aspects* (1981), pp. 321-327.

⁴ Jowitts Dictionary of English Law (2nd ed., 1977), p. 1588; This definition is taken from, *The Signe: Tiedemann v. The Signe et al.* (1941), 37 F. Supp. 819 (U.S. Dist., Louisiana), at p. 820. See also Wigmore, *op. cit.*, *ibid.*

⁵ Wigmore, *op. cit.*, *ibid.*

⁶ Canada Evidence Act, R.S.C. 1970, c. E-10, ss 43-48. Also see in the United States, 28 U.S.C. 1782; in England, The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, as well as Canada Criminal Code, R.S.C. 1970, c. C-34, ss 637, 640 and Provincial Supreme Court Rules. Several of the states in Australia and New Zealand have also passed legislation dealing with the matter of international judicial assistance.

⁷ *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench from Manitoba, Canada* (1973), 59 F.R.D. 625 (U.S. Dist., N.D. Cal.). This decision was criticized in a case comment, *International Judicial Assistance* (1974), 9 Texas Int. L.J. 108. See also *Judicial Assistance for the Foreign Tribunal*, [1968] Duke L.J. 981; *Re McCarthy and Menin and United States Securities and Exchange Commission* (1963), 38

jurisdiction,⁸ and the matters for which judicial assistance will be provided.⁹

American and Canadian courts have expressed the view that there is compelling merit and logic in favour of providing assistance when requested,¹⁰ and the United States Congress has attempted to clarify and liberalize existing procedures for assisting foreign tribunals and litigants in obtaining evidence.¹¹ However, while the policy of the American govern-

D.L.R. (2d) 660 (Ont. C.A.); *Re Letters Rogatory issued by the Director of Inspection of the Government of India* (1967), 385 F. 2d. 1017 (U.S.C.A., 2nd Cir.). The latter decision was criticized in an article by J.S. Kenoff, *Letters Rogatory—Indian Income Tax Officer was not a Tribunal Entitled to Execution of its Letters Rogatory* under 28 U.S.C. 1782 (1969), 10 *Harvard Int. L.J.* 172. These cases and articles concern themselves with the question of whether the requests for judicial assistance must come from a court or tribunal and what characteristics the foreign court or tribunal must have before a foreign court will respond to the request.

⁸ *Medical Ancillary Services et al. v. Sperry Rand Company* (1979), 95 D.L.R. (3d) 735 (Ont. H.C.J.); *Hardie Rubber Company Pty. Ltd v. The General Tire and Rubber Company* (1972-73), 129 C.L.R. 521 (H.C. Aust.); *Re Regina and Lester* (1972), 6 C.C.C. (2d) 227 (Ont. C.A.); *Re Baton and the Queen* (1976), 30 C.C.C. (2d) 253 (Ont. H.C.J.); *R v. Bulleyment* (1979), 46 C.C.C. (2d) 429 (Ont. C.A.); *R v. Crux* (1972), 6 C.C.C. (2d) 330 (B.C.S.C.); *R. v. Rowbotham (No. 2)* (1977), 36 C.C.C. (2d) 303 (Ont. G.S.P.); *R. v. Demeter* (1976), 25 C.C. (2d) 417 (Ont. C.A.); See also, Canada Evidence Act, *supra*, footnote 6, ss 41-48.

⁹ *Re Application by Letters Rogatory from the United States District Court, Middle District of Florida, Tampa Division; Re Canada Evidence Act, s. 43*, [1980] 1 W.W.R. 7 (Alta Q.B.); *Re McCarthy and Meiran and the United States Securities and Exchange Commission*, *supra*, footnote 6; *Re Westinghouse Electric Corporation and Duquesne Light Company* (1977), 78 D.L.R. (3d) 3 (Ont. H.C.J.).

¹⁰ *Re Request for International Judicial Assistance*, *supra*, footnote 1; *In Re Letters of Request to Examine Witnesses from the Court of Queen's Bench from Manitoba*, *supra*, footnote 7.

¹¹ 28 U.S.C. 1782: "Assistance to foreign and international tribunals and to litigants before such tribunals.

- (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure of the foreign country or the international tribunal, for the taking of testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

- (b) This chapter does not preclude a person within the United States voluntarily giving his testimony or statement, or producing a document or other thing, for use in a

ment and courts is to be as liberal as possible in providing assistance to foreign courts,¹² that policy may at times come into conflict with a person's constitutional right against self-incrimination. The Fifth Amendment to the Constitution of the United States provides that "... [n]o person shall be compelled in any criminal case to be a witness against himself". In other words, no witness can be compelled to give evidence, where that evidence, or any evidence derived from it, may be used to incriminate him. As there is no general protection against self-incrimination in Canada, a witness in the United States may legitimately fear that evidence, given at the request of a Canadian court, may be used against him in subsequent proceedings in Canada. Where a witness has such a legitimate fear, he is unlikely to be compelled by an American court to give the requested evidence.

This article will concern itself with the problem that Canadian courts confront when attempting to obtain evidence in the United States from a witness who has pleaded the Fifth Amendment. This article will also make a recommendation for a legislative change which could assist Canadian courts to circumvent this problem and to obtain needed evidence.

I. *Right Against Self-Incrimination in Canada.*

When determining whether to provide judicial assistance, the American courts must first decide whether the protection against self-incrimination in the Constitution extends to a witness who fears foreign prosecutions. Assuming that it does, the American courts must then decide when a witness is in jeopardy. In determining the second question, American courts will consider the law of the requesting country to determine whether it adequately protects the constitutional rights of a United States resident from whom evidence is being sought. Because Canadian law provides considerably less protection against self-incrimination than does the American Constitution, it may become difficult for Canadian courts to obtain evidence from witnesses in the United States. What follows is a brief discussion of the Canadian law with regard to self-incrimination.

At common law, a person had the right to refuse to testify under oath on the ground that the answers might tend to incriminate him.¹³ However,

proceeding in a foreign or international tribunal before any person and in any manner acceptable to him. June 25, 1948, c. 646, 62 Stat. 949; May 24, 1949, c. 139, & 93, 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, & 9(a), 78 Stat."

See also, H. Smit, *International Litigation under the United States Code* (1965), 65 Col. L. Rev. 1015; *Judicial Procedures in Litigation with International Aspects*, Senate Report 1850, 88th Cong., 2nd sess., Sept. 15th, 1964; Public Law 88-619, Oct. 3rd, 1964; *New Developments in International Judicial Assistance in the United States of America*, [1964] D.C. Bar J., Jan., p. 32.

¹² See *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench of Manitoba, Canada*, *supra*, footnote 7.

¹³ *Triplex Safety Glass Co. Ltd v. Lancegay Safety Glass (1934) Ltd*, [1939] 2 All E.R. 613 (C.A.).

section 5 of the Canada Evidence Act removes that common law right against self-incrimination,¹⁴ and replaces it with a more limited protection. The result is that there is no general right against self-incrimination in Canada;¹⁵ there are only limited and specific rules against self-incrimination, some of which are as follows:¹⁶

1. While a witness can be compelled to answer questions under oath, if he claims the protection of section 5 of the Canada Evidence Act, no answer given may be used against him in any subsequent proceeding.
2. The common law right of an accused not to give evidence at his own trial still remains.
3. The courts continue to hold that any statement given to a person in authority outside the courtroom can only be used against that person in a criminal trial if the statement was made voluntarily without threats or inducements.

The protection in section 5 is limited to answers given under oath. It does not afford a witness protection against the use of evidence uncovered as a result of the protected testimony that is, derivative evidence. This was made clear by the Supreme Court of Canada in *Di Iorio and Fontaine v. The Warden of the Common Jail of Montreal and Burnet et al.* where the court stated:¹⁷

¹⁴ Canada Evidence Act, *supra*, footnote 6, s. 5: "Incriminating Questions—Answer not receivable against witness.

- (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
- (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence. R.S., c. 307, s. 5."

¹⁵ This point is extensively and convincingly argued in two articles by E. Ratushny, *Is There a Right against Self-Incrimination in Canada?* (1973), 19 McGill L.J. 1, and *Self-Incrimination: Nailing the Coffin Shut* (1977-78), 20 Crim L.Q. 312. These articles are referred to extensively, and much was adopted by the Supreme Court of Canada in *Di Iorio and Fontaine v. The Warden of the Common Jail of Montreal and Burnet et al.* (1976), 33 C.C.C. (2d) 289 (S.C.C.). See also *Re Inquiry Re Department of Manpower and Immigration in Montreal* (1974), 22 C.C.C. (2d) 176 (Que. Commission of Inquiry), and *Stickney v. Trusz* (1973), 16 C.C.C. (2d) 25 (Ont. H.C.J.).

¹⁶ See *Stickney v. Trusz*, *ibid.*

¹⁷ *Supra*, footnote 15, per Dickson J., at p. 337. See also the report of the Canadian Committee on Corrections (Ouimet Report, 1969) which states as follows: "A searching

Whether or not one agrees with a result which may force a person to assist in an investigation of his criminal activity, the provisions of s. 5 of the *Canada Evidence Act* and both federal and provincial Inquiries Acts compel such a result.

Even the limited protection provided by section 5 must be claimed by the witness. If a witness fails to claim the protection, either through ignorance of the section or because he does not realize that his answers may incriminate him, the section will not serve to protect him, and any answer given may be used against him in subsequent proceedings.¹⁸

Although a person has the right to remain silent and cannot be compelled to testify against himself at his own trial, there are specific statutes which compel a person to give evidence during an investigation,¹⁹ that very same evidence may be used against him in a subsequent proceeding.

The following cases will illustrate that a witness in Canada is not only endangered by the use of derivative evidence, but also that the courts in Canada will compel a witness to testify even though that evidence may be used directly against him in subsequent foreign proceedings. When deciding whether to provide judicial assistance, the American courts may be more reluctant to do so when they see that the protection against self-incrimination in Canada is significantly less than that provided by the

examination may . . . elicit facts or clues which enable the case to be independently proved. Thus the abolition of the privilege of a witness to refuse to answer on the ground that his answer may tend to incriminate him places an additional and powerful weapon in the hands of law enforcement."

¹⁸ *Tass v. The King*, [1947] S.C.R. 103, per Kerwin J., at p. 105: "It has been pointed out in several cases . . . that the protection now afforded may not be as wide as that under the common law and objections have been raised from time to time as to the possibility of the evidence acquired under the Act being used to build up a case against a person who may be subsequently charged with an offence. However that may be, the matter seems quite clear that if a person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not know his rights."

The Constitution Act 1981, part of Canada Act, 1982, c. 11 (U.K.), with its Charter of Rights and Freedoms, makes it unnecessary for the witness to claim protection under the Act. S. 13 reads as follows: "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."

However this section would not protect the witness against the use of derivative evidence, and the protection provided is even less than that provided by s. 5 of the *Canada Evidence Act*. The phrase "or for the giving of contradictory evidence", does not appear in s. 5 of the *Canada Evidence Act* or in the comparable provincial statutory provisions. See *R. v. Staranchuk*, [1983] 2 W.W.R. 145 (Sask. Q.B.), per Grotsky J., at pp. 152-154. The phrase "incriminating evidence" may limit the protection to evidence which is incriminating at the time it was given. The Evidence Acts protect all testimony which has been given under their protection. See *R. v. Altseimer* (1982), 29 C.R. (3d) 276 (Ont. C.A.), at pp. 279-281.

¹⁹ For example, B.C. Securities Act, R.S.B.C. 1979, c. 380, s. 22; Immigration Act, R.S.C. 1976, c. 52, s. 95; Income Tax Act, R.S.C. 1970-71-72, c. 63, s. 231(1)(c.).

American Constitution. If Canadian courts are unwilling or unable to protect Canadian citizens against self-incrimination, they will be much less likely to protect a citizen of a foreign country where that person has been compelled to give evidence in the foreign country. This position could help influence American courts to protect American residents by refusing to compel testimony at the request of Canadian courts.

In *Campbell v. Bell*,²⁰ Bell was being questioned by the British Columbia Securities Commission under the British Columbia Securities Act,²¹ which compels a person under investigation to answer questions under oath; a failure to do so could result in his being held in contempt. In this instance, the investigation was being carried out jointly with authorities from California and, at the time that Bell was being questioned in British Columbia, the California investigating officers were waiting outside the hearing room. Bell refused to answer on the ground that, although his answers were protected by the Canada Evidence Act²² and the British Columbia Evidence Act,²³ the transcript of the inquiry could be turned over to the American authorities and his answers used against him in a subsequent prosecution in the United States. The British Columbia Court of Appeal held that the fact that Bell could subsequently be charged in the United States would not "... be allowed to inhibit or restrict the British Columbia investigation".²⁴ Thus, Bell was placed in jeopardy in two ways. First, the British Columbia Securities Commission could use his answers to discover other evidence, and further its own investigation against him. Secondly, the answers which Bell gave could be used directly against him in any prosecution in the United States.²⁵ In order to arrive at its result, the court drew a distinction between an investigation being conducted by Canadian authorities under a Canadian statute and an investigation being done at the request of the United States. The court said that:²⁶

... at this juncture it should be made clear that the investigation order directed an investigation to be made in British Columbia, conducted by British Columbia officials appointed under a British Columbia statutory provision. The subject investigation was not directed pursuant to a request from any court in the United States for an examination of Bell under Section 51 [am. 1976, c. 33, s. 13(d)] of the *British Columbia Evidence Act*. If it were simply this, the appropriate protection against self-incrimination would apply: *U.S.A. v. McRae*, [1867] 3 Ch. App. 78.

²⁰ [1979] 5 W.W.R. 411 (B.C.C.A.).

²¹ *Supra*, footnote 19.

²² *Supra*, footnote 6, s. 5.

²³ R.S.B.C. 1979, c. 134, s. 4(2). This section of the British Columbia Evidence Act has the same effect as s. 5 of the Canada Evidence Act.

²⁴ *Supra*, footnote 20, at p. 421.

²⁵ It should also be noted that counsel for Bell asked the Commission to give an undertaking that the testimony given at the inquiry would not be given to the American authorities. The undertaking was refused and the British Columbia Court of Appeal refused to order such an undertaking.

²⁶ *Campbell v. Bell*, *supra*, footnote 20, at p. 420.

The British Columbia Court of Appeal again dealt with the issue of domestic law compelling testimony that might incriminate the witness in foreign proceedings in the case of *Summa Corporation (formerly Hughes Tool Company) v. Meier*.²⁷ In that case an American corporation obtained a judgment against the defendant in the United States. The company then sued on the judgment in British Columbia and sought to examine the defendant in aid of execution. The defendant refused to answer questions on the ground that the answers regarding his financial circumstances might incriminate him in relation to a murder with which he was charged in California. The court, accepting the fact that the answers could incriminate the defendant in the California prosecution, went on to decide that he could be compelled to answer in any event.

Hinkson J.A. (Macdonald J.A. concurring) decided that the common law privilege against self-incrimination had been abolished by section 5 of the Canada Evidence Act. He did not distinguish between a Canadian and an American investigation as Carrothers J.A. did in *Campbell v. Bell*. He might have been able to distinguish the facts in *Summa Corporation v. Meier* on the basis that, in this instance, the common law protection did not apply, because the action to enforce the judgment was a British Columbia action and not merely a request for assistance by a foreign court. It is significant that Hinkson J.A. chose not to make such a distinction, but stated clearly instead that the common law privilege against self-incrimination had been abolished.²⁸ Hutcheon J.A. in the same case came to a different conclusion on this point. He maintained that section 5(2) of the Canada Evidence Act and section 4(1) of the British Columbia Evidence Act may not have the effect of abolishing entirely the common law privilege against self-incrimination. He put it as follows:²⁹

Without deciding that question, I prefer to assume that the common law privilege may still be available if there is no statutory protection to accompany the compulsion. The issue, then, becomes the extent of that common law privilege.

He then went on to decide that, in this instance, Meier's position was analogous to that of a bankrupt and, at common law, a bankrupt was required to answer questions about his financial circumstances even though the answers could incriminate him in some other proceeding.

In summary, it appears that if a person is compelled to testify pursuant to a Canadian statute, with Canadians doing the investigation for Canadian purposes, the witness is protected only to the extent that the answers that he gives cannot be used against him in any subsequent Canadian proceeding. They may, however, be used against him in a foreign proceeding. If the testimony has been required at the request of a foreign country, it is unclear

²⁷ (1981), 30 B.C.L.R. 69 (B.C.C.A.).

²⁸ *Ibid.*, at p. 73.

²⁹ *Ibid.*, at p. 76.

whether a witness can rely on his common law right to refuse to testify where the answers may incriminate him. Any evidence derived from the testimony of a witness may be used to incriminate that witness.

II. *Self-Incrimination in the United States.*

The privilege against self-incrimination given by the Fifth Amendment is more extensive than its Canadian counterpart.³⁰ If a witness pleads the Fifth Amendment and refuses to testify, the American government may ask the court to grant him immunity.³¹ If the immunity is granted, the witness will be compelled to testify. However, no testimony, or information directly or indirectly derived from such testimony, may be used against the witness in any criminal proceeding.³² If the government decides to prosecute the witness at some later stage, there is a very heavy burden on the government to prove affirmatively that the evidence that it proposed to use is derived from a legitimate source that is wholly independent of the

³⁰ See L.W. Levy, *Origins of the 5th Amendment* (1968).

³¹ 18 U.S.C. 6003. "Court and grand jury proceedings:

- (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part [18 USC § 6002].
- (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
 - (1) the testimony or other information from such individual may be necessary to the public interest and
 - (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. [Added Oct. 15, 1970, P.L. 91-452, Title II, 201(a), 84 Stat. 927.]"

³² 18 U.S.C. 6002: "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) A court or grand jury of the United States,
- (2) An agency of the United States, or
- (3) Either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part (18 U.S.C. §§ 6001 *et seq.*), the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

compelled testimony.³³ One can readily see how this approach differs from that of the Supreme Court of Canada in *Di Iorio*³⁴ where the Canadian court decided that it was permissible for the government to build its case on evidence derived from the compelled testimony.

The 5th Amendment and Foreign Prosecutions.

Where there is a possibility that a witness' evidence could be used against him in a foreign jurisdiction, there are as mentioned earlier two issues for an American court to decide before compelling a witness to give evidence. The first is whether the scope of the Fifth Amendment extends to protect a United States resident or citizen who fears foreign prosecution. The second is, assuming that the Fifth Amendment does so extend, how will the court determine when a witness is in jeopardy.

The first of these issues has never been clearly decided by the Supreme Court of the United States. That court commented on the issue in *Zicarelli v. New Jersey State Commission of Investigation*³⁵ but was not called upon to decide it. In that case the New Jersey State Commission was carrying out an investigation into organized crime. In the course of its investigation, it called witnesses to answer questions under oath. One witness pleaded the Fifth Amendment and refused to answer questions, even though immunity had been granted, because he feared prosecution in a foreign country. On the facts of the case the court found that there was no reasonable likelihood of a foreign prosecution because the questions asked by the Commission were restricted to obtaining information about criminal activities in the United States. With regard to the constitutional issue, the court made the following statement:³⁶

This Court noted probable jurisdiction to consider appellant's claim that a grant of immunity cannot support the Fifth Amendment privilege with respect to an individual who has a real and substantial fear of foreign prosecution. We have concluded, however, that it is unnecessary to reach the constitutional question in this case.

³³ This proposition was developed by the United States Supreme Court in the case of *Kastigar v. U.S.* (1972), 406 U.S. 441. In that case a witness before the grand jury refused to testify, relying on his Fifth Amendment privilege. The witness was then granted immunity and ordered to testify. The Supreme Court held that his constitutional rights were not being violated because he would not suffer any prejudice from giving the evidence, and the court put the proposition as follows: "Once a defendant demonstrates that he has testified under a state grant of immunity to matters related to federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they have an independent, legitimate source for the disputed evidence." [The court was quoting from *Murphy v. Waterfront Commission of New York Harbour* (1964), 378 U.S. 52.] "This burden of proof which we affirm as appropriate is not limited to a negation of taint. It imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from legitimate sources wholly independent of the compelled testimony." See *Kastigar, ibid.*, at p. 460.

³⁴ *Supra*, footnote 15.

³⁵ (1972), 92 S. Ct 1670.

³⁶ *Ibid.*, at p. 1675.

It is well established that the privilege protects against real dangers not remote and speculative possibilities.

Various other courts in the United States have considered the scope of the Fifth Amendment but have not been called upon to decide the constitutional issue because in most instances the court found that there was no reasonable likelihood of prosecution in a foreign jurisdiction.³⁷

The most recent illustration is *In re Trevor Davies Baird*,³⁸ a decision of the United States Court of Appeals, Eighth Circuit. Baird had pleaded guilty to two hashish charges in 1980, and was sentenced to eight years' imprisonment. He was subsequently called to testify before a federal grand jury regarding his drug-related activities. Even after being granted immunity he refused to testify, fearing that he would be charged in British Columbia; he was named in an indictment alleging a conspiracy to import narcotics into Canada.

Without addressing the constitutional issue, the court ruled that Baird had not shown a real and substantial fear that his testimony would expose him to foreign prosecution. Baird had argued that the 1961 Multilateral Single Convention on Narcotic Drugs authorized the exchange of information amongst signatory states, including Canada.

But the court accepted the government argument that the agreement must be carried out subject to the constitutional, legal and administrative systems of each of the contracting parties. Since the Federal Rules of Criminal Procedure make grand jury proceedings secret, "the possibility that incriminating testimony will be funnelled to foreign officials by an attorney for the government for use against Baird in a criminal prosecution in Canada is remote and speculative".³⁹

Rule 6(e)(2) forbids disclosure to foreign officials without a court order, and "the district court, if presented with such a request, may protect Baird's Fifth Amendment rights by, among other things, refusing to permit disclosure of the incriminating evidence".⁴⁰ The implication in all of those cases is that if there were such a threat, the witness would not be compelled to testify in spite of the grant of immunity.

³⁷ *Zicarelli v. The New Jersey State Commission of Investigation*, *ibid.*; *In Re Grand Jury Proceedings: United States v. Postal* (1977), 559 F. 2d 234 (U.S.C.A., 5th Cir.); *In Re Kenneth Tierney* (1972), 465 F. 2d 806 (U.S.C.A., 5th Cir.); *United States v. John Doe*, *in re Grand Jury Subpoena of Daniel Cahalane* (1973), 361 F. Supp. 226 (U.S. Dist. Penn.); *United States v. Lemieux* (1979), 597 F. 2d 1166 (U.S. C.A., 9th Cir.); *In Re Weir* (1974), 495 F. 2d 879 (U.S.C.A., 9th Cir.); *In Re Parker* (1969), 411 F. 2d 1067 (U.S.C.A., 10th Cir.); *United States v. Yanagita* (1977), 552 F. 2d 940 (U.S.C.A., 2nd Cir.).

³⁸ (1982), 668 F. 2d 432 (U.S.C.A., 8th Cir.). Petition for writ of certiorari denied, May 17th, 1982: 456 U.S. 982.

³⁹ *Ibid.*, at p. 433.

⁴⁰ *Ibid.*, at p. 434.

The constitutional question was decided, however, by the District Court of Connecticut *In Re Karen Cardassi*,⁴¹ where a witness was being questioned by a grand jury about her involvement in the importation of marijuana from Mexico. In spite of a grant of immunity, the witness refused to testify on the ground that she feared prosecution in Mexico. The court found that there was a reasonable fear of prosecution in a foreign jurisdiction and went on to hold that the Fifth Amendment protected the witness from the requirement to testify, because the immunity could not extend into Mexico.⁴² This conclusion, it will be noted, is exactly the opposite of that reached by the British Columbia Court of Appeal in the case of *Campbell v. Bell*. In both cases, the testimony was being compelled under a local statute by a local court for local purposes. The difference in the conclusions is not surprising because the two courts were operating under a different constitution and a different statute. However, this difference may create difficulties when Canadian courts seek the assistance of American courts in obtaining evidence, because an American court may well be reluctant to compel residents of the United States to give evidence at the request of courts in a country which provides so little protection for witnesses.

The second question that the courts in the United States have to answer is whether a witness' testimony would, in fact, jeopardize him in a foreign prosecution;⁴³ how they determine that question is not clear. In the *Cardassi*⁴⁴ case, for example, the court decided that, even though the evidence was being compelled at secret grand jury proceedings, there was still the prospect of foreign prosecution because law enforcement agencies have access to grand jury minutes; as a result, the minutes could be disseminated to law enforcement agencies in other countries. On the other hand a number of courts have come to the opposite conclusion and have decided that the secrecy of the grand jury is adequate protection for the witness.⁴⁵ The United States Supreme Court has yet to rule on this issue. Whether grand jury secrecy is adequate protection is therefore unclear.

⁴¹ (1972), 351 F. Supp. 1080 (U.S.).

⁴² The court noted that the U.S. Court of Appeals, 10th Circuit had a different opinion on the constitutional issue in *Re Parker*, *supra*, footnote 37. The *Cardassi* court refused to follow that opinion because the question had been left open by the Supreme Court of the United States in the *Zicarelli* decision, *supra*, footnote 35, and a previous decision of the Supreme Court, *Murphy v. Waterfront Commissioners*, *supra*, footnote 33, had provided sufficient guidance on the issue to permit it to conclude as it did. In any event the court in the *Parker* case had found that there was no real danger of prosecution in a foreign country.

⁴³ In *Cardassi*, *supra*, footnote 41, at p. 1083, the court said: "The preliminary question, here, therefore, is whether this witness had a reasonable basis for fearing foreign prosecution. Unfortunately, analysis of *Zicarelli* creates some doubt as to what test is to be applied in making that determination."

⁴⁴ *Ibid.*, at p. 1082.

⁴⁵ *Tierney, Postal, Weir*, *supra*, footnote 37. In the *Lemieux* case, *supra*, footnote 37, the court considered the conflict and would have preferred to follow the *Cardassi* case; however it felt compelled to follow *Weir* and *Tierney*.

In other instances the courts in the United States have looked at the questions that were proposed to be asked to determine whether the answers were capable of incriminating the witness. In *Zicarelli v. New Jersey* the court determined that, of the one hundred questions asked, none posed a real danger of incriminating the witness under foreign law.⁴⁶ In the case of *Re Daniel Cahalane*,⁴⁷ the witness was being asked about suspected smuggling of guns to the Irish Republican Army. The witness refused to answer on the ground that he could be prosecuted in Great Britain. The court distinguished *Cardassi* by saying that, in that case, the witness was being asked about activities in Mexico, whereas here, the witness was only being asked about activities in the United States, and not about activities in Great Britain or Ireland. The court did comment that, even in *Cardassi*, if the questions before the grand jury had been framed so as to relate solely to activities within the United States, no reasonable fear of incrimination under foreign law could exist.⁴⁸ The *Cahalane* court did not comment on another aspect of the questions raised in the *Cardassi* case. In *Cardassi* the court said that, even if the questions did not relate directly to activities in the foreign jurisdiction, the questions relating to the United States might provide a link in a chain of evidence which could be incriminating. For example, in *Cardassi*, questions concerning the presence of the witness "at an apartment with those accused of smuggling narcotics can certainly provide a link in the chain of evidence needed for such a foreign prosecution".⁴⁹ If the "link in the chain" test is accepted, it would provide much more scope for objecting to questions which may incriminate a witness.⁵⁰ A recent case in which that argument was raised is *In re Grand Jury Subpoena of Martin Flanagan*.⁵¹ Flanagan was an unindicted co-conspirator in an alleged gun-running scheme to Ireland. He was subpoenaed to testify at a grand jury, and the district court granted him immunity. He then applied to quash the subpoena, fearing prosecution in Ireland, Northern Ireland or Great Britain.

The District Court examined in detail the Irish and British laws, and the statistics for prosecutions against alleged members of proscribed organizations such as the Irish Republican Army and was satisfied that if Flanagan answered the questions put, he would entangle himself deeply in the penal laws of those countries.

It then answered in the affirmative the question whether the Fifth Amendment protection against self-incrimination extends to a risk of

⁴⁶ *Supra*, footnote 35, at p. 1675.

⁴⁷ *Supra*, footnote 37.

⁴⁸ *Ibid.*, at p. 227.

⁴⁹ *Supra*, footnote 41, at p. 1080.

⁵⁰ There is support for the "link in the chain" theory in U.S. Circuit Court of Appeal: see *Blan v. United States* (1950), 340 U.S. 159.

⁵¹ (1982), 691 F. 2d 116 (U.S.C.A., 2nd Cir.). See also, *Gilboe v. U.S.A.* (1983), 699 F. 2d 71 (U.S.C.A., 2nd Cir.), at p. 75.

foreign prosecution. It went on to say that the Fifth Amendment "may be invoked if the answers to the questions might provide a link in the chain leading to the witness' incrimination in a foreign jurisdiction".⁵² That decision was reversed by the United States Court of Appeals, which found that Flanagan's fear of foreign prosecution, viewed objectively, was remote and speculative rather than real, reasonable or substantial.

While recognizing the "link in the chain" test, the court held that the surrounding circumstances and context must be looked at to determine whether the asserted fear is real or imaginary. For example, is there an existing or potential foreign prosecution of him? What foreign charges could be filed against him? Would prosecution be initiated or furthered by his testimony? Would such charges entitle the foreign jurisdiction to have him extradited? Is there a likelihood that his testimony given here will be disclosed to the foreign government?

Another factor that the court considered in *Cahalane* was that there was no indication of any pending prosecution against Cahalane in Great Britain or Ireland; nor was there any statute or case cited to show that Cahalane might be answerable in a foreign country for his activities in the United States. This factor was also considered in the case of *U.S. v. Yanagita*.⁵³ In rejecting the witness' claim of privilege, the court stated that the appellees had totally failed to demonstrate that the Japanese authorities had any interest in prosecuting the witness. It is difficult to assess the weight attached to this factor in either of the above cases. However, it may lend support to the view that the determination of reasonable fear is dependent on the facts in each case and that no single factor is determinative of the issue.

It is apparent that American courts will not compel testimony for American cases where there is a threat of foreign prosecution, and therefore it is less likely that they would compel testimony at the request of a foreign country in similar circumstances.

In determining the likelihood of a foreign prosecution, the American court will hear evidence and consider the state of the law of the foreign jurisdiction. In the case *Allman et al. v. The Queen*,⁵⁴ the government of British Columbia was attempting to obtain commission evidence from a witness in the United States in a commercial crime prosecution. The witness refused to answer questions, pleading the Fifth Amendment. The United States Attorney's Office applied to the court for a grant of immunity for the witness. On the immunity application, the court heard testimony from two Canadian lawyers, one on behalf of the government of Canada and the other on behalf of the government of British Columbia, both of

⁵² *Ibid.*, at p. 963.

⁵³ *Supra*, footnote 37.

⁵⁴ (1980), 57 C.C.C. (2d) 146 (B.C. Co. Ct).

whom gave evidence that their respective governments had granted the witness both "use" and "derivative use" immunity. The court accepted the testimony, granted the immunity and ordered the witness to give evidence at the Commission. In a memorandum in support of the application for immunity, both counsel filed statements which read as follows: "This is to advise you that Mr. Bertram I. Nesbitt has immunity from prosecution arising from the use of any compelled testimony in this matter and from the use of any evidence derived therefrom." That statement is, however, ambiguous. It does not say whether this purports to be the law of Canada or whether the government is undertaking not to prosecute the witness, using evidence derived from his testimony. If it purports to be the law of Canada, it is clearly wrong. If it is merely an assurance given by the government that the witness will not be prosecuted, it creates other difficulties which will be discussed later. While giving evidence, the lawyer testifying on behalf of the government of Canada responded to questions by the court as follows:

The court: Are there any immunity statutes in the Dominion of Canada?

The witness: No Your Honour, there is not. Immunity is granted by a crown prosecutor or someone speaking on behalf of the Attorney General of Canada or the province. That is the way it is done. It is a common law thing that has grown up.

The court: Common law immunity, if granted by the crown attorney for the Dominion extends to what kind of cases?

The witness: It extends to all kinds of cases that the Dominion would have jurisdiction over. That is, generally speaking, every statute of Canada, of the Dominion of Canada apart from the Criminal Code. The Criminal Code is administered by the Province of British Columbia and the Attorney General of British Columbia. Every other statute of Canada is administered by the Attorney General of Canada under whom I am employed.

Later, under questioning by the lawyer for the witness, counsel testifying on behalf of the government of Canada made the following responses:

Question: In fact sir, if there were a grant of immunity by the crown it can be withdrawn by the crown. Is that correct?

Answer: No sir, it cannot be withdrawn. I am saying it would never be done that way because it is of such a high thing that you do not play fast and loose with the criminal law.

Question: But it could be done?

Answer: I would say it would never be done.

Question: I am asking you sir, could it be done legally?

Answer: I would not say legally it could be done, because it would not be done.

The court's decision did not make clear whether it granted the immunity because it believed that the law of Canada provided an immunity or because of assurances given by the government of Canada. Later in the testimony there were references to the limited immunity provided by section 5 of the Canada Evidence Act, but there was no detailed discussion, either in the testimony or in the judgment, about the question of derivative use immunity. If the court granted the immunity on the basis that, in the

face of assurances by the government of Canada and the government of British Columbia, there was no reasonable likelihood of prosecution, it would have given us a fairer indication of the sort of evidence that the court finds acceptable in deciding to compel a witness to answer questions at the behest of a Canadian court.

It is of interest to note that in other cases, the American courts have been willing to compel a witness to rely on the assurances of either foreign governments or, indeed, the government of the United States. In the cases of *State v. Sullivan*⁵⁵ and *Doyle v. Hofstader*,⁵⁶ the prosecution offered not to prosecute the witnesses if they gave evidence. In both cases the court held that a witness is not obliged to rely on gratuitous offers of immunity from the prosecution. He may choose to refuse the offer of immunity and insist that the court grant immunity pursuant to the statute.⁵⁷ If a witness is not compelled to rely upon assurances of his own government, it seems odd that he should be compelled to rely on assurances of a foreign government.

In another case⁵⁸ the Federal Republic of Germany was seeking testimony from an American citizen who had been convicted in the United States of selling worthless stock in Germany. The German government sought his testimony by way of letters of request, but the American court refused to compel the testimony on the ground that the witness could be prosecuted in Germany. The German prosecutor provided assurances that the witness would not be prosecuted, but the court heard evidence regarding the law of Germany and decided that Germany did not have an immunity procedure comparable to that of the United States. The court found further that the law of Germany provided that if a citizen laid a charge against the witness, the German prosecutor would be compelled to carry out a prosecution. Although in Canada, federal and provincial governments of the day may give assurances that they will not prosecute, such assurances cannot bind subsequent governments. This sort of evidence was not clearly placed before the American court in *Allman*⁵⁹ and it is uncertain what the American court would have done if it had been. If in *Allman* the court was relying on the assurances of the federal and provincial governments, the granting of immunity was questionable.

When an American court is exercising its discretion whether to grant an order for international judicial assistance of any kind, it seems that the court may consider the nature and attitude of the foreign government, the

⁵⁵ (1948), 37 S.W. (2d) 907 (Fla S.C.).

⁵⁶ (1931), 177 N.E. 489 (N.Y.C.A.).

⁵⁷ 18 U.S.C. 6003, *supra*, footnote 31. But see, *U.S. v. Pellon* (1979), 475 F. Supp. 467 (U.S. Dist., N.Y.), at p. 479.

⁵⁸ *In Re Letters Rogatory from the 9th Criminal Division, Regional Court, Mannheim, Federal Republic of Germany* (1978), 448 F. Supp. 786 (U.S. Dist., Fla).

⁵⁹ *Supra*, footnote 51.

standards of its procedures and the nature of the proceedings abroad.⁶⁰ This broad discretion might leave it open to the American court to accept the assurances of the Canadian government that a witness will not be prosecuted and on this basis compel a witness to testify. However, whether courts other than that which decided the *Allman* case would be willing to do so in the face of the *State v. Sullivan* and *Doyle v. Hofsteader*⁶¹ decisions is uncertain. The policy question for the American courts is how far to go in extending comity to Canada and relying on assurances that the witness will not be prosecuted. If the American court should decide that the lack of protection in Canada from the use of evidence derived from a witness' testimony jeopardizes the constitutional rights of an American citizen or of a Canadian citizen resident in the United States, it will create a serious problem for Canadian prosecutors attempting to obtain evidence in the United States. Because of the international nature of certain types of commercial crime and the drug trade, Canada will have to rely more and more heavily on obtaining evidence in the United States, and the limited rights against self-incrimination extended to witnesses in Canada may inhibit the obtaining of evidence in that country.

Conclusion

Section 5 of the Canada Evidence Act and section 13 of the Charter of Rights and Freedoms provide only limited protection for witnesses before a Canadian court who have been compelled to testify. A witness cannot be protected against the use of evidence derived from the compelled testimony.⁶² Crown agencies in Canada may find this lack of protection useful in general. However, it will have its disadvantages if American courts are unwilling to compel testimony where they conclude that Canadian authorities are incapable of providing protection comparable to that available in the United States. The American courts have already shown that they are reluctant to compel testimony for their own purposes, where there is a threat of foreign prosecution. They are even less likely to compel testimony for a foreign court pursuant to letters rogatory, where a witness faces the possibility of prosecution in that foreign country.

It is recommended that the government of Canada and the governments of the Provinces amend their respective Evidence Acts to permit the courts to grant "use" and "derivative use" immunity to witnesses who have been compelled to testify inside or outside the borders of Canada. Otherwise, the gathering of essential evidence in the United States, to facilitate prosecutions here in Canada, may be greatly impeded.

⁶⁰ See Senate Report, p. 7, *op. cit.*, footnote 11 and *In Re Letters Rogatory for the Justice Court, District of Montreal, Canada* (1975), 523 F. 2d 562 (U.S.C.A., 6th Cir.).

⁶¹ *Supra*, footnote 55 and 56.

⁶² *Supra*, footnote 17.