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The cross-border woes of Conrad Black – the dilemma of differing approaches to self-incrimination in Canada and the US.

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Conrad Black and other officers and directors of Ravelston must attend to be examined under oath, even though there is a risk that their evidence could be used against them in criminal proceedings in the US, the Ontario Court of Appeal ruled in November 2005.¹ This case highlights a serious conflict between the Canadian and US approaches to protection against self-incrimination. In Canada, a witness can be compelled to answer a self-incriminating question, but that evidence cannot be used against the witness in subsequent criminal proceedings.² In the US, a person can “plead the Fifth” and refuse to answer on grounds of self-incrimination. However, if the person does answer the question, the evidence can be used against that person in criminal proceedings. There is thus a danger that self-incriminating evidence compelled from a witness in Canada could be used in a prosecution of that witness in the US.

In October 2004, with regulatory and criminal investigations well under way in the United States, Justice Colin Campbell of the Ontario Superior Court appointed Ernst & Young to investigate related-party transactions between Hollinger Inc., Ravelston and its directors and officers. In May 2005, Campbell J. ordered Lord Black and other officers of Ravelston to answer questions under oath.³ Campbell J. dismissed the Ravelston officers’ argument that being compelled to testify under oath would infringe their right to remain silent under ss. 7 and 13 of the *Charter* and their protection against self-incrimination contained in

the Fifth Amendment to the Constitution of the US, as their testimony in the Canadian investigation could be admissible in US proceedings. Lord Black and the other Ravelston officers appealed.

The Court of Appeal affirmed Campbell J.’s decision. The court agreed that a constitutional exemption was not appropriate in the circumstances, as the purpose of the inquiry under the *Canada Business Corporations Act* is fact-finding and not prosecutorial. The court also approved of the procedure for dealing with the potential conflict between Canadian and US approaches to self-incrimination that Campbell J. outlined.

Though Campbell J. found that the *Charter* does not have extra-territorial application, he ruled that Lord Black and the other officers could object to specific questions on grounds of potential self-incrimination and obtain a court ruling before being forced to answer. The court could make the appropriate directions, including shielding particular answers from disclosure. As well, the inspector’s information and materials could only be made available to US authorities through the Mutual Legal Assistance Treaty (“MLAT”) process. The fact that information and materials obtained by the inspector are privileged and subject to order of the court would be a significant factor in any application under the MLAT.

Though the Court of Appeal’s decision has not garnered the same media attention as the more

sensational aspects of Conrad Black's ongoing legal dramas, it does hold serious implications for corporations engaged in cross-border business. It not only illuminates the growing tension between the different ways that Canada and the US shield witnesses from self-incrimination, but the potential vulnerability of officers and directors on both sides of the border due to these differences. Canada forces a witness to speak, but immunizes self-incriminatory evidence from use in criminal proceedings. The US allows witnesses to stay silent, but if they speak, does not recognize such an immunity.

Currently, there is no requirement that a judge reviewing an MLAT application consider whether the US will honour the privilege attaching to evidence obtained through compulsion that tends to incriminate the witness. Also problematic is Campbell J.'s finding that evidence can be

compelled because the *Charter* does not have extra-territorial application. The right not to incriminate oneself contained in the *Charter* is a principle of fundamental justice. To force witnesses to provide self-incriminating testimony in Canada that could result in a conviction outside of Canada, would, in a world where individuals do business, work, travel, and thus come under the jurisdiction of many countries, completely erode the right against self-incrimination.

Canada must find a way to co-operate with foreign law enforcement authorities that does not violate this fundamental right, either through legislative amendment or judicial rule-making. The integration of the Canadian and American economies, the greater scrutiny of Canadian corporations by US regulatory officials (and vice versa), and the increasing number of cross-border class actions, underline the urgency of this issue.



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¹ *Catalyst Fund General Partner Inc. v. Hollinger Inc.* [2005] O.J. No. 4666 (C.A.)

² *Canadian Charter of Rights and Freedoms*, s. 13; *Canada Evidence Act*, c. C-5, s. 5

³ *Catalyst Fund General Partner Inc. v. Hollinger Inc.* [2005] O.J. No. 2191 (S.C.J.)