File Number: 34228

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

MARIUS NEDELCU

Respondent
(Appellant)

- and –

PROCUREUR GÉNÉRAL DU QUÉBEC
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)
THE ADVOCATES' SOCIETY

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It seems that our relationship with the protection against self-incrimination in section 13 of the *Charter* is not an easy one.[1]

Section 13 of the *Charter*, whatever its scope, will be viewed by some as standing in the way of the truth-finding process.[2]

PART I – OVERVIEW

1. In 2005 in *R v. Henry*[3] this Court (in a unanimous decision) offered a principled and practical approach to the protection entrenched in section 13 of the *Charter*. The Court removed the unworkable distinction that older cases had struggled to maintain between using prior testimony to challenge or impeach an accused's credibility and adducing prior testimony so as to incriminate an accused directly. The Court refocused the analysis on the purpose of the section. It held that s.13 establishes a constitutional "*quid pro quo*": where the administration of justice compels a person to give evidence in a proceeding it offers, in return, the promise that such evidence will not be used to incriminate the witness.

2. In this case the Crown says the administration of justice should go back on this promise. That is wrong.

3. *Henry* was a *carefully considered* departure from the prior jurisprudence, a departure intended to simplify the doctrinal approach to, and practical operation of, s. 13 of the *Charter* (the "post-*Henry* approach"). It has been met by universal academic congratulation as a "very welcome rationalization of the s.13 protection against self-incrimination."[4] The rule brings order to a difficult area of the law and is regarded as being both "realistic and clear"[5]. Put simply, by every measure, *Henry* is a jurisprudential success story.

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1 G. Cournoyer, "*Noel* and its Progeny: Is there a Constitutional Right to Swear Falsely in One's Own Defence" (2004), 14 C.R.(6th) 312 at 312

2 *R. v. Noel*, [2002] 3 S.C.R. 433, per Arbour J. at para.57

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

4 Prof. H. Stewart, "*Henry* in the Supreme Court of Canada: Reorienting the s.13 Right Against Self-Incrimination" (2006), 34 C.R.(6th) 112 at 112; Prof. P. Sankoff, "*R. v. Nedelcu:* The Role of Compulsion in Excluding Incriminating Prior Testimony under Section 13 of the Charter" (2011), 83 C.R. (6th) 55

5 Paciocco, D.M. and L. Struesser *The law of* Evidence (5th ed) (2008, Irwin Law: Toronto) at 294

4. The Crown now complains that this recent, well received, and unanimous revision of the law by this Court – a revision firmly grounded in judicial experience – is inconvenient to prosecutors because it may in some cases result in a court not hearing a possibly conflicting version of events given by an accused in some other proceeding. It seeks to overturn its own decision in *Henry* and revive the unworkable and ultimately artificial pre-*Henry* distinction between "use to impeach" and "use to prove".

5. The parties disagree on the application of the post-*Henry* approach on two points, the first relatively narrow, the second foundational:

a) the quality and nature of the 'compulsion' required to engage the promise of immunity made by s. 13 of the *Charter* and more particularly whether honouring a summons to attend for an examination for discovery in a civil case in the Superior Court (or face various legal consequences) counts, and

b) whether this Court should overrule its recent judgment in *Henry* in order to permit the Crown to use a prior compelled statement to impeach, and to attempt to label as a liar, an accused who testified in his own defence.

6. The Intervener the Criminal Lawyers' Association (Ontario) ('CLA') is a non-profit organization founded in 1971 comprised of more than 1000 criminal defence lawyers practising in Ontario and elsewhere. The objects of the CLA are to educate, promote, and represent the membership on issues of criminal and constitutional law. By Order of Justice Cromwell dated January 31, 2012, the CLA was granted leave to intervene in this appeal.

7. **On the issue of compulsion**, the CLA respectfully takes the position that this Honourable Court should adopt a broad and practical approach to 'compulsion' based on *Henry* and should reject the Crown's invitation to return to the confusing and unworkable pre-*Henry* law.

8. On the specifics of this case, the Court should confirm that testimony given in a civil discovery by a defendant or other witness in the pre-trial stages of civil litigation is 'compelled' evidence within the scope of s.13 and provide a principled framework for its operation because:

a) a party examined on discovery derives no benefit from the evidence provided and is compelled to attend and answer questions under penalty of being found in contempt of court;

b) a case-by-case approach in this area will lead to unnecessary uncertainty surrounding the scope of a witness's constitutionally afforded right not to incriminate herself; and

c) The infinite number of situations in which this issue will arise require that a stable and predictable definition of 'compelled' evidence post-*Henry* be available so that counsel might properly advise their clients.

9. On the issue of the proposed reversal of *R v. Henry*, the CLA submits that this Court should confirm both the operation of s. 13 of the *Charter* and its application as set out in that decision. The post-*Henry* approach was intended to simplify this area of *Charter* rights. It is well reasoned and there is no proper basis for the Court to resile from what it said in *Henry*. In fact, the post-*Henry* landscape has enabled cross-examination on prior inconsistent testimony more than it has curtailed it. The mischief alleged by the Crown -- of an alleged fraud on justice -- is a straw-man created by the Appellant.

PART II – THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

10. On the issues as stated by the Appellant the CLA takes the following positions:

> **Issue #1:** Does an application of this Honourable Court's judgment in *R. v. Henry* 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?

11. No. The Court of Appeal for Ontario was correct in its finding that evidence given at an examination for discovery is compelled testimony. The deponent must make themselves available to be discovered by any party adverse in interest and the deponent will derive no benefit from the evidence provided. The CLA will submit that no distinction can be drawn between litigants who commence an action and those who respond to an action.

> **Issue #2:** If the answer to Issue #1 is no, then should this Court's judgment in *R v. Henry* be overturned as it relates to impeaching the credibility of an accused through the use of prior inconsistent evidence?

12. No. The Appellant's suggestion that the revised approach has somehow expanded the ability of individuals to tailor their testimony with impunity is not supported by common sense or by the post-*Henry* jurisprudence. Indeed, if anything it would seem that the post-*Henry* approach ensures that the most troubling examples of inconsistency (where an accused testifies inconsistently on a retrial or within the same proceeding) are clearly subject to appropriate cross-examination.

PART III – STATEMENT OF ARGUMENT

13. The CLA's submissions, while generally supporting the position advanced in the Respondent's Factum, are confined to the following two points:

a) *Henry* properly identified legal compellability as the mechanism engaging the operation of s.13. If the witness (now accused) was compellable in the previous proceeding then the protection must apply. Constitutional protections should be knowable and predictable if they are to be meaningful. A party to a civil case is legally compelled to give evidence upon his or her examination for discovery: it is the price of admission to the civil justice system. The Rules of Civil Procedure enforce this requirement.

The *quid pro quo* rationale articulated in *Henry* makes it clear that the availability of this sort of legal compulsion -- requiring the evidence of the witness -- is what drives the rule. That is, the subjective reasons which may have animated the accused *qua* witness are irrelevant if the there was a legal power to compel those actions in any event. It follows that it is only if a party is under "no obligation to commence a proceeding or give sworn testimony at all" and yet testifies that they have waived their rights under s. 13; and

b) There is no compelling reason to over-rule *Henry* and return to the much scorned pre-*Henry* position. The values of *stare decisis* require some compelling reason be demonstrated before this Honourable Court will depart from its own precedents. This is particularly the case where, as here, the rule under attack is one set down recently, after careful consideration, by a unanimous court. There is no academic criticism of the rule – indeed, it has been widely welcomed – and no evidence to suggest the rule has caused any mischief.

A. Constitutional protection (which attaches at the time the evidence is compelled by the administration of justice) must be certain and predictable if it is to have meaning

14. Answers given at an examination for discovery have long attracted the protection afforded by s. 13 of the *Charter*. As one court observed early on in the life of s.13:[6]

> ...[T]he provisions of the Charter should not be read in a vacuum. Substantive responses given by the defendant at examinations for

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6 *Saccomanno v. Swanson*, 1987 CanLII 3304 (AB QB), at para [24]

> discovery cannot, on a plain reading of s. 5(2) of the Canada Evidence Act and of s. 13 of the Charter, be relied upon by the Crown to incriminate the accused in subsequent criminal proceedings.

15. As a matter of common sense a party served with a summons to appear at a set time and place to be questioned under oath in the context of a civil discovery is legally compelled to be there and to answer. If they fail or refuse various legal consequences will attach, including: an order compelling attendance or re-attendance; striking of that party's evidence and affidavits; striking of the party's defence; dismissal of the party's action; the issuance of an order finding that party in contempt of court and any other order that the court deems just.[7] A finding of contempt can result in a term of imprisonment.[8]

16. It is critically important that counsel advising clients be able to provide them with reasonable guidance about the consequences of attending and answering such questions. The present rule, to quote Professors Paciocco (as he then was) and Stuesser, has the "considerable virtue of being both ***realistic and clear***".[9] Counsel can advise clients with reasonable certainty of the legal consequences of their actions and those clients can then act accordingly. There is no reason to go back and undo *Henry's* clear direction on legal compellability and introduce nice distinctions between categories or stages of proceedings, or the precise negative legal consequences faced by witnesses who do not comply with the compulsion, or whether every procedural nicety has been complied with. If a witness *could be* compelled to give the evidence they provided, then that witness *should be* protected.

17. Contrary to the Crown's submission, this Court's ruling in *Juman v. Doucette*[10] in 2008 is by no means dispositive of the issue of whether or not discovery evidence can be used to impeach an accused's testimony in other proceedings. The Court of Appeal for Ontario properly held that the passing reference to this case in *Juman* should be understood to relate only to the limitation put on the uses that might be made of discovery evidence in proceedings other than those for which the evidence was compelled. As such, *Juman* canvases only the scope of the

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7 See Rules of Civil Procedure, R. 34.15
8 See Rules of Civil Procedure, R. 60.11
9 *Paccicco, supra*, at p.289
10 *Juman v. Doucette*, [2008] 1 S.C.R. 157

deemed undertaking rule and not the operation of the protections afforded to an accused under s. 13 of the *Charter*.

18. The deemed undertaking rule in Ontario represents a codification of the well established implied undertaking rule at common law.[11] The deemed undertaking only applies to evidence obtained by way of some compelled evidence production process: documentary discovery; oral examination for discovery; inspection of documents; medical examination and examination for discovery by way of written interrogatories.[12] The deemed undertaking does not apply where the individual who provided the evidence consents to what would otherwise be a prohibited use or where the evidence in question has been filed with the court or referred to during a hearing.[13]

19. This Court explained in *R v. Dubois*[14] that s. 13 guarantees protection against self-incrimination. That is s. 13, unlike the deemed undertaking rule, comes into operation when a witness' prior testimony is sought to incriminate its author in any other proceedings. *Juman* simply dealt with the scope of acceptable uses that could be made of pre-trial evidence. It did not deal with evidence that had been filed with the court or referred to during a hearing. Indeed, this is why Binnie J. expressly stated in *Juman* that the procedural stage in that matter rendered the appellant's statutory or *Charter* rights not in issue and properly dismissed.[15]

20. In the present case, the Respondent Nedelcu did not voluntarily testify at a trial of the civil action. Moreover, he is prevented by rules of evidence and procedure from relying on his discovery evidence at his civil trial (or at any stage in the civil case).[16] Had the Respondent chosen to testify at his civil trial as a witness for the defence, the post-*Henry* approach would suggest that he may not be able to avail himself of s. 13. He would in all likelihood have been subjected to cross examination on his discovery transcript in the civil action and unable to rely on s. 13 in subsequent criminal proceedings. Additionally, the deemed undertaking rule, as above, would no longer operate (but it would be irrelevant in any event).

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11 See *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (CA).
12 R. 30.1.01(1)
13 See Wirth, C., *Interlocutory Proceedings*, Release No. 7, November 2011, (Canada Law Book, Aurora) at p. 4-20.
14 *R. v. Dubois*, [1985] 2 S.C.R. 350
15 *Juman, supra*, at para 54.
16 Rule . 31.11.

21. Despite the above, the Appellant's submissions and suggested operation of *Juman* do confirm an area of confusion in the post-*Henry* landscape. This is an illustration of just one of many risks that arise from applying a case-by-case approach to this particular constitutional issue. A case-by-case approach is not simply undesirable, it is dangerous and unfair. Central to the compromise in s.13 is the implicit promise that if the administration of justice is going to force you to speak, it will not use evidence from that compelled event against you. *Individuals deserve to know when they speak what limits exist on the use the state will make of their forced answers.*

22. There is a need for clarification and confirmation of how to judicially determine when evidence is given under compulsion. In addition to discerning whether or not Henry applies to evidence given in an examination for discovery, this case represents an opportunity for the Court to reaffirm the *quid pro quo* doctrine and clarify its application.

23. The CLA agrees with and repeats the Respondent's submission that "if a witness does not know at the time of testifying whether or not the testimony will later be admissible against her, s. 13 will fail to achieve its objective of encouraging witnesses to give full and frank testimony".[17] Far from advancing the search for truth, the Crown's approach will frustrate the administration of justice generally.

B. Legal definition of compelled evidence is preferable

24. The issues outlined above can be resolved if the operation of the *quid pro quo* doctrine, after *Henry*, is clarified and the clear definition of 'compelled evidence' in that case is reaffirmed and made clearer. The parties agree that the Crown need not be "assisted" in order for the *quid pro quo* doctrine to operate.[18]

25. Professor Sankoff warns against efforts such as those urged by the Crown here to move towards a more "factual" definition of compulsion for the purposes of assessing the *Henry* ratio and the *quid pro quo* doctrine. The CLA submits that Prof. Sankoff, correctly articulates that compulsion cannot be determined based solely on the presence or absence of an actual subpoena

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17 Respondent's Factum at para [29]
18 Appellant's Factum at paras. [44]-[47]; Respondent's Factum at para. [30]

or summons in the particular case. This approach would result in: (1) unnecessary and excessive use of these documents to trigger the doctrine and (2) fail to address the operation of the doctrine in any situations where - the fact that the administration of justice may require the witness to make incriminating testimony - is not contemplated by the witness before they attend court in the other proceeding.[19]

26. As such the CLA proposes, as Prof. Sankoff posits, that the triggering of the right in s.13 must ask: whether the litigant had "any obligation to commence a proceeding or to give sworn testimony at all". It follows that the *quid pro quo* doctrine would therefore only be absent where the "person giving evidence has, in effect, waived his or her privilege against self-incrimination." This approach is wholly compatible with the spirit and substance of *Henry*.

C. *Henry* is a jurisprudential success story that should not be undone

27. Few decisions of this court have met with the sort of near universal applause that welcomed *Henry*. The decision has been described by Prof. Stewart as a "very welcome rationalization" of the previous law governing s.13 cutting through "troubling distinctions" that the Crown here seeks to revive. The pre-*Henry* law was "too complex and impractical" to sustain itself.[20] Professors Paciocco and Stuesser laud *Henry* as an "intensely practical" decision which has the "considerable virtue of being realistic and clear"[21] Prof. Sankoff correctly observes that what emerged from *Henry* was a "tighter, more principled version of s.13".

28. Notwithstanding that this Court can and occasionally will depart from or overturn its own decisions, it has always been the case that there must be compelling reasons to do so.[22] This Court reinforced in *Henry*[23] that it should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection. There is no compelling reason to undo the good work accomplished in *Henry*.

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19 P. Sankoff, "*R. v. Nedelcu*: The Role of Compulsion in Excluding Incriminating Testimony under s. 13 of the *Charter*" (2011) 83 CR (6th) 55

20 *Paciocco, supra*, at 289

21 *Paciocco, supra* at pp. 294 and 295

22 *R. v. Salituro*, [1991] 3 S.C.R. 654 at para. 27

23 *Henry* at para 44.

29. **To conclude,** the operation of s. 13 post-*Henry* has been simplified and placed on a principled footing. Egregious efforts to subvert justice by testifying differently within the same proceeding are now caught. The result is a reduction of contradictory evidence being tailored and adduced under the cloak of *Charter* protection. The problem is not *Henry*; rather the problem is the inconsistent application and consequential uncertainty that arises by way of the fact that the Court in *Henry* did not fully explain the way in which to judicially determine compulsion for the purposes of identifying testimony protected under the revised s. 13 regime. It is for these reasons that *Henry* should be explained and not overturned.

PART IV – SUBMISSIONS ON COSTS

30. The CLA does not seek costs, and submits that no costs should be awarded against it.

PART V – ORDER REQUESTED

31. The CLA makes no submission on the final disposition of the appeal.

32. The CLA submits that the appeal should be determined in accordance with the positions advanced by the CLA.

33. The CLA requests permission to present oral argument of no more than 15 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

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PART VI – AUTHORITIES CITED

CASES	**Cited at paragraphs**
Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.)	18
Juman v. Doucette, [2008] 1 S.C.R. 157	17, 19, 21
R. v. Dubois, [1985] 2 S.C.R. 350	19
R. v. Henry, [2005] 3 S.C.R. 609	1,3,4,5,7,8,9,12,13,14,15,17, 20,21,22,24,25,26,27
R. v. Noel, [2002] 3 S.C.R. 433	1
R. v. Salituro, [1991] 3 S.C.R. 654	28
Saccomanno v. Swanson, 1987 CanLII 3304 (AB QB)	14
TEXTS AND ARTICLES	
G. Cournoyer, "*Noel* and its Progeny: Is there a Constitutional Right to Swear Falsely in One's Own Defence" (2004) C.R. (6th) 312 at 312	1
David M. Paciocco, Lee Stuesser, *The Law of Evidence*, fifth edition (Toronto: Irwin Law Inc., 2008)	3, 16, 27
P. Sankoff, *"R. v. Nedelcu: The Role of Compulsion in Excluding Incriminating Testimony under s. 13 of the Charter"* (2011) 83 CR (6th) 55	25, 26, 27
H. Stewart, *"Henry in the Supreme Court of Canada: Reorienting the s.13 Right against Self-incrimination"* (2006), 34 C.R.(6th) 112	3, 27
C. Wirth, *Interlocutory Proceedings*, Release No. 7, November 2011 (Canada Law Book, Aurora) at p. 4-20	18

PART VII - STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms - Part I of the *Constitution Act, 1982*

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.