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OBA Sunrise Series

# The Protections Against Self Incrimination in Civil and Regulatory Proceedings

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# Civil Proceedings

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## Protections Against Self-Incrimination

### **Use Immunity**

Protects a witness from having their compelled evidence used to incriminate them in another proceeding, except for prosecution of perjury

### **Derivative Use Immunity**

Protects a witness from having their evidence used as a means to obtain incriminating evidence that would otherwise be unavailable

### **Constitutional Exemption**

Provides that a witness is not required to testify if the purpose of obtaining their testimony or evidence is to expose the to penal liability

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## Civil Proceedings

The protections against self-incrimination are the “single most important” organizing principle of our criminal justice system.

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

Criminal protections are enshrined in sections 11(c) and 13 of the *Charter*.

**But what about in the civil context?**

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## Canada Evidence Act

### **Incriminating questions**

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

### **Answer not admissible against witness**

(2) **Where with respect to any question a witness objects to answer** on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in **any criminal trial or other criminal proceeding against him** thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

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## **Ontario Evidence Act R.S.O. 1990, CHAPTER E.23**

### **Witness not excused from answering questions tending to criminate**

**9. (1)** A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

### **Answer not to be used in evidence against witness**

**(2)** If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature.

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## Ontario *Rules of Civil Procedure* Deemed Undertaking Rule

### **RULE 30.1 DEEMED UNDERTAKING**

#### **APPLICATION**

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
  - (i) Rule 30 (documentary discovery),
  - (ii) Rule 31 (examination for discovery),
  - (iii) Rule 32 (inspection of property),
  - (iv) Rule 33 (medical examination),
  - (v) Rule 35 (examination for discovery by written questions); and
- (b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

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## Ontario *Rules of Civil Procedure* Deemed Undertaking Rule Cont.

### *Deemed Undertaking*

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

### *Exceptions*

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

- (a) evidence that is filed with the court;
- (b) evidence that is given or referred to during a hearing;
- (c) information obtained from evidence referred to in clause (a) or (b).

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## Ontario *Rules of Civil Procedure* Deemed Undertaking Rule Cont.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

### *Order that Undertaking does not Apply*

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

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## Use of Discovery Transcript at Trial

- **Use that can be made of Discovery transcript at trial of same action.**
- **Use that can be made of Discovery transcript in other proceeding.**

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## Internal Investigations

- **Are the results of an internal investigation produceable?**
- **What about witness notes, documents collected?**

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## Regulatory Proceedings

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## 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.

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## Ontario Securities Act

During an Investigation:

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.

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## Sharing of Information by the Ontario Securities Commission

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 ...

### **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.

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## Ontario Securities Act, Section 17

(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;  
[...]

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## Ontario Securities Act, Section 17

### **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.

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## Ontario Securities Act, Section 18

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*.

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## Memoranda 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](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.

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## Use of Compelled Testimony and Materials in Civil Proceedings

- 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.

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# Thank You.

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