

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

MARIUS NEDELCU

Respondent

APPELLANT'S FACTUM

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PART I
STATEMENT OF FACTS

I. Overview

1. This appeal is about taking steps to maintain a credible justice system.
2. Marius Nedelcu took his co-worker, Vicente Perdon, for a ride on the back of his motorcycle. Mr. Perdon did not wear a helmet. When Mr. Nedelcu crashed his bike, Mr. Perdon was badly injured and suffered permanent brain damage. Both a lawsuit and criminal charges resulted. During his examination for discovery, Mr. Nedelcu testified to having no memory, whatsoever, about the crash or the events on either side of the crash: "I don't remember nothing from before ... 5 o'clock ... [to] Eleven o'clock next day when I was in the hospital". Over a year later, while testifying during his criminal trial, and providing impressive details of the events surrounding the crash, Mr. Nedelcu asserted that he had a "90, 95 percent" recollection of what had occurred. The core issue on appeal is whether s. 13 of the *Charter* should protect Mr. Nedelcu, and those similarly inclined to treat sworn testimony as a game to serve their purposes along the way, from being cross-examined on their former evidence for the sole purpose of impeaching their credibility? The answer to this question will have a profound impact on the public's confidence in our justice system.

Evidence of Marius Nedelcu in *Vincente Perdon, et al., v. Marius Nedelcu, et al.*, September 12, 2005 (hereinafter referred to as "Evidence in Civil Proceedings") Appellant's Record, Vol. I, p. 99, l. 17 - p. 100, l. 15

Evidence of Marius Nedelcu in *R. v. Nedelcu*, November 23 and 24, 2006 and May 23, 2007 (hereinafter referred to as "Evidence in Criminal Proceedings"), Appellant's Record, Vol. II, p. 215, ll. 19-23

3. Triers of fact in criminal trials hold one of the most formidable responsibilities we ask of our citizens and judges: to determine whether a person is guilty of a criminal offence. The ability to reach a just verdict is rooted in the truth seeking function of the criminal trial, which is inextricably linked to the trier of fact's ability to make informed and accurate assessments of credibility. Prior inconsistent statements and sworn evidence are critical tools in the hands of a cross-examiner, allowing the credibility of a witness to be tested and giving the truth a chance to reveal itself. Yet, if the court below is correct, when it comes to civil discovery evidence s. 13 of the *Charter* provides

blanket immunity to an accused to lie, precluding cross-examiners from resorting to this fundamental truth seeking technique. Even more importantly, s.13 of the *Charter* precludes the very individuals tasked with the responsibility of assessing credibility from knowing that the accused has provided different, sometimes opposite, sworn accounts. The Attorney General of Ontario submits that s. 13 of the *Charter* was never intended to extend constitutional protection to an accused to make a mockery of the oath in their trials. A proud administration of justice is not well served by such an approach.

4. While *Henry* seems to suggest that an accused's prior compelled testimony cannot be used for any purpose at his or her subsequent criminal trial, this Court's judgment in *Juman* suggests that the rule is not as rigid as one may think. In fact, *quoting from the impugned ruling in this case*, this unanimous Court in *Juman* made the important observation that "a person accused of an offence" should not be permitted to "[w]ith impunity ... tailor his evidence to suit his needs in each particular proceeding". Ontario respectfully requests that this Court reinforce these comments in *Juman* and confirm that testimony given in an examination for discovery can be used to impeach an accused's credibility at his or her criminal trial. Indeed, Ontario goes further and says that all prior evidence of an accused, whether compelled or not, must be available for impeachment purposes. To the extent that this proposition is inconsistent with this Court's judgment in *Henry*, Ontario asks that *Henry* be reconsidered on this point. This case demonstrates why such reconsideration is necessary. An accused should not be permitted to "play games with the administration of justice". Where this occurs, regardless of the nature of the proceedings in which the prior evidence was given, that evidence must be available for the purpose of impeachment. A credible justice system demands nothing less.

R. v. Henry, [2005] 3 S.C.R. 609, at paras. 49-50

Juman v. Doucette, [2008] 1 S.C.R. 157, at para. 41

Ruling on s. 13 of the *Charter*, Appellant's Record, Vol. I, p. 25, para. 50

II. The Facts Surrounding the Offence

5. The factual context for this appeal is simple and striking.

6. Mr. Nedelcu worked at Brampton Brick with Vincente Perdon. After work on July 30, 2004, they, along with another co-worker, sat and had a few beers. Mr. Nedelcu had a motorcycle at work with him that day. His colleagues had been admiring the bike. It was decided that he would take them each for a ride. First he took Mr. Bardakov for a ride and then Mr. Perdon. There was only one helmet, which Mr. Nedelcu wore when Mr. Perdon was on board. He drove around the Brampton Brick building. When the motorcycle reappeared, and with Mr. Perdon's wife watching (waiting to take him home), the accident occurred that gave rise to both the civil and criminal cases. The motorcycle was travelling fast and Mr. Nedelcu lost control. The trial judge found as a fact that, using the most "reasonable" and "conservative" methodology, the motorcycle was travelling in the parking lot at speeds between 49 and 70 km/hour. Aside from the expert evidence on speed, there were eyewitnesses at trial who testified to the speed of the motorcycle. The parking lot where this occurred was described by the trial judge as a "confined space".

Reasons for Judgment, Appellant's Record, Vol. I, pp. 39-44, paras. 28-39

7. Both Mr. Nedelcu and Mr. Person were thrown from the bike and were injured. Mr. Perdon was badly injured; his skull opened and part of his brain was left on the curbside. He was in a coma for six weeks and had a frontal lobotomy, removing part of his brain that was bruised and damaged. Physiotherapy assisted somewhat in his physical recovery, but at the time of trial he still had substantial physical and cognitive impairment as a direct result of the accident.

Exhibit 1: Agreed Statement of Facts, Appellant's Record, Vol. III, pp. 106-109, paras. 6-15

III. The Facts Behind the Impugned Cross-Examination

8. Mr. Nedelcu was charged with dangerous driving. Following the close of the Crown's case, he likely felt he had no choice but to provide some kind of explanation for his driving to rebut the almost inevitable inference that it was a "marked departure" from the standard of care a reasonable person would show in the circumstances. So he testified in his own defence. In doing so, he testified in a completely different way than he had at his examination for discovery just over a year earlier.

R. v. Hundal, [1993] 1 S.C.R. 867

R. v. Beatty, [2008] 1 S.C.R. 49

9. At his examination for discovery, Mr. Nedelcu testified that he had no memory of the time leading up to the accident at around 6:30 p.m., the accident itself, or the time after. His testimony about his missing memory is captured in the following passage of transcript from his examination for discovery:

A. ...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 ... remember when I was putting my tools away. I don't remember when we're drinking after.

Q. ... 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. ... 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....

Q. And so you have no memory whatsoever between 5 o'clock p.m. on July 30th and 11 o'clock the next morning?

A. Correct.

Evidence in Civil Proceedings, Appellant's Record, Vol. I, p. 99, l. 6. - p. 100, l. 17

10. Just over 14 months later, while testifying at his criminal trial, Mr. Nedelcu's evidence changed substantially. During his trial he gave a second-by-second account of the events leading up to the accident and how it occurred. He testified to the following:

- Mr. Perdon approached him "very close to 6:25" and asked for a ride.
- He offered Mr. Perdon the helmet, but it was refused because Mr. Perdon said it did not fit his head.
- Mr. Perdon then got onto the motorcycle and placed his hands around Mr. Nedelcu's waist. He told Mr. Perdon where to place his feet.
- He described the path that he took on the motorcycle and testified, in some detail, about the speeds he drove as he navigated that path around the building at Brampton Brick.
- He described the gears he was in at different points on the path and where he stopped to do a three point turn.

- He then said that Mr. Perdon moved his hand from his waist to his shoulder and, from there, because of Mr. Perdon's actions, things started to unfold badly. Note the minute detail in the following passage, approaching 2.5 years following the crash and over one-year following his examination for discovery where he could not remember a thing:

he have his right hand on my shoulder, he was pulling my helmet and my shoulder and that mean he was backing up too much. So he was pushing backwards. So I ... release the acceleration. The motorcycle starting slowing down pretty fast, starting slowing down, decelerating and in that moment, Vince was - he come in my back but because he have the hand, I think he doesn't expect ... starting pushing me on the left side. ... I don't have enough speed, the motorcycle start balancing to, leaning towards left side. So to recover ... I accelerate again. I just give like a short acceleration so I recover the motorcycle. And after that we get too close to the end where we wanted to make the left turn. So I slow down. I push the brake. ... I push only the back brake and ... the motorcycle start leaning again to the left side because ... Vince was starting pushing me left side. I release the brake so I can control again the motorcycle.

Evidence in Criminal Proceedings, Appellant's Record, Vol. II, p. 58, l. 18 - p. 60, l. 20

11. Mr. Nedelcu testified that, despite his best efforts, he was unable to overcome his passenger's interference with his driving and the accident occurred. Each effort to maintain control of his bike was recounted down to the smallest detail. The trial judge summarized his evidence as follows:

At trial, Mr. Nedelcu gave lengthy and detailed evidence about his day at work, his preparation for the ride with Mr. Perdon as his passenger, and a second-by-second account of the entire trip up and down and around the parking lot. This ride culminated with his losing control of the bike, the bike toppling over and skidding into the curb, at which point he and Mr. Perdon flew into the air. His chronology included estimates of speed, the manoeuvres he took to try to control the bike and the exact points at which he applied the brakes. His description of these events, which took no more than five minutes of actual time, consumed approximately 34 pages of transcript of his examination-in-chief.

Ruling on s. 13 of the *Charter*, Appellant's Record, Vol. I, p. 7, para. 11

12. In cross-examination, Mr. Nedelcu was asked what his memory was like relating to the day of the accident. He confirmed: "I have a recollection about 90, 95 percent". That was about 90-95 percent more memory than he testified to having at his examination for discovery.

Evidence in Criminal Proceedings, Appellant's Record, Vol. II, p. 215, ll. 20-23

13. The trial Crown received the transcript of the examination for discovery after Mr. Nedelcu had testified in chief and only at the commencement of the cross-examination, after the Crown was already "on [her] feet". The record is silent as to who gave the transcript to the Crown or how that came to be. There is reference in the record to the fact that "civil lawyers" had been present in the courtroom throughout the preliminary inquiry and trial and Mr. Nedelcu acknowledged during cross-examination that he was aware that "civil lawyers" had been present in the courtroom throughout. In submissions the Crown said that while she was aware that there had been ongoing civil proceedings, until the cross-examination had started, she had no knowledge of "what was going on with it" or "what was said at it for sure I didn't know any details". That was discovered only after the cross-examination commenced.

Submissions, Appellant's Record, Vol. II, p. 216, ll. 2-12, p. 219, ll. 14-17; Vol. III, pp. 12, 73-74

14. The Crown sought leave of the court to cross-examine on the transcript of the examination for discovery. A *voir dire* ensued and she was ultimately permitted to do so.

IV. Ruling of the Trial Court

15. In a thorough 26-page pre-*Juman* ruling, Justice O'Connor determined that while evidence from a civil examination for discovery is compelled, it can be used in cross-examination for credibility purposes. This result was informed by his conclusion that this Court, in *Henry*, while focusing on compulsion as the key factor for consideration under s.13 of the *Charter*, only precluded subsequent use of compelled evidence where there had been a bargain or "*quid pro quo*" with the state. Interpreting what Justice Binnie said on behalf of this unanimous Court in *Henry*, the trial judge held:

Justice Binnie stressed the need for a consistent and purposeful analysis of s.13 to avoid the earlier interpretative complications that accompanied the protection against self-incrimination. He said that s.13 must be analyzed purposefully, always within the context of the *quid pro quo* - circumstances where the State offers subsequent use immunity to an accused in exchange for evidence directly compelled by the State....

Ruling on s. 13 of the *Charter*, Appellant's Record, Vol. I, p. 14, para. 25

16. Justice O'Connor concluded that no *quid pro quo* exists where the Crown attempts to use evidence from an examination for discovery, because the Crown played no part in the evolution of that testimony. As he said:

Situations that do not meet the *quid pro quo* rationale of compulsion would be inconsistent with the purpose and character of the prior compelled proceeding protected by *Henry*. The fact-gathering exercise, although statutorily compelled, lacks the State-compelled incriminatory features discussed in that case.

Thus, in my view, s.13 of the *Charter* does not protect Mr. Nedelcu from the use of his discovery testimony to impeach his credibility. No bargain or *quid pro quo* with the State exists. He cannot now argue that he gave evidence under compulsion that assisted the Crown to further the ends of justice, thereby earning him protection against the use of that evidence contrary to his interests. On the contrary, he gave his discovery evidence to further his own private interests in a civil action against him, a proceeding in which the State was not involved, nor has any interest in the outcome.

Ruling on s. 13 of the *Charter*, Appellant's Record, Vol. I, p. 15, paras. 26-27
R. v. W.(D.), [1991] 1 S.C.R. 742

17. In the end, and upon noting that the trial Crown only wished to challenge Mr. Nedelcu's credibility by cross-examining him on his prior evidence, the trial judge concluded that "significant mischief could ensue" if he denied the Crown's request. He concluded that preventing the Crown from cross-examining on the prior evidence:

would permit a person accused of an offence to give differing versions of the events at his civil and subsequent criminal trial. **With impunity, he could tailor his evidence to suit his needs in each particular proceeding.**

The bold portion of this quote was adopted later by this Court in *Juman*.

Ruling on s. 13 of the *Charter*, Appellant's Record, Vol. I, pp. 24-26, paras. 49-51

18. The accused was cross-examined on his prior inconsistent testimony. His dishonesty was so badly exposed that his own trial counsel admitted in his closing submissions that Mr. Nedelcu's "entire testimony should be considered unreliable". The trial judge remarked that this was a concession of the "obvious". In the context of a *D.W.* analysis, he went on:

When confronted with these remarkably conflicting tales he said only that on the day of his discovery he was tired and upset at his pregnant wife losing their baby. He was unable to

concentrate and just wanted to forget everything. Significantly, he claimed that he had not suffered amnesia as a result of the accident.

Thus, I have no difficulty acceding to his counsel's position that Mr. Nedelcu's entire testimony should be considered unreliable.

Reasons for Judgment, Appellant's Record, Vol. I, pp. 32-33, 34-35, paras. 9, 13-15
Evidence in Criminal Proceedings, Appellant's Record, Vol. III, p. 90, l. 17-p. 96, l. 30

19. Ultimately Mr. Nedelcu was convicted of dangerous driving causing bodily harm. He received a conditional sentence of two years less a day followed by three years' probation and a two year driving prohibition.

V. The Judgment on Appeal

20. The Court of Appeal for Ontario had the benefit of this Court's judgment in *Juman*, released almost a year after the Ruling appealed from. Nonetheless, the Court of Appeal was not swayed by the comments of this Court in *Juman* and concluded that *Henry precludes the use, for any purpose, of all prior compelled evidence*, regardless of the context in which it is given. According to the court below, by virtue of what it perceived to be its compelled status, the evidence gathered in the context of civil discoveries is prohibited from use for any and all purposes in a criminal trial. The *quid pro quo* distinction advanced by the trial judge was rejected:

there is nothing in the s.13 jurisprudence that suggests the protection is only engaged where a witness's prior testimony 'assisted the Crown'. ... In my view, s.13 cannot be so restricted in its reach. The protection in s.13 refers to '[a] witness who testifies in any proceedings [emphasis in original].

Judgment of the Court of Appeal, Appellant's Record, Vol. I, p. 65, para. 31

21. Dealing with *Juman*, the Court of Appeal said that because the principal issue discussed was the scope of the implied undertaking rule, and because this Court did not advert to *Charter* issues in *Juman*, it could not be said to apply to this case. In particular, Justice Armstrong noted:

The Supreme Court in *Juman* was not addressing the *Charter* issue in this case in para. 41 of its reasons for judgment. The decision was about whether and how the Vancouver Police and the Attorney General could obtain the transcript for investigative purposes, not about the use of the transcript in a criminal trial if charges were subsequently laid. There is nothing

in *Juman* which alters the ratio in *Henry* and therefore there is nothing that alters its application in this case.

Judgment of the Court of Appeal, Appellant's Record, Vol. I, p. 70, para. 45

22. The Court of Appeal ordered a new trial. The Crown appeals from this order.

PART II
POINTS IN ISSUE

- Issue #1:** Whether an application of this Court's judgment in *R. v. Henry*, [2005] 3 S.C.R. 609 permits the use of examination for discovery evidence to impeach the credibility of an accused who testifies inconsistently with that evidence at his or her criminal trial?
- Issue #2:** If the answer to Issue #1 is no, then should this Court's judgment in *R. v. Henry*, [2005] 3 S.C.R. 609 be overturned as it relates to impeaching the credibility of an accused through the use of prior inconsistent evidence?

PART III
BRIEF OF ARGUMENT

I. Overview

23. The principle against self-incrimination, a principle of fundamental justice, enjoys an imposing position in Canadian criminal law. While not absolute, it has been described by this Court as the "single most important" organizing principle of our criminal justice system. It finds expression throughout the *Charter*.¹ The principle against self-incrimination is not only a "cornerstone" of our criminal justice system, but a cornerstone of our democratic way of life. Nonetheless, if the court below is correct in its approach to s. 13 of the *Charter*, there will come times when the principle against self-incrimination will do grave harm to the integrity of our justice system.

24. This appeal may be granted on either a narrow or broad basis. The narrow basis involves a strict application of this Court's judgment in *Henry* and, in particular, a finding that Mr. Nedelcu, as a civil litigant, was not *compelled* within the meaning of that term as set out by this Court in *Henry*. While this appeal *could* be resolved on this basis, Ontario urges a broader approach. Whether Mr. Nedelcu was compelled to testify in the context of his civil proceeding or not, the central problem with this case (and others that will follow), is that the distinction between the use of prior evidence for incrimination and impeachment purposes appears to have been collapsed in *Henry*. With this collapse comes constitutional protection for tailoring evidence to suit one's purpose at a criminal trial. It is Ontario's core position that regardless of where or why a person testifies under oath to the tell the truth, s. 13 of the *Charter* should not permit that person to thumb his nose at the oath and secure a potentially unjustified acquittal, simply because everyone but the trier of fact - trier

¹For instance, the principle against self-incrimination is embodied in the right to silence as a principle of fundamental justice under s.7, the right not to be compelled to be a witness against oneself under s. 11(c), and the right not to have "incriminating" evidence given in one proceeding used to "incriminate" in another proceeding under s. 13. It has also been said that the underlying purpose of the right to counsel under s. 10(b) is the protection against self-incrimination. See: *R. v. Jones*, [1994] 2 S.C.R. 229, at paras. 45-47; *R. v. White*, [1999] 2 S.C.R. 417, at para. 44; *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 175; *R. v. Dubois*, [1985] 2 S.C.R. 350, at p. 358.

of credibility - is permitted to know that he lies under oath. Put simply, the cost of such an approach to the integrity of the administration of justice is just too dear.

R. v. White, supra, at paras. 40-44

R. v. P. (M.B.), [1994] 1 S.C.R. 555, at pp. 577-79

R. v. Jones, supra, at paras. 30-33, p. 249

R. v. S.(R.J.), [1995] 1 S.C.R. 451, at paras. 82-83

Canadian Charter of Rights and Freedoms, ss. 7, 10(b), 11(c), and 13

II. The Road to *Henry*

25. As noted in *Henry*, and earlier jurisprudence from this Court, the right against self-incrimination finds its “roots in the general revulsion against the practices of the Star Chamber”. At common law, there existed a privilege against self-incrimination such that one could not be compelled to give answers that could incriminate.

R. v. Henry, supra, at para. 2

26. This common law rule was statutorily abrogated when s. 5 of the *Canada Evidence Act* was enacted.² This provision has been the subject of much discussion in this Court. Parting company with our friends to the south, and their Fifth Amendment right to silence in the face of incrimination, s. 5(1) of the *Canada Evidence Act* requires a witness to answer questions, even in the face of potential self-incrimination or establishing liability in a civil proceeding.³ Where a witness claims s. 5 protection because the answer may “tend to criminate him”, in return for being required to answer the question, s. 5(2) of the *Act* ensures that any answer given “shall not be used or admissible

²Provincial statutes contain the equivalent protections. For easy reference see Sopinka, Lederman, Bryant, Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: Lexis Nexis, 2009), at §8.192, footnote 555.

³As noted later in this factum, and of significance to the outcome of this appeal, Mr. Nedelcu did not provide incriminating evidence in his examination for discovery. Quite to the contrary, he said that he remembered nothing. In this sense, reaching back to the common law, there would have been nothing for him to assert silence on, and, as such, both s. 5 of the *Act* and s. 13 of the *Charter* are inapplicable in relation to Mr. Nedelcu.

in evidence against him in any criminal trial or other criminal proceeding against him ... other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence”.⁴

R. v. S.(R.J.), *supra*, at paras. 55-70

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 471

Marcoux v. The Queen, [1976] 1 S.C.R. 763, at pp. 768-69

Canada Evidence Act, S.C. 1893, c.31, s. 5

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

27. Section 13 of the *Charter* is a constitutional reflection of s. 5 of the *Canada Evidence Act*. The principal difference between the provisions is that, unlike s. 5, s. 13 *Charter* protection applies automatically and regardless of whether an accused asks for such protection when testifying in the first instance.

R. v. Noël, [2002] 3 S.C.R. 433, at para. 21

28. In the lead-up to *Henry*, this Court penned four notable s. 13 judgments: *Dubois*, *Mannion*, *Kuldip* and *Noël*.⁵ While some inconsistencies had developed along the way, the general organizing approach in these cases was to define the limits of s. 13 protection by the *use* the prosecution was making of the accused’s prior testimony at his or her criminal trial. If the *use* was to impeach credibility, s. 13 of the *Charter* stood down. If the use was to incriminate the accused on the basis of his former evidence, s. 13 loomed large and applied. In *Noël* there was a discussion about the perceived link between impeachment and incrimination, and the possibility that a trier of fact may experience difficulty separating these concepts. This gave rise to a majority *Noël* position that only prior evidence that was “innocuous”, not touching upon the circumstances of the alleged offence, could be used in cross-examination for purposes of impeachment.

⁴As discussed later in this factum, prosecutions for perjury and the giving of contradictory evidence are an inadequate solution for an accused who, for all intents and purposes, uses the principle against self-incrimination as his defence at his criminal trial.

⁵It is important to note that *Dubois* is properly characterized as both a s. 13 and s. 11(c) judgment. The Court determined that where the prosecution used Mr. Dubois’ evidence from his first trial in its case in-chief at his second trial, it was his s. 11(c) right not to be compelled to testify against himself that was infringed.

R. v. Dubois, [1985] 2 S.C.R. 350
R. v. Kuldip, [1990] 3 S.C.R. 618
R. v. Mannion, [1986] 2 S.C.R. 272
R. v. Noël, supra
R. v. Allen, [2003] 1 S.C.R. 223

29. *Henry* provided guidance about the parameters of s. 13 of the *Charter* and grappled with inconsistencies in the s.13 cases that had come before it. On any contextual reading, the Court's pre-*Henry* approach to limiting the reach of s. 13 through the use to be made of earlier evidence, was supplanted in *Henry* by an approach focussed on compulsion.⁶ This Court determined that where an accused had been compelled to testify on a prior occasion, that evidence was cloaked in protection from use at the accused's subsequent criminal trial, including for impeachment purposes. The following passages from *Henry* are apposite:

When s. 5(2) says "the answer so given shall not be used or admissible in evidence", it means not to be used for *any* purpose, including the impeachment of credibility. ...

I conclude that the prior *compelled* evidence should, under s. 13 as under s. 5(2), 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.'

R. v. Henry, supra, at paras. 49-50

30. While *Kuldip* had long drawn a distinction between using an accused's prior evidence to impeach credibility, and using it for its substantive value, Justice Binnie commented that this distinction was difficult for a trier of fact to understand. Justice Binnie made this observation on the basis that the parties to the appeal viewed "with scepticism the idea that the trier of fact can truly isolate the purpose of impeaching credibility from the purpose of incrimination". Thus, while Justice Arbour in *Noël* acknowledged that there were times when the distinction between impeachment and incrimination may be too difficult to draw, the *Henry* court went further. By creating a new

⁶While in the early stages of drafting, s. 13 included reference to compulsion, "[a] witness has the right when compelled to testify not to have ...", this was later removed. See: Robin Elliot, *Interpreting the Charter - Use of the Earlier Versions As An Aid* (1982), Charter Edition U.B.C. L.Rev. 11, at p. 36.

paradigm for s. 13, one focussed on compulsion, the Court did away with the distinction between impeachment and incrimination.

31. Ultimately, it is the undoing of this distinction between impeachment and incrimination that has provided the opportunity to accused, like Mr. Nedelcu, to pursue unjustified acquittals by tailoring their evidence with impunity, secure in the knowledge that the trier of fact will never know. This s. 13 approach will not only lead to unjustified acquittals, but will damage the reputation of justice. This Court recognized this in *Juman* when it adopted the trial judge's comments from this case.

32. While this appeal could be resolved on the narrow basis that Mr. Nedelcu was not compelled in his civil proceeding, at least within the meaning of *Henry* compulsion, Ontario respectfully asks this Court to go further. Resolving this appeal on a narrow basis will ensure that we are back here on the same issue when a person like Mr. Nedelcu, who has been compelled to testify, decides to lie with impunity. In the end, whether this Court decides that Mr. Nedelcu testified voluntarily at his discovery proceeding, or whether he was compelled to testify, it is the appellant's position that this Court should revisit *Henry* as it relates to the fusion of the concepts of incrimination and impeachment for purposes of s. 13 protection.

III. The Narrow Answer: The Meaning of "Compulsion" in *Henry* and Why the Voluntary Accused Is Like the Civil Plaintiff and Defendant

33. The Court's focus on *compulsion* in *Henry* means true compulsion and, as such, just *feeling compelled* is not good enough to bring one within the protection of s.13. So it is that, since *Henry*, an accused who testifies at his first trial is doing so voluntarily, meaning that she can be cross-examined on that evidence in the event of a second trial. Indeed, owing to the *voluntary* status of the evidence from the first trial, it can be used in cross-examination at the second trial for all purposes, including establishing an inference of guilt. This is so regardless of whether the accused has no real meaningful choice but to testify.

34. While an accused can never be legally compelled to testify, there are occasions where, for all intents and purposes, the accused simply has to testify; where the Crown's case cries out for an explanation; where a conviction verges on a forgone conclusion unless the accused takes the stand. On a *Henry* analysis, even an accused who finds herself in these unenviable circumstances testifies *voluntarily* and with s.13 protection nowhere in sight.

R. v. Henry, supra, at paras. 41-50, 59-60

R. v. Cook, [1997] 1 S.C.R. 1113, at para. 39

R. v. Kociuk, [2011] M.J. No. 340 (C.A.), at paras. 54-56

R. v. Pomeroy 2008 ONCA 521, at para. 79

R. v. Tracey 2010 ONCA 297, at para. 4

R. v. Ward 2011 NSCA 78, at para. 70

R. v. Oddleifson 2010 MBCA 44, at para. 26

35. Both the trial judge and the Court of Appeal concluded that Mr. Nedelcu was compelled to testify at his civil discovery proceeding. While at first blush this seems to be the case, when one looks at the issue through a *Henry* lens, it is simply not so. Both subjectively and objectively, Mr. Nedelcu was not compelled to testify.

36. Subjectively, Mr. Nedelcu was not compelled to testify at the discovery proceeding. He testified to this fact at his criminal trial:

Q. You weren't subpoenaed or anything like that because it's civil.

A. Yes.

Q. Yeah. You just voluntarily decided to attend.

A. Yes.

Q. Right. And voluntarily deciding to attend, you just offered your position for your defence. Is that fair?

A. Yes.

In light of this testimony, it is difficult to see how Mr. Nedelcu was deserving of any s. 13 protection. From his perspective, he was not conscripted in any meaningful sense. In his own mind, the principles of self-incrimination were never meaningfully engaged.

Evidence in Criminal Proceedings, Appellant's Record, Vol. II, p. 219, ll. 1-14

37. Similarly, from an objective perspective, Mr. Nedelcu was not compelled in a *Henry* sense of the word. Just like the accused who can choose not to testify and face a near certain conviction,

the defendant in a civil lawsuit can choose not to file a statement of defence and risk having a judgment in default made against him. If he makes this choice, he will avoid coming within the grasp of the procedural rules reviewed below that would, only then, compel his evidence. Only if he makes the voluntary choice to defend the lawsuit, will state compulsion be engaged. This is analogous to the status of an accused person who chooses to defend himself by testifying and, thereby, may be compelled to answer questions in cross-examination.

38. In terms of the plaintiff in a civil matter, she has no s. 13 protection because she *chooses* to launch the lawsuit. Having made the active choice to launch the proceeding, she cannot then complain about rules of procedure that compel her evidence thereafter. In this sense, a plaintiff is no different than an individual charged with a criminal offence who chooses to launch a private prosecution arising out of the same matter. By launching the private prosecution, she may be required to testify at a pre-enquete hearing. In such a situation, her evidence at the pre-enquete can be used for purposes of cross-examination at trial.⁷ It is the choice to proceed or defend civilly that aligns the civil litigant with the same notion of voluntariness that touches a person facing a first degree murder conviction and who, for all practical purposes, must testify or face a life sentence.

Carter v. Connors, [2009] N.B.J. No. 403 (Q.B.) at para. 41

39. After a party to a civil action chooses to proceed or defend, then it is acknowledged that all manner of compulsion is engaged under the *Rules of Civil Procedure*. By way of example, and as a general rule, parties to civil proceedings must attend for examination for discovery and must produce all relevant documents. The *Rules of Civil Procedure* in Ontario require that a party "adverse in interest" to another party present themselves for discovery.⁸ Refusing to accede to an examination, or to answer proper questions, may result in civil consequences, including a dismissal

⁷*R. v. Scully*, [2007] O.J. No. 2837 (Ct. Jus.), at paras. 13-14. See also: *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, *supra*; *R. v. Vasarhelyi*, [2011] O.J. No. 2238 (C.A.); *R. v. Richards*, [2008] O.J. No. 4842 (Sup. Ct.); *R. v. Grinshpun*, 2004 BCCA 579, leave to appeal ref'd [2004] S.C.C.A. No. 579. See also: *Criminal Code of Canada*, s. 507.

⁸It is a question of fact as to who is adverse in interest.

of the party's proceeding or a striking out of the party's defence or the striking of evidence at trial. The *Rules of Civil Procedure* also provide that a person refusing to attend or answer proper questions may be found in civil contempt of court. Pending the civil contempt hearing, a warrant may issue for the arrest of a person against whom contempt is sought. If the person is found in contempt, consequences, including imprisonment, may flow.⁹

Rules of Civil Procedure, R.R.O. 1990, Reg. 194 ("ON"), R. 31.03(1), 34.15(1)(b-c), 34.15(2), 60.11, 60.11(4-5)

Nemni v. BCE Inc. 2011 ONSC 6196 (Mast.)

Waxman v. Waxman 2011 ONSC 4707

Kinch v. Walden 2011 ONSC 2791

Sopinka, Lederman, Bryant, Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: Lexis Nexis, 2009), at §13.74, p. 898

40. As noted by the court below, while the subject of a civil discovery may seek an adjournment or stay of that process, the chances of succeeding are low. This is true even where the subject of discovery is facing criminal charges arising from the same matter. The threshold test is one of "exceptional and extraordinary circumstances". Potential disclosure of one's defence or evidence relevant to the criminal trial, through a civil discovery process, is insufficient on its own to rise to this level. Ontario does not request a change in this jurisprudence.

Stickney v. Trusz (1973), 2 O.R. (2d) 469; aff'd (1974), 17 C.C.C. (3d) 478 (Div. Ct.), (Ont. C.A.); leave ref'd [1974] S.C.R. xii

Juman v. Doucette, *supra*, at para. 20

Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.)

Sopinka, Lederman, Bryant, Fuerst, *The Law of Evidence in Canada*, 3rd ed., *supra*, at §13.57, pp. 890-91

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106

Schreiber v. Canada (A.G.) (2001), 160 C.C.C. (3d) 131 (Ont. C.A.)¹⁰

⁹For assistance, a breakdown of the relevant legislative provisions throughout the country is found at Appendix "A" to this factum.

¹⁰See also: *Canada (A.G.) v. Courchene*, [2006] M.J. No. 497 (Q.B.); *Belanger v. Caughell* (1995), 22 O.R. (3d) 741 (Gen. Div.); *Bour v. Manraj* (1995), 24 O.R. (3d) 279 (Gen. Div.); *Daniels Investment Saskatoon Ltd. v. Houk*, 20110 SKQB 246, at paras. 32-33. *Contra: Italian Centre Shop South Ltd. v. Moreira*, [2011] A.J. No. 83 (Q.B.).

41. Despite these robust powers of compulsion, the plaintiff and defendant to a law suit must make an initial voluntary choice to bring themselves within the grasp of these powers. A plaintiff is not compelled because she exercises a choice to bring a law suit. The defendant is not compelled because she chooses to file a statement of defence. In making these choices, both parties to a law suit voluntarily place themselves within the reach of rules of compulsion that would not otherwise apply. Like the *voluntary* accused testifying because he is facing a Crown case that cries out for an explanation, when Mr. Nedelcu chose to defend his lawsuit, he *voluntarily* stepped into the *Rules of Civil Procedure*.

42. For these reasons, Ontario submits that Mr. Nedelcu was not *compelled* at the discovery process within the *Henry* sense of the word. Accordingly, the Crown was entitled to cross-examine him at his criminal trial on his prior discovery testimony. This is the narrow basis upon which this appeal should be allowed. But, even if this Court concludes that Mr. Nedelcu was compelled at the discovery process, it is submitted that the trial judge was right to permit cross-examination on his earlier evidence for purposes of impeachment. *Henry* should be revisited on this point. Compelled or voluntarily, a person who gives inconsistent evidence under oath should be confronted with that evidence so that a trier of fact can make an informed and accurate assessment of credibility. *Juman* supports this approach.

43. Before addressing *Juman*, a word about the trial judge's approach.

IV. The Trial Judge's Approach

44. The trial judge determined that the application of *Henry* was confined to situations where the evidence sought to be used in cross-examination had been compelled by the state at an earlier criminal proceeding. He relied upon this Court's prior jurisprudence emphasizing that the principle against self-incrimination calls for different things in different contexts.¹¹ The trial judge determined

¹¹Justice O'Connor cited from *R. v. S.(R.J.)*, *supra*, at paras. 101, 144. *R.J.S.* discussed the s.7 right against self-incrimination and pertained to the constitutional interests of a separately indicted co-accused to be compelled by the Crown to testify at the trial of his alleged cohort.

that while the discovery process has an “information-gathering purpose”, the criminal trial has a “public, justice-oriented purpose”. Ultimately, the trial judge concluded that the “fact-gathering discovery exercise, although statutorily compelled, lacks the State-compelled incriminatory features” discussed in *Henry*. He went on:

...s. 13 of the *Charter* does not protect Mr. Nedelcu from the use of his discovery testimony to impeach his credibility. No bargain or *quid pro quo* with the State exists. He cannot now argue that he gave evidence under compulsion that assisted the Crown to further the ends of justice, thereby earning him protection against the use of that evidence contrary to his interests. On the contrary, he gave his discovery evidence to further his own private interests in a civil action against him, a proceeding in which the State was not involved, nor has any interest in the outcome.

Ruling on s. 13 of the *Charter*, Appellant’s Record, Vol. I, pp. 10-15, paras.19-24, 26-27

45. While this Court may decide to resolve the appeal on this basis, the appellant finds it somewhat difficult to reconcile with the articulation of the *quid pro quo* in *Noël* and *Henry*. These judgments hold that the *quid pro quo* is a statutory (s. 5 of the *Canada Evidence Act*) and constitutional (s. 13 of the *Charter*) bargain between the state and person compelled to give incriminating evidence, pursuant to which the person has a right not to have that evidence used to incriminate her at a subsequent criminal trial. The following passage from *Noël* demonstrates the meaning of the *quid pro quo*:

Like the statutory protection [s.5 *Canada Evidence Act*], the constitutional one [s.13 *Charter*] 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. ...*

Under the regime of the *Canada Evidence Act*, and now also under the *Charter*, a different bargain is struck. When a witness provides evidence in any proceeding, whether voluntarily or under legal compulsion, he or she cannot refuse to answer a question that may tend to incriminate the witness, but is offered protection against the subsequent use of that evidence.¹² The question before us is the extent of that protection. *To answer that question, it is important to remember its root in the quid pro quo. The witness, now accused, gave something in exchange for the protection.* [emphasis added]

¹² Interestingly, Mr. Nedelcu said nothing incriminating because he “remembered” nothing.

R. v. Noël, supra, at paras. 21-22, 32

R. v. Henry, supra, at paras. 22, 33, 36, 49-51, 59

46. It is difficult to say that the *quid pro quo* discussed in *Noël*, and adopted in *Henry*, is grounded in anything other than the legislative abrogation of the right to silence in the face of potential incrimination. While the trial judge arrived at the correct result below, he did so by reasoning that evidence is only protected from future use where it has been compelled *by the state* for a “public, justice-oriented purpose”, rather than an “information-gathering purpose”.

47. The trial judge’s reasoning could lead to anomalous results. For example, if the Crown (relying on *R.J.S.*¹³) compelled an accused to testify at proceedings involving his separately indicted co-accused, the accused would be protected against the use of his testimony for purpose of impeachment at his later trial. However, another separately indicted co-accused, who is compelled by the defence, would be left with no protection. The trial judge’s reasoning would also leave anyone compelled to testify by any party or body, outside of criminal proceedings, without s. 13 protection for purposes of impeachment.¹⁴ It is somewhat difficult to settle on why these distinctions should be drawn.

48. The appellant agrees with the trial judge that the *quid pro quo* is critical to the outcome of this appeal, but the appellant approaches it from a different perspective. There are at least two reasons that the *quid pro quo* does not apply to Mr. Nedelcu. First, what is significant about the *quid pro quo* is that it offers protection “against the subsequent use of that evidence against the witness *in exchange for his or her full and frank testimony*”. The whole point of the Canadian tradition of requiring a person to testify in exchange for protection against incrimination, is to encourage the receipt of full, frank, and honest evidence. The problem is that while the *quid pro quo* may

¹³In *R. v. R.J.S.*, *supra*, at para. 324, Justices Sopinka and McLachlin, as she then was, specifically adverted to the ability to impeach a Crown witness, later accused, compelled to testify in these circumstances.

¹⁴Sopinka, Lederman, Bryant, Fuerst, *The Law of Evidence in Canada*, 3rd ed., *supra*, at pp. 506-507.

encourage honesty, the *Henry* interpretation of the rule permits dishonesty for those so inclined. The very foundation of the *quid pro quo* falls apart when the bargain is broken. Mr. Nedelcu broke the statutory and constitutional bargain here when he testified differently at the two different proceedings. Why would s. 13 of the *Charter*, or, for that matter, s. 5 of the *Canada Evidence Act* protect him from impeachment in circumstances where there is clear evidence that he has lied under oath?

49. Second, the *quid pro quo*, both under s. 5 of the *Canada Evidence Act* and s. 13 of the *Charter*, is all about protecting against the subsequent use of conscripted, incriminating testimony. Mr. Nedelcu neither considered himself conscripted nor gave incriminating testimony. The *quid pro quo* was not engaged.

50. *Juman* supports this reasoning.

V. *Henry Meets Juman*

51. In *Juman* this Court was asked to determine the scope of the implied undertaking rule. In particular, the Court considered when the implied undertaking rule should give way to a higher public interest than the one protected by keeping civil discovery proceedings cloaked in confidentiality. It is widely recognized, and not disputed by the appellant, that confidentiality encourages an open, complete, and candid discovery process. Accordingly, this Court determined that the party requesting access to discovery materials should "demonstrate a superior public interest in disclosure", and the undertaking should only be set aside in "exceptional circumstances". The Court noted that weighing heavily in the balance, in determining whether the implied undertaking should be set aside, is the right not to incriminate oneself.

Juman v. Doucette, *supra*, at paras. 23-27, 32, 38

Kitchenham v. AXA Insurance Canada, 2008 ONCA 877, at paras. 18-19, 28-32

Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.)

Carter v. Connors, [2009] N.B.J. No. 403 (Q.B.), at paras. 21-23

Seely v. Corrier, [2009] N.B.J. No. 6 (C.A.), at paras. 23-25

52. The Court provided examples of where such "exceptional circumstances" may arise. Justice Binnie discussed the need to address public safety concerns,¹⁵ statutory exceptions, the "'crimes' exception", and "*impeaching inconsistent testimony* [emphasis added]". It is this last "exceptional circumstance" that is of critical importance to this appeal and demonstrates this Court's commitment to ensuring a credible justice system. The full text of the passage reads as follows:

Impeaching Inconsistent Testimony

Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment. In provinces where the implied undertaking rule has been codified, there is a specific provision that the undertaking "does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding": see Manitoba r. 30.1(6), Ontario r. 30.1.01(6), Prince Edward Island r. 30.1.01(6). *While statutory, this provision, in my view, also reflects the general common law in Canada. An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice: R. v. Henry, (citation omitted). 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) [emphasis added].*

Juman v. Doucette, supra, at paras. 41, 39-50

Kitchenham v. AXA Insurance Canada, supra, at paras. 52-55

Rules of Civil Procedure, (ON) Rules 30.1.01(6)

53. Even if examination for discovery evidence is compelled, *Juman* plainly suggests that it can be used to impeach credibility at a subsequent criminal proceeding. In the above passage, *Henry* is cited for the proposition that a witness should not be permitted "to play games with the administration of justice". *The ruling from the trial court in this very case*, an obviously criminal case, was cited with approval for the proposition that an "accused" person should not be permitted to "tailor his evidence" with impunity. While the court below is correct that *Juman* was not a *Charter* case and did not specifically deal with s. 13 issues,¹⁶ it simply cannot be that this Court did not have

¹⁵*Smith v. Jones*, [1999] 1 S.C.R. 455

¹⁶*R. v. Juman, supra*, at para. 5

s. 13 in mind when it recognized the “superior public interest” of allowing impeachment on discovery evidence. It relies on *Henry*, a s. 13 case; it relies on the trial ruling in this case, a s. 13 case; and it talks about impeaching the credibility of an “accused”. To say that the Court did not have s. 13 in mind when it wrote *Juman*, is tantamount to saying that this Court would find a “superior public interest” in allowing the implied undertaking rule to lift in order to impeach “inconsistent testimony”, but then preclude the Crown from impeaching inconsistent testimony. That cannot be right.

54. *Juman* is a practical recognition by this Court that impeaching an accused on inconsistent evidence is necessary to the integrity of the justice system. If impeachment is not available, then the potential for mischief abounds. Consider the accused who compels his buddy to take the “rap” at his murder trial. Why wouldn’t a friend do so? By virtue of his compulsion, he can testify to anything and sleep well at night, knowing that he will not be held to account for his testimony when he testifies at his trial for the same murder, after his friend has been acquitted. He may face a possible conviction for perjury or the giving of contradictory evidence, but that would be a bargain when contrasted with two acquittals for first degree murder.

R. v. Nguyen, [2009] A.J. No. 95 (C.A.)

55. Compounding the problem is the fact that, for the most part, and as a general rule, the Crown cannot even probe credibility by suggesting that the witness *qua* accused may be lying because of his knowledge of the protection s. 13 of the *Charter* will offer.

R. v. Jabarianha, [2001] 3 S.C.R. 430, at paras. 18-22
R. v. Nguyen, *supra*

56. All of this is to say, and with the greatest of respect, if *Henry* leads us down this path, we need to change paths. This case calls out for such a change. If s. 13 of the *Charter*, as currently interpreted by *Henry*, protects Mr. Nedelcu from being impeached on his prior evidence, there is something wrong. 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.¹⁷ 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. This Court's judgment in *Juman* is the beginning of that change. Ontario invites this Court to amplify upon its judgment in *Juman*.

57. Paragraph 41 of *Juman* is a powerful passage that encapsulates why Ontario has brought this appeal. The proper administration of justice demands that the *Charter* not be available as a tool for an accused to adapt his evidence with impunity; to allow an accused to serve his interests by violating his oath to speak the truth, secure in the knowledge that the trier of fact will never be the wiser. It is submitted that this is exactly what Mr. Nedelcu did and why the trial judge ruled in the way he did.

VI. Reconsidering *Henry*: The Line Between Incrimination and Impeachment

a) Overview

58. The focus in *Henry* on compulsion, and the seeming collapse of the distinction between impeachment and incrimination, lies at the core of why this case is here. While the appellant appreciates that the collapse of this distinction arose, in part, out of a concession of the parties to the appeal in *Henry*, with great respect, this distinction should be resurrected. The distinction is well recognized in our law, as is our collective faith in the intelligence and conscientiousness of Canadian juries. Moreover, the truth seeking function of the criminal trial is seriously undermined by abandoning this distinction. By restoring this long standing distinction, s. 13 of the *Charter* can be respected and the reputation of justice maintained. As noted by Dale Ives in *R. v. Henry: A welcome retreat from an overly broad interpretation of s. 13 of the Canadian Charter and Rights and Freedoms*:

Henry broadens the protection afforded to a compellable witness by granting the witness automatic and complete immunity against any subsequent use of his or her testimony at a later proceeding. This aspect of *Henry* will not please those who believe that a witness

¹⁷In *R. v. Noël, supra*, Justice Arbour held that s. 13 only applies if, but for s. 5(1) of the *Canada Evidence Act*, an accused could have refused to testify at common law. Here, Mr. Nedelcu could not have refused to testify because he really had no evidence to give at the civil discovery.

should not be able to change his or her prior sworn testimony without fear of contradiction and that juries are capable of distinguishing between the use of testimony to incriminate and its use to impeach credibility. A more preferable result, one which would have better promoted the search for the truth, would have been the overruling of *Noël* and a return to a straightforward application of *Kuldip* in relation to compellable witnesses, particularly since neither the language of s. 13 nor a purposive approach analysis mandates a different result.¹⁸

Ontario adopts these comments.

b) *Successful Impeachment Is Not Incriminating*

59. The successful impeachment of a witness' evidence is not evidence of his or her guilt. Indeed, it is not incriminating. All impeachment can do is neutralize a witness' evidence. This includes the accused. This Court has recognized this on many prior occasions, but never clearer than in *Calder*. As Justice Sopinka held for the majority of this Court in *Calder*:

The distinction draws a fine line. When a statement is admitted, generally it is available as positive evidence of innocence or guilt. The statement is evidence of the truth of its contents which may be incriminating. Moreover, the mere fact that a false exculpatory statement was made may be evidence of consciousness of guilt. *On the other hand, a statement whose use is limited to a challenge of credibility can serve only to impeach the testimony of the witness. The most that can be achieved is the nullification of the witness's evidence. No matter how complete the impeachment, it does not constitute proof upon which the Crown can rely to establish its case beyond a reasonable doubt, although it may result in non-acceptance of a defence set up by the accused.* [emphasis added]

R. v. Calder, [1996] 1 S.C.R. 660, at para. 24

60. The line between impeachment and incrimination is “firmly rooted in our law” and one that we ask triers of fact to draw all of the time. As this Court noted in *Calder*, it is a distinction that is “well entrenched in the law of evidence” and has existed for years. In *Jabarianha*, this Court stated as a fact that “self-incriminatory evidence cannot be used to establish guilt” but that it can be used to “test the witness’s credibility including that of the accused should he or she testify”. In *Kuldip*, this Court held that while the distinction may be difficult, it was one that triers of fact are capable of applying and that well serves the interests of justice. As Chief Justice Lamer held:

¹⁸(2006), 10 Int’l J. Evidence & Proof 212 at p. 219.

This seems an appropriate time at which to mention that I share Martin J.A.'s concern that it is sometimes 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. A trial judge will have to be very clear in his or her instructions to the jury when setting out the uses to which previous testimony can be put and the uses to which such testimony must not be put. While such a distinction may be somewhat troublesome to the jury, it is my view that with the benefit of clear instructions from the trial judge the jury will not be unduly burdened with this distinction. These instructions should, in many ways, be reminiscent of those which are routinely given with respect to the use to which an accused's criminal record may be put. A trial necessarily involves evidentiary questions which are sometimes complex in nature. ...

R. v. Kuldip, *supra*, at paras. 28-30

R. v. Jabarianha, *supra*, at para. 20

R. v. Crawford, [1995] 1 S.C.R. 858 at para. 37

Deacon v. The King, [1947] S.C.R. 531

McInroy v. The Queen, [1979] 1 S.C.R. 588

R. v. Toten, (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at p. 23

c) *Putting Our Faith in Triers of Fact*

61. The difficulty with the judgment below is that it strikes at the heart of our justice system. The foundation upon which our system rests is that triers of fact, whether they are judges or jurors, can and will follow the law. They sometimes make difficult distinctions between the uses for which evidence can and cannot be put. If we cast away our confidence that triers of fact will follow instructions, where does that leave our system of justice? What can we have confidence in?

62. This Court in *Corbett* recognized the intelligence and conscientiousness of juries and said that they are capable of following instructions about the use of evidence. One of the examples given in *Corbett* was *Mannion*, where the Court had affirmed that prior inconsistent statements by witnesses were relevant only to the “credibility of the witness and not as proof of the facts given in the prior statement and the jury must be so told”. As Justice Rothstein recently wrote in *White*:

Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence. I agree with the view expressed by Dickson C.J., in *R. v. Corbett*, [citation omitted] that ‘it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the

entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense.

R. v. Corbett, [1988] 1 S.C.R. 670 at pp. 692, 695-96

R. v. White, [2011] 1 S.C.R. 433 at para. 56

R. v. B.(F.F.), [1993] 1 S.C.R. 697 at p. 25

R. v. Suzack (2000), 141 C.C.C. (3d) 449; leave to appeal ref'd [2000] S.C.C.A. No. 583

63. In *D.W.*, the beacon that guides all triers of fact, Justice Cory noted that today's jurors are "intelligent and conscientious" and "anxious to perform their duties as jurors in the best manner possible". To this end, this Court placed confidence in their ability to listen to instructions and observed that they "are not likely to be forgetful of instructions".

R. v. W.(D.), *supra*, at pp. 760-62

64. Not only do we ask triers of fact to distinguish between impeachment and incrimination all of the time, but we ask them to engage in far more difficult exercises in applying facts to law:

Cross-examining Accused in Joint Trials on Pre-Trial Silence

Perhaps some of the most difficult jury instructions come in the context of joint trials where the co-accuseds' interests are not *ad idem*. By way of example, one accused may testify against another, and that other accused may cross-examine the witness *qua* accused on his pre-trial silence. In these circumstances, a jury must be instructed that the pre-trial silence can be used to assess the witness *qua* accused's credibility, but not on the issue of his innocence or guilt. If the jury concludes that the failure to make a pre-trial statement does not reflect on the credibility of the accused, then it must not be given any weight.

R. v. Crawford, *supra*

Crown Leading Out-of-Court Statement of Accused in a Joint Trial

Where the Crown leads the out-of-court statement of one accused in a joint trial, the jury must be told that the statement may only be used in considering the Crown's case against the maker of the statement and not against any of the other accused.

R. v. Olah (1997), 115 C.C.C. (3d) 389 (Ont. C.A.), leave ref'd [1997] S.C.C.A. 549

Propensity Evidence in a Joint Trial

Sometimes an accused will point to his co-accused as the person who committed the crime. In doing so, he may assert that the co-accused has a propensity to have committed the

offence. In these circumstances, the jury must be instructed that they can use the evidence of prior disreputable conduct of the one accused for purposes of determining whether the other accused tendering the evidence committed the offence, but must disregard it in relation to whether the accused it relates to committed the offence.

R. v. Suzack, supra

Criminal Record of Accused and Other Forms of Disreputable Conduct

Where an accused's criminal record is put to him in cross-examination, the jury must be instructed not to use the record for any purpose beyond assessing the accused's credibility. The jury must be specifically instructed that they not use the record or nature of the prior offences to help decide if the accused is the sort of person who would have committed the offence charged.

R. v. Corbett, supra

65. Surely, a jury that is capable of understanding and following these complex instructions is also capable of applying the well-worn and comparatively simple distinction between incrimination and impeachment.

d) *The Truth Seeking Function of the Criminal Trial*

66. The importance of the truth seeking function of the criminal trial cannot be overstated. Of course, the truth cannot be "pursued at all costs, by all means", but to approach the truth as nothing more than a laudable goal in a criminal trial, is to vastly underestimate its value. So important is the truth seeking function of the criminal trial, that it has been recognized as a principle of fundamental justice that will sometimes conflict with the principle against self-incrimination. Indeed, as noted in *R.J.S.*, the principle against self-incrimination is sometimes in "dynamic tension with an opposing principle of fundamental justice. That is the principle that suggests that, in a search for the truth, relevant evidence should be available to the trier of fact."

R. v. S.(R.J.) supra, at paras. 108, 155-56

R. v. White, supra, at para. 48

R. v. Noël, supra, at para. 58

R. v. Mills, [1999] 3 S.C.R. 668, at paras. 73-76

R. v. Jarvis, [2002] 3 S.C.R. 757, at para. 68

U.S. v. Beechum, 582 F.2d 898 (5th Cir., 1978)

U.S. v. Havens, 446 U.S. 620; 100 S.Ct 1912 (1980)

67. There is a strong societal interest in taking aim at the truth in a criminal trial. In the past almost 20 years, this Court has repeatedly reinforced this concept. From procedural rules related to witnesses testifying behind screens, or giving their evidence by videotape, to admissibility rules like the principled approach to hearsay, this Court has reinforced the essential goal of truth seeking in criminal trials.

R. v. Levogiannis, [1993] 4 S.C.R. 475, at paras. 13, 19, 22-24

R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 603

R. v. L.(D.O.), [1993] 4 S.C.R. 419, at paras. 46-50

R. v. Khelawon, [2006] 2 S.C.R. 787

e) Cross-Examination and Credibility: Giving Truth a Chance

68. In *Henry*, this Court recognized that it was a “long stretch from the important purpose served by a right designed to protect against compelled self-incrimination” to the proposition that “an accused can volunteer one story at his or her first trial, have it rejected by the jury” and then, after securing a new trial, “volunteer a different and contradictory story to a jury differently constituted in the hope of a better result because the second jury is kept in the dark about the inconsistencies”. The appellant adopts this comment, but says that it should go one step further. Whether an accused testifies voluntarily or through compulsion in the first proceeding, it should be a “long stretch” from *Charter* protection to allow the accused to testify differently at two different proceedings and leave the trier of fact oblivious to the inconsistencies. While s. 13 of the *Charter* is designed to protect against incrimination, that principle does not come into play when prior evidence is used only for impeachment.

69. As noted by Justice McLachlin (as she then was) in dissent in *Garofoli*, but not on this point, cross-examination is a “powerful engine for ferreting out the truth”. Wigmore has described cross-examination as “beyond any doubt the greatest legal engine ever invented for the discovery of truth”. One of the key aspects of every cross-examination is the ability to probe the credibility of witnesses, including the accused who, when he chooses to testify, makes his veracity a triable issue. As Justices Major and Fish observed in *Lyttle*:

Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At

times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. [emphasis in original]

R. v. Lyttle, [2004] 1 S.C.R. 193 at para. 1

R. v. Garofoli, [1990] 2 S.C.R. 1421, at pp. 1485-86

Innisfil (Township) v. Vespra (Township), [1981] 2 S.C.R. 145

Wigmore on Evidence (Chadbourne Rev. 1974) vol. 5, p. 32, para. 1367

R. v. Osolin, [1993] 4 S.C.R. 595 at p. 663

70. As noted by Justice Binnie in *Henry*, cross-examination lies at the core of a fair trial and catching a witness in a self-contradiction is "one of the staples of effective cross-examination". Yet, if there is a rule that says that an accused cannot be impeached based on prior compelled testimony, then he can lie with impunity. All anyone is asking is that when he takes an oath, he honour that oath. And if he takes the oath twice, he honour it twice. And if he fails to do so, as revealed through inconsistent accounts, his credibility be assessed on the basis of that failure.

R. v. Henry, *supra*, at para. 3¹⁹

71. Mr. Nedelcu's case demonstrates this point. Imagine if jurors had tried Mr. Nedelcu and the Crown was precluded from cross-examining him on his civil discovery evidence. His trial evidence, standing on its own, could have raised a false doubt and he could have been unjustly acquitted. Imagine those same jurors, if they had acquitted Mr. Nedelcu (moved by his version of events), reading their Saturday morning paper. They may discover in that paper what Mr. Nedelcu had testified to on the earlier occasion, when he was also bound by an oath to tell the truth. What would those twelve people, with their "healthy measure of common sense", think? We can say with confidence that they would have wanted to know about the earlier sworn evidence before they placed their confidence in Mr. Nedelcu's trial evidence.

R. v. Corbett, [1988] 1 S.C.R. 670, at pp. 692

¹⁹See also: *R. v. Rockey*, [1996] 3 S.C.R. 829, at p. 850; *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 619; *R. v. Sylvester* (1997), 114 C.C.C. (3d) 364 (Ont. C.A.), at p. 372; *R. v. Mannion*, *supra*, at pp. 277-78; *R. v. Lyttle*, *supra*, at para. 41-42; *R. v. Anandmalik*, (1984) 6 O.A.C. 143, at p. 144; *R. v. Wallick* (1990), 69 Man. R. (2d) 310 (C.A.), at p. 311; *R. v. Fanjoy*, [1985] 2 S.C.R. 233, at p. 239.

72. The United States Supreme Court has recognized the importance of permitting cross-examinations that probe the credibility of the accused. This is why prosecutors can cross-examine accused persons on statements given in breach of their *Miranda*²⁰ rights for purposes of impeachment. As noted by Chief Justice Burger in *Harris*:

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. ... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

Chief Justice Burger went on to make the important observation, critical to this appeal, that the “shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from confrontation with prior inconsistent utterances”. As Justice Scalia noted in *Ventris*:

Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of the ‘traditional truth-testing devices of the adversary process’, ... is a high price to pay for vindication for the right to counsel at the prior stage.

Harris v. New York, 401 U.S. 222 (1971), at pp. 224-226

Kansas v. Ventris, 556 U.S. 586; 129 S.Ct. 1841 (2009), at pp. 1845-47

Oregon v. Hass, 420 U.S. 714 (1975), at pp. 722-23

Brown v. U.S., 356 U.S. 148 (1957), at pp. 154-56

73. This approach is consistent with this Court’s comments in *Calder*, where it was determined that there may be *limited circumstances* where an accused’s statement, taken pursuant to a *Charter* breach, may be ruled inadmissible, but still used for purposes of impeaching the accused’s credibility. Of course, *Calder* was decided long before *Grant*, and at a time when the s.24(2) rule, for all intents and purposes, led to automatic exclusion of statements taken in breach of the *Charter*.²¹ Importantly, Justice McLachlin, as she then was, in dissent, made the following comments applicable to this appeal:

The concern for getting at the truth may weigh against admitting a statement tendered as substantive evidence where there is fear that the *Charter* violation may have rendered it

²⁰*Miranda v. Arizona*, 384 U.S. 436 (1966)

²¹It is submitted that today, with the ability in limited circumstances to introduce statements taken pursuant to a *Charter* breach for the purposes of their substantive value, the *Calder* approach to impeachment may be extended.

unreliable. The same concern for getting at the truth may weigh in favour of using the same statement in cross-examination to test the accused's credibility and uncover any inaccuracies or fabrications in his evidence in chief. From the perspective of the individual case, it is important to permit the jury to fairly judge the truthfulness of the witness. From the perspective of the trial process as a whole, it is equally important not to permit witnesses to take the stand and fabricate lies free from the fear that they may be cross-examined on earlier contradictory statements.

R. v. Calder, *supra*, at paras. 35, 44-45

74. In *Grant*, this Court recently acknowledged that while statements gathered pursuant to a *Charter* breach are presumptively inadmissible, there will be times when the admission of such statements will not bring the administration of justice into disrepute. As such, in certain limited circumstances, self-incriminating statements may be admitted for the truth of their contents. It is submitted that this approach is difficult to reconcile with the *Henry* approach. After all, how can it be that a prior statement, taken pursuant to a *Charter* breach, can be admissible for the truth of its contents, but testimony taken from an accused on a prior occasion, is not useable to impeach credibility? The inconsistency in this approach is clear on its face.

R. v. Grant, [2009] 2 S.C.R. 353, at paras. 89-98

R. v. Harrison, [2009] 2 S.C.R. 494

VII. Why the Offences of Perjury and the Giving of Contradictory Evidence Are Not Good Enough

75. Both s. 13 of the *Charter* and s. 5(2) of the *Canada Evidence Act* permit prior incriminating evidence to be used in prosecutions for perjury or the giving of contradictory evidence.²² While some may say that a prosecution for these offences is the answer to the injustice of allowing an accused to shield himself from impeachment on his prior compelled testimony, it is, in fact, an inadequate remedy for an acquittal. This is particularly true in a serious case where, but for the brazen lies of the accused (kept secret from the trier of fact), such a result may not (and in some cases, likely would not) have flowed.

²²Section 5(2) of the *Canada Evidence Act* was amended in 1997 to include the offence of giving contradictory evidence. Through this amendment, s. 5(2) was synchronized with s. 13 of the *Charter*.

76. The offences of perjury (s. 131) and giving inconsistent evidence (s. 136) are crimes against the administration of justice. The seriousness with which they are approached is reflected in their strict indictable status and their maximum penalties of fourteen years imprisonment. In addition, the s. 136 contradictory evidence offence is one that requires the consent of the Attorney General. They are offences that stand separate and apart from the crime for which the accused was originally charged and in which he perjured himself or gave contradictory evidence.²³

R. v. Gushue, [1980] 1 S.C.R. 798

77. These offences must be kept analytically distinct from the original trial where the accused is said to have committed the perjury or to have given contradictory evidence. A proceeding for perjury may well redress harm done to the administration of justice when a person takes an oath and then lies, but it will never redress the harm done by an unjustified acquittal that may result from that lie. It is a separate and distinct delict from the original crime and can never be a substitute for a just resolution to the original matter.

78. Section 13 contains reference to “perjury” and the “giving of contradictory evidence” as exceptions to the rule that evidence given cannot be “used to incriminate” for one simple reason: the Crown must *lead that evidence in its case in-chief* when prosecuting for these crimes. Indeed, the prior sworn evidence is the very *actus reus* of the offence. A conviction for perjury or giving contradictory evidence is not a substitute for the potential harm done to a just verdict in the trial where the offence was committed. If it were a substitute, then we would be left in the untenable situation where the offence of perjury could be advanced as a defence at trial. This cannot be right.

R. v. Dubois, *supra*

²³*R. v. Calder*, [1960] S.C.R. 892; *R. v. Wolf*, [1975] 2 S.C.R. 107; *R. v. Brewer* (1921), 34 C.C.C. 341 (Alta. S.C. (App. Div.)); *R. v. Neveu* (2004), 184 C.C.C. (3d) 18 (Que. C.A.); *R. v. Eriksen* (2006), 213 C.C.C. 374 (Y.T.C.A.); *R. v. Wilson* 2011 ONSC 3385; *R. v. Falkenberg* (1973), 13 C.C.C. (2d) 562 (Ont. Co. Ct.), rev’d on other grounds 16 C.C.C. (2d) 525 (C.A.).

VIII. In the End

79. It is respectfully requested that this Court resurrect the ability to challenge the credibility of an accused based on prior inconsistent evidence, regardless of whether the accused has been compelled to testify or not. When a person takes an oath and testifies, he or she is expected to tell the truth. This expectation attaches both to people who are compelled and those who testify voluntarily. Where he or she fails in this expectation, the truth can only shine through if there exists an opportunity to explore the inconsistent accounts. The trier of fact needs to hear this. The trier of fact is capable of hearing this. The integrity of our justice system demands this.

PART IV
SUBMISSIONS ON COSTS

80. The Appellant makes no submissions as to costs.

PART V
ORDER REQUESTED

81. It is respectfully submitted that the appeal should be allowed and the conviction restored.

ALL OF WHICH is respectfully submitted by:

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Federal and Provincial Rules Respecting Civil Examinations for Discovery

Jurisdiction	Who is Discoverable?	Discovery Mandatory?	Consequence of not Providing Discovery
Canada Federal Courts Rules	A party may examine for discovery any adverse party and, with leave of the Court, any person who is not a party to the action. The examination may be conducted orally or in writing. See: Rules 87, 88, 91, 236, 238	Yes. Where a person fails to attend for an examination for discovery or refuses to take an oath or to answer a proper question, the Court may order the person to attend and answer questions. See: Rule 97	If a person refuses to attend an examination for discovery or refuses to take an oath or to answer a proper question, the Court may: • order the person to attend and to answer, • strike out the person's evidence, • dismiss the proceeding or give judgment by default, • order the person to pay costs of the examination, and • may find the person guilty of contempt of court and may subject the person to the Court's power to punish contempt of court, including imprisonment, a fine, and an order for costs. See: Rules 96-98, 100, 466, 472
Alberta Rules Of Court	A party may examine under oath any party who is adverse in interest. See: Rule 5.17(1)	Yes. On application, the Court may order a person who is required to be questioned to attend for questioning at a date, time and place specified by the Court. See: Rule 6.38(1)	If a person does not comply with the Rules or with an order of the Court, the Court may: • set aside any act, application or proceeding brought by the party, • impose costs against the party, and • declare the person to be in civil contempt of Court. A person declared to be in civil contempt of Court is liable to, among other things: • imprisonment, • a fine, • costs, • an order that any claim, action, application or defence of the person be stayed or dismissed, and • an order that a record or evidence is prohibited from being used by the party. See: Rules 1.5, 10.49(1), 10.52(3), 10.53(1)

Jurisdiction	Who is Discoverable?	Discovery Mandatory?	Consequence of not Providing Discovery
British Columbia Supreme Court Civil Rules	Any party who has filed a pleading, petition or response must make himself or herself available for examinations for discovery by the parties who are adverse in interest. The Court may also order the party to respond to interrogatories served by another party. Non-party witnesses may also be examined. See: Rules 1-1, 7-2(1), 7-3, 7-5	Yes. A person to be examined for discovery must attend and submit to the examination if proper procedures have been complied with. A person ordered to respond to interrogatories must provide answers by affidavit. See: Rules 7-2(14), 7-3(4)	If a person does not comply with the Rules, the Court may, among other things, set aside any step taken or document or order made in the proceeding or dismiss the proceeding or strike out the response and pronounce judgment. If a person refuses or neglects to attend an examination for discovery, to answer any questions put to him or her, or to answer interrogatories, the Court may: • if the person is the plaintiff or petitioner, dismiss the proceeding, and • if the person is the defendant, order the proceeding to continue as if there is no response, and • may find the person guilty of contempt of court and may subject the person to the Court's power to punish contempt of court, including imprisonment or a fine. See: Rules 22-7(2), 22-7(5), 22-8
Manitoba Court of Queen's Bench Rules	A party to an action may examine for discovery any party who is adverse in interest and, with leave of the Court, any other person with relevant information to give. The examination may be conducted orally or by interrogatories, or both. See: Rules 31, 35	Yes. A party may be summoned to attend at an examination by Notice of Examination, and a non-party may be subpoenaed. Where a person fails to attend or refuses to take an oath or affirmation, or to answer a proper question, or to submit to interrogatories, the Court may order the person to attend and answer questions or interrogatories. See: Rules 34, 35	If a person refuses to attend an examination for discovery or refuses to take an oath or affirmation or to answer a proper question, or to submit to interrogatories, the Court may: • order the person to attend and to answer, • dismiss the party's proceeding or strike out the party's defence, • strike out all or part of the person's evidence, and • find the person guilty of contempt of court and may subject the person to the Court's power to punish contempt of court, including imprisonment, a fine, and an order for costs. See: Rules 34, 35, 60

Jurisdiction	Who is Discoverable?	Discovery Mandatory?	Consequence of not Providing Discovery
New Brunswick Rules of Court	A party to an action may examine for discovery any party who is adverse in interest and, with leave of the Court, any other person with relevant information to give. The examination may be conducted orally or in writing. See: Rules 32.02, 32.04, 32.10	Yes. A party may be required to attend at an examination for discovery by Notice of Examination, and a non-party may be summoned. A person being examined "shall" answer any proper question relating to an issue in the action. Where a person fails to attend or refuses to be sworn or to answer a proper question, the Court may order the person to attend and answer questions. See: Rules 32.06, 33.03, 33.11, 33.12, 34.04, 34.05	If a person refuses to attend an examination for discovery or refuses to be sworn or to answer a proper question, the Court may: • order the person to attend and to answer, • dismiss the claim or strike out the Statement of Defence, • strike out all or part of the person's evidence, • order costs, and • order that the person be apprehended and detained and brought before the court. See: Rules 33.11, 33.12, 34.04, 34.05
Newfoundland Rules of the Supreme Court	A party may examine for discovery any person. The examination may be conducted orally or by written interrogatories. See: Rules 30.01, 30.04, 31.01	Yes. A person being examined "shall" answer any proper question. Where a person omits to answer or answers insufficiently, the Court may order the person to answer or to answer further, and may give such other directions as are just. See: Rules 30.08, 31.01, 31.04	If a person refuses or neglects to attend for an examination or refuses to be sworn or to answer a proper question, or to answer any interrogatory, the Court may: • order the person to answer, • dismiss the party's proceeding or strike out the party's defence, and • hold the person guilty of contempt and subject the person to the Court's power to punish contempt of court, including imprisonment, a fine, and an order for costs. See: Rules 30.08, 30.14, 31.05, 53.05

Jurisdiction	Who is Discoverable?	Discovery Mandatory?	Consequence of not Providing Discovery
Northwest Territories and Nunavut Rules of the Supreme Court	A party may examine under oath any party who is adverse in interest. The examination may be conducted orally or by written interrogatories. See: Rules 235, 236	Yes. A person may be required to attend at an examination for discovery by Notice of Appointment, and the person "shall" answer any proper question. Where a person fails to answer or answers insufficiently, the Court may order the person to answer. See: Rules 248, 251, 263	If a person fails to attend an examination for discovery or refuses to be sworn or to affirm or to answer proper questions, the Court may find the person in contempt and may, among other things: • imprison the person • fine the person • strike out or stay the action or proceeding or have judgment entered against the person, • prohibit the person from introducing into evidence any designated document, thing or testimony. See: Rules 703, 704, 705
Nova Scotia Civil Procedure Rules	A party to an action may examine for discovery any other party or witness who is not a party. The examination may be conducted orally or by written interrogatories. See: Rules 18.01, 18.04, 18.05, 19.01	Yes. A subpoena may issue requiring a person to attend for examination for discovery, and the person must answer every proper question. See: Rules 18.04, 18.05, 18.13, 18.22, 19.06, 19.08	If a person fails to attend an examination for discovery or refuses to answer a proper question, the Court may find the person in contempt and may, among other things: • exclude evidence from trial, • imprison the person, • order a fine, • sequester the person's assets, and • order that the person abide by other stated penal terms. See: Rules 18.22, 51.03, 89.13
Ontario Rules of Civil Procedure	A party to an action may examine for discovery any party who is adverse in interest and, with leave of the Court, any other person with relevant information to give. The examination may be conducted orally or in writing.	Yes. A party may be required to attend at an examination for discovery by Notice of Examination, and a non-party may be summoned. A person being examined "shall" answer any proper question relating to an issue in the action.	If a person refuses to attend an examination for discovery or refuses to take an oath or affirmation or to answer a proper question, the Court may, among other things: • order the person to attend and to answer, • dismiss the party's proceeding or strike out the party's defence, • strike out all or part of the person's evidence, • order costs, • order that the person may not introduce at the trial the information that was not provided, and

Jurisdiction	Who is Discoverable?	Discovery Mandatory?	Consequence of not Providing Discovery
	See: Rules 31.02, 31.03, 31.10	Where a person fails to attend or refuses to take an oath or affirmation, or to answer a proper question, the Court may order the person to attend and answer questions. See: Rules 31.03, 31.04, 31.06, 34.04, 34.14, 34.15, 35.04	hold the person guilty of contempt and subject the person to the Court's power to punish contempt of court, including imprisonment, a fine, and an order for costs. See: Rules 31.07, 34.14, 34.15, 35.04, 60.11
Prince Edward Island Rules of Civil Procedure	A party to an action may examine for discovery any party who is adverse in interest and, with leave of the Court, any other person with relevant information to give. The examination may be conducted orally or in writing. See: Rules 31.02, 31.03, 31.10	Yes. A party may be required to attend at an examination for discovery by Notice of Examination, and a non-party may be summoned. A person being examined "shall" answer any proper question relating to an issue in the action. Where a person fails to attend or refuses to take an oath or affirmation, or to answer a proper question, the Court may order the person to attend and answer questions. See: Rules 31.03, 31.04, 31.06, 34.04, 34.14, 34.15, 35.04	If a person refuses to attend an examination for discovery or refuses to take an oath or affirmation or to answer a proper question, the Court may: - order the person to attend and to answer, - dismiss the party's proceeding or strike out the party's defence, - strike out all or part of the person's evidence, - order costs, - order that the person may not introduce at the trial the information that was not provided, - hold the person guilty of contempt and subject the person to the Court's power to punish contempt of court, including imprisonment, a fine, and an order for costs. See: Rules 31.07, 34.14, 34.15, 35.04, 60.12

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Quebec Code of Civil Procedure	A party to an action may be summoned to be examined before a judge or clerk the adverse party, other enumerated persons involved in the action, and, with the permission of the court, any other person. See: Rules 397, 398	Yes. Anyone who disobeys any process or order of the court or of a judge thereof, is guilty of contempt of court. See: Rule 50	Anyone found guilty of contempt of court is liable to a fine or to imprisonment, and the period of imprisonment may be repeated until the person obeys the process or order of the court or of a judge thereof. See: Rules 49-53
Saskatchewan Queen's Bench Rules	A party to an action may examine for discovery any party who is adverse in interest and, with leave of the Court, any other person with relevant information to give. See: Rules 222, 222A	Yes. The person to be examined may be served with a subpoena requiring his or her attendance at the examination. See: Rule 228	If a person refuses or neglects to attend an examination for discovery or refuses to be sworn or to answer a lawful question, the Court may: • dismiss the party's action or strike out the party's defence, and • hold the person guilty of contempt and take steps to commit him for contempt. See: Rule 231
Yukon Rules of Court for the Supreme Court of Yukon	A party may examine for discovery any party who is adverse in interest. The examination may be conducted orally or by written interrogatories. See: Rules 27(3), 29(2)	Yes. The person to be examined shall attend and submit to the examination and may be ordered to respond to interrogatories. See: Rules 27(15), 27(20), 29(7)	If a person refuses or neglects to attend an examination for discovery or refuses to be sworn or to answer a question, the Court may: • order that the party may not introduce the information at trial except with leave of the trial judge, • dismiss the proceeding or order the proceeding to continue as if no defence had been filed, • hold the person guilty of contempt and subject the person to the Court's power to punish contempt of court by imprisonment or the imposition of a fine. See: Rules 2(5), 27(23), 59