When approaching an internal or external investigation, an attorney who represents a company with cross-border activities in the United States and Canada needs to be aware of two fundamental differences in the legal frameworks for both countries. First, there is a radical difference in the way that the right against self-incrimination is interpreted and implemented on both sides of the border; second, the divergent manner in which the concept of international double jeopardy is approached by the judiciary of both nations has very real consequences when contemplating a cross-border settlement.

Two Takes on the Protection Against Self-Incrimination

Absent a grant of immunity, a defendant in the United States who faces a real and substantial danger of self-incrimination may invoke the protection of the Fifth Amendment and refuse to answer any question at the time that he or she asserts the privilege. This is consistent with the common law approach to the right against self-incrimination. Provided the privilege is validly invoked, it may be asserted in any proceeding, whether civil, criminal, administrative, judicial, investigatory or adjudicatory in nature. The Fifth Amendment approach to the privilege against self-incrimination offers what is conceptually labeled as “front end” protection because the protection is invoked at earliest opportunity, as soon as the potential issue of self-incrimination first arises.

Note, however, that in order to successfully rely upon the privilege, a defendant in the United States must have reasonable cause to apprehend danger of a prosecution “by the government of either the United States or one the States”. A potential prosecution by a foreign government or the fact that “there is a real and substantial risk that...testimony [compelled in a United States court] will be used in a criminal prosecution abroad” is an insufficient basis to invoke the Fifth Amendment privilege against self-incrimination. Accordingly, an executive who faces potential criminal charges in Canada but is compelled to testify in proceedings in the United States cannot refuse to answer potentially self-incriminatory questions based solely on the fact that (a) he or she faces potential or actual criminal proceedings in Canada and/or (b) their incriminatory testimony may be shared with the Canadian authorities.

To a certain extent the same is true vice-versa: an executive who is compelled to testify in Canada cannot generally refuse to answer incriminatory questions based solely on pending or actual American criminal proceedings. In practice, this scenario is likely to arise with more frequency than the reverse situation (being forced to testify in US proceedings with pending/actual Canadian criminal charges) because in Canada there is limited front end protection against self-incrimination.

While the American position on self-incrimination is consistent with the traditional common law approach on the matter, Canada elected to statutorily override the common law protection and instead offers “back end” safeguards to the right against self-incrimination. Under the federal Evidence Act in Canada, no witness may refuse to answer a question on the ground that the answer may tend to criminate the witness; however, any answer so given “shall not be used or admissible in evidence against him in any criminal trial or other criminal proceedings against him [or her] thereafter taking place”.

The fact that a witness is forced to provide incriminatory evidence in Canadian proceedings but then enjoys use and derivative use immunity has been described as the quid pro quo animating the constitutional right against self-incrimination under Canadian law.

Despite the difference between the front-end American approach and the back-end Canadian approach to self-incrimination, the same dilemma arises in both countries if a subject is only facing a potential prosecution on the other side of the border: foreign law enforcement and foreign judiciary are generally not bound by domestic constitutional guarantees. Any immunity granted in exchange for incriminating testimony is only binding on the sovereign that had the authority to grant the immunity in the first place.
The difference between the Canadian and American approach to self-incrimination comes to the fore-front when a subject is facing potential or actual parallel proceedings in both the United States and Canada. In such circumstances, the subject may exercise his or her Fifth Amendment privilege in the United States and refuse to provide incriminatory testimony. The same is not true in Canada. While there is generally no duty to cooperate with the police or provide a statement to authorities in Canada during the course of a criminal investigation, a subject forced to testify during a regulatory or administrative investigation in Canada while facing parallel proceedings in the United States is subject to “the worst of both worlds - compulsion to testify in Canada followed by use of the compelled material in the U.S.”

In order to address this legal conundrum, Canadian courts have at least been open to the possibility of tailoring case specific remedies to mitigate the fact that compelled testimony could be shared with law enforcement south of the border, including judicially imposed protective mechanisms, sealing orders and even a stay of Canadian proceedings pending the conclusion of American criminal proceedings. Attorneys representing clients facing parallel Canadian and American proceedings should at minimum exercise the opportunity to be heard by Canadian courts or tribunals to explore whether a protective order or remedy may be available to help mitigate against the impact of compelled Canadian testimony being made available to American authorities.

**International Double Jeopardy**

When attempting to negotiate a global settlement of a matter that involves parallel Canadian and American proceedings, counsel must always be mindful of one simple fact: while the Canadian judiciary will generally treat the verdict of an American court as a bar to further prosecution in Canada due to the protection against double jeopardy, the same does not hold true in reverse. Due to the application of the dual sovereignty doctrine in the international realm, American courts are likely to be permissive of any attempt by American authorities to re-prosecute a party for the same transaction that has already been subject to prior Canadian judicial proceedings.

Accordingly, any attempt to reach a global settlement without the input and consent of the Canadian authorities only risks placing a client in very real double jeopardy for the same conduct.

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**Endnotes**

1. US v. Apfelbaum, 445 U.S. 115 (1980), 127. The Fifth Amendment to the Constitution of the United States provides in part that “No person...shall be compelled in any criminal case to be a witness against himself.”


6. Canada Evidence Act, s. 5. Most corresponding provincial Evidence Acts have similar provisions: see, for example, Ontario Evidence Act, s. 9.

7. R. v. Nedelcu, [2012] 3 S.C.R. 311, paras. 6-7. Section 13 of the Canadian Charter of Rights and Freedoms provides 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.”

8. Many regulatory statutes in Canada, both federal and provincial, grant the powers of compulsion to regulatory bodies to compel testimony from subjects under investigation. See, for example, s. 13, Securities Act (Ontario), R.S.O. 1990, c. S. 5; see in general, Catalyst Fund General Inc. v. Hollinger Inc., [2005] O.J. No. 2191 (SC).


10. Hallstone Products Ltd. v. Canada Customs Revenue Agency, [2005] O.J. No. 3096 (SC). The court found that a sealing order was premature on the facts of the case before it but did not foreclose the possibility of such an order being issued in the appropriate case.

11. Giles v. Eagleson, [1995] O.J. No. 1160 (Ont. Crt. Gen. Div.) CA at para. 22. Section 11(h) of the Canadian Charter provides: “Any person charged with an offence has the right ... (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”