

OBA Sunrise Series

The Protections Against Self Incrimination in Civil and Regulatory Proceedings

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Context

Your client is a defendant in a tort claim arising out of a MVA and facing possible/actual criminal charges

Your client is being investigated by the OSC for insider trading and facing a concurrent civil claim for oppression / breach of fiduciary duty

Your client is subject to concurrent proceedings in the US and Canada

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Agenda

Overview of the Canadian Approach to Self-Incrimination

Self-Incrimination and Civil Proceedings

Self-Incrimination and Regulatory Proceedings

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Overview of the Canadian Approach to Self-Incrimination

Principle against self-incrimination has been referred to by the Supreme Court of Canada as an "overarching", "fundamental" principle and "the single most important organizing principle in criminal law"

- *R. v. Henry*, [2005] 3 S.C.R. 609

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Overview of the Canadian Approach to Self-Incrimination

In Canada, principle against self-incrimination is regulated by the *Charter* and Evidence Acts (Federal and Provincial)

Three important protections arising from the legislation:

- 1- Use Immunity
- 2- Derivative Use Immunity
- 3- Constitutional/Testimonial Exemption

One important right that does not arise in Canada: the right to "take the Fifth"

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

Protects a witness from having his/her compelled incriminating testimony used directly against him/her in a subsequent proceeding, except for prosecution of perjury

Section 13 of the Charter:

"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."

Known as the "*quid pro quo*"

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

What is *compelled* testimony?

- Statutorily compelled to give evidence
- Includes a witness in a civil/criminal trial or regulatory hearing who gives evidence, even if attendance not secured by subpoena
- Includes a defendant who gives oral evidence on discovery in a civil proceeding

- *R. v. Nedelcu*, 2012 SCC 59

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

What is *incriminating* testimony?

- Evidence that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt (*i.e.*, to prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried)
- Does not include evidence from the prior proceeding that the Crown wishes to use for the sole purpose of impeaching the witness's testimony at the subsequent proceeding

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

What is the difference between incriminating and impeaching a witness?

- Heated debate in *Nedelcu* between the majority (Moldaver J.) and minority (LeBel J.)
- Accused's testimony on discovery in civil action: No memory of the events in question
- Accused's testimony at criminal trial: "I have a recollection about 90, 95 percent"

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

Where is the distinction between incriminating and impeaching?

- Majority concluded that there was no "quid" because accused's discovery evidence was not "incriminating evidence"
- "...rejection of an accused's testimony does not create evidence for the Crown..."
- Without the "quid", there can be no "quo", meaning no restriction on the Crown's use of *that* evidence

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Overview of the Canadian Approach to Self-Incrimination

Use Immunity

In addition to the *Charter*, use immunity is also provided for in the *Canada Evidence Act* (section 5), the *Ontario Evidence Act* (section 9) and other provincial evidence statutes

Unlike section 13 of the *Charter*, protections in the Evidence Acts must be expressly claimed

Section 9 of the *Ontario Evidence Act* extends the use immunity to quasi-criminal prosecutions

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Overview of the Canadian Approach to Self-Incrimination

Derivative Use Immunity

Protections a witness from having his/her evidence used as a means to obtain incriminating evidence that would otherwise be unavailable

Example: Accused testifies at trial of accomplice about location of a gun they used to commit robbery

- Section 13 would not prevent admission of the gun into evidence if it was discovered by the police
- But, section 7 of the *Charter* (life, liberty and security of the person) may operate to exclude the gun

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Overview of the Canadian Approach to Self-Incrimination

Constitutional/Testimonial Immunity

A right to silence

Provides that a witness is not required to testify if the purpose of obtaining his/her testimony is to expose him/her to penal liability

Established where the predominate purpose of the civil, administrative or inquisitorial proceeding is a colourable attempt by police/prosecutors to obtain evidence for criminal prosecution

In other words, the other proceeding is an abuse of process

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Self-Incrimination and Regulatory Proceedings

Self-Incrimination and Civil Proceedings

An accused cannot be compelled to testify in a criminal proceeding (*Charter*, section 11(c))

But, the accused can be compelled to give all manner of evidence in a prior/concurrent civil proceeding

Means through which evidence can be compelled in a civil proceeding include:

- Documentary discovery (Rule 30)
- Examination for discovery (Rule 31)
- Inspection of property (Rule 32)
- Medical examination (Rule 33)
- Written interrogatories (Rule 35)

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Rule 30.1.01 requires that parties/counsel undertake not to use evidence or information obtained through the discovery process for any purposes other than those of the proceeding in which the evidence was obtained

This "deemed undertaking" largely codifies the "**implied undertaking**" of confidentiality developed at common law

Developed to balance public interest in getting at the truth in a civil action against the privacy interests of parties and examinees in civil litigation

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Applies only to the parties and their counsel

Does not prevent police authorities from exercising search/seizure powers to obtain a transcript of an accused's examination for discovery

But it does prevent parties from disclosing information obtained during civil discoveries to the authorities, subject to a court order or immediate/serious danger to public safety

- Doucette v. Wee Watch, 2008 SCC 8

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Deemed undertaking applies only to evidence obtained through discovery procedures (Rule 30.1.01(1) and (2))

But, it applies to all evidence obtained in the discovery process, whether incriminatory or not incriminatory

- ACI Brands Inc. v. Pow, 2014 ONSC 2784

It does not extend to procedures that are primarily evidence taking procedures, such as:

- Affidavits
- Cross-examinations on affidavits
- Examinations of witnesses on a pending motion or application (Rule 39.03)

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Sanctions for breaching the deemed undertaking rule can be very severe, and include:

- Adverse costs orders
- Striking a pleading or refusing to permit amendments
- Staying or dismissing a proceeding
- Contempt

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Deemed undertaking is not absolute and subject to various exceptions, including:

- the producing party consents (Rule 30.1.01(4))
- the evidence is filed with the court or given/referred to during a hearing (Rule 30.1.01(5))
- to impeach the testimony of a witness in another proceeding (Rule 30.1.01(6))
- Clear and imminent threat of serious bodily harm to an identifiable group – but no "crimes exception"

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Deemed undertaking is not absolute and subject to various exceptions, including:

- Interest of justice outweighs any prejudice that would result to a party who disclosed evidence (Rule 30.1.01(8))
- Heavy burden – relief granted only in exceptional cases
- Examples: to alert victims of ongoing fraud; subsequent proceeding involves same parties and same/similar issues

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Open court exception can eviscerate the deemed undertaking rule:

- Rule 34.18(2) – Where a party intends to refer to a transcript on motion/application, a copy "shall be filed..."
- Rule 37.10(5) – A party who intends to refer to a transcript at the hearing of a motion "shall file a copy..."
- No express basis in Rules for courts to interfere with filing of *entire* transcript

Self-Incrimination and Civil Proceedings

Deemed Undertaking Rule

Options for preventing the filing of an entire transcript:

- Obtain the consent of the parties
- Seek directions from the court to ensure only the relevant excerpts are filed (granted sparingly)
- Apply for a sealing order (granted sparingly)
- Apply to have motion heard in the absence of the public (granted sparingly)

Self-Incrimination and Civil Proceedings

Important to remember that your client can "incriminate" himself / herself *within* a civil proceeding:

- Rule 51 and Admissions
 - * Request to Admit
 - * Pleadings
 - * Agreed Statement of Facts
 - * Submissions of counsel
- Rule 31.11 and Use of Discovery Transcripts at Trial
 - * Reading in evidence from transcript
 - * Impeachment

Self-Incrimination and Civil Proceedings

To avoid incriminating disclosure in civil proceedings, it may be possible to seek a stay of the civil proceeding

- Stay would apply to allow the criminal proceeding to proceed first
- Available only in extraordinary and exceptional circumstances, where the accused's right to a fair trial would be prejudiced by the progress of civil proceeding
- Very difficult to establish because of section 13 of the *Charter*
- Example: Ontario civil action prejudicing accused's right to fair trial in US

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Self-Incrimination and Civil Proceedings

Self-Incrimination and Regulatory Proceedings

Self-Incrimination and Regulatory Proceedings

Statutory Powers Procedures Act

[14.\(1\)](#) A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

[13\(2\)](#) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled.

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

Sharing of information by the OSC – Section 17:

17. (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

(b) [...] any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13 ...

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

Sharing of information by the OSC – Section 17:

Opportunity to object

(2) No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

[\(2.1\)](#) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153.
Disclosure to police

[\(3\)](#) Without the written consent of the person from whom the testimony was obtained, no order shall be made ... authorizing the disclosure of testimony given under subsection 13 (1) to,
(a) a municipal, provincial, federal or other police force or to a member of a police force;
[...]

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

Disclosure by court

[\(5\)](#) A court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution.

Self-Incrimination and Regulatory Proceedings

Ontario Securities Act

18. Testimony given under section 13 shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

Self-Incrimination and Regulatory Proceedings

Memorandum of Understanding – OSC, AMF, SEC

OSC, AMF and SEC have entered into a Memorandum of understanding, where by they agreed to provide each other with the “fullest mutual assistance”

See https://www.osc.gov.on.ca/documents/en/Securities/mou_20100610_sec-osc-amf.pdf

Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494 – upheld the constitutionality of a provision in the Securities Act that required registrants to produce documents to the BCSC to assist other securities regulators in other jurisdictions.

Self-Incrimination and Regulatory Proceedings

Memorandum of Understanding – OSC, AMF, SEC

Generally, the Ontario Securities Commission has recognized that production of compelled material for use by a private party for civil purposes is not generally “in the public interest.”

See *Re Black* (2007), 31 OSCB 10397

BUT the Courts have allowed “voluntary” admissions in regulatory settlements to be used in related civil proceedings.

See *Buckingham Securities Corp. v. Miller Bernstein LLP*, [2008] O.J. No. 1859; *National Bank Financial Ltd. v. Potter*, 2012 NSSC 76.

Thank You

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