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The Law of Privilege in Canada Robert W. Hubbard and Katie Doherty Release No. 1, April 2026

The Law of Privilege in Canada is a comprehensive guide to privilege and confidentiality. It includes chapters on each type of privilege with “key points”, case law and commentary as well as a table of cases, relevant legislation, and an index.

What's New in this Update:

The authors have updated the commentary and case law in chapter 10 (The Privilege Against Self-Incrimination).

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Highlights

The Privilege Against Self-Incrimination—Section 13 of the Charter—Overview—In *R. v. Nassr*, Justice Stribopoulos of the Ontario Superior Court of Justice concluded that s. 13 was not engaged regarding comments that the accused had made from the witness stand. The accused in *Nassr* had been previously charged with making and distributing child pornography, as well as with extortion. The accused elected to take the stand in his own defence in that proceeding. During the course of his cross-examination, the accused stated to the prosecutor that he knew that the prosecutor had a child and mentioned the child’s first name. As a result of this conduct, the accused was charged with intimidating a justice system participant.

Justice Stribopoulos concluded that s. 13 does not extend its protection to prior testimony that constitutes the *actus reus* of the offence charged. Otherwise, s. 13 of the *Charter* would go much further than the drafters intended. It would grant every witness immunity to commit offences while testifying, effectively transforming s. 13 of the *Charter* from a shield into a sword that witnesses could wield with relative impunity: *R. v. Nassr*, 2025 CarswellOnt 9919, 2025 ONSC 3571.

The Privilege Against Self-Incrimination—Section 13 of the Charter—Does s. 13 protect a witness’ refusal to answer questions?—Does a witness’ refusal to answer questions constitute “evidence” that could be protected by s. 13 of the *Charter*? There is some mixed jurisprudence on this question in the province of Ontario. In *R. v. Seecharran*, Justice Code of the Ontario Superior Court of Justice answered this question affirmatively. The Crown called Mr. Seecharran to testify at the preliminary inquiry of another individual. The Crown proceeded to put several questions to Mr. Seecharran. He refused to answer. Mr. Seecharran was charged with obstruct justice. At the obstruct justice trial, he sought to exclude the transcript from the preliminary inquiry. One of the reasons that the Crown argued that s. 13 did not apply was that Mr. Seecharran did not give “evidence” that could attract the section’s protection. Justice Code rejected this argument: *R. v. Seecharran*, 2016 CarswellOnt 19327, 2016 ONSC 764.

However, the notion that an accused who refuses to testify provides “evidence” for s. 13 purposes is not universally accepted. In an unreported decision, *R. v. Khodayar*, Justice Loignon of the Ontario Court of Justice concluded that a witness’ refusal to answer questions did not attract s. 13 protection. A similar situation to *R. v. Seecharran* occurred, but Justice Loignon determined that s. 13 did not protect against the admission of the transcript of the preliminary inquiry at the witness’ trial for obstruct justice. One of the reasons in support of this conclusion was that the witness had not provided the evidence that is the essence of the quid pro quo that underlies the s.

13 protection. In essence, by refusing to testify, the witness had not provided the quid. He was not entitled to the quo.