



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Nedelcu, 2012 SCC 59

**DATE:** 20121107

**DOCKET:** 34228

**BETWEEN:**

**Her Majesty The Queen**

Appellant

and

**Marius Nedelcu**

Respondent

- and -

**Attorney General of Quebec, Advocates' Society and  
Criminal Lawyers' Association (Ontario)**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,  
Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:** Moldaver J. (McLachlin C.J. and Deschamps, Abella,  
(paras. 1 to 43) Rothstein and Karakatsanis JJ. concurring)

**DISSENTING REASONS:** LeBel J. (Fish and Cromwell JJ. concurring)  
(paras. 44 to 145)

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R. v. NEDELCU

**Her Majesty The Queen**

*Appellant*

v.

**Marius Nedelcu**

*Respondent*

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**Attorney General of Quebec,  
Advocates' Society and  
Criminal Lawyers' Association (Ontario)**

*Interveners*

**Indexed as: R. v. Nedelcu**

**2012 SCC 59**

File No.: 34228.

2012: March 16; 2012: November 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,  
Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Self-incrimination — Accused involved in motor vehicle accident where victim sustained serious injuries — Accused charged with Criminal Code offences — Accused testifying in criminal action — Testimony inconsistent with discovery testimony in prior related civil action — Whether Crown at criminal trial may cross-examine accused on prior inconsistent statements without infringing right against self-incrimination — Canadian Charter of Rights and Freedoms, s. 13.*

After work one evening, N took the victim for a ride on his motorcycle on their employer's property. The motorcycle crashed into a curb, causing the victim permanent brain damage. N sustained minor injuries and was hospitalized overnight. N was charged with dangerous driving causing bodily harm and impaired driving causing bodily harm. He was also sued in a civil action by the victim and his family. During his examination for discovery in the civil matter, N testified that he had no memory of the events from the day of the accident until he woke up in the hospital the following day. At his criminal trial, however, N gave a detailed account of the events leading up to and during the accident. Having been granted leave to cross-examine N on his discovery evidence, the Crown asked N about his memory of the events. N stated, "I have a recollection about 90, 95 percent". N's trial testimony was found to be unreliable and he was found guilty of dangerous driving causing bodily harm. The Court of Appeal allowed N's appeal. The trial judge's ruling was overturned, the conviction was set aside and a new trial was ordered.

*Held* (LeBel, Fish and Cromwell JJ. dissenting): The appeal should be allowed, the order for a new trial set aside, and the guilty verdict on the charge of dangerous driving causing bodily harm restored.

*Per* McLachlin C.J. and Deschamps, Abella, Rothstein, **Moldaver** and Karatkatsanis JJ.: Although N was statutorily compellable and therefore compelled for the purpose of s. 13 of the *Charter* to testify at his examination for discovery in the civil action, the use of his non-incriminating discovery evidence for impeachment purposes could not and did not trigger the application of s. 13. Section 13 is not directed to “any evidence” the witness may have been compelled to give at the prior proceeding, but to incriminating evidence. Incriminating evidence is evidence given by the witness at the prior proceeding 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. Where the evidence given by the witness at the prior proceeding could not be used by the Crown at the subsequent proceeding to prove the witness’s guilt on the charge for which he or she is being tried, the prior evidence is not “incriminating evidence”.

The mere possibility that evidence, which is otherwise “non-incriminating”, can be converted into “incriminating” evidence if the Crown were to take the added steps needed to make it so, is not enough to trigger the application of s. 13. The use of N’s discovery evidence to test his credibility, and

nothing else, could not convert his discovery evidence into incriminating evidence. The discovery evidence would retain its original characteristics and it would not become evidence from which the triers of fact could infer guilt.

While it is true that N's inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused's testimony does not create evidence for the Crown — any more than the rejection of an accused's alibi evidence does, absent a finding on independent evidence, that the alibi has been concocted.

On this construction of s. 13, neither the truthful witness nor the perjurer need be concerned that any incriminating evidence given by them at a prior proceeding will be used against them, for any purpose, at a subsequent proceeding for anything other than perjury.

While this approach might impinge ever so slightly on clarity and predictability, clarity and predictability should not be pursued at the expense of rewriting s. 13 to remove critical words that alter the meaning of the section and impermissibly extend its protection beyond its intended purpose. Trial judges will have little difficulty deciding whether evidence put forward by the Crown meets the test for “incriminating” evidence as defined. It would of course be incumbent on trial judges to provide juries with clear instructions as to the use they could make of the evidence given at the prior proceeding.

On its own, N's discovery testimony could not have been used by the Crown to prove or assist in proving one or more of the essential elements of the criminal charges he was facing. While his inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused's testimony does not create evidence for the Crown.

*Per LeBel, Fish and Cromwell JJ. (dissenting):* The right against self-incrimination lies at the heart of our justice system and is enshrined in the *Canadian Charter of Rights and Freedoms*. It is intimately linked to the right to stand silent in the face of one's accuser, to the presumption of innocence and to the notion that the Crown must prove its case beyond a reasonable doubt without any assistance from the accused.

Section 13 only applies when the *quid pro quo* is engaged: a witness's evidence is compelled in exchange for a guarantee that the Crown will not use that evidence against that person in another proceeding is engaged. The focus of the s. 13 analysis should be on compulsion. Evidence should be treated as compelled where there is a statutory route by which the witness could be compelled to give evidence. Whether or not that route is actually taken does not change the fact that it was available and could have been taken. It would be unprincipled to give a lesser degree of *Charter* protection to a witness who testifies willingly than to a witness who must be subpoenaed or otherwise forced to give evidence, if both could have been statutorily compelled to testify in any event.

Similarly, the focus should not be on the nature of the statements. While s. 13 refers to using “incriminating statements” to “incriminate”, parsing an accused person’s testimony to distinguish what is “incriminating” from what is “innocuous” in order to determine on what parts of his or her testimony the accused may be cross-examined might result in a protracted and unpredictable classification exercise. That distinction is just as unworkable as the previously abolished distinction between using prior compelled testimony to impeach credibility and using it to incriminate the accused. It is especially difficult to draw that distinction because the focus of the right against self-incrimination is on the second proceedings, the time at which the previous testimony is sought to be used, rather than the time at which it is given. Any evidence that may assist the Crown in proving its case will have an incriminating effect and must therefore be subject to s. 13 protection.

The protection afforded by s. 13 is not lost when a witness gives what is perceived to be dishonest testimony. Although the *quid pro quo* is meant to encourage full and frank evidence, s. 13, in the context of the greater balancing of interests embodied in the *Charter*, dictates that the truth-seeking function of the trial give way to the right of the accused against self-incrimination. The *quid pro quo* is not a “contract” with a witness that can be nullified if the witness lies under oath. Prior compelled evidence can be used in a prosecution for perjury or for the giving of contradictory evidence. Laying criminal charges for perjury is the appropriate way to deal with witnesses who tailor their evidence to suit their needs in each particular proceeding without diluting the *Charter* rights of the accused. This approach

maintains respect for the administration of justice while fully preserving the s. 13 right of the accused. It also avoids the need to conduct a *voir dire*, which would encumber the trial process, render the scope of s. 13 dubious in theory and uncertain in practice, discourage full and frank testimony, and reduce the scope of the s. 13 protection that previously compelled witnesses have had since *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

In this case, N was statutorily compellable to be examined for discovery, and therefore “compelled” within the meaning of *Henry* and for the purposes of s. 13. Whether he freely decided to attend the discovery proceeding is irrelevant because Rule 31.04(2) of the Ontario *Rules of Civil Procedure* compels a defendant in a civil action to be examined for discovery. Failing to file a statement of defence would not have allowed N to avoid coming within the grasp of the procedural rules that would compel his evidence, so whether he was actually noted in default is irrelevant. Despite the rather blatant inconsistencies in his testimony, s. 13 dictates that the truth-seeking function of the trial give way to the right of the accused against self-incrimination.

## Cases Cited

By Moldaver J.

**Referred to:** *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Kuldip*, [1990] 3 S.C.R. 618; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445.

By LeBel J. (dissenting)

*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157; *Attorney General for Quebec v. Begin*, [1955] S.C.R. 593; *Curr v. The Queen*, [1972] S.C.R. 889; *R. v. Kuldip*, [1990] 3 S.C.R. 618; *R. v. Mannion*, [1986] 2 S.C.R. 272; *R. v. Allen*, 2003 SCC 18, [2003] 1 S.C.R. 223; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Cophorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721.

## Statutes and Regulations Cited

*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5.

*Canadian Charter of Rights and Freedoms*, ss. 11(c), 13.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 31.04(2).

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Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 6th ed. Toronto: Irwin Law, 2011.

Sankoff, Peter. “*R. v. Nedelcu*: The Role of Compulsion in Excluding Incriminating Prior Testimony under Section 13 of the *Charter*” (2011), 83 C.R. (6th) 55.

Stewart, Hamish. “*Henry* in the Supreme Court of Canada: Reorienting the s. 13 Right against Self-incrimination” (2006), 34 C.R. (6th) 112.

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, MacPherson and Armstrong JJ.A.), 2011 ONCA 143, 276 O.A.C. 106, 269 C.C.C. (3d) 1, 83 C.R. (6th) 41, 227 C.R.R. (2d) 364, 7 M.V.R. (6th) 10, 5 C.P.C. (7th) 16, [2011] O.J. No. 795 (QL), 2011 CarswellOnt 1090, setting aside the conviction for dangerous driving causing bodily harm entered by O’Connor J., 60 M.V.R. (5th) 186, 2007 CanLII 54970, [2007] O.J. No. 4906 (QL), 2007 CarswellOnt 8205, and ordering a new trial. Appeal allowed, LeBel, Fish and Cromwell JJ. dissenting.

*Michal Fairburn and Randy Schwartz*, for the appellant.

*P. Andras Schreck and Candice Suter*, for the respondent.

*Sylvain Leboeuf and Gilles Laporte*, for the intervener the Attorney General of Quebec.

*Barbara A. McIsaac, Q.C., Jacquie El-Chammas and Frank Addario*, for the intervener the Advocates’ Society.

*Scott C. Hutchison and Edward Marrocco*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ. was delivered by

MOLDAVER J. —

[1] I have had the privilege of reading Justice LeBel's reasons for judgment and I agree with him on the issue of compulsion. In particular, I accept his conclusion, at para. 109, that Mr. Nedelcu "was statutorily compellable, and therefore 'compelled' . . . for the purposes of s. 13 [of the *Canadian Charter of Rights and Freedoms*]" to testify at his examination for discovery in the civil action.

[2] Where I part company with my colleague is on the interpretation of s. 13 and in particular, its application to the facts of this case. In my respectful view, s. 13 was never meant to apply to a case such as this — and I am convinced it does not. This Court's decision in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, does not provide otherwise.

[3] My colleague has canvassed *Henry* in detail and I see no need to retrace his steps. Fundamentally, as he observes at para. 81 of his reasons, the Court in *Henry* outlined “a unified approach to s. 13, one based on the historical rationale underlying s. 13 — the *quid pro quo*”. I take no issue with that observation.

[4] The difficulty I have with the present case is that there was no “*quid*” for there to be a “*quo*” — and hence, in my view, s. 13 was never engaged. I would accordingly allow the appeal.

[5] Section 13 of the *Charter* reads as follows:

**13.** 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.

[6] As I read the section, the “*quid*” that forms the critical first branch of the historical rationale, refers to “incriminating evidence” the witness has given at a prior proceeding in which the witness could not refuse to answer. The section does not refer to all manner of evidence the witness has given at the prior proceeding. It refers to “incriminating evidence” the witness has given under compulsion.

[7] The “*quo*” refers to the state’s side of the bargain. In return for having compelled the witness to testify, to the extent the witness has provided “incriminating evidence”, the state undertakes that it will not use *that* evidence to incriminate the

witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.

[8] Thus, a party seeking to invoke s. 13 must first establish that he or she gave “incriminating evidence” under compulsion at the prior proceeding. If the party fails to meet these twin requirements, s. 13 is not engaged and that ends the matter.

[9] What then is “incriminating evidence”? The answer, I believe, should be straightforward. In my view, it can only mean evidence given by the witness at the prior proceeding 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.

[10] In *Henry*, at para. 25, Justice Binnie adopted the following definition of “incriminating evidence” from this Court’s earlier decision in *R. v. Kuldip*, [1990] 3 S.C.R. 618, at p. 633: “Incriminating evidence means ‘something “from which a trier of fact may infer that an accused is guilty of the crime charged””’.

[11] While that definition of “incriminating evidence” is framed somewhat differently than the definition I am proposing, one thing is clear — the *Kuldip* definition did not include evidence from the prior proceeding that the Crown wished to use for the sole purpose of impeaching the witness’s testimony at the subsequent proceeding. Indeed, *Kuldip* affirmed, without qualification, that the witness’s evidence from the prior proceeding could be used for that purpose. And that is how

things stood for 12 years, until 2002, when this Court in *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, qualified the rule — correctly in my view — in a way that does not read the words “incriminating evidence” out of s. 13. At para. 47 of *Noël*, Arbour J. stated, for the majority:

. . . If the original evidence was not incriminating, the *quid pro quo* was never engaged, and the witness cannot ask of the state that he be prevented from being cross-examined as to his credibility should he assert matters differently in a subsequent proceeding, even if the ultimate effect of that subsequent cross-examination may be adverse to his interest. This is consistent with the language of s. 13 which grants to every witness the right not to have any “incriminating evidence so given used to incriminate that witness in any other proceedings”. [Emphasis in original.]

[12] The pertinent facts in *Noël* are straightforward. Noël was called as a Crown witness at his brother’s trial for murder. In his testimony at that trial, he admitted to being his brother’s accomplice in the murder of a little boy. Noël was later charged with the same murder. At his trial, he took the stand and denied any participation in the murder. The Crown was then permitted to cross-examine him at length on the incriminating statements he had made during his brother’s trial.

[13] Arbour J., writing for the majority, ruled that the cross-examination was improper and in violation of Noël’s rights under s. 13 of the *Charter* because “the risk of misuse of the incriminating evidence given by [Noël] at his brother’s trial, [though] introduced . . . purportedly to challenge his credibility, was overwhelming and could not have been alleviated by any instructions” (para. 20).

[14] The evidence given by Noël at his brother's trial fits squarely within the meaning of "incriminating evidence" as I have defined it. His admission that he participated with his brother in the murder of a young boy was clearly evidence that the Crown could have led at Noël's trial, if permitted to do so, to prove his guilt on the charge of murder for which he was now being tried. And it is because the evidence was "incriminating" that it passed the first step (the "*quid*") required to trigger the application of s. 13.

[15] There are two schools of thought as to whether the use of Noël's testimony from his brother's trial to impeach his testimony at his own trial can be distinguished from its use to incriminate him. That is a debate upon which reasonable people can and do disagree. I need not engage in it here. For present purposes, suffice it to say that if the evidence used to impeach meets the test for "incriminating evidence" as I have defined it, then I am prepared to accept, per *Henry*, at para. 50, that in practice it may be difficult for triers of fact to work with that distinction. Hence, the Crown should not be able to use it for any purpose at the witness's subsequent trial. That in my view is the "*quo*" that forms the second half of s. 13. Apart from using it in a prosecution for perjury or for giving contradictory evidence, it will be off limits to the Crown.

[16] The law is clear and I accept it to be so, that the time for determining whether the evidence given at the prior proceeding may properly be characterized as "incriminating evidence" is the time when the Crown seeks to use it at the subsequent

hearing. (See *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at pp. 363-64). That however, does not detract from my contention that the evidence to which s. 13 is directed is not “any evidence” the witness may have been compelled to give at the prior proceeding, but evidence that the Crown could use at the subsequent proceeding, if permitted to do so, to prove the witness’s guilt on the charge for which he or she is being tried.

[17] In so concluding, I recognize that there will be instances where evidence given at the prior proceeding, though seemingly innocuous or exculpatory at the time, may become “incriminating evidence” at the subsequent proceeding, thereby triggering the application of s. 13.

[18] Take for example, the witness who, at the trial of a third party for robbery, admits to having been present at the scene of the crime but denies any involvement in it. If the witness is subsequently charged with the same robbery and testifies that he was not present when the robbery occurred, his evidence from the prior proceeding, though innocuous at the time, will have taken on new meaning. For purposes of s. 13, it would now be treated as “incriminating evidence” because it is evidence that the Crown could use at the witness’s robbery trial, if permitted to do so, to prove the essential element of identity. And that is where s. 13 comes in. It precludes the Crown from introducing it for any purpose, whether as part of its case to prove identity or as a means of impeaching the witness’s testimony.

[19] Manifestly, I take a different view where the evidence given by the witness at the prior proceeding could not be used by the Crown at the subsequent proceeding to prove the witness's guilt on the charge for which he or she is being tried. In such circumstances, because the prior evidence is not "incriminating evidence", there can be no "*quid*" for purposes of s. 13 — and because there is no "*quid*", no "*quo*" is owed in return. The case at hand provides a classic example of this.

[20] On its own, Mr. Nedelcu's "I . . . remember nothing" testimony from his discovery could not have been used by the Crown to prove or assist in proving one or more of the essential elements of the criminal charges he was facing — dangerous driving causing bodily harm and impaired driving causing bodily harm. I say "on its own" because in theory, if the Crown were able to prove that Mr. Nedelcu had concocted his discovery evidence with a view to deliberately misleading the court and obstructing the course of justice, that finding would constitute evidence of consciousness of guilt from which the trier of fact could, if it chose to, infer guilt.

[21] But realistically, that scenario is one with which we need not be concerned. Any attempt on the Crown's part to convert Mr. Nedelcu's "non-incriminating" evidence from the discovery into potentially "incriminating evidence" at his criminal trial would trigger the application of s. 13 and the protection afforded by it. And that would be self-defeating. It would disentitle the Crown from being able to use Mr. Nedelcu's "non-incriminating" discovery evidence for impeachment

purposes — the sole purpose of the exercise. In short, the Crown would know that it could not suggest in cross-examination that the prior evidence had been concocted, nor could it lead any evidence to that effect.

[22] The mere possibility that evidence, which is otherwise “non-incriminating”, can be converted into “incriminating” evidence if the Crown were to take the added steps needed to make it so, is not enough to trigger the application of s. 13. The use of Mr. Nedelcu’s discovery evidence to test his credibility, and nothing else, could not convert his discovery evidence into incriminating evidence. The discovery evidence would retain its original characteristics and it would not become evidence from which the triers of fact could infer guilt.

[23] While it is true that Mr. Nedelcu’s inconsistent discovery evidence might lead the triers of fact to reject his trial testimony, rejection of an accused’s testimony does not create evidence for the Crown — any more than the rejection of an accused’s alibi evidence does, absent a finding on independent evidence, that the alibi has been concocted. (See *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 61-67.) As Arbour J. observed at para. 67 of *Hibbert*:

A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury.

[24] In the present context, it would of course be incumbent on trial judges to provide juries with clear instructions as to the use they could make of the evidence given at the prior proceeding, similar to the instructions that trial judges have been providing in cases where an accused has given alibi evidence. Thus, in Mr. Nedelcu's case, unless he were to adopt his discovery evidence, the jury would be told that they could not use his discovery evidence for its truth, but only to test his credibility and for no other purpose. The jury would also be told that if they were to reject Mr. Nedelcu's trial evidence, they could not use that rejection to bolster the Crown's case. They would simply remove Mr. Nedelcu's evidence from their consideration. To convict, the jury would have to be satisfied, on the basis of the remaining evidence, that the Crown had proved its case beyond a reasonable doubt.

[25] In sum, I am satisfied that the use of Mr. Nedelcu's non-incriminating discovery evidence for impeachment purposes, and nothing else, could not and did not trigger the application of s. 13.

[26] In my respectful view, *Henry* could not have meant something different. In concluding that a witness's testimony from a prior proceeding could not be used to impeach that witness in a subsequent proceeding, the Court must have been referring to "incriminating evidence" being used for that purpose; it could not have been referring to "non-incriminating" evidence since s. 13 does not concern itself with that type of evidence.

[27] To take an obvious example, assume that at a prior proceeding, a witness has testified, as part of the narrative, that she got up at 10:00 a.m., had breakfast, went to the corner store for a paper and then returned home. Assume further that none of that information has any bearing on the crime of robbery she is alleged to have committed at 5:00 p.m. later that day. At her subsequent robbery trial, some three years later, she states in chief that she awoke at noon, had nothing to eat and stayed home until 3:00 p.m. As for the robbery itself, she admits to having been at the robbery scene but claims that she could not have been the robber because she was wearing a pink coat that day and all of the witnesses have described the robber as wearing a black coat.

[28] On that example, surely the Crown would not be precluded, on the basis of *Henry*, from cross-examining on the apparent inconsistencies relating to her morning activities, with a view to testing the witness's powers of recollection and hence, the overall credibility and reliability of her testimony — particularly as to her ability to remember what she wearing at the time of the robbery. Using non-incriminating evidence for impeachment purposes does not engage s. 13. And I do not read *Henry* as holding otherwise, even though some of the language used could leave that impression.: At para. 50, Binnie J. states: “ . . . the prior compelled evidence [of the witness] should, under s. 13 . . ., be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to ‘a prosecution for perjury or for the giving of contradictory evidence’” (emphasis in original).

[29] While Justice Binnie speaks only of “prior compelled evidence”, s. 13 is concerned with prior “incriminating evidence” that has been compelled. It should not be interpreted as referring to “compelled” evidence of *any* kind — and certainly not compelled evidence that was neither incriminating at the time it was given nor incriminating at the witness’s subsequent trial. Using Justice Binnie’s definition of “incriminating evidence” as “something ‘from which a trier of fact may infer that an accused is guilty of the crime charged’”, Mr. Nedelcu’s discovery evidence fails to meet that test.

[30] In this case, the Crown sought to use Mr. Nedelcu’s “non-incriminating” prior discovery evidence to impeach him. The use of his non-incriminating discovery evidence for that purpose did not convert it into incriminating evidence, i.e. evidence that the Crown could use, if permitted to do so, to prove or assist in proving one or more of the essential elements of the offences upon which Mr. Nedelcu was being tried. As such, s. 13 was not engaged. There was no “*quid*” and, therefore, no “*quo*” for the state to honour.

[31] My colleague, Justice LeBel, takes issue with my conclusion that s. 13 is not engaged here. He maintains that I have misconstrued *Henry* and misinterpreted s. 13. He predicts that the interpretation of s. 13 to which I ascribe will lead to confusion and unpredictability. Courts will be inundated with time-consuming *voir dire*s; the scope of s. 13 will be rendered dubious in theory and uncertain in practice;

and the objective of the *quid pro quo*, which is to encourage full and frank testimony, will be undermined.

[32] I propose to address each of these concerns in brief compass.

[33] But first, let me deal with the suggestion that the way in which I interpret s. 13 was not raised by any of the parties or interveners and that it is “entirely contrary to Crown counsel’s submissions before this Court” (para. 127).

[34] At para. 56 of their factum, Ms. Fairburn and Mr. Schwartz, on behalf of the Crown, wrote:

Mr. Nedelcu’s discovery evidence would not even have the potential to incriminate. Properly conceptualized, his discovery evidence was non-evidence: *I remember nothing*. Query whether at common law he could have asserted his silence in relation to this non-evidence. What is incriminating about remembering nothing? Nothing. If the *Henry* interpretation of s. 13 extends even to non-evidence, through the conduit of compulsion, with great respect, this signals a need for change. [Italics in original; underlining added; footnote omitted.]

[35] My reasons address this very issue. They make clear that *Henry* did not extend the protection of s. 13 to non-incriminating evidence — and that those who believed it had were mistaken. While some might like to read the words “incriminating evidence” out of s. 13, the Court in *Henry* did no such thing.

[36] Turning to my colleague's prediction that the construction I place on s. 13 will lead to uncertainty and time-consuming *voir dire*s, unlike my colleague, I expect that trial judges will have little trouble discerning whether evidence given by the accused as a witness in a prior proceeding is "incriminating" evidence — that is, evidence that the Crown could use, if permitted to do so, to prove guilt.

[37] Under the test I have proposed, trial judges are not given a discretion. The only added burden on the court will be to qualify the evidence as incriminating or not — hardly a difficult or time-consuming task. Where the evidence the Crown seeks to introduce could be used by the Crown, 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 — it is not admissible under s. 13 for *any purpose* (other than a prosecution for perjury or giving contradictory evidence).

[38] In sum, far from opening the *voir dire* floodgates, I am confident that trial judges will have little difficulty deciding whether evidence put forward by the Crown meets the test for "incriminating" evidence as I have defined it.

[39] That brings me to the last of my colleague's concerns — that in construing s. 13 as I have, the objective of the *quid pro quo*, which is to encourage full and frank testimony, will be undermined.

[40] With respect, I do not agree. Full and frank testimony presupposes a witness who wants to tell the truth but is afraid to do so lest the evidence be used to

incriminate him at a subsequent proceeding. It does not presuppose a witness who is bent on giving false testimony.

[41] Be that as it may, on my construction of s. 13, neither the truthful witness nor the perjurer need be concerned that any incriminating evidence given by them at a prior proceeding will be used against them, for any purpose, at a subsequent proceeding (the perjurer need only fear a prosecution for perjury or for giving contradictory evidence). Thus, the witness who sincerely wants to tell the truth — that is, make full and frank disclosure — need not fear any repercussions. He or she will gain the full protection of s. 13, and the bargain contemplated by s. 13 will have been fulfilled.

[42] I do not gainsay the possibility that construing s. 13 as I have may impinge ever so slightly on the clarity and predictability that my colleague considers all-important. Clarity and predictability are laudable goals, to be sure — but they should not be pursued at the expense of rewriting s. 13 to remove critical words that alter the meaning of the section and impermissibly extend its protection beyond its intended purpose.

[43] I would accordingly allow the appeal, set aside the order for a new trial and restore the guilty verdict on the charge of dangerous driving causing bodily harm.

The reasons of LeBel, Fish and Cromwell JJ. were delivered by

LEBEL J. —

[44] The right against self-incrimination is a principle that lies at the heart of our justice system and is enshrined in the *Canadian Charter of Rights and Freedoms*. A specific form of protection against self-incrimination is the right against testimonial self-incrimination provided for in s. 13 of the *Charter*. Section 13 protects a witness who gives evidence in any proceeding from having that evidence used against him or her in a subsequent proceeding. This *Charter* guarantee has engendered many decisions of this Court, the latest significant pronouncement being *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

[45] The Crown asks this Court to reconsider the s. 13 principles it unanimously espoused in *Henry*. For the reasons that follow, I would decline to do so. I would therefore dismiss the appeal.

#### I. Introduction

[46] This appeal arises out of a guilty verdict for dangerous driving causing bodily harm (60 M.V.R. (5th) 186). The Ontario Court of Appeal set aside the respondent's guilty verdict and ordered a new trial on the basis of this Court's decision in *Henry* (2011 ONCA 143, 276 O.A.C. 106).

[47] At his criminal trial, the respondent was cross-examined on inconsistent statements he had previously made during discovery in a tort action brought against him in relation to the same incident. After his cross-examination, it became clear to all the parties, including the respondent's own counsel and the trial judge, that the respondent's entire testimony was unreliable and had to be disregarded. He was found guilty on one count of dangerous driving.

[48] The issue is whether, at his criminal trial, the Crown could cross-examine the respondent on statements he had made during discovery in a civil action without infringing his right against self-incrimination. In my view, the Court of Appeal correctly applied *Henry* in holding that the respondent could not be cross-examined on these statements. Therefore, the appeal must be dismissed.

## II. Facts

[49] The respondent and the victim worked together. After work one evening, at around 6:30 p.m., the respondent took the victim for a ride on his motorcycle on their employer's property. The motorcycle crashed into a curb, and both the victim and the respondent were thrown from it. The victim was not wearing a helmet, and the accident caused him permanent brain damage. The respondent sustained minor injuries and was hospitalized overnight.

[50] The respondent was charged with dangerous driving causing bodily harm and impaired driving causing bodily harm. The respondent was also sued in a civil

action by the victim and his family. He was examined for discovery as part of the civil proceedings. During his examination for discovery, he testified that he had no memory of the events from 5:00 p.m. on the day of the accident to the following day at 11:00 a.m., when he woke up in the hospital. Fourteen months later, at his criminal trial, however, he gave a detailed account of the accident and the events leading up to it.

[51] The Crown sought leave to cross-examine the respondent on his discovery evidence. After a *voir dire*, the trial judge ruled that the discovery evidence could be put to the respondent in cross-examination for the purpose of impeaching his credibility. The respondent was ultimately found guilty of dangerous driving causing bodily harm. On the basis of *Henry*, the Ontario Court of Appeal overturned the trial judge's ruling, set aside the respondent's conviction and ordered a new trial.

### III. Judicial History

#### A. *Superior Court of Justice*

##### (1) The Charge

[52] The respondent testified in his own defence. In his testimony, he gave a detailed account of the events of that day leading up to and during the accident. In cross-examination, on being asked about his memory of the events, he stated, "I have a recollection about 90, 95 percent" (A.R., vol. II, at p. 215).

[53] Before Crown counsel began her cross-examination, a police officer handed her a transcript of the respondent's examination for discovery from the civil proceeding, apparently provided by the victim's counsel. The transcript indicated that the respondent had denied remembering anything about the accident in his discovery evidence:

Q. And when did you first see Victor on July 30th, 2004?

A. When I see him?

Q. The first time.

A. I don't see him in that night. He come around 5 o'clock, but I don't remember nothing from before that, so I--last things I remember was 5 o'clock when I finish one job on the line. I don't remember when I was going to the shop. I don't--don't remember when I was putting my tools away. I don't remember when we're drinking after.

Q. Do you have any memory after 5--or, sorry. What is your first memory after 5 o'clock p.m. on July 30th?

A. Eleven o'clock next day when I was in the hospital.

Q. So, July 31st?

A. Exact.

Q. Eleven o'clock in the morning or the evening?

A. In the morning when I get out from the ER. Shortly after that, they take me out of--from the--10:30, 11. I'm not sure. [A.R., vol. I, at p. 99]

[54] At the conclusion of her cross-examination, and based on the inconsistent evidence regarding the respondent's memory of the events, Crown counsel sought leave to cross-examine the respondent on his discovery evidence.

(2) Ruling on the *Voir Dire* ((2007), 41 C.P.C. (6th) 357)

[55] After reviewing this Court's decision in *Henry*, the trial judge found that s. 13 protection applies only in relation to prior compelled testimony and cannot be invoked if the prior testimony was given voluntarily.

[56] In determining whether the respondent's discovery evidence was compelled, he noted that parties to a civil action in Ontario are obligated to attend examinations for discovery and provide answers under oath, and that discovery evidence is therefore statutorily compelled evidence under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. However, in his view there was a difference between evidence given in a civil proceeding and in a criminal proceeding.

[57] According to the trial judge, the differences in character, purpose and philosophy between civil and criminal proceedings must be taken into account when applying the *Charter* to exclude evidence obtained in a civil action. While civil discovery is meant to eliminate issues not seriously contested, to ensure that all relevant evidence is disclosed and to expose groundless claims, criminal investigations have "a public, justice-oriented purpose" (para. 24).

[58] The trial judge quoted with approval a passage from *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, in which this Court had stated that, to qualify as having a "valid public purpose", compelled testimony in a criminal context must be aimed at obtaining evidence in furtherance of the prosecution

(para. 24). Referring to this Court’s decision in *Henry*, he stated that s. 13 must be analyzed purposefully, within the context of the “bargain” at its heart, known as the “*quid pro quo*”, which protects a witness who is compelled to testify. He explained the *quid pro quo* as follows: “. . . when a person is compelled to testify in a court proceeding and exposes himself to the risk of self-incrimination, the section provides protection against the subsequent use of his evidence against him.” In his view, however, “the fact-gathering discovery exercise, although statutorily compelled, lacks the State-compelled incriminatory features discussed in [*Henry*]” (para. 26). He therefore concluded that s. 13 of the *Charter* did not protect the accused from the use of discovery testimony to impeach his credibility, as there was no *quid pro quo* with the state:

Mr. Nedelcu’s prior discovery testimony is potentially relevant to the issue of his credibility as it seems to contradict his testimony at trial. It is deemed to be a verbatim account of what he said at his examination for discovery, in that it is certified by a qualified court reporter to be an accurate transcription of his words. He has not taken the position that transcription of his testimony on discovery is inaccurate. The use the Crown seeks to make of the evidence is the permitted one of assessing credibility only and not the prohibited purpose of incrimination. Accordingly, I have found its use is not prohibited by s. 13 of the *Charter*. [para. 49]

In the trial judge’s view, therefore, the use of the respondent’s prior evidence to assess credibility was permissible under s. 13. I note that the Crown concedes that the trial judge erred in his approach to s. 13. The parties agree that s. 13 is engaged when evidence is compelled in *any* proceeding, regardless of whether the evidence elicited

in the first proceeding assists the Crown: see A.F., at paras. 44-47, and R.F., at para. 30.

[59] Finally, the trial judge noted that excluding the evidence of a prior inconsistent statement in this case could lead to “significant mischief” (para. 50). It would allow the accused to tender different evidence in his civil and criminal trials: “With impunity, he could tailor his evidence to suit his needs in each particular proceeding” (para. 50).

[60] Accordingly, the trial judge granted the Crown’s application to cross-examine the respondent on his civil discovery evidence.

(3) Verdict ((2007), 60 M.V.R. (5th) 186)

[61] The trial judge acquitted the respondent on the impaired driving charge but found him guilty of dangerous driving causing bodily harm. With respect to the effect of the Crown’s cross-examination on the respondent’s credibility, the trial judge said,

Counsel for Mr. Nedelcu concedes the obvious about his client’s credibility. At trial, Mr. Nedelcu recited a second by second account of the motorcycle ride, the route they took, their speeds at several locations, when and where he changed gears, when he applied the brakes and the manoeuvres he undertook when he felt the bike going down. He attributed the cause of the accident to Mr. Perdon, whom he said grabbed his shoulder, and leaned in the wrong direction. However, upon his examination for discovery in the related civil action brought by Mr. Perdon, Mr. Nedelcu testified he had no recollection of anything

whatsoever about the ride between when they got on the bike and his waking up the next morning in the hospital.

...

Thus, I have no difficulty acceding to his counsel's position that Mr. Nedelcu's entire testimony should be considered unreliable. I disbelieve his evidence of the events before and during the motorcycle ride and his evidence does not leave me with a reasonable doubt about his guilt on either charge . . . . [paras. 13 and 15]

B. *Ontario Court of Appeal (2011 ONCA 143, 276 O.A.C. 106)*

[62] The Court of Appeal began its analysis by noting that the latest guidance on s. 13 from this Court was in *Henry*, in which the Court had reviewed its s. 13 jurisprudence. It noted that, in *Henry*, the Court had quoted a passage from *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 358, to the effect that the purpose of s. 13 is to protect individuals from being indirectly compelled to incriminate themselves, therefore ensuring that the Crown will not be able to do indirectly what s. 11(c) of the *Charter* prohibits.

[63] Armstrong J.A., writing for the Court of Appeal, noted that, in *Henry*, this Court had abandoned the distinction made in the earlier cases between prior testimony used to incriminate an accused and prior testimony used to impeach the credibility of an accused because that distinction was unrealistic. Further, according to *Henry*, only compelled evidence is protected by s. 13.

[64] As to whether the respondent had been “compelled” to testify on his examination for discovery, Armstrong J.A. concluded that he had been. Although the respondent could have taken steps to avoid testifying by seeking a stay of the civil action or an adjournment of the examination for discovery until the conclusion of the criminal prosecution, the Court of Appeal noted that such requests are granted only in exceptional circumstances, none of which existed in the present case.

[65] In the Court of Appeal’s view, the trial judge had erred in his analysis of the *quid pro quo*. Armstrong J.A. stated that there is nothing in the jurisprudence to suggest that s. 13 protection is only engaged when a witness’s prior testimony “assisted the Crown” (para. 31). If that were the case, the section would apply only to proceedings in which the Crown was a party. However, s. 13 specifically states that protection is afforded to “[a] witness who testifies in any other proceedings”.

[66] The Court of Appeal also found that the respondent had not given his discovery evidence “to further his own private interest in a civil action against him”, as the trial judge had characterized it. The respondent was a defendant in a civil suit against him and, as such, he “was compelled to testify on the examination for discovery solely for the benefit of the plaintiffs” (para. 32).

[67] Relying on statements made by the majority in *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, and by the dissent in *Dubois*, the Court of Appeal held that the distinction between criminal and non-criminal interrogatories was not relevant to the

appeal and that it was unnecessary to consider whether such a distinction was supported by the cases referred to by the trial judge.

[68] Finally, the Court of Appeal rejected the Crown's argument that the observations made by Binnie J. in *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157, at para. 41, were determinative of the appeal. Although, in *Juman*, this Court had quoted the *voir dire* reasons of the trial judge in the case at bar, Armstrong J.A. noted that *Juman* was decided in the context of determining the scope of the implied undertaking rule in British Columbia. Armstrong J.A. pointed out that this Court was discussing general categories of exceptions to the implied undertaking rule. The fourth category, under which this trial decision was quoted, was entitled "Impeaching Inconsistent Testimony". There was no reference to the *Charter* at this point in the judgment, and in fact, he noted, there was no *Charter* issue before this Court in *Juman* at all. The Court of Appeal concluded that, since this Court did not address s. 13 in *Juman*, "[t]here is nothing in *Juman* which alters the ratio in *Henry* and therefore there is nothing that alters its application to this case" (para. 45).

[69] The Court of Appeal allowed the appeal, set aside the respondent's conviction and ordered a new trial.

#### IV. Analysis

##### A. *Issues and Positions of the Parties*

[70] The Crown makes two main submissions. First, the Crown contends that *Henry* should not apply to this case, because the respondent's civil discovery evidence was not "compelled" within the meaning of *Henry*. In the alternative, it submits that *Henry* should be overturned and that this Court should restore the distinction between using prior testimony to impeach credibility and using it to incriminate.

[71] The respondent, not surprisingly, maintains that the approach in *Henry* applies to this case, because he was compelled to give evidence on discovery. He also submits that *Henry* should not be revisited.

[72] Therefore the two issues for this Court to decide are whether the respondent was "compelled" within the meaning of *Henry* to give discovery evidence in relation to his civil case, and whether this Court should overturn *Henry* or somehow revisit the principles laid out in that case.

[73] For the reasons that follow, I conclude that the respondent was compelled to give evidence at his civil discovery within the meaning of *Henry* and that *Henry* ought not to be altered or overturned. I would therefore dismiss the appeal.

#### B. *Constitutional Guarantee Against Self-Incrimination*

[74] The guarantee against self-incrimination is one of the fundamental principles of our criminal justice system. As Binnie J. noted in *Henry*, at para. 2, it

has its historical roots in “the revulsion that was felt over the Star Chamber, which would detain suspected enemies of the state on mere suspicion, compel them to swear an oath, and then require them on pain of punishment to answer questions”: see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (6th ed. 2011), at p. 283. Today, the right against self-incrimination is intimately linked to the right to stand silent in the face of one’s accuser, to the presumption of innocence and to the notion that the Crown must prove its case beyond a reasonable doubt without any assistance from the accused.

[75] Self-incrimination can be of two types: testimonial and non-testimonial. Testimonial self-incrimination refers to using oral evidence of the accused against the accused, either by forcing the accused to testify at his or her own trial (covered by s. 11(c) of the *Charter*), or by using prior testimony of the accused in another proceeding (embodied in s. 13 of the *Charter*). Non-testimonial self-incrimination refers to the proffering of other types of incriminating evidence by the accused, such as blood or breathalyzer samples: see e.g. *Attorney General of Quebec v. Begin*, [1955] S.C.R. 593; *Curr v. The Queen*, [1972] S.C.R. 889. In the instant case, we are concerned with testimonial self-incrimination, specifically the right enshrined in s. 13.

[76] Before the *Charter* came into force, the protection against testimonial self-incrimination was provided for in s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Section 5 currently states:

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.

(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.

[77] Therefore, s. 5(1) obliges a witness to answer any question put to him or her, regardless of whether the answer will be incriminating or give rise to civil liability. In exchange, however, s. 5(2) offers protection against the subsequent use of that evidence to incriminate the witness. This “bargain” is what has become known as the *quid pro quo*.

[78] It is clear that the drafters of the *Charter* considered s. 5 of the *Canada Evidence Act* when crafting s. 13. As Binnie J. noted in *Henry*, there is “a consensus that s. 13 was intended to extend s. 5 of the *Canada Evidence Act*” (para. 23). Binnie J., relying on statements in *Dubois* and *Noël*, also confirmed that s. 13 is not limited to questions a witness might have been entitled to refuse to answer at common law and that s. 13 is intimately linked, although not necessarily limited to, the traditional role and function of s. 5 of the *Canada Evidence Act*. Although s. 5(2) requires the witness to specifically invoke its protection, s. 13 contains no such

requirement. Therefore, s. 13 of the *Charter* is broader in application than s. 5 of the *Canada Evidence Act*, as Arbour J. noted in *Noël*, at para. 53:

[*R. v. Mannion*, [1986] 2 S.C.R. 272,] is a case where it is unlikely that the accused would have sought the protection of the *Canada Evidence Act* when he gave his original evidence since that evidence did not “tend to criminate” him when it was given. In that sense s. 13 is an expansion of the statutory protection, and one fully in line with the broad constitutional protection against compulsory self-incrimination. [Emphasis added.]

[79] Section 13 of the *Charter* states:

**13.** 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.

[80] *Henry* is this Court’s most recent significant pronouncement on s. 13. To determine whether we should revisit its approach requires a closer look at what the Court actually decided in that case.

### C. *Henry*

[81] As I stated at the outset, s. 13 of the *Charter* has proven difficult for courts to apply, and even this Court has struggled to define its contours consistently. In the face of inconsistent jurisprudence, this Court decided *Henry* in 2005. It was a unanimous decision and was intended to outline a unified approach to s. 13, one based on the historical rationale underlying s. 13 — the *quid pro quo*.

[82] In *Henry*, the appellants had told a different story under oath in their retrial on a charge of first degree murder than at their first trial five years earlier. They were cross-examined on these prior inconsistent statements at the retrial and were again convicted of first degree murder. They appealed, claiming that this use of prior statements violated their s. 13 rights.

[83] Binnie J., writing for the Court, began his analysis by noting that “[t]he consistent theme in the s. 13 jurisprudence is that ‘the purpose of s. 13 . . . is to protect individuals from being indirectly compelled to incriminate themselves’” (para. 22, citing *Dubois*, at p. 358). In setting the tone for the analysis that followed, he quoted Arbour J. in *Noël*:

Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony. [Emphasis added by Binnie J.; para. 21.]

[84] With respect to its scope, Binnie J. noted that s. 13 precludes the use of “incriminating evidence” given in one proceeding to “incriminate that witness” in a subsequent proceeding. He explained the meaning of “incriminating evidence” by quoting from *R. v. Kuldip*, [1990] 3 S.C.R. 618, at p. 633, in which the Court had

described it as “something ‘from which a trier of fact may infer that an accused is guilty of the crime charged’” (para. 25).

[85] Given the lack of clarity in the s. 13 cases at the time, Binnie J. carefully reviewed this Court’s s. 13 jurisprudence. He discussed each case’s *ratio* and considered whether it was in line with the fundamental *quid pro quo* principle underlying s. 13.

[86] He first considered *Dubois*. In that case, the accused had testified at his first trial and made certain admissions. On a retrial for the same offence, he chose not to testify or to call any evidence. The Crown sought to enter the testimony of the accused from his first trial as evidence in the retrial. This Court concluded that to use the prior testimony of the accused as evidence against him in his retrial would be a violation of his s. 13 right.

[87] Two main holdings came out of *Dubois*. The first is that a retrial of the same offence is considered “other proceedings” within the meaning of s. 13. The second — and the one most relevant to this appeal — is that “[t]he focus of the right is on the second proceedings, the time at which the previous testimony is sought to be used, rather than the time at which it is given” (p. 361). Therefore, the Court noted, although s. 13 refers to the notion of incrimination, the evidence in issue need not be incriminating at the time it is given. In light of the purpose of the section, the incriminating nature of the evidence must be evaluated only in the context of the

second proceeding. For the purposes of s. 13, incriminating evidence is any evidence the Crown tenders as part of its case against the accused.

[88] Binnie J. noted that the outcome in *Dubois* was correct, and declined to revisit it.

[89] Binnie J. then considered *R. v. Mannion*, [1986] 2 S.C.R. 272, in which the Crown had attempted to use the accused's prior inconsistent testimony from the first trial in the cross-examination of an accused at a retrial. The accused had chosen to testify twice and had changed his evidence from the first trial to the second. In *Mannion*, the Court had held that the cross-examination on his prior evidence was improper.

[90] Binnie J. noted that, in *Mannion*, the Court had focused on the purpose of the cross-examination (incrimination) rather than on the purpose of s. 13 (protection against *compelled* self-incrimination). He stated that, although the Court had concluded that *Dubois* dictated the outcome in *Mannion*, the Court had not commented on a key distinction: *Dubois* was a compelled witness at the second trial (since he had chosen not to testify), while *Mannion* had testified voluntarily at both trials.

[91] This distinction was key to understanding the *quid pro quo* principle underlying s. 13, and therefore to understanding s. 13's proper application. Binnie J. explained it in this way, at para. 42:

In *Dubois*, the prosecution sought to pre-empt the right of the accused not to testify. The filing of the earlier testimony was compelled self-incrimination. In *Mannion*, there was no such compulsion. The accused freely testified at his first trial and freely testified at his second trial. The compulsion, which lies at the root of the *quid pro quo* which in turn lies at the root of s. 13, was missing. Experience in the 20 years since *Dubois* and *Mannion* were decided shows that taking our eye off the underlying purpose of s. 13 has given rise to a number of distinctions and sub-distinctions that in the end have proven unworkable.

One such unworkable distinction was the one “between use of prior statements for the impeachment of credibility and use of prior statements for the purpose of incrimination” (para. 42).

[92] In *Henry*, the Court overruled *Mannion* for three main reasons. First, it had not been guided by the *quid pro quo* principle underlying s. 13. Second, failing to adhere to s. 13’s purpose had created distinctions between impeachment of credibility and incrimination that were unworkable in practice. In *Henry*, the Court did away with those distinctions and properly returned the focus to the *quid pro quo*: compelled testimony in exchange for s. 13 protection against subsequent use of that testimony against the accused. Third, *Mannion* had led to an unprincipled distinction between an accused who voluntarily testified at his or her trial and retrial and an accused who was not an accused but a compellable witness in the first proceeding. By returning to the *quid pro quo* in *Henry*, the Court restored the balance: it strengthened a *compellable* witness’s s. 13 protection while taking s. 13 protection away from an accused who has volunteered evidence in his or her own defence (para. 60). This was justified because, as Binnie J. noted,

[a]ccused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection “from being indirectly compelled to incriminate themselves” in any relevant sense of the word, and s. 13 protection should not be available to them. [Emphasis deleted; para. 47.]

[93] Next, Binnie J. considered *Kuldip*, in which the accused, as in *Mannion*, had volunteered inconsistent testimony at his trial and at his retrial. In *Kuldip*, however, the Court had distinguished *Mannion* on the basis that the Crown was seeking to cross-examine the accused on his prior evidence for the purpose of impeachment and not for the purpose of incrimination. On the basis of this distinction, the Court held in *Kuldip* that the cross-examination was proper.

[94] Binnie J. noted that the result in *Kuldip* was correct, although not for the reasons stated by the Court. It was correct, rather, because the *quid pro quo* was not engaged. He reiterated that the distinction between using prior evidence to impeach credibility and using it to incriminate posed problems in practice. In making the point, he quoted Martin J.A. from the Court of Appeal’s decision in *R. v. Kuldip* (1988), 40 C.C.C. (3d) 11:

Furthermore, in my view, where the prior evidence is used ostensibly to impeach the accused’s credibility only, it nevertheless does assist the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to draw a clear line between cross-examination on the accused’s prior testimony for the purpose of incriminating him and such cross-examination for the purpose of impeaching his credibility. If the court concludes on the basis of the accused’s contradictory statements that he deliberately lied on a material matter, that lie could give rise to an inference of guilt. [Para. 35, quoting Court of Appeal, at p. 23.]

[95] Indeed, in the instant case, the Crown submits that a prosecution for perjury or the giving of contradictory evidence would be an “inadequate remedy for an acquittal” (A.F., at para. 75, emphasis added). In other words, if a trier of fact were deprived of hearing prior inconsistent evidence given by an accused, an acquittal could result. The Crown therefore acknowledges that even evidence used solely for impeachment purposes can make the difference between a conviction and an acquittal. How, then, can one say that such evidence is not “incriminating” within the meaning of s. 13?

[96] Binnie J. then considered *Noël*. In that case, the accused had been a compellable witness at his brother’s murder trial and had given evidence that implicated himself in the offence. When he was subsequently charged, he testified in his own defence and denied any involvement in the murder.

[97] Arbour J., writing for the majority in *Noël*, held that the cross-examination on the earlier evidence of the accused was impermissible. In doing so, she put the emphasis of the analysis back on the *quid pro quo*:

. . . when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against the witness in exchange for his or her full and frank testimony. If the evidence proffered is less than full and frank, the witness is subject to prosecution for perjury or for the related offence of giving contradictory testimony. [Emphasis added; para. 21.]

[98] Binnie J. affirmed *Noël*. However, he distanced himself from Arbour J.'s comment that the Crown could be permitted to cross-examine an accused on prior testimony only "when there is no possibility that the jury could use the content of the prior testimony to draw an inference of guilt, except to the limited extent that a finding that the accused has been untruthful under oath could be damaging to his defence" (*Noël*, at para. 54). Instead, Binnie J. concluded that, for the purposes of s. 13, prior compelled testimony should "be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to 'a prosecution for perjury or for the giving of contradictory evidence'" (para. 50).

[99] Finally, Binnie J. considered *R. v. Allen*, 2003 SCC 18, [2003] 1 S.C.R. 223, a case with facts similar to those of *Noël*. The Court had applied *Noël* in an oral decision without much discussion. Like *Noël*, the decision was based on the *quid pro quo* and was affirmed in *Henry*.

[100] As can be seen, two major themes that are directly relevant to this appeal emerge from *Henry*. The first is that s. 13 only applies in situations in which the *quid pro quo* is engaged. Under s. 13, the *quid pro quo* refers to a witness's *compelled* evidence in exchange for a guarantee that the Crown will not use that evidence against that person in another proceeding. The second theme is that the distinction between using prior testimony to impeach credibility and using it to incriminate the

accused should be abolished. I will comment briefly on these two points and how they apply to the case before the Court.

#### D. *Compelled Testimony*

[101] One of the Crown's main submissions is that the respondent was not "compelled" to testify at his examination for discovery in the civil action against him in the sense described in *Henry*. The Crown argues that the respondent was not subjectively compelled, because he freely decided to attend the discovery proceeding [FAP 36], and that he was not objectively compelled, because he chose to file a statement of defence and to therefore put himself "within the grasp of procedural rules . . . that would, only then, compel his evidence" (A.F., at para. 37).

[102] Although Binnie J. did not fully canvass what constitutes "compelled" evidence in the *Henry* sense, he did note that an accused who chooses to testify freely at his or her first trial and then at a retrial is not "compelled" and so does not qualify for s. 13 protection (para. 43). He also stated parenthetically that "[f]or present purposes, evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena" (para. 34; emphasis added).

[103] Binnie J.'s observation that evidence from an accused who decides to testify is "voluntary" simply means that, because accused persons have a right not to be called to testify in their own defence under s. 11(c) of the *Charter*, any accused who chooses to testify waives his or her right not to be compellable. In contrast, a

witness who voluntarily gives evidence at someone else's trial is not giving evidence "voluntarily" within the meaning of *Henry* even if the witness decides to testify on his or her own volition, for example, to assist the accused. The difference is this: An accused who testifies voluntarily is waiving a constitutional right by choosing to testify. Any other witness can otherwise be compelled, meaning the witness is statutorily compellable regardless of whether he or she "volunteers" to take the stand. This view is confirmed by Binnie J.'s observation that "evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena".

[104] Therefore, whether the respondent freely decided to attend the discovery proceeding is irrelevant. Whether a witness was compelled should not be determined on a subjective standard. It would be unprincipled to give a lesser degree of *Charter* protection to a witness who testifies willingly than to a witness who must be subpoenaed or otherwise forced to give evidence, if both could have been statutorily compelled to testify in any event. Therefore, to determine whether the *quid pro quo* is engaged in a particular case, the court should consider whether the witness was statutorily compellable and not whether the witness felt subjectively compelled to testify. The relevant question is this: Was the respondent statutorily compelled to give evidence in the proceeding?

[105] The Crown's second argument on compulsion is that the respondent was not objectively compelled because he chose to file a statement of defence, and

therefore that he voluntarily put himself within the grasp of the powers of civil discovery.

[106] This argument must also fail. First, as noted by the intervener Advocates' Society, the integrity of the civil discovery process could be undermined if courts considered that those who defend civil actions are not "compelled" for the purposes of s. 13. Parties facing criminal proceedings might then find it advantageous not to co-operate in any civil action, thereby forcing the other party to obtain a court order compelling their testimony on discovery.

[107] More importantly, however, there is a principled reason why a defendant who gives evidence in a civil discovery proceeding is "compelled" for the purpose of s. 13. Again, the relevant question to ask is: Was the respondent *statutorily compelled* to give evidence in the proceeding? In this case, Rule 31.04(2) of the *Rules of Civil Procedure* is the statutory authority that compels a defendant in a civil action to be examined for discovery *whether or not the defendant files a statement of defence*:

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

- (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
- (b) the defendant has been noted in default.

[108] Therefore, failing to file a statement of defence does not allow the respondent to “avoid coming within the grasp of the procedural rules . . . that would, only then, compel his evidence”, as the Crown asserts (A.F., at para. 37). Had the respondent failed to file a statement of defence, the plaintiff could have noted him in default and then, under Rule 31.04(2)(b), obliged him to be examined for discovery. I note that whether the plaintiff actually took the step of noting the respondent in default is irrelevant. Just as it does not matter for the purposes of s. 13 that a witness who can be statutorily compelled to testify chooses to testify uncoerced, it does not matter that a plaintiff does not resort to the available statutory powers to compel a defendant to be examined for discovery. In either case, there is a statutory route by which to compel the witness to give evidence. This is what makes a witness compellable. Whether or not that route is actually taken does not change the fact that it was available and *could have been taken*.

[109] I conclude, therefore, that the respondent was statutorily compellable, and therefore “compelled” within the meaning of *Henry* and for the purposes of s. 13.

#### E. *Should the Court Revisit Henry?*

[110] *Henry* makes it quite clear that the distinction between using prior compelled testimony to impeach credibility and using it to incriminate the accused is unworkable. Even using so-called “innocent statements” to expose inconsistencies in the testimony of an accused will, as Martin J.A. said in *Kuldip*, “assist the Crown in its case and, in a broad sense, may help to prove guilt” (p. 23). Counsel for the

respondent summarized this concern in oral argument before this Court: “. . . the distinction doesn’t really exist between incriminating and impeaching. If you are impeaching, you are advancing the Crown’s case. There may be an inference of consciousness of guilt” (transcript, at p. 52).

[111] I agree that, in the context of s. 13, there can be no such distinction in practice. Any evidence that may assist the Crown in proving its case, including evidence impeaching the credibility of the accused, will have an incriminating effect and must therefore be subject to s. 13 protection.

[112] It seems evident, therefore, that this distinction is not compatible with the underlying purpose of s. 13. One need only go back to the cases in which the distinction was maintained to see just how inconsistently — and at times arbitrarily — it was applied in practice. There were undoubtedly accused persons whose s. 13 *Charter* rights were unduly diminished under this approach. It is for this reason that the Court abolished this problematic distinction in *Henry*.

[113] The concerns expressed in *Henry* with respect to the difference between using prior compelled testimony to impeach credibility and using it to incriminate still exist. Should this Court nevertheless revisit *Henry* on this point?

[114] In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 58, a majority of this Court endorsed Binnie J.’s observation in *Henry*, at para. 44, that “[t]he Court should be particularly careful before reversing a precedent

where the effect is to diminish *Charter* protection”. Further, the majority in *Fraser* noted that this Court should not overturn one of its own decisions lightly, especially if the decision represents the considered views of a firm majority and is of “recent vintage” (para. 57). In *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, Rothstein J., writing for the Court, cited *Fraser* with approval and stated that “[b]efore a court will entertain reversing a recently decided decision, there must be substantial reasons to believe the precedent was wrongly decided” (para. 57).

[115] In my view, there are no substantial reasons to believe *Henry* was wrongly decided. Nor are there any compelling or principled reasons to reintroduce the distinction between impeachment and incrimination, thereby reducing the scope of s. 13 of the *Charter*. *Henry* is a fairly recent, unanimous decision of this Court, which has largely been welcomed by the profession for providing predictability and simplifying the law in this area: see e.g. H. Stewart, “*Henry* in the Supreme Court of Canada: Reorienting the s. 13 Right against Self-incrimination” (2006), 34 C.R. (6th) 112; P. Sankoff, “*R. v. Nedelcu*: The Role of Compulsion in Excluding Incriminating Prior Testimony under Section 13 of the *Charter*” (2011), 83 C.R. (6th) 55.

[116] Nothing has changed since *Henry*, and it should not be revisited.

#### F. *Problem of Conflicting Testimony: Does Henry Apply?*

[117] The soundness of the *Henry* decision has now been reaffirmed. There seems to be an argument, however, that the case at bar is an unforeseen consequence

of *Henry* and that *Henry* cannot possibly apply given the rather blatant inconsistencies in the respondent's testimony.

[118] The Crown submits that providing s. 13 protection for compelled testimony for all purposes allows accused persons to tailor their evidence as they see fit and therefore impedes the truth-seeking function of a criminal trial.

[119] The response to this argument is that, in adopting the *Charter*, we chose as a society to balance the truth-seeking function of a criminal trial against the rights of the accused. Every day, this function is balanced against other important objectives, such as preserving the repute of the administration of justice by excluding unconstitutionally obtained evidence.

[120] The point here is that s. 13 is but one example of how the truth-seeking function of a criminal trial is not pursued at all costs. In this case, s. 13 dictates that the truth-seeking function of the trial give way to the right of the accused against self-incrimination. This limitation must be considered in light of the greater balancing of interests embodied in the *Charter*.

[121] The intervener Attorney General of Quebec also expresses concerns about the truth-seeking function of a trial and puts forward an alternative approach for determining whether an accused can be cross-examined on prior evidence. In the intervener's view, a *voir dire* should be conducted in every case to determine whether the probative value of the prior evidence outweighs its prejudicial effects.

[122] This approach raises at least three problems. First, it adds a layer of complexity to an already complicated trial process. Second, such an approach is not required by the *Charter*. Third, and most importantly, the weighing proposed by the intervener would have the effect of compromising the s. 13 rights of the accused in some cases. The approach proposed by the Attorney General of Quebec is therefore incompatible with *Henry*.

[123] A further point is what I would describe as the trial judge's desire to avoid an unpalatable result. At para. 18 of his *voir dire* reasons, he acknowledged that the respondent's evidence seemed to meet the *Henry* requirement of compellability; however, in his view, to apply *Henry* without considering the context "could easily give rise to a form of philosophical and practical dissonance that seems rather awkward, and perhaps even perverse, in the result". And he made the following observation at para. 50: ". . . if the introduction of the evidence is denied, a significant mischief could ensue. . . . With impunity, [the accused] could tailor his evidence to suit his needs in each particular proceeding." Similarly, the Crown asks in its factum, "Why would s. 13 of the *Charter* . . . protect [the respondent] from impeachment in circumstances where there is clear evidence that he has lied under oath?" (para. 48).

[124] This Court was fully alive to this issue in *Henry*. By eliminating the distinction between impeachment and incrimination, the Court explicitly opened the door to this kind of result:

. . . prior *compelled* evidence should, under s. 13 . . . , be treated as inadmissible in evidence against the accused, even for the ostensible purpose of challenging his or her credibility, and be restricted (in the words of s. 13 itself) to “a prosecution for perjury or for the giving of contradictory evidence”. [Italics in original; underlining added; para. 50]

Therefore, this case falls squarely within the expected outcomes of *Henry*.

[125] As Binnie J. noted in *Henry*, prior compelled evidence can be used in “a prosecution for perjury or for the giving of contradictory evidence”. Laying criminal charges for perjury is the appropriate way to deal with witnesses who “tailor [their] evidence to suit [their] needs in each particular proceeding” without diluting the *Charter* rights of the accused. This approach maintains respect for the administration of justice while fully preserving the s. 13 right of the accused. The protection afforded by s. 13 is not lost when a witness gives what is perceived to be dishonest testimony. Although the *quid pro quo* is meant to encourage full and frank evidence, it is not a “contract” with a witness that can be nullified if the witness lies under oath: see *Noël*, at para. 24.

#### G. *Reinterpretation and Reversal of Henry*

[126] I have had the benefit of reading Moldaver J.’s reasons, and with respect, I cannot agree with his interpretation of *Henry*.

[127] First, this proposed reading of *Henry* is unsupported by the Court’s reasons in that case. Second, his interpretation was not raised by any of the parties or

interveners. Indeed, it is entirely contrary to Crown counsel's submissions before this Court. The Crown acknowledged that it could not succeed without departing from its own understanding of *Henry*, with which I agree. In counsel's own words:

And Ontario is here today appreciating and letting me say right now that *Henry creates a formidable hurdle on this appeal. I am not oblivious to that fact.* [Emphasis added; transcript, at p. 2.]

[128] Third, my colleague's approach dilutes *Henry*. As I stated earlier in these reasons, *Henry* has been lauded as a decision that brought predictability and clarity to a previously murky area of law. This interpretation of *Henry* will again send the application of s. 13 into a state of confusion. It will cause uncertainty regarding the s. 13 rights of an accused.

[129] I am not aware of any decision since *Henry* in which a court has inquired into whether the statements of an accused were "innocent" or "incriminating" in order to determine whether s. 13 applied. Courts will now have to conduct *voir dices* to make this determination, which will both encumber the trial process and render the scope of s. 13 dubious in theory and uncertain in practice. Such uncertainty undermines the objective of the *quid pro quo*, which is to encourage full and frank testimony. Without knowing in advance how their evidence might be used in future proceedings, witnesses will undoubtedly be less likely to display candour, a consequence that is completely at odds with what this Court sought to accomplish in *Henry*. This will also undoubtedly reduce the scope of the s. 13 protection that previously compelled witnesses have had since *Henry*.

[130] In *Henry*, Binnie J. recognized the importance of ensuring predictability in the application of s. 13. He concluded his reasons by stating that the approach he proposed would avert the “unpredictability inherent in sorting out attacks on credibility from attempts at incrimination” (para. 60). In my view, my colleague’s opinion reintroduces uncertainty by resurrecting the abandoned distinction, for s. 13 purposes, between “innocuous” and “incriminating” evidence. Witnesses will be less likely to testify truthfully if they do not know, when called to testify, whether and to what extent the evidence they give will be admissible against them in future proceedings.

[131] The focus of *Henry* is on compulsion, not on the nature of the statements. My colleague rightly points out that s. 13 refers to using “incriminating statements” to “incriminate”. However, this Court found in *Henry* that drawing a distinction between using prior compelled evidence to impeach and using it to incriminate was unrealistic. Likewise, Binnie J. implicitly found that the distinction between “incriminating statements” and “innocuous statements” was unrealistic, as he stated at para. 45 of his reasons:

In *Noël*, it will be recalled, the Court identified permissible cross-examination by reference to testimony “innocuous” when made at the initial trial and “innocuous” when used at the retrial, opening up consideration of various combinations and permutations of statements innocuous/incriminating, incriminating/innocuous and incriminating/incriminating, an exercise in classification that when argued on a question by question basis can become both protracted and somewhat unpredictable, as an examination of the questions at issue in the present appeal illustrates. [Emphasis added.]

Therefore, parsing an accused person's testimony to distinguish what is "incriminating" from what is "innocuous" in order to determine on what parts of his or her testimony the accused may be cross-examined might result in a "protracted" and "unpredictable" classification exercise. This is the approach the majority endorses, and in my view, it is directly at odds with *Henry*.

[132] My colleague appears willing to recognize and reaffirm a departure from the strict words of s. 13 in the case of prior compelled evidence on the basis of *Henry*: such evidence cannot be used *for any purpose*. However, he does not seem willing to acknowledge that a departure from the strict words of s. 13 is also warranted — and Binnie J. stated as much in *Henry* — with respect to the kind of evidence that will give rise to the *quid pro quo*. This departure is necessary because the same practical difficulties that arise when determining what constitutes "impeachment" and what constitutes "incrimination" also arise when determining what is "incriminating" evidence and what is "innocuous" evidence.

[133] In the case at bar, Crown counsel unintentionally, yet convincingly, demonstrated in her submissions at trial that the distinction proposed in my colleague's reasons, though attractive in theory, is unworkable in practice:

MS. PRENGER: . . . And how at the end of the day, I think it's in *Kuldip* where they essentially say, you know, if it goes so — and I think this is perhaps your point, Your Honour. When it goes so to the heart of credibility, it can't help the forward journey of incrimination because one links into the other.

THE COURT: Uh huh.

MS. PRENGER: And perhaps with Mr. Nedelcu's case, when there is such a huge, what I would respectfully suggest, is a huge contradiction, and even though it goes directly towards credibility, as per Henry now, it could still, to a degree, be given some weight towards incrimination.

THE COURT: There's an analogy in the case of alibi evidence. There's a case called *Pearce* . . . .

MS. PRENGER: M'hmm.

THE COURT: . . . that says if you simply don't believe the alibi, that goes to credibility but if you feel the accused concocted the alibi, then that goes to the question of guilt.

MS. PRENGER: Right.

THE COURT: So it can be used as positive evidence of guilt.

MS. PRENGER: Right.

THE COURT: And here you're saying if it's -- it's so big . . .

MS. PRENGER: So aggravating.

THE COURT: It's so big a difference it obviously goes to credibility but can also be used to imply guilt. Is that what you're saying?

MS. PRENGER: That would be my position and I think that's what Henry suggests, that there can be a root there. [Emphasis added; A.R., vol. III, at pp. 49-51.]

[134] If this Court is prepared to say that once s. 13 is engaged, no use of an accused person's prior testimony is permissible because of the unrealistic distinction between impeachment and incrimination, then, by logical extension, the same must be said about the distinction between innocuous and incriminating evidence. If "innocuous" statements can be used at a subsequent trial to "impeach" the accused, as the majority contends, then that "innocuous" statement could have the effect of

incriminating, since it has already been determined in *Henry* that the distinction between impeachment and incrimination is unrealistic in the context of s. 13. It is incongruous to accept that one distinction is unrealistic for the purpose of determining whether s. 13 applies, but not the other.

[135] The examples given by my colleague in his reasons illustrate how difficult it is to distinguish “innocuous” evidence from “incriminating” evidence, especially given that “[t]he focus of the right is on the second proceedings, the time at which the previous testimony is sought to be used, rather than the time at which it is given” (*Dubois*, at p. 361). His explanation of those examples is reminiscent of the rationalization in pre-*Henry* cases with respect to whether the purpose of the cross-examination was impeachment or incrimination. This seems to take us back to where we were before *Henry*.

[136] Although my colleague is correct to say that rejecting an accused person’s testimony does not create evidence for the Crown, impeaching an accused lends support to the Crown’s position and may assist in proving guilt. That was the whole point of eliminating the distinction between impeachment and incrimination in *Henry*, and Binnie J. made this clear at para. 35 when he endorsed the view of Martin J.A. in *Kuldip*:

*Kuldip* can be seen as an attempt by the Court to put the brakes on *Mannion*, but in its unwillingness to reconsider its reasoning in *Mannion*, the Court was required to resort to reliance on the sometimes difficult distinction between the purposes of impeachment of credibility and incrimination. Although this distinction is well established in the law

(see, e.g., *R. v. Calder*, [1996] 1 S.C.R. 660, at para. 25), its practicality in this particular context is frequently questioned. It is worth setting out in full what was said by Arthur Martin J.A., writing in *Kuldip*, when it was before the Ontario Court of Appeal:

Furthermore, in my view, where the prior evidence is used ostensibly to impeach the accused's credibility only, it nevertheless does assist the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to draw a clear line between cross-examination on the accused's prior testimony for the purpose of incriminating him and such cross-examination for the purpose of impeaching his credibility. If the court concludes on the basis of the accused's contradictory statements that he deliberately lied on a material matter, that lie could give rise to an inference of guilt. [p. 23] [Emphasis added.]

[137] I acknowledge that the facts of this case are not favourable to the accused. However, the case must be decided by applying the principles laid out in *Henry*, not by attempting to carve out an exception that is manifestly incompatible with *Henry* in order to arrive at a desired result.

#### H. *This Court's Comment in Juman*

[138] Finally, I wish to briefly address the Crown's argument that this Court's comment in *Juman* provides the answer to question before us.

[139] In *Juman*, the Court was considering the scope of the implied undertaking rule in British Columbia. The question for the Court was under what circumstances, if any, information in discovery transcripts could be used for a purpose other than that of the civil action in question.

[140] Binnie J., writing for the Court, noted that the implied undertaking rule is a “recognition of the examinee’s privacy interest” but that this privacy interest is not absolute (para. 30). He then cited several exceptions of compelling public interests that could “trump” an examinee’s privacy interest. At para. 41, he noted that one such exception is “where the deponent has given contradictory testimony about the same matters in successive or different proceedings”. In making this point, Binnie J. quoted the trial reasons in the instant case: “Any other outcome would allow a person accused of an offence ‘[w]ith impunity [to] tailor his evidence to suit his needs in each particular proceeding’ (*R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357 (Ont. S.C.J.), at paras. 49-51).”

[141] The Court of Appeal in the instant case correctly noted that *Juman* was not a s. 13 case. Although s. 13 had been raised at other stages in the litigation, by the time it was heard in this Court, s. 13 was no longer at issue. Therefore, the fact that Binnie J. quoted the trial judge’s reasons cannot be taken as an endorsement of the trial judge’s approach to s. 13. The words in *Juman* illustrate a point related to the implied undertaking rule only. They do not suggest that s. 13 protection should be diminished in the case of an accused who makes inconsistent statements.

[142] In fact, Binnie J. specifically noted that there was no *Charter* issue before the Court and that any use of discovery transcripts in a criminal context would have to take into consideration the *Charter* rights of the accused:

If criminal charges are brought, the prosecution may also compel a witness to produce a copy of the documents or transcripts in question from his or her possession by a subpoena *duces tecum*. The trial judge would then determine what, if any, use could be made of the material, having regard to the appellant's Charter rights and any other relevant considerations. None of these issues arise for decision on the present appeal. [Emphasis added; para. 57.]

[143] Although there may be exceptions to the implied undertaking rule that include the giving of contradictory testimony, this does not mean that those same exceptions will apply to the s. 13 rights of an accused. A civil procedure rule cannot be compared to a constitutional guarantee. They involve different interests and have different degrees of flexibility.

[144] As noted by the Court of Appeal below, there is nothing in *Juman* that alters the ratio of *Henry*. *Juman* is of no assistance in this case.

V. Conclusion

[145] I would dismiss the appeal.

*Appeal allowed, LEBEL, FISH and CROMWELL JJ. dissenting.*

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