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# The Production of Evidence Subject to Foreign Nondisclosure Laws

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# CASENOTES

## The Production of Evidence Subject to Foreign Nondisclosure Laws

*In re Grand Jury Proceedings. United States v. The Bank of Nova Scotia* 691 F.2d 1384 (11th Cir. 1982)

A federal grand jury[1] issued a subpoena duces tecum to the Bank of Nova Scotia (the Bank), a Canadian chartered, multinational company.[2] The subpoena called for the production of records concerning a customer's bank account, which were located at the Bank's main branch or branch offices in Nassau, Bahamas and Antigua, Lesser Antilles.[3] On September 23, 1981, the subpoena was served on the Bank's agency in Miami, Florida. The Bank refused to produce the documents, contending that compliance would violate Bahamian bank secrecy laws,[4] unless the cus-

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1. The federal grand jury was investigating tax and narcotics violations.

2. The Bank had branches and agencies in the United States, the Bahamas, and forty-three other countries.

3. The part of the subpoena which called for documents located in Antigua was not at issue, since the Bank searched and found no documents there.

4. Banks and Trust Companies Regulations Act of 1965, 1965 Bah. Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, and Section 19 of the Banks Act, III Bah. Rev. Laws, c. 96 (1965), as amended by the Banks Amendment Act 1980, 1980 Bah. Acts No. ____ Both Section 10 and Section 19 are identical. Section 10 of the Bank and Trust Companies Regulation Act as amended provides:

> Preservation of secrecy
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> 10— (1) No person who has acquired information in his capacity as:
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> (a) director, officer, employee or agent, of any licensee or former licensee;
>
> (b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under Section 3 of the Central Bank of The Bahamas Act 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;
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> (c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;
>
> (d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;
>
> (e) the Inspector under the providions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any per-

tomer consented or if it were ordered by a Bahamian court. The U.S. government moved to compel the Bank's compliance with the subpoena. Upon hearing the motion, the district court issued an order compelling the Bank's compliance with the subpoena. The Bank, again refused to produce the documents.

The United States District Court for the Southern District of Florida held the Bank in civil contempt for noncompliance. The Bank appealed from the contempt order asserting that: (1) there were insufficient grounds to enforce the subpoena; (2) that enforcing the subpoena would be a violation of due process; and (3) that due to the principle of comity between nations, the subpoena should not be enforced. The United States Court of Appeals for the Eleventh Circuit, affirmed and *held:* That enforcement of the subpoena did not violate due process, even though compliance would probably cause the bank to violate Bahamian law,[5] and that enforcement was allowed under the principle of comity since Bahamian courts had the power to order production.[6] *In re Grand Jury Proceedings. United States v. The Bank of Nova Scotia,* 691 F.2d 1384 (11th Cir. 1982).

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son any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except:

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) where a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall:

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

5. The court assumed for the purposes of the appeal, that production of the documents would subject the Bank to Bahamian criminal penalties. *In re* Grand Jury Proceedings. United States v. The Bank of Nova Scotia, 69 F.2d 1384, 1386 (1982).

6. *Supra* note 4 at §10 (I)(iii) (the court noted that under this section, numerous people connected with the Bank of Nova Scotia, and the Central Bank of the Bahamas, could relate information about the account).

The court employed a balance of state interests test[7] to arrive at its holding. The Fifth Circuit[8] achieved essentially the same outcome under this test six years earlier.[9] *Nova Scotia* also involved the application of the good faith efforts test.

This note will focus on the case law which was developed prior to this decision and the application of both the good faith efforts and balance of state interests tests by the Eleventh Circuit in *Nova Scotia*. The note concludes with an analysis of the probable future use of these tests in light of this decision and the viable alternatives to their use.

## I. Scope of the Problem: Development of Current Tests

### A. *The Problem*

Domestic courts often require the production of documents located in foreign countries. In response, some countries have enacted various nondisclosure laws.[10] Conflict occurs when docu-

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7. Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965) [hereinafter cited as Restatement].

8. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopted, as precedent, the decisions decided by the former Fifth Circuit prior to October 1, 1981).

9. In re Grand Jury Proceedings. United States v. Field, 532 F.2d 404 (5th Cir.) *cert. denied* 429 U.S. 940 (1976).

10. Reporters' Note 1 of Restatement of the Foreign Laws of the United States (Tent. Draft No. 3, 1982) § 420 states that as of 1982, fifteen nations had enacted legislation specifically aimed at preventing United States efforts to produce documents from their countries. These enactments are in addition to the efforts of nations, such as Switzerland, which have long standing secrecy laws which were not specifically enacted in response to the United States' production efforts.

Reporters' Note 3 comments further on foreign "blocking statutes" which carry penal sentences and are attempts to thwart the production of documents. The Business Records Protection Act, 1947 Ont. Rev. Stat. c. 54, was the first blocking statute in response to a grand jury's subpoena duces tecum in its investigation of possible Sherman Antitrust Act violations. A U.S. Department of Justice investigation of an alleged petroleum cartel prompted orders from the French, Italian, Dutch and British governments to prohibit the release of documents. The Netherlands Economic Competition Act of June 28, 1956 amended by Act of Nov. 14, 1958, Art. 39 was subsequently enacted to prohibit cooperation with foreign investigations of competition.

The U.S. Federal Maritime Commission's investigation of shipping conferences resulted in the following legislation: Federal Republic of Germany: Federal Maritime Shipping Act of May 24, 1965, Art. 11, [1965] Bundesgesetzblatt pt. II 833, 835; France: Law No. 68-678 of July 26, 1968 Relating to the Transmission of Documents and Information to Foreign Authorities in the Area of Maritime Trade, [1968] J.O. 7267, [1968] B.L.D. 438; Great Britain: The Shipping and Commercial Documents Act, 1964, c. 87; Norway: Act of June 16, 1967, Power for the King to Forbid Shipowners to Give Information, etc. to Foreign Authorities, Norges Lover 1682-1967, No. 3 at 2541 (1968).

The seventies produced the following blocking statutes in responses to U.S. Justice De-

ments are sought from within these countries. The principles of *lex fori* and international comity characterize the nature of this conflict. *Lex fori* maintains that the law of the forum where the suit is brought controls. This may intrude on the principle of international comity which holds that action by a domestic court should not cause a transgression of a foreign nation's law.

Two approaches are generally used to resolve the conflict of these two principles. The first approach, the good faith efforts test, gauges whether the party required to produce the documents did so with due diligence. Without such a requirement, it would be easy to circumvent domestic law by maintaining all records in foreign jurisdictions with nondisclosure laws[11] and simply stating that the records were inaccessible. The second approach, balances state interests and weighs the relative importance of the competing interests of the parties and nations involved. The Supreme Court's decision in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,*[12] marked the abandonment of a *per se* rule and the commencement of efforts to resolve situations which could involve basic irreconcilable issues on a case-by-case basis.

## B. *Good Faith Efforts*

The good faith efforts test was promulgated in *Societe* to avoid unnecessarily harsh sanctions on parties unwittingly caught between conflicting laws. In *Societe,* the plaintiffs failed to produce documents required by discovery, resulting in a dismissal of the suit. On appeal, the Supreme Court acknowledged that there was noncompliance, but held that dismissal of the suit was an excessive measure in light of the plaintiff's diligent efforts to procure the

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partment and Congressional investigations of an international uranium cartel: Australia: Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121, amended by Foreign Proceedings (Prohibitions of Certain Evidence) Amendment Act, 1976, Austl. Acts No. 202; Canada: Uranium Information Security Regulations, Prov. Can. Stat. 1976-2368, Stat. O. & R. 76-644 (Sept. 21, 1976), replaced by Prov. Can. Stat. 1977-2923, Stat. O. & R. 77-836 (Oct. 13, 1977), in implementation of the Atomic Control Act, 1970, s. 9, Can. Rev. Stat. C. A-19; France: Law No. 80-538 of July 16, 1980 Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, [1980] J.O. 1799; Great Britain: Protection of Trading Interests Act, 1980 c. 11 s. 1-4; South Africa: Second General Law Amendment Act 94, 1974 § 2, 12 Stat. S. Afr. 602.

11. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 205 (1958).

12. *Id.*

documents. The Court also recognized that the plaintiff's inability to produce the documents might "prove a serious handicap" in efforts to prove their case.[13] Unfortunately, neither *Societe* nor subsequent cases present clear guidelines indicating what steps constitute sufficient good faith efforts.[14]

Assertions have been made that *Societe* requires complete deference to foreign law. In *United States v. Vetco, Inc.*,[15] the Ninth Circuit rejected this claim. The court took a dim view of the fact that the appellants would benefit by the nonproduction of documents. The court also considered that in *Societe*, the Swiss government enjoined the plaintiffs from compliance, while in *Vetco*, the Swiss government took no comparable action. The appellants merely alleged that Swiss law would bar production of documents, assuming that this was sufficient under the good faith efforts test.

In *Field*, the district court acknowledged that Mr. Field, an alien who was subpoenaed to testify before a grand jury, would "probably be exposed to some criminal charges and some criminal punishment for violating the Cayman Bank Secrecy Act."[16] The Fifth Circuit Court of Appeals failed to examine whether under this legitimate threat there was a good faith effort by Mr. Field. Instead, the court based its analysis on the relative interests of the nations involved.[17]

Even if the good faith efforts test is warranted by the legitimate threat of penalties provided under foreign law, the importance of domestic interests may surmount the use of this test.[18] The balance of state interests analysis is broader and thus, is used more frequently than the good faith efforts test.

### C. *Balance of State Interests*

Components of the balance of state interests test are embodied in *Restatement (Second) of Foreign Relations Law of the United States*, § 40 (1965). Section 40 states:

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13. *Id.* at 213.

14. For decisions contrasting bad faith with the ability to comply, *compare*, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) *and* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

15. 644 F.2d 1324 (9th Cir.) *cert. denied* 454 U.S. 1098 (1981).

16. Bank and Trust Companies Regulation Law, 1966 (Law 8) (Cayman Islands).

17. 532 F.2d at 410.

18. *See, infra* note 33, 2(a) which acknowledges this situation.

> 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 interest 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.[19]

The Reporter of this section assimilates this analysis to the conflict of laws analysis. "In both cases the question is not one of lack of jurisdiction but of the desirability of exercising power in a hardship situation (from the standpoint of the person concerned) or of international difficulty or tension (from the standpoint of the states concerned)."[20]

The guidelines call for a good faith inquiry, but domestic courts may be both subjective and partial in their application of § 40. Decisions employing these guidelines generally result in holdings which favor domestic interests.

In *United States v. First National City Bank*,[21] a bank refused to produce documents located in Germany, claiming that it would be subject to civil liability under Germany's "bank secrecy law."[22] The court considered the elements of § 40, and held, that since the potential liability was only civil, and since the interests of the United States in furthering its antitrust policies outweighed the German policy to protect bank customers, the civil contempt judgment for noncompliance with a subpoena duces tecum must be affirmed.[23]

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19. RESTATEMENT, *supra* note 7, § 40.

20. *Id.* reporters' note 2.

21. 396 F.2d 897 (2nd Cir. 1968).

22. No statutory law in Germany pertains to bank secrecy, but, according to the Bank's expert witness, the breach would flow from an implied contractual relationship between the customer and the bank, and therefore subject the bank to both contractual and tort liability. Some of the penalties could be considered criminal sanctions since Section 890 of the German Code of Civil Procedure can result in jail terms of up to six months. *Id.* at 899.

23. *Id.* at 905.

*In re Westinghouse Elec. Corp. Uranium Etc.*[24] illustrates a situation where a domestic court deferred to foreign interests using §40 factors in its analysis. In *Westinghouse,* the corporation made efforts to obtain its records which were located in Canada and which related to that nation's atomic energy interests. Production of these documents would have violated Canada's uranium information security and atomic energy regulations.[25] The court noted the considerable importance of Canada's interests in this matter and held that the imposition of a contempt order and per diem penalties for failure to comply with a discovery order were excessive in light of the balance of interests in the case.[26]

Use of the balance of state interests test is also found in *Field.* In *Field,* the managing director of a bank on Grand Cayman Island was subpoened to testify before a grand jury concerning possible tax evasion by clients of the bank. The director refused, contending that his act of testifying would violate Cayman Island's bank secrecy laws.[27] The court stressed the importance of facilitating the United States' ability to collect tax revenues,[28] as well as the grand jury's pressing need for access to information.[29] The court also considered that under Cayman law, the information sought was accessible to domestic tribunals, yet denied to foreign tribunals. *Field* held that the managing director was required to produce evidence before the grand jury since domestic interests outweighed Cayman interests.[30]

The *Nova Scotia* decision is important because it (1) adopts the good faith efforts test as applied by the Ninth Circuit in *Vetco,* and (2) strengthens the use of the balance of state interests test as a means of furthering domestic interests. The decision adheres to the principle of *lex fori* at the expense of the principle of international comity.

## II. The Nova Scotia Opinion

The appellants in both *Nova Scotia* and *Vetco* failed to convince the court of their good faith efforts to comply with a sum-

24. 563 F.2d 992 (10th Cir. 1977).
25. *See, supra* note 10.
26. 563 F.2d at 899.
27. Bank and Trust Companies Regulation Law, 1966 (Law 8) (Cayman Islands).
28. 532 F.2d at 409.
29. *Id.* at 408.
30. *Id.* at 410.

mons for the production of records. The important factors outlined in *Societe* were not established. In both cases (1) the appellants would benefit by not producing the documents, and (2) the foreign governments never actually enjoined the parties from complying.

The court stated that *Field* controlled and relied on the balancing test adopted in *Field* for its analysis. The court found that the Bahamian bank secrecy statute was "hardly a blanket guarantee of privacy"[31] and did "not present a Bahamian interest sufficient to outweigh the United States' interest in collecting revenues and insuring an unimpeded and efficacious grand jury process."[32] As in *Field,* the court disagreed with foreign statutes that allow foreign tribunals greater access to bank customer information than United States tribunals. The Bank suggested that to avoid provoking a friendly nation, the court should apply to the Supreme Court of the Bahamas for an order of judicial assistance permitting disclosure.[33] The court stated that the judicial assistance procedure was uncertain, costly, and did

> not afford due deference to the United States' interests. In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to be allowed to do something lawful under the United States law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.[34]

This statement displays a complete disregard for the legal system in the Bahamas. There is no recognition of either the sovereignty or jurisdiction of that nation. The statement assumes that anything which is lawful in the United States must be *per se* lawful in the Bahamas. Thus, the spirit of § 40 and the principle of international comity are thus thwarted.

A more logical and diplomatic rationale for reaching the decision in *Nova Scotia* is that foreign "blocking" statutes, which are designed solely to frustrate efforts to obtain documents, as opposed to substantive foreign laws, should be given less deference by United States courts.[35]

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31. 691 F.2d at 1391.
32. *Id.*
33. *Id.* at 1390.
34. *Id.* at 1391.
35. *See* RESTATEMENT REVISED OF FOREIGN RELATIONS LAWS OF THE UNITED STATES (Tent. Draft No. 3, 1983) § 420 Reporters' Note 4.

## III. CONCLUSION

Domestic courts will continue to require the production of evidence located in foreign jurisdictions due to the increased internationalization of banking, business, narcotics trafficking and tax evasion. Existing legislation and international treaties do not adequately delineate the power of domestic courts to seek this information. Therefore, conflicts between the principles of *lex fori* and international comity will continue to result in cases which are similar to *Nova Scotia.*

Until both the United States and foreign nations agree on diplomatic solutions, it appears that domestic courts will continue to approach such jurisdictional conflicts on a case-by-case basis via the balance of state interests test. The *Restatement (Revised) of Foreign Relations Law of the United States* (Tent. Draft No. 3, 1982) § 420, expands upon this approach and enumerates more extensive guidelines.[36] Nevertheless, as Judge Marshall recognized in

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36. This section reads:

§ 420. Requests for Disclosure and Foreign Government Compulsion.

(1)(a) Where authorized by statute or rule of court, a court in the United States may order a person before the court to produce documents or other information directly relevant, necessary, and material to an action or investigation, even if the information or the person in possession of the information is located outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including contempt or dismissal of a claim or defense, or to a finding by the court that the facts to which the order was addressed are as asserted by the opposing party.

(c) In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

(2) 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, or by the state of nationality of the prospective witness,

(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;

(b) the court may not ordinarily impose the sanction of contempt, dismissal, or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) the court may, in appropriate cases, make findings of fact adverse

*In re Uranium Antitrust Litigation:*

> [T]he judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy . . . . In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially "balance" these totally contradictory and mutually negating actions.[37]

Therefore it appears that the executive and legislative branches of government are the proper forums for the resolutions of these situations.

The trend of judicial decisions indicates that there are few situations in which domestic courts will defer to foreign nondisclosure laws. *Nova Scotia* is a recent example of the judicial use of the balance of state interests test with a result that expands the potential for the advancement of domestic interests. This decision, as well as previous cases, serves as notice to entities which subject themselves to the United States' jurisdiction that they may be required to produce documents for domestic courts, notwithstanding their potential liabilities under foreign nondisclosure laws.

Further diplomatic agreements could, and probably will, be made in order to minimize international conflicts concerning the production of documents. Such agreements, however, may take years to formulate, and may involve concessions detrimental to domestic interests in return for the disclosure of documents. Therefore, a preferable solution could evolve from unilateral legislation by the United States requiring entities, which voluntarily subject themselves to this nation's jurisdiction, to maintain duplicate records in locations accessible to domestic courts. Although such legislation was introduced and subsequently rejected by Congress in the 1950's[38], perhaps the frequency and serious international

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> to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

37. 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

38. H. R. RES. 7339, 82d Cong., 1st Sess. (1951); H. R. RES. 642, 84th Cong., 1st Sess. (1955); H. R. RES. 391, 83d Cong., 1st Sess. (1953).

ramifications of this dispute will convince Congress to seriously consider and act upon similar proposals.

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