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Compelling Disclosure by a Non-Party Litigant in Violation of Foreign Bank Secrecy Laws: Recent Developments in Canada-United States Relations

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INTRODUCTION

THE QUESTION WHETHER Canadian or American courts should enforce their laws in a manner that respects the laws of friendly sovereign states has recently been examined by the Supreme Court of Canada and the United States Court of Appeals for the Eleventh Circuit. Their decisions will be the object of this note in the light of recent developments in Canada-United States relations in the area of legal assistance in civil and criminal matters.

Often our courts are asked to compel a person not a party to the litigation or investigation to produce documents or give evidence in Canada when to do so might or does constitute a criminal offence where the information originated or must be obtained. How can the witness choose between the conflicting commands of two states? Does the principle of equality of states demand that these conflicting commands be given equal weight so that the witness will not be penalized if he or she obeys one or the other or should the *lex fori* always prevail, especially in criminal matters, in order not to frustrate the administration of justice in Canada? Are there other ways to resolve this dilemma which respect international law principles? More generally, to what extent is the foreign state compulsion defence available in a Canadian or American civil or criminal trial?

RECENT DEVELOPMENTS

In *Spencer v. R.*,¹ the Supreme Court of Canada in a unanimous decision was of the opinion that a Canadian citizen employee of the

¹ Oct. 10, 1985, file 17603, not yet reported, affirming (1983) 145 D.L.R. (3d) 344, 2 C.C.C. (3d) 526 (C.A.) setting aside a decision of a judge of the Supreme Court of Ontario (1982) 8 W.C.B. 111 which had quashed a decision of a Provincial Court judge ordering the witness to testify.

Royal Bank of Canada who, while now a resident of Canada, was at the relevant time the bank manager for a branch in the Bahamas could not refuse to answer questions when subpoenaed as a witness by the Crown at the trial in Canada of an accused charged with evading Canadian income taxes, concerning transactions by the accused at that branch, on the ground that disclosure of the information requested could expose him to a criminal prosecution in the Bahamas.

The relevant Bahamian legislation² provides that a bank employee shall not, without the express or implied consent of the customer concerned, disclose to any person any information relating to the identity, assets, liabilities, transactions, or accounts of a customer. Every person who contravenes this legislation is guilty of an offence and is liable on summary conviction to a fine or to a term of imprisonment or to both.

The Supreme Court of Canada considered the issue of the compellability of a witness in a Canadian court from the point of view of the liberty and security of the person provision of the Canadian Charter of Rights and Freedoms³ and from the point of view of public and private international law principles.

With respect to the Charter, it is sufficient to say that the court was of the opinion that the infringement of liberty or security, if any, did not result from the application of Canadian law but solely from that of Bahamian law in the Bahamas. Thus, the Charter has no extraterritorial effect.

From the point of view of public and private international law principles, the Supreme Court of Canada felt that the principle of sovereign equality of states as applied to the Bahamas had not been violated. On the contrary, to have given effect to the laws of that state by allowing the witness to refuse to testify with impunity would have constituted a violation of Canadian sovereignty since the result would have been the frustration of the administration of justice in Canada in respect of a Canadian citizen in relation to an essentially domestic situation. The court was of the opinion that Canada's interest in enforcing its taxation laws must take priority over the interest of the Bahamas to ensure for its own public policy reasons the confidentiality of banking transactions.

² See s. 10 of the Bank and Trust Companies Regulations Act, 1965, 1965 Bah. Acts, No. 64, as am. by Bank and Trust Companies Regulations (Amendment) Act, 1980, 1980 Bah. Acts. No. 3.

³ Constitution Act 1982, Schedule B of Canada Act, 1982, c. 11 (U.K.), s. 7.

In a concurring opinion Mr. Justice Estey⁴ adopted a more conciliatory view with respect to the method to be followed when he declared that international comity dictates that orders to compel a witness to give evidence should not be made lightly when they result in a violation or an unnecessary circumvention of the laws or procedures of a friendly foreign state. He pointed out that in such cases a preferable method would be to grant a stay of proceedings at the trial level to allow the witness sufficient time to apply to the foreign court for an order permitting disclosure which would exempt him or her from criminal liability. Only where such an order had not been sought or obtained within a reasonable period of time would the Canadian trial court have the power to compel the witness.⁵

Mr. Justice LaForest in his opinion specifically approved the reasons given by the Ontario Court of Appeal, which relied on public and private international law principles.

The Court of Appeal stated that whether or not a person is a compellable witness is a question which must be characterized as a matter of procedure governed by the *lex fori*. The fact that Bahamian law prohibited the witness from testifying was irrelevant. Even if compellability had been characterized as a matter of substance, still public and private international law hold that the courts of one state are not bound to recognize and enforce the criminal laws and judgments of another state.⁶ This principle is based primarily on the territorial nature of the criminal law as the expression of the public policy of the enacting state.⁷ The answer would have been the same if the Bahamas had given its Banks and Trusts Companies Regulation Act an extraterritorial effect, as a distinction is made between the capacity of the state under international law to prescribe

⁴ *Supra* note 1.

⁵ S. 10(1)(iii) of the Bahamian law, *supra* note 2, to that effect except with respect to tax matters.

⁶ Castel, *Canadian Conflict of Laws* (2nd ed., 1986), para. 88; Williams and Castel, *Canadian Criminal Law: International and Transnational Aspects* 436 *et seq.* (1981).

⁷ The Ontario Court of Appeal held *obiter* that s. 10 of the Bahamian law was not intended to apply to foreign nationals testifying in foreign courts as there exist two well-established presumptions: (1), that an offence creating section is not intended by Parliament to cover conduct outside the territorial jurisdiction of the Crown and (2), that a statute will not be construed as applying to foreigners in respect of acts done by them abroad. The court cited Lord Scarman in *Air India v. Wiggins*, [1980] 2 All E.R. 593, at 597.

and its capacity to enforce a rule of law.⁸ The Ontario Court of Appeal also invoked the general principle of private international law that Canadian courts will not recognize and enforce foreign laws whether or not they are intended to have a territorial or extra-territorial effect when they conflict with our fundamental ideas or institutions, in other words, when they are contrary to the fundamental public policy of Canada.⁹ In the immediate case, the fundamental public policy was the right of the citizens and the courts to obtain relevant evidence from every person competent to give it. The Court of Appeal considered *Frischke et al. v. Royal Bank of Canada et al.*,¹⁰ one of its earlier decisions, where the plaintiff brought a civil action against his daughter and her husband charging that they had fraudulently converted funds belonging to him. To support his claim, he sought records from the Panamanian branch of the Royal Bank of Canada. The trial judge ordered the bank to obtain the information in question from the employees of that branch although compliance would be against Panamanian banking and secrecy laws as they affect banking and banking accounts in that state. The Court of Appeal reversed this order and held that since "[a]n Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that jurisdiction to break the laws of that state. We respect those laws."¹¹

In response to a submission made by the petitioner that the Court of Appeal should balance the interests of the forum including necessary urgency in tracing funds, as against the unlikely event that a breach of the foreign law would bring heavy penalties or punishment, that court declined to speculate on how the matter would be regarded in Panama and said:

We note that there is a Court in that jurisdiction that has power to authorize the production of the information requested, and perhaps an

⁸ See *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965), s. 6, hereinafter referred to as *Restatement Second*.

⁹ Castel, *Canadian Conflict of Laws* (2nd ed., 1986), para. 91. See also Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 Br. Y.B. Int'l L. 111, at 122 *et seq.*

¹⁰ (1977), 17 O.R. (2d) 388, 8 D.L.R. (3d) 393.

¹¹ (1977), 17 O.R. (2d), at 399. The Court of Appeal quoted with approval Lord Justice Scrutton, who in a different context had said: "this country should not in my opinion assist or sanction the breach of the laws of other independent states (*Ralli Bros. v. Compania Naviera Sota Y Aznar*, [1920] 2 K.B. 287, at 304 (C.A.))."

application should be made to that tribunal rather than circumvent its authority. In no case between private interests to which we have been referred has an order such as that in question been upheld. *Ings et al. v. Ferguson*, 282 F.2d 149, a case in the United States Court of Appeals Second Circuit, is of persuasive value dealing with comparable issues. The judgment concludes with a statement which is apt where it was said that upon fundamental principles of international comity our courts dedicated to the enforcement of our laws should not take such action as may well cause a violation of the laws of a friendly neighbour or at least an unnecessary circumvention of its procedures: see also *Re Chase Manhattan Bank*, 297 F.2d 611.¹²

In *R. v. Spencer*, the Court of Appeal was of the opinion that *Frischke* could be distinguished as the facts were different. Unlike *Frischke*, which involved information located in Panama to be produced in Canada in violation of Panamanian law, in *Spencer* the witness was a resident Canadian citizen testifying in Canada. He was not ordered to produce records from the bank's branch in the Bahamas in violation of the law of that state but simply to rely on his memory. To give effect to the Bahamian law in these circumstances would be to recognize that it had an extraterritorial effect. The Court of Appeal and the Supreme Court of Canada were not prepared to protect foreign bank secrecy at all costs. Where the evidence is located in the forum, the subpoena must be honoured. Where it is located in a state that prohibits disclosure the subpoena must be set aside.

The Court of Appeal also relied upon an American case where the court had said:

No principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American law, simply because that country

¹² *Ibid.*, at 399-400. See also *Re MacDonald and Briant* (1982), 35 O.R. (2d) 161, at 162 (M), where the witness refused to answer any questions regarding Mr. Briant's affairs on the ground that, as a resident of the Bahamas, he was subject to the laws of the Bahamas prohibiting such disclosure. The court held that "the legislation enacted by the Parliament of the Bahamas has been shown to be applicable to the facts of this case and, on the authority of *Frischke* . . . that privilege is one which ought to be recognized by the Court." In *Fosco International Ltd. v. Bimac Canada* (1980), 51 C.P.R. (2d) 51 (F.C.T.D.), the plaintiffs in a patent infringement suit sought an order to protect confidential information in a form corresponding to an order in a companion U.S. case. Walsh, J. held that the terms of the American order should be followed: "If this were not so, this Court would be in a position of permitting the parties here to violate the laws of another country" (at 55).

chooses to throw a veil of secrecy around bank accounts except insofar as their courts may see fit to lift it.¹³

Much emphasis seems to have been given to the situs of the requested documents or information. This should not be the case as the situs may be insignificant when compared with the respective states' identifiable interests. The test should be control of the information, not its situs. This was recognized by an American court that stated:

The fact that a corporation's records and documents are physically located beyond the confines of the United States does not excuse it from producing them if they are in its possession and the court has jurisdiction of the corporation. The test is control, not location of the records.¹⁴

The *Frischke* and the *Spencer* cases indicate that Canadian courts will not punish resident Canadian citizens or non-resident foreign nationals in Canada for complying *outside* Canada with the laws of foreign states properly applicable to matters within their territory, as it would be unfair to place such persons, especially non-party litigants, in a position that whatever they do subjects them to sanctions in Canada or in a foreign state.

Where two states issue directly conflicting commands, international law, starting from the basic notions of sovereignty and equality of states, accords primacy to the commands taken within their respective territories. This statement explains the divergent decisions reached in *Frischke* and *Spencer*. In *Frischke* the Ontario Court of Appeal could not require the bank to do an act (obtaining records) *in Panama* which was prohibited there. On the other hand in *Spencer*, the act (giving information based on memory) was to be done *in Canada* where it was not prohibited. It might have been different if Mr. Spencer had been asked to produce records which were physically located in the Bahamas. The Panamanian and Bahamian

¹³ *United States v. Frank et al.*, 494 F.2d 145, at 156-57 (2nd Cir. 1974). See also *In Re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404, at 410 (5th Cir. 1976), cert. den. 429 U.S. 940, 97 S. Ct. 354, 60 L.Ed. 2d 309 (1976): "In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states."

¹⁴ *Re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Company*, 72 F. Supp. 1013, at p. 1020 (S.D. N.Y. 1974).

laws seek to control conduct within their territory, not conduct abroad. Yet in the United States of America two recent cases involving a Canadian bank seem to have practically eliminated the defence of foreign state compulsion except where the enforcement of American antitrust laws is involved.¹⁵

In *In Re Grand Jury Proceedings, United States of America v. The Bank of Nova Scotia*,¹⁶ the federal Court of Appeals for the Eleventh Circuit affirmed a District Court order holding the Bank of Nova Scotia in civil contempt for failing to comply with an order of that court enforcing a grand jury subpoena *duces tecum*. A United States federal grand jury conducting a tax and narcotics investigation issued a subpoena to the bank which was served in 1981 on its Miami office, calling for the production of certain bank records maintained at its branch offices in Nassau, the Bahamas, and Antigua in the Antilles¹⁷ relating to the bank accounts of one of its customers. The Bank of Nova Scotia's Miami agent appeared before the grand jury and formally declined to produce the documents in question, in part on the ground that compliance with the subpoena without the customer's consent or an order of a Bahamian court would violate Bahamian bank secrecy laws.¹⁸ He also contended that alternative methods were available to obtain these documents that would not require the bank to violate foreign laws.¹⁹

Leaving aside American constitutional law issues,²⁰ let us consider one of the bank's most important contentions, that comity between

¹⁵ For a short summary of the situation in the United States of America, see Castel, "The Extraterritorial Effects of Antitrust Laws" (1981), 179 *Recueil des Cours* 11, at 58.

¹⁶ 691 F.2d 1384 (11th Cir. 1982), cert. den. *sub nom. Bank of Nova Scotia v. United States*, 103 S. Ct. 3086, 77 L.Ed. 2d 1348 (1983). For a comment see Caggiano (1983), 7 *Suffolk Trans. L.J.* 565.

¹⁷ No documents were found at the Antigua branch. Accordingly the court dealt with documents in the Bahamas only.

¹⁸ See *supra* note 2.

¹⁹ Apparently the U.S. government could have obtained an order of judicial assistance from the Supreme Court of the Bahamas allowing disclosure by the Nassau branch only if the subject matter of the grand jury investigation was a crime under Bahamian law and not solely criminal under United States tax laws.

²⁰ Such as due process. See *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L.Ed. 2d 1255 (1958). The Court of Appeals held that the bank had failed to bring itself within the holding of that case. See also Browne, "Extraterritorial Discovery: An Analysis Based on Good Faith" (1983), 83 *Col. L. Rev.* 1320.

states precluded the enforcement of the subpoena. In rejecting this contention the Court of Appeals relied on *In Grand Jury Proceedings, United States v. Field*,²¹ where contempt penalties imposed by the District Court were upheld by the Court of Appeals against a non-resident alien officer of a bank located in the Grand Cayman Island, British West Indies. Having been subpoenaed to testify before a grand jury investigating the use of foreign banks in evading tax enforcement while present in the United States, he refused to answer the questions put to him by the grand jury concerning his bank and its clients on the ground that by testifying he would subject himself to criminal penalties in his country of residence. Except for the fact that the bank officer was still resident in the Grand Cayman Island, the facts of the case resemble those in *Spencer*. In the *Bank of Nova Scotia* case, the Court of Appeals was of the opinion that the situation before it was similar to that in *Field* in all material respects. Thus, the balancing of competing interests test of section 40 of the *Restatement Second*²² which was applied in *Field* yielded identical results here because the vital role of a grand jury's investigative function to the American system of jurisprudence and the crucial importance of the collection of revenue to the financial integrity of the United States outweighed the Bahamian interest in the right of privacy of banking transactions. The court rejected all the grounds advanced by the bank to distinguish *Field* from the immediate case. The fact that in *Field* the bank itself and not just its customers were under investigation by the grand jury was deemed to be irrelevant as in both cases the concern

²¹ *Supra* note 13.

²² S. 40 provides:

Limitations on Exercise of Enforcement Jurisdiction

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

was the proliferation of foreign secret bank accounts utilized by Americans to evade income taxes and conceal crimes. The bank's argument that the present situation was different because documentary evidence was requested rather than testimonial evidence as in *Field* was also rejected, quite correctly, on the ground that irrespective of the form of the requested information, its effect on the competing state interests would be the same. The last argument advanced by the bank for distinguishing *Field*, that the instant subpoena called for the disclosure of information located in a foreign state instead of the United States, was also dismissed since the disclosure would occur in the United States and the affront to the Bahamas would be the same no matter where the information was originally located. In other words, the interest of the Bahamas in preserving the secrecy of the bank records was impinged by the fact of the disclosure itself. This is a valid argument only if the Bahamian law applies extraterritorially. If one considers the situation in *Frischke*, *Spencer*, and *Bank of Nova Scotia*, one must admit that the distinctions sought to be made with respect to the location of the information pertain more to semantics than logic and realism. Actually, it does not matter where the information is located or where it is disclosed. The form of the disclosure is equally unimportant. What is important is the disclosure. That, as the Court of Appeals said, is the affront to the state that wishes to preserve the secrecy of bank accounts. The violation of that state's laws takes place when the information is disclosed at home or abroad in any manner.

In the *Bank of Nova Scotia* case, the Court of Appeals did not seem to be inclined to consider alternative methods for obtaining the requested information in order to respect the sovereignty of a friendly foreign state because of the possible delays and expenses involved and the uncertain likelihood of success in obtaining an order for judicial assistance in the Bahamas. Practical reasons were improperly advanced in order to avoid complying with the comity of nations. The real basis for rejecting alternative methods of compliance was that they would not have afforded due deference to United States interests. Why should the United States government ask the courts of the Bahamas to be allowed to do something lawful under American law! If that is the case, why has the United States entered into special international agreements that provide for judicial assistance?

The second case, *In Re Grand Jury Proceedings the Bank of Nova Scotia, United States of America v. The Bank of Nova*

Scotia,²³ also involved civil contempt proceedings for the failure by the bank to comply with a grand jury subpoena served in 1983 on its Miami office requesting it to produce financial records pertaining to narcotics investigation suspects, held by its branches in the Bahamas, Cayman Islands, and Antigua.²⁴ In an effort to comply with the subpoena, the bank filed a petition before the Grand Court of the Cayman Islands for permission to produce the records. This petition was denied and the bank specifically ordered not to produce them. Later on, however, the Governor of the Islands, acting in conformity with the provisions of the confidentiality statute, authorized their disclosure.²⁵ The main issue was whether the bank had failed to exercise good faith in its efforts to comply with the subpoena. The bank was found in contempt by the District Court and its decision was upheld by the Circuit Court of Appeals after an initial appeal to that court had resulted in a remand.²⁶

In finding against the bank the Court of Appeals reviewed the way in which the District Court had balanced the several factors enumerated in section 40 of the *Restatement Second*.²⁷ Clearly, the United States' interest in stemming the narcotics trade outweighed the Cayman Islands' interest in preserving bank secrecy as vital to the expansion of its principal industry. However, even there, it is recognized that bank secrecy should not be used to encourage or foster criminal activities. Thus, the policy of the Cayman Islands was held to be consistent with that of the United States.²⁸ Since in

²³ 740 F.2d 817 (11th Cir. 1984), after remand 722 F.2d 657 (11th Cir. 1983), cert. den. 105 S. Ct. 778 (1985). For a comment see Paikin, "Bank of Nova Scotia II: The American Subpoena and the Multinational Enterprise" (1984), 9 Can. B.L.J. 497.

²⁴ As no documents existed at its Antigua branch and the Bahamas authorized the bank to release the documents found there, only the Grand Cayman documents were at issue in this case.

²⁵ S. 3A(1)-(2), Confidential Relationships (Preservation) Law 1976 (Law 16 of 1976) as am. in 1979 (Law 26 of 1979). This action and subsequent disclosure by the bank did not exonerate it from liability for past contempt.

²⁶ *Supra* note 23. The fact that the Grand Court of the Cayman Islands had ordered the bank not to produce the documents or disclose the information did not afford a valid defence to the bad faith charge. Cf. *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, *supra* note 20.

²⁷ *Supra* note 22.

²⁸ The law of the Cayman Islands contains many exceptions. In *Re Confidential Relationships (Preservation) Law, United States v. Carver* (Jamaica Ct. App. 1982), the court said:

the present case American citizens were the object of the investigation, United States courts had a legitimate basis for examining their financial records.

The Court of Appeals also pointed out that the disclosure and production of the records would take place in the United States and that their situs was not a decisive factor as contended by the Canadian government in its brief *amicus curiae*.²⁹ Furthermore, the Canadian nationality of the Bank of Nova Scotia was not important in view of its pervasive presence in the United States. By doing business there and in other foreign states, the bank had accepted the incident risk of occasional inconsistent governmental actions.³⁰ The fact that a person may be held criminally liable for acts that are legal where performed is not unusual. This type of liability can be justified under the passive personality principle or the protective principle.³¹ The Court of Appeals also was of the opinion that the single Convention on Narcotic Drugs³² which binds the United States and the Cayman Islands does not contain exclusive means for the exchange of information between the contracting parties that should have been followed. It could not impair the investigatory powers granted to the grand jury under United States law. The Convention was adopted to aid, not to hinder, the enforcement of drug-trafficking laws. Therefore, it did not require greater deference to the law of the Cayman Islands than that recognized in the balancing test found in the *Restatement Second*.

[T]here is nothing in the statute to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment.

²⁹ See also Brief of the Government of Canada as *Amicus Curiae* in Support of Petition for Writ of Certiorari, Oct. 23, 1984, pp. 4-7.

³⁰ The Court of Appeals cited *First National City Bank of New York v. International Revenue Service*, 271 F.2d 616, at 620 (2nd Cir. 1959), cert. den. 361 U.S. 948, 80 S. Ct. 402, 4 L.Ed. 2d 381 (1960), where the Court of Appeal said:

If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom.

³¹ For an analysis of these principles as bases for the exercise of jurisdiction see Williams and Castel, *op. cit.* note 6, at 126-36.

³² (1961), 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, ratified by the United States in 1967, as am. by Protocol of Mar. 25, 1972, ratified by the United States in 1975, 26 U.S.T. 1439, T.I.A.S. 8118. Canada is also a party to this Convention.

The two *Bank of Nova Scotia* cases clearly show that in the United States, the courts have moved from deference to comity to the paramount importance of American law enforcement.³³

Today section 40 of the *Restatement Second* seems to have little restraining effect on the courts. A subsequent decision of the United States Court of Appeals for the Seventh Circuit where the competing state interests were balanced in favour of the foreign state is not sufficient to point to a new direction.³⁴ Actually this case can be reconciled with the *Bank of Nova Scotia* cases as the disclosure would have been initiated in Greece, Greek nationals would have participated in the release of information, and a heavy penalty would have been imposed on them. However, the Court of Appeals failed to identify properly the nature of Greek interests. It was concerned primarily in avoiding criminal sanctions. If the Greek law had imposed lesser penalties, the court's balancing analysis might have produced a different result.

The *Restatement Second* test is clearly deficient in its treatment of vital national interests as it provides no meaningful guidelines for balancing conflicting national interests and does not require that these interests be evaluated according to their particular importance in each case. The courts should be forced to examine the policies that underlie the foreign state's interests in enacting the law under review.³⁵

The availability of viable alternatives to obtain the information sought should also be considered as a matter of course when balancing competing interests. This is recognized by section 420(2)(a) of

³³ For a survey see Onkelinx, "Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs" (1969), 64 *Northwestern U.L. Rev.* 487; Blejec, "Extraterritorial Jurisdiction of U.S. Courts Regarding the Use of Subpoenas *Duces Tecum* to Obtain Discovery in Transnational Litigation: The Search for a Limiting Principle" (1984), 16 *N.Y.U.J. Int'l L. & Pol.* 1135; Olsen, "Discovery in Federal Criminal Investigations" (1984), 16 *J. Int'l L. & Pol.* 999.

³⁴ *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983). The court held that compliance with an Internal Revenue Service summons to produce records located at the Athens branch of the First National Bank of Chicago was not required because the persons who could make the records available would be subject to criminal prosecution under Greek law. For a comment see Hight, "*United States v. First National Bank of Chicago*: Limiting American Extraterritorial Authority to Order the Production of Documents in Violation of Foreign Law" (1983), 33 *DePaul L. Rev.* 183.

³⁵ For an analysis of governmental interests and policies in a different context, see Currie, *Selected Essays on the Conflict of Laws* (1963).

the Draft *Restatement Second (Revised)* which provides that: "If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located . . . (a) the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authorities to make the information available."

It is interesting to note that both in Canada and the United States when criminal activities are involved the vital interests of the investigating or prosecuting forum state will prevail. One cannot expect Canadian or American courts to be objective when balancing the vital interests of the competing states where one of these states is their own. Neither judicial comity nor the *Restatement Second* seems to provide an acceptable solution. Section 403 of the Draft *Restatement Second (Revised)*,³⁶ which deals with the limitations

³⁶ 403. *Limitations on Jurisdiction to Prescribe*

(1) Even when one of the bases for jurisdiction under 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state:

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.

(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more

on jurisdiction to prescribe and uses as a criterion the reasonableness of the exercise of jurisdiction, will not make things easier as the courts will still have to evaluate all relevant factors including their own state interests. True comity implies self-restraint and accommodation of the interests of other states based on reciprocity, but this is difficult to achieve as our courts are not equipped to ascertain such interests. Deference seems to be a one-way street as in most cases it means deference to the interests of the state whose courts are doing the evaluation. Foreign government compulsion should certainly be a valid defence to contempt sanctions where the witness is not a target of the investigation and has made a serious effort to comply with the discovery order.

The *Bank of Nova Scotia* cases should not be read as holding that all of the bank's Canadian and foreign activities and operations were subject to the jurisdiction of the federal grand jury and federal courts. Since the bank was conducting some of its banking operations through a branch in Miami which was a conduit for its international banking business, it was properly subject to the jurisdiction of the United States with respect to these operations. Jurisdiction was based on the fact that the bank had a fixed place of business in Florida where it conducted banking operations that were material to the grand jury investigation. Thus, it cannot be said that the Bank of Nova Scotia was a totally disinterested third party. The

states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2); and to defer to the other state if that state's interest is greater.

See also s. 436 [419]

436 [419]. *Foreign Government Compulsion*

- (1) A person generally may not be required by a state
 - (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.
- (2) A person of foreign nationality may generally be required by a state
 - (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

This section applies the principle of s. 403(3). See also Rosenthal and Yale-Loehr, "Two Cheers for the ALI Restatement's Provisions on Foreign Discovery" (1983), 16 J. of Int'l L. & Pol. 1075; Robinson, "Compelling Discovery and Evidence in International Litigation," [1984] Int'l L. 533.

bank ought to have known that its decision to operate in the United States would eventually involve it in a conflict of this nature. To avoid such a situation the bank could have decided to conduct business in one state only. It could also have obtained secrecy waivers from its customers although that would have destroyed the bank's *raison d'être* for operating in Florida and in the Caribbean region.

It could be argued that by doing business in Florida through an agency or a branch, the Canadian company subjected itself to United States jurisdiction since it had total control over its Miami agency. However, reaching the foreign parent through a local wholly-owned subsidiary is a procedure that is not free from controversy.³⁷

CANADIAN RESPONSES

The position of American courts with respect to non-disclosure laws has been widely criticized as another example of the extra-territorial application of the laws of the United States. In response, Canada has enacted blocking statutes designed to prevent disclosure of information to foreign courts and investigative bodies in certain circumstances. For instance, section 3(1)(a) and (c) of the Foreign Extraterritorial Measures Act³⁸ provides that the Attorney General of Canada may by order prohibit or restrict the production "before or the disclosure or identification to, or for the purposes of a foreign tribunal or records that, at any time while the order is in force, are in Canada or are in the possession or under the control of a Canadian citizen or a person resident in Canada" or "the giving by a person, at a time when he is a Canadian citizen or a resident of

³⁷ See *In Re Electric & Musical Industries Ltd.*, 155 F. Supp. 892 (S.D.N.Y. 1957); cf. *Matter of Arawak Trust Co. (Cayman) Ltd.*, 489 F. Supp. 162 (E.D.N.Y. 1980), where it was held that jurisdiction could not be exercised over a foreign company that had no office in the United States, did not hold itself out as transacting business there and had no significant property in the forum except a bank account. The United States grand jury's power could not extend further than that of the court of which it was an arm. In Canada see *Bowlen v. R. (No. 2)*, [1978] 1 F.C. 798, 5 C.P.C. 215 (F.C.T.D.), where the court held that Federal Court Rule 464(1) which deals with the production of documents in the possession of a person not a party to the action does not cover the production of documents within the possession of and representing the property of a partially controlled or even a wholly-owned subsidiary company of the company or person to whom the court's order is directed. The court refused to pierce the corporate veil.

³⁸ S.C. 1984-85, c. 49. See also Business Records Protection Act, R.S.O., 1980, c. 56 and Business Concerns Records Act, L.R.Q. 1977, c. D-12.

Canada, of information before, or for the purposes of, a foreign tribunal in relation to the contents or identification of, records that, at any time while the order is in force, are or were in Canada or under the control of a Canadian citizen or a person resident in Canada" if doing so has or is likely to affect adversely significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or otherwise infringe Canadian sovereignty. This section, if it were invoked by the Attorney General of Canada in a situation similar to that which existed in the *Bank of Nova Scotia* cases, would not be effective when the United States is not seeking evidence in Canada.

CONCLUSION: POSSIBLE SOLUTIONS

What is the solution? One could adopt the solution proposed by Mr. Justice Estey in the *Spencer* case and the Draft *Restatement Second (Revised)* and require the person to whom the order is directed to make an effort in good faith to secure permission from the foreign authorities to make the information available. However, this may not always be possible, especially in the case of tax evasion. Furthermore, to require the courts to consult affected foreign states before issuing compulsory process may constitute a usurpation of the functions of the executive branch of the government. Judicial restraint and deferral, except pursuant to a domestic statute or an international treaty, is far too unpredictable in the best of circumstances.³⁹

The principle of the sovereign equality of states requires a political solution based on reciprocity which must go beyond diplomatic representations and informal arrangements or understandings and take the form of a treaty⁴⁰ or other formal intergovernmental agreement.

³⁹ For a review of possible solutions in the antitrust field, see Castel, *op. cit.* *supra* note 15, at 105 *et seq.* Note that in 1985 a Subpoena Working Group comprising legal officials of Canada and the United States was created which provides an informal "early warning" mechanism and forum for consultations on practical approaches that may avoid the conflicts caused in the *Bank of Nova Scotia* case.

⁴⁰ Note that in the 1984 *Bank of Nova Scotia* case the Court of Appeals refused to apply a "Gentleman's Agreement" between the United States and the Cayman Islands on the ground that it was not a formal intergovernmental agreement and was not considered binding by the parties. At most it was a simple understanding as to how informal requests for assistance were to be channelled between the parties.

On March 9, 1984, Canada and the United States signed a Memorandum of Understanding which provides for notification and consultation in the antitrust field in order to minimize conflicts between the two countries.⁴¹ Paragraph 8 of this Understanding is of particular interest as it deals with information to be obtained from private persons:

(1) Either Party may utilize whatever means it considers necessary to obtain for antitrust investigations and proceedings relevant information located in its own territory, whether or not an entity from which information is sought has a parent or subsidiary in the territory of the other.

(2) Where, in the opinion of the investigating Party, information is adequately available from sources within its territory, that Party will, in the first instance, attempt to obtain such information from those sources before seeking it from the territory of the other Party.

(3) If a Party intends to seek information located in the territory of the other Party, it will attempt to obtain the information by voluntary means in the first instance, unless it concludes that in the specific circumstances compulsory process should be used. Examples of such circumstances include, but are not limited to, concern that evidence might otherwise be destroyed or removed or that voluntary compliance would not be forthcoming. If the Party in whose territory the information is located requests consultations, the process normally will not be issued until there has been a reasonable opportunity for consultation. If exceptional circumstances require that the process be issued before there has been an opportunity for requested consultation, the Party that issued the process will not seek to enforce compliance until a reasonable period for consultation, if requested, has elapsed.

(4) When requests for information located in the territory of the other are made, they will be framed as narrowly and specifically as possible in order to minimize the financial and administrative burden on the recipient.

(5) After notification and consultation or waiver thereof, and subject to paragraph 5, voluntary in-person interviews with private persons may generally be conducted in the territory of the other Party. Such Party retains the right to attach any conditions to the conduct of an interview that it deems appropriate, including the attendance of its officials at such interviews.

This Understanding is not a formal agreement. It simply reiterates in a more elaborate form the Recommendation of September 25,

⁴¹ Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984 (1984), 23 Int'l Leg. Mat. 275.

1979 of the Council of the OECD⁴² on Notification and Consultation on Restrictive Business Practices.⁴³

In the case of civil and commercial actions, the 1970 Hague Convention on the taking of Evidence Abroad in Civil or Commercial Matters to which the United States is a party⁴⁴ cannot be used by our courts since Canada has not yet signed and ratified it but is planning to do so as soon as the provinces have passed the necessary implementing legislation. Even if it were in force between the two countries, it may not be effective in certain cases as a letter of request cannot be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.⁴⁵ Furthermore, according to Article 23, "A contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." To date, twelve of the sixteen signatory states have made such a declaration. Therefore, it would be difficult if not impossible to resort to the procedure contemplated by the Convention for pre-trial discovery and an order would not be made unless there was already an action pending before the courts of the requesting state.

In 1977 the United States and Canada signed an Agreement entitled Procedures for Mutual Assistance in the Administration of Justice in Connection with the Boeing Company Matter.⁴⁶ The Agreement provided in part that:

2. Upon request, the parties shall use their best efforts to make available to each other relevant and material information, such as statements, depositions, documents, business records, correspondence or other materials, available to them concerning alleged illicit acts pertaining to the sales activities in Canada of the Boeing Company and its subsidiaries or affiliates.

(3) Such information shall be used exclusively for purposes of investi-

⁴² Canada and the United States are members of the Organization for Economic Cooperation and Development. See Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, entered into force Sept. 30, 1961, 12 U.S.T. 1728, T.I.A.S. 4891, 888 U.N.T.S. 179.

⁴³ C. (79) 154 Final.

⁴⁴ 23 U.S.T. 2555, T.I.A.S. 744, 28 U.S.C.A. 1781, 658 U.N.T.S. 163. For a case applying the Convention see *Graco Inc. v. Kremlin Inc. and SKM S.A.* (1985), 8 European Com. Cas. 195 (U.S. D.C., N.D. Ill. E.D.). The case also involved a foreign blocking statute.

⁴⁵ Art. 1. Also arts. 11, 12.

⁴⁶ Mar. 15, 1977, 28 U.S.T. 2463, T.I.A.S. 8567. No longer in force.

gation conducted by agencies with law enforcement responsibilities and in ensuing criminal, civil and administrative proceedings, herein-after referred to as "legal proceedings."

5. Information made available pursuant to these procedures may be used freely in ensuing legal proceedings in the requesting state in which an agency of the requesting state having law enforcement responsibilities is a party, and the parties shall use their best efforts to furnish the information for purposes of such legal proceedings in such form as to render it admissible pursuant to the rules of evidence in existence in the requesting state, including, but not limited to, certifications, authentications, and such other assistance as may be necessary to provide the foundation for the admissibility of evidence.

6. The parties shall give advance notice and afford an opportunity for consultation prior to the use, within the meaning of paragraph 5, of any information made available pursuant to these procedures.

8. The parties shall use their best efforts to assist in the expeditious execution of letters rogatory issued by the judicial authorities of their respective countries in connection with any legal proceedings which may ensue in their respective countries.

9. The assistance to be rendered to a requesting state shall not be required to extend to such acts by the authorities of the requested state as might result in the immunization of any person from prosecution in the requested state.

10. All actions to be taken by a requested state will be performed subject to all limitations imposed by the domestic law of the country concerned. Execution of a request for assistance may be postponed or denied if execution would interfere with ongoing investigations or legal proceedings, criminal, civil and administrative, in the requested state.

In the criminal field, the United States and Canada are parties to several multilateral conventions that contain specific provisions for the transmission of letters of request relating to the offences listed in these conventions.⁴⁷

⁴⁷ E.g., 1961 Single Convention on Narcotic Drugs, 1964 C.T.S. No. 30, 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, as am. by 1972 Protocol, 26 U.S.T. 1439, T.I.A.S. 8118, art. 35(e). In the *Bank of Nova Scotia* cases, *supra* note 23, mention was made of an Agreement in the form of an Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Cayman Islands and Matters Connected with, Arising from, Related to or Resulting from any Narcotics Activity Referred in the Single Convention on Narcotic Drugs 1961, as amended by the Protocol Amending the Single Convention on Narcotic Drugs 1961 signed at London on July 26, 1984 (1985), 24 Int'l Leg. Mat. 1110. On Aug. 27, 1984, legislation was passed in the Cayman Islands which brought into effect this Agreement: Narcotic Drugs (Evidence) (United States of America) Law, 1984, Law 17 of 1984, Extraordinary Gazette, Aug. 29, 1984, Supplement No. 4 (1984), 24 Int'l Leg. Mat. 937.

The OECD Committee on International Investment and Multinational Enterprises has also been concerned with conflicting requirements imposed on multinational enterprises and on May 18, 1984, the Council of this organization agreed to strengthen bilateral and multilateral co-operation in intergovernmental conflicts involving multilateral enterprises.⁴⁸ To this end, the ministers reviewed the 1976 Declaration and Guidelines on International Investment and Multinational Enterprises, and in particular endorsed a series of recommendations concerning methods to ameliorate conflicting requirements imposed on multinational enterprises by various jurisdictions. The pertinent part of these recommendations states:

27. In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

- (i) Have regard to relevant principles of international law;
- (ii) Endeavour to avoid or minimize such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries;
- (iii) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries . . .

28. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.⁴⁹

This type of co-operation and consultation has received the support

⁴⁸ Organization for Economic Cooperation and Development, PRESS/A (84) 28, para. 36 (May 18, 1984).

⁴⁹ Organization for Economic Cooperation and Development, International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decision 26 (1984).

In the banking field the Basle Concordat, formally known as Principles for the Supervision of Banks' Foreign Establishments (1975 rev. 1983) (see (1983), 12 *Int'l Monetary Fund Survey* 201), to which the central banks of Canada, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, The Netherlands, Sweden, Switzerland, the United Kingdom, and the United States are parties, has established the framework of an international supervisory system of transnational banking operations. Under this Concordat, gaps in regulations are to be filled by either host or home state, and overlaps are to be worked out between the regulatory authorities of the two states having jurisdiction so as to avoid conflicts and uncertainty.

of Canadian officials whenever the actions of one state are likely to affect another adversely.⁵⁰ To be fully effective such co-operation and consultation should take the form of a comprehensive formal mutual assistance agreement.

This was done on March 18, 1985, when Canada and the United States signed a Treaty on Mutual Legal Assistance in Criminal Matters.⁵¹ According to Article 2, the parties shall provide mutual legal assistance in all matters relating to the investigation, prosecution, and suppression of offences. Such assistance shall include, *inter alia*, taking the evidence of persons, providing documents and records, and executing requests for searches and seizures. A party seeking to obtain documents or records located in the territory of the other party shall request assistance in accordance with the provisions of the treaty except as otherwise agreed pursuant to other agreements, arrangements, or practices. Where denial of a request or delay in its execution may jeopardize the successful completion of an investigation or prosecution, the parties shall promptly consult, at the instance of either party, to consider alternative means of assistance.⁵² The requested state may deny assistance to the extent that execution of the request is contrary to its public interest.⁵³ This provision resembles that found in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.⁵⁴ Thus, if the Canadian government has decided that it is in its public interest to prevent the disclosure of certain evidence pursuant to the Foreign Extraterritorial Measures Act,⁵⁵ co-operation will not take place.

The treaty indicates to whom and how requests shall be made.⁵⁶

⁵⁰ April and Fried, "Compelling Discovery and Disclosure in Transnational Criminal Litigation: A Canadian View" (1984), 16 N.Y.U.J. Int'l L. & Pol. 961, at 968.

⁵¹ Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, signed at Quebec City on Mar. 18, 1985, not yet in force (1985), 24 Int'l Leg. Mat. 1092. The offences contemplated by the Treaty are found in Article 1 and in the Annex. See also United States-Switzerland Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. 8302 entered into force Jan. 23, 1977, and 1982 Memorandum of Understanding.

⁵² Art. 4.

⁵³ Art. 5.1(b).

⁵⁴ *Supra* note 44, art. 12(b).

⁵⁵ *Supra* note 38.

⁵⁶ Art. 6.

The courts of the requested state shall have jurisdiction to issue subpoenas, search warrants, or other orders necessary to execute the request.⁵⁷ In all cases the request shall be executed in the requested state only to the extent not prohibited by its law. Thus, it will not be executed if it involves violating the law of the requested state.⁵⁸

The requesting state shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the requested state.⁵⁹ Article 12 makes it quite clear that a person requested to testify and produce documents, records, or other articles in the requested state may be compelled to do so only in accordance with the requirements of the law of the requested state.

Finally, it should be noted that the Central Authority of either party shall notify the Central Authority of the other party of proceeds of crime believed to be located in the territory of the other party (e.g., local bank accounts).⁶⁰ The parties shall also assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime and the collection of fines imposed as a sentence in a criminal prosecution.⁶¹ This means that Canadian courts must abandon the rule that they will not recognize and enforce United States criminal laws and judgments imposing a monetary penalty.⁶² The banks will also have to co-operate with the Central Authorities in order to return money that has been laundered through their agencies.

This treaty, which contains many other important provisions not relevant to this note, represents the most comprehensive approach to legal assistance in criminal matters and should serve as a model for other states. It respects the principle of sovereign equality of states as it recognizes the interests of both parties in a very realistic fashion. It also leaves open other available avenues for international judicial assistance. This is international comity at its best. Once proclaimed in force, the treaty should eliminate frictions between Canada and

⁵⁷ Art. 7.

⁵⁸ *Ibid.*

⁵⁹ Art. 9. "Central Authority" means for Canada the Minister of Justice or officials designated by him and for the United States of America, the Attorney General or officials designated by him (Art. 1).

⁶⁰ Art. 17.

⁶¹ *Ibid.*

⁶² See Castel, *op. cit. supra* note 9, para. 88.

the United States and promote full and effective co-operation in the fight against ever mounting transnational criminality. However, it is doubtful that it will solve the problems that arose in the *Bank of Nova Scotia* cases as these are intractable in the absence of similar treaty provisions binding all the states where the requested information is located. Under the Canada-United States treaty, a federal grand jury could obtain documents located in Canada but it could not obtain documents located in another foreign state, such as the Bahamas, unless the provisions of the treaty were given extraterritorial effect and were applied by Canadian courts to Canadian nationals such as the Bank of Nova Scotia when operating outside Canada. This is particularly important when the United States or Canada is attempting to recover the proceeds of crimes deposited in a foreign branch of one of its banks.

It is comforting to see that in recent years, at least on the federal level, Canada has taken some very important and constructive steps in the area of international legal assistance. The provinces should heed this new trend and, in civil and commercial matters, implement the provisions of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.⁶³ Full interna-

⁶³ *Supra* note 44. Note that Canada is bound by 19 treaties, mainly with European states regarding Legal Proceedings in Civil and Commercial Matters, which provide for the transmission and the service of documents as well as the execution of letters of request:

Austria	Canada Treaty Series, 1935, No. 16
Belgium	Canada Treaty Series, 1928, No. 16
Czechoslovakia	Canada Treaty Series, 1928, No. 17
Denmark	Canada Treaty Series, 1936, No. 4
Finland	Canada Treaty Series, 1936, No. 5
France	Canada Treaty Series, 1928, No. 15
Germany	Canada Treaty Series, 1935, No. 11
Greece	Canada Treaty Series, 1938, No. 11
Hungary	Canada Treaty Series, 1939, No. 6
Iraq	Canada Treaty Series, 1938, No. 12
Italy	Canada Treaty Series, 1935, No. 14
Netherlands	Canada Treaty Series, 1936, No. 2
Norway	Canada Treaty Series, 1935, No. 15
Poland	Canada Treaty Series, 1935, No. 18
Portugal	Canada Treaty Series, 1935, No. 17
Spain	Canada Treaty Series, 1935, No. 12
Sweden	Canada Treaty Series, 1935, No. 13
Turkey	Canada Treaty Series, 1935, No. 19
Yugoslavia	Canada Treaty Series, 1939, No. 4

In Quebec, see also 1977 Entente between Quebec and France Regarding Judicial Mutual Aid in Civil, Commercial and Administrative Matters, L.Q. 1978, c. 20.

tional legal assistance in civil, commercial, and criminal matters is the only practical way in which true justice can be extended to all.

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Most provinces have adopted an Interprovincial Subpoena Act which facilitates the enforcement of a subpoena or other document from a court outside the province requiring a person to attend as a witness. The legislation does not apply to a subpoena issued with respect to a criminal offence under an Act of Canada. See, for instance, S.A. 1981, c. I-8.1; R.S.B.C. 1979, c. 396; S.M. 1975, c. 3; S.N.B. 1979, c. I-13.1; S.N. 1975-76, No. 33; O.N.W.T. 1976 (2nd), c. 2; R.S.O. 1980, c. 220; R.S.S. 1978, c. I-12.1; O.Y.T. 1981 (1st), c. 7.

Sommaire

Divulgarion forcée des renseignements par un tiers tenu au secret bancaire selon le droit étranger: Développements récents dans les rapports Canado-américains

La question de l'obtention des preuves à l'étranger en matière criminelle, civile ou commerciale est un sujet qui a fait couler beaucoup d'encre ces dernières années. Cette étude fait le tour de la question surtout en ce qui concerne l'entraide judiciaire entre le Canada et les États-Unis d'Amérique. En principe, les tribunaux canadiens ne doivent pas enjoindre une personne à faire un acte qui viole les dispositions d'une loi étrangère si cet acte doit être fait dans le pays dont la loi sera violée. Ainsi, on ne peut exiger d'une banque canadienne qu'elle force les employés d'une de ses agences à l'étranger à révéler les opérations financières d'un client de cette agence, ce qui serait contraire aux dispositions des lois en vigueur dans ce lieu ayant trait au secret bancaire. Par contre, dans une affaire criminelle, un employé de banque peut être contraint à témoigner au Canada concernant les opérations financières de l'accusé, car dans ce cas il ne s'agit pas de produire des documents qui se trouvent à l'étranger, mais simplement de répondre aux questions qui lui sont posées par le procureur de la couronne.

L'auteur compare la pratique canadienne assez libérale à celle plus rigide qui est suivie aux États-Unis d'Amérique, où le refus de violation du secret bancaire a donné lieu à plusieurs décisions importantes concernant une banque canadienne.

Après avoir passé en revue les différents accords internationaux, l'auteur préconise l'adoption par les provinces canadiennes de la Convention de la Haye de 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.