Court File No. 34228

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

MARIUS NEDELCU

Respondent
(Appellant)

- and -

MINISTÈRE DE LA JUSTICE DU QUÉBEC, THE CRIMINAL LAWYERS' ASSOCIATION and THE ADVOCATES' SOCIETY

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FACTUM OF THE RESPONDENT

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PART I - STATEMENT OF THE FACTS

I. POSITION OF THE RESPONDENT

1. In 2005, this Court in *R. v. Henry* undertook a detailed review of the jurisprudence respecting s. 13 of the *Charter* and produced a comprehensive, principled and sensible approach to its application. Now, less than seven years later, the Appellant asks this Court to overrule itself. The Respondents submits that this is neither necessary nor desirable.

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

2. The Respondent's position is as follows:

(1) The Respondent was compelled to testify at an examination for discovery during civil proceedings and the Crown subsequently used that testimony to advance its case at the Respondent's criminal trial. The Court of Appeal correctly concluded that *R. v. Henry* leads inexorably to the conclusion that this resulted in a violation of s. 13 of the *Charter.*

(2) The Appellant's submission that the Respondent was not compelled to testify at the examination for discovery because he could have chosen not to defend the action is not supportable on this record. The Respondent was one of two defendants and would undoubtedly have been required to give evidence regardless of his position.

(3) This Court's unanimous decision in *R. v. Henry* is the product of a careful consideration of the pre-existing jurisprudence and the competing policy considerations surrounding the interpretation of s. 13 of the *Charter.* All of the Appellant's arguments and concerns were given due consideration by the Court at the time and there is no compelling reason why the decision should be overruled. This Court's judgment in *Juman v. Doucette* was not about s. 13 of the *Charter* and the Court of Appeal correctly concluded that nothing in *Juman v. Doucette* altered the clear application of *R. v. Henry* to this case.

(4) In any event, at trial the Crown took the position that the Respondent's prior testimony should be used to incriminate him as well as impeach him, so even if *Henry* were overruled, the evidence should still not have been admitted.

II. THE FACTS

A. Introduction

3. The Respondent accepts the summary of the facts set out in the Factum of the Appellant, and also relies on the following additional facts.

B. The Cross-Examination on the Discovery Transcript

4. Mr. Perdon and members of his family commenced a civil action naming the Respondent and the Traders General Insurance Company as defendants. On September 12, 2005, about 13 ½ months after the accident, the Respondent attended an examination for discovery in relation to the civil proceedings. Counsel for the plaintiff as well as counsel for both defendants were present. During the discovery, the Appellant testified that he had no recollection of the accident.

Discovery Transcript, *Appellant's Record,* Vol. I, p.88

5. At the trial on the criminal charges about 14 months later, a police officer handed Crown counsel a copy of the discovery transcript as she began her cross-examination of the Respondent. The officer had apparently received it from civil counsel for Mr. Perdon. Crown counsel proceeded to cross-examine the Respondent and did not advise defence counsel of the existence of the transcript or her intention to rely on it until near the end of her cross-examination. At that time, she advised the Court that she wished to cross-examine the Respondent on the transcript. It was provided to defence counsel, who was granted a brief adjournment to review it and prepare his response. Following a *voir dire*, the trial Judge ruled that the Crown could rely on the transcript.

Submissions of Counsel at trial, *Appellant's Record,* Vol. II, p.217 - Vol. III, p.16

6. The Respondent agreed in cross-examination that his trial evidence was very different from his discovery testimony. He explained that many things had happened in his life around the time of the discovery. His wife had recently miscarried, he had lost his job and he was depressed. He had slept very little in the days leading up the discovery. He was in pain, taking medication, unable to concentrate and extremely tired.

Discovery Transcript, *Appellant's Record,* Vol. I, p.88;
Evidence of Marius Nedelcu, *Appellant's Record,* Vol. III, pp.89-94

C. The Trial Judge's Ruling

7. The defence objected to the Crown's use of the discovery transcript on two bases. First, defence counsel submitted that the use of the transcript would violate s. 13 of the *Charter.* Second, he submitted that its use was contrary to Rule 30.1.01(3) of the Ontario *Rules of Civil Procedure* ("the deemed undertaking rule") which prohibited the use of the transcript for "any purposes other than those of the proceedings in which the evidence was obtained." The trial Judge rejected both submissions. First, at paragraphs 12 to 27 of the Ruling, he considered s. 13 of the *Charter* and concluded that it did not apply because the Respondent's discovery testimony did not "assist the State."[1] Second, at paragraphs 28 to 54, he considered the deemed undertaking rule and concluded that it did not apply where the prior testimony was to be used for impeachment purposes. As will be seen, it is this portion of the trial Ruling that this Court cited in *Juman v. Doucette,* not the portion dealing with s. 13.

Ruling (Ontario Superior Court of Justice), *Appellant's Record,* Vol. I, pp.3-5, 8-27

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[1] The Appellant has effectively conceded that the trial Judge was in error in so concluding: See Appellant's Factum, ¶ 44-47.

PART II - POINTS IN ISSUE

8. The Respondent agrees that the issues on this appeal are as identified by the Appellant, but submits that the answer to both questions must be "no."

PART III - ARGUMENT

I. OVERVIEW

9. The Appellant invites this Court to allow the appeal on either of two bases. The first is that s. 13 of the *Charter* does not apply in this case since the Respondent was not "compelled" to testify at the discovery because he could have chosen not to defend against the civil action and could thereby have avoided testifying at the discovery. The second is that *R. v. Henry* was wrongly decided and ought to be overruled so as to revive the distinction between using prior testimony for impeachment purposes rather than to incriminate the accused.

10. The Appellant's first argument is easily disposed of. Even if the Respondent had not filed a statement of defence, his insurance company would have. As well, the Respondent was not the only defendant and would have been compellable at the discovery at the instance of either the plaintiff or the co-defendant. Given that he was directly involved in the accident, it is inconceivable that the other parties would not have wished to discover him. He was compellable regardless of what he did.

11. With respect to the second argument, the fact that *R. v. Henry* could lead to situations such as the one in the case at bar was not lost on this Court at the time the judgment was written. After a thorough and careful analysis of the jurisprudence, this Court concluded that in order to achieve its purpose, s. 13 of the *Charter* must restrict the use of prior compelled testimony for any purpose, including impeachment. This Court expressly considered its earlier judgment in *R. v. Kuldip,* which recognized a distinction between impeachment and incrimination, and chose not to follow it. The

Court was aware of and gave consideration to all of the reasons why the Appellant submits that the distinction ought to be maintained, but opted not to take that course. The Court's reasons for that decision were sound and principled and ought not to be revisited.

12. In any event, at trial the Crown took the position that the inconsistency between the Respondent's discovery testimony and his evidence at trial was such that it should give rise to an inference of guilt. The Crown sought to rely on the prior testimony to incriminate the Respondent as well as impeach him. The evidence should not have been admitted even if *Henry* is overruled.

II. <u>THE RESPONDENT WAS COMPELLED</u>

A. The Respondent's Compellability Was Beyond His Control

(i) *<u>Overview</u>*

13. There is very little in the record respecting the civil proceedings. What is known is that Mr. Perdon and members of his family were the plaintiffs, and the Respondent and the Traders General Insurance Company were the defendants. It is unclear whether the Trader's General Insurance Company was the Respondent's insurer or the plaintiff's.

Discovery Transcript, *Appellant's Record,* Vol. I, p.88

14. The Appellant has attempted to draw an analogy between the Respondent's situation in the civil proceedings and a criminal accused who elects to testify at his trial. While the Appellant concedes that the *Rules of Civil Procedure* includes powers of compulsion to which the Respondent was subject, it is argued that the Respondent made "an initial voluntary choice to bring [himself]

within the grasp of those powers" by choosing to file a statement of defence.[2] It is suggested that he could have instead chosen not to defend against the action and have judgment in default made against him. This argument is being advanced for the first time in this Court and the Respondent has had no opportunity to adduce evidence in relation to this issue.

15. The Appellant's argument is not supported by either the law or the record in this case. This is so for three reasons. First, even if the Respondent had chosen not to defend the action, his insurance company could have and likely would have defended it in any event. Second, even if there was a default judgment against the Respondent, he would nonetheless have been compellable. Third, there was more than one defendant, so the action would have proceeded regardless of what the Respondent did and he would have been compellable by the parties.

(ii) *The Insurer's Right to Defend*

16. The Respondent was insured at the time of the accident. Had he failed to defend the action, he would have been in breach of his contract with his insurance company. As well, his insurer would have had the right to defend the action, regardless of what he did, by virtue of s. 252(1) of the *Insurance Act,* which provides as follows:

> 252.(1) Every motor vehicle liability policy issued in Ontario shall provide that, in the case of liability arising out of the ownership or, directly or indirectly, out of the use or operation of the automobile in any province or territory of Canada, in a jurisdiction of the United States of America or in any other jurisdiction designated in the *Statutory Accident Benefits Schedule*,

---

[2] See Appellant's Factum at ¶ 41.

> (a) the insurer is liable up to the minimum limits prescribed for that province, territory or jurisdiction if those limits are higher than the limits prescribed by the policy;
>
> . . . .
>
> (c) the insured, by acceptance of the policy, constitutes and appoints the insurer as the insured's irrevocable attorney to appear and defend in any province or territory of Canada, any jurisdiction of the United States of America or any other jurisdiction designated in the *Statutory Accident Benefits Schedule* in which an action is brought against the insured arising out of the ownership, use or operation of the automobile. [Emphasis added].

It is unlikely that the insurance company, which was liable to pay at least a portion of the damages if the plaintiff was successful, would not have defended the action if the Respondent had chosen not to. The Respondent would not have had the power to stop the insurer from doing so.[3]

> Discovery Transcript, *Appellant's Record,* Vol. I, pp.270-271;
> *Insurance Act,* R.S.O. 1990, c. I.8, s.252(1)

(iii) *Rights of Discovery in Case of Default*

17. In Ontario, rights of discovery are governed by Rule 31.04 of the *Rules of Civil Procedure.* With respect to the discovery of a defendant, the *Rules* provide as follows:

> 31.04 (2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,
>
> (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
>
> (b) the defendant has been noted in default. [Emphasis added].

---

[3] The Respondent's failure to defend the action would likely have resulted in a reduction in coverage from his insurance company because of his breach of the terms of the policy. As a result, the plaintiff, if successful, would have been entitled to claim any damages in excess of the amount covered from his own insurance company, which could then attempt to recover this amount from the Respondent. Given the unlikelihood that much could have been recovered from the Respondent, an unemployed millwright, the course of action suggested by the Appellant would have resulted in a significant financial loss for the plaintiff's insurer.

It is clear from this that even if the Respondent had not filed a statement of defence and had been noted in default, the plaintiff would have had the right to discover him.

> *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 31.04(2);
> *Ogilvie v. Gray,* [1967] 2 O.R. 272 (H.C.)

(iv) The Co-Defendant's Discovery Rights

18. In addition, the co-defendant may also have had the right to discover the Respondent. Rule 31.03(1) provides that a party may discover any other party adverse in interest. Had the Respondent been noted in default, he would have been deemed to have admitted the allegations in the statement of claim and therefore likely would have been adverse in interest to the co-defendant. Furthermore, it appears that counsel for the co-defendant insurance company (Mr. Rachlin) was of the view that he had the right to discover the Respondent, as is apparent from the following exchange between him and counsel for the Respondent (Ms. Georgoudis):

> MR. RACHLIN: Well, will you client sign a consent to allow us to obtain any blood alcohol reports from the hospital where he was treated on that basis?
>
> MS. GEORGOUDIS: No, I'm not going to prejudice his criminal proceedings at this time.
>
> MR. RACHLIN: On what basis do you say that our discovery rights in this action would prejudice his criminal position having regard to both the common law implied undertaking rule and the provisions of Rule 30.1?[4]
>
> MS. GEORGOUDIS: Well, let me – and I appreciate the implied undertaking rule, but at the moment, I'm going to refuse it. I may reconsider it. I may.
>
> MR. RACHLIN: I may move to find out.
>
> [Emphasis added].

---

[4]Rule 30.1 of the Ontario *Rules of Civil Procedure* codifies the deemed undertaking rule.

It is noteworthy that at the time of the Respondent's discovery, his counsel as well as counsel for the co-defendant were of the view that the deemed undertaking rule applied to the discovery and were under the impression that the discovery evidence could not be used in the criminal proceedings.

> Discovery Transcript, *Appellant's Record,* Vol. I, pp. 280-281;
> *Rules of Civil Procedure,* Rule 31.03(1);
> *Northern Heights (Sault) Ltd. v. Majic*, [1968] 1 O.R. 616 at ¶ 5-7 (S.C.);
> *Aviaco International Leasing Inc. v. Boeing Canada Inc.,* [2000] O.J. No. 4401 at ¶ 21 (S.C.J.);
> *Kapileshwar v. Sivarajah,* [2008] O.J. No. 4501 (S.C.J.)

B. The Respondent's "Voluntary Attendance"

19. The Appellant suggests, at paragraph 36 of its factum, that the fact that the Respondent agreed with the suggestion put to him in cross-examination that he attended the discovery without being *"subpoenaed* or anything like that*"* means that he was not compelled to attend. Ordinarily, parties will serve the other party with a"Notice of Examination", not a *subpoena.* The Notice of Examination *requires* the witness to attend the discovery. There is nothing in the record to indicate whether the Respondent was served with a Notice of Examination, but he certainly would have been if he had failed to attend the discovery when requested to do so. As well, Rule 34.15 of the *Rules of Civil Procedure* makes it clear that the plaintiff would have been entitled to obtain a Court order requiring him to attend had he refused to do so after being served with a Notice of Examination.

20. The Appellant's argument is in effect a suggestion that in order to obtain the protection of s. 13 of the *Charter,* the Respondent had to be uncooperative and force the plaintiff to go through the trouble of attending court to obtain an order against him. It is submitted that s. 13 protection does not and should not require resort to such obstructionist tactics before it is given effect. For the purposes of s. 13 of the *Charter,* "compelled" is the same as "compellable".

Ezeh v. 2317706 Ontario Inc. (c.o.b. Club Seventy-Seven), [2011] O.J. No. 3568 at ¶ 12-13 (S.C.J.);
Valani v. Garrick, [2009] O.J. No. 5945 at ¶ 41 (S.C.J.);
Rules of Civil Procedure, Rule 34.15;
Form 34A, *Courts of Justice Act,* R.S.O. 1990, c. C.43

21. An argument similar to the Appellant's was considered and rejected in *R. c. Talon.* In that case, an accused had willingly testified at another accused's trial without being *subpoenaed.* When he sought the protection of s. 13 at his own trial, the Crown argued that although he had been *compellable* at the previous trial, he had not actually been *compelled*. The Court rejected this submission, noting that it would lead to the absurd result that those who voluntarily come forward to testify would be entitled to less protection than those who do so unwillingly and only under threat of legal sanction:

> Souhaitant utiliser le témoignage antérieur de Marcel Talon en contre-interrogatoire, la Poursuite suggère au Tribunal d'adopter une interprétation restrictive du concept de témoignage forcé en le limitant au témoin qui ne voulait pas témoigner. Selon l'interprétation de la Poursuite, un témoin ayant témoigné volontairement dans un autre procès, même si c'est le procès d'un tiers et même s'il a témoigné en faveur de la Poursuite, ne devrait pas bénéficier de la protection de l'article 13 parce qu'il a témoigné volontairement, donc qu'il n'a pas été contraint.
>
> Pour appuyer son argument, la Poursuite a fait la démonstration que Marcel Talon, lors de son témoignage antérieur dans le procès Riopel, voulait et désirait témoigner contre ses anciens complices, et qu'il n'y eut aucune contrainte de la part de la Poursuite pour qu'il témoigne.
>
> Avec respect, le Tribunal ne peut adopter une telle interprétation. Outre le non-sens auquel elle mène et sur lequel nous reviendrons, la Cour suprême a tout de même donné de bonnes indications sur l'interprétation du concept de contrainte dans les arrêts *Henry* et *Noël*. Selon nous, l'important est maintenant de déterminer si le témoin était légalement contraignable, par l'une ou l'autre des parties, plutôt que de savoir s'il voulait ou non témoigner. C'est l'existence d'une contrainte légale qui nous gouverne, et non pas l'utilisation dans les faits de cette contrainte qui aurait amené le témoin à la barre.
>
> . . . .

> Si l'accusé a témoigné dans le procès d'un tiers, qu'il l'ait fait volontairement ou non n'est pas pertinent, compte tenu de l'importance, pour l'administration de la justice de s'assurer du témoignage complet et sincère des témoins. La protection qui lui est accordée est alors beaucoup plus grande, et elle reflète l'existence de cette contrepartie. Que le témoin ait voulu témoigner ou non, l'État en tire le même bénéfice, il doit donc offrir la même contrepartie.
>
> De plus, interpréter la notion de contrainte comme le désire la Poursuite mènerait à un non-sens, à savoir que le témoin qui désire aider l'État et la justice en livrant un témoignage complet et sincère, aurait une protection constitutionnelle moindre que celui, qui pour toutes sortes de raisons, ne témoignerait que parce qu'il y est forcé par la menace de l'exercice des pouvoirs de contraintes du tribunal.
>
> Il ne faut pas oublier que l'article 13 s'applique à tout témoignage antérieur donné sous serment, que ce soit dans une procédure de nature criminelle, civile ou administrative. Dans la grande majorité des cas, heureusement pour le système judiciaire, les témoins offrent leur prestation de leur plein gré, dans le désir de servir la justice. L'interprétation que préconise la Poursuite aurait donc pour effet de dépouiller de la protection constitutionnelle, la grande majorité des témoins qui chaque jour, donnent au système de justice aide, temps, argent (pour plusieurs témoigner signifie perdre une journée de travail, et les indemnités accordées sont insuffisantes pour la rembourser) et énergie. Les priver au surplus de la protection constitutionnelle, serait contraire à l'intérêt de la justice. [Emphasis added and in original].

The Respondent respectfully adopts this reasoning.

R. c. Talon, [2006] J.Q. No. 5336 at ¶ 16-32 (C.S.);
P. Sankoff, "*R. v. Nedelcu:* The Role of Compulsion in Excluding Incriminating Prior Testimony under Section 13 of the *Charter"* (2011), 83 C.R. (6^{th}) 55

22. Both the trial judge and the Court of Appeal concluded that the Appellant was compelled to attend the discovery. It is submitted that they were correct in doing so.

Ruling (Ontario Superior Court of Justice), *Appellant's Record,* Vol. I, at ¶ 15-17, pp. 8-9;
Judgment of the Court of Appeal for Ontario, *Appellant's Record,* Vol. I, at ¶ 27-29, pp.63-64

III. R. v. HENRY SHOULD NOT BE OVERRULED

A. Overview

23. The Appellant asks this Court to overrule *R. v. Henry,* a unanimous judgment of a full panel of this Court,[5] less than seven years after it was released because its interpretation of s. 13 "permits dishonesty for those so inclined." This possibility would not have escaped Binnie J. and the eight other members of the Court who concurred in his judgment. The fact that an application of *Henry* could lead to a situation such as arose in the case at bar would have been obvious to the Court. Nevertheless, this Court decided that to give full effect to s. 13, it was necessary to erase the distinction between impeachment and incrimination. Nothing has changed so as to warrant re-visiting that conclusion.

B. Overruling Recent Decisions of this Court

24. As was recently noted by Rothstein J., writing for this Court in *Copthorne Holdings Ltd. v. Canada,* "[b]efore a Court will entertain reversing a recently decided decision, there must be substantial reasons to believe the precedent was wrongly decided." As Binnie J. held in *Henry,* "[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection." To similar effect, in *Ontario (Attorney General) v. Fraser,* McLachlin C.J. and LeBel J., writing for a majority of the Court, stated: "The seriousness of overturning . . . recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage." The Court held that a "high threshold"

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[5]The appeal in *R. v. Henry* was initially heard by a seven-member panel (McLachlin C.J. and Iacobucci, Major, Binnie, Arbour, LeBel and Fish JJ.) on April 23, 2004. A re-hearing before all nine members of the Court (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.) took place on January 12, 2005.

must be met before the Court will take the unusual step of reversing its own precedent. That threshold has not been met in this case.

> *Copthorne Holdings Ltd. v. Canada,* 2011 SCC 63 at ¶ 57
> *R. v. Henry, supra* at ¶ 44;
> *Ontario (Attorney General) v. Fraser,* [2011] 2 S.C.R. 3 at ¶ 57-58, 60;
> *R. v. Chaulk,* [1990] 3 S.C.R. 1303 at ¶ 93;
> *R. v. Bernard,* [1988] 2 S.C.R. 833 at ¶ 28, *per* Dickson C.J.C., dissenting;
> *R. v. Salituro,* [1991] 3 S.C.R. 654 at ¶ 37, 49

25. In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.,* Laskin J.A., writing for the Ontario Court of Appeal, reviewed the jurisprudence of this Court and identified the factors that would allow for the reversal of a recent precedent:

> In *Bernard, Chaulk, Salituro*, and other cases, the Supreme Court has articulated five factors that would allow it to overrule one of its previous decisions: where a previous decision does not reflect the values of the *Canadian Charter of Rights and Freedoms*; where a previous decision is inconsistent with or "attenuated" by a later decision of the court; where the social, political, or economic assumptions underlying a previous decision are no longer valid in contemporary society; where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused.

None of these apply in the case at bar. *Henry* was clearly intended to reflect *Charter* values and has not been modified by an subsequent decision of this Court. There have been no social, political of economic changes that would warrant re-visiting the decision, nor is there any evidence of an epidemic of "wrongful acquittals" resulting from an application of *Henry*. Indeed, counsel for the Respondent has been able to find only three cases where an application of *Henry* resulted in the Crown being unable to rely on prior testimony.[6] As well, not only did *Henry* not create uncertainty,

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[6] In *R. c. Ménard*, in the course of dismissing an application for a stay of proceedings in a murder trial, the trial judge noted that the Crown would be unable to cross-examine the accused on testimony he had given at somebody else's trial. This had no effect on the result, as there was later a directed verdict of acquittal: see *R. c. Ménard,* [2007] J.Q. No. 15247 (C.S.). In *R. v. Talon,* the Crown was not permitted

it clarified the law. Perhaps most importantly, overruling it would establish a rule that is *unfavourable* to the accused.

> *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 at ¶ 24 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 390;
> *R. v. Robinson,* [1996] 1 S.C.R. 683 at ¶ 16-40;
> *R. c. Ménard,* [2007] J.Q. No. 15246 at ¶ 20-21 (C.S.);
> *R. v. Wilson,* [2011] O.J. No. 2532 at ¶3 (S.C.J.);
> *R. c. Talon, supra*

26. Virtually all of the submissions made by the Appellant were made and considered by this Court in *Henry*. In particular, the distinction between incrimination and impeachment was squarely before the Court and in fact was the subject upon which the majority and the minority in the British Columbia Court of Appeal disagreed. Hall J.A., dissenting, was of the view that *Noël* had modified *Kuldip* and had significantly limited the extent to which prior testimony could be used for impeachment purposes. Southin J.A. disagreed.[7] In a portion of her judgment that is strikingly similar to portions of the Appellant's Factum in this case, she stated:

> The precise issue here can only be resolved by the Supreme Court of Canada. If my colleague is right, then Canada has a new constitutionally protected right - the right to swear falsely in one's own defence or, to put it another way, a right to give the jury one story at one's first trial and if, from some judicial misstep, one gets a new trial, to abandon the story which the first jury had rejected and try something different on the second jury. In that context, I use the word "right" to mean that which one can do

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to cross-examine an accused in a murder trial with respect to evidence he had given at somebody else's trial in exchange for immunity from prosecution for the murders he was on trial for. The charge was later stayed on the basis of an abuse of process: see *R. v. Talon,* [2006] Q.J. No. 4874 (C.S.). In *R. v. Wilson,* the accused was charged with obstruct justice and perjury based on an allegation that he had given false testimony at a murder trial. The testimony was held to be inadmissible on the basis of s. 13 with respect to the obstruct justice and the accused was acquitted of that charge. He was, however, convicted of perjury.

[7] Newbury J.A. agreed with Southin J.A. that the appeals should be dismissed, but on the basis that s. 13 does not apply to testimony given by an accused on earlier trial on the same indictment, as this Court ultimately held.

> with impunity or with so little consequence as makes no matter. A possible charge under s. 136 of the *Criminal Code* is of trivial consequence to a man charged with first degree murder.

As Southin J.A. suggested, this Court did resolve the issue. While the Appellant may not be pleased with the way it was resolved, that is no basis to have this Court reconsider its decision.

> *R. v. Henry* (2003), 179 C.C.C. (3d) 307 at ¶77-79, *per* Hall J.A., dissenting, at ¶ 93, *per* Southin J.A. (B.C.C.A.), affirmed *supra*

C. The Section 13 Jurisprudence in This Court

(i) *<u>The "Quid Pro Quo"</u>*

(a) The Nature of the Quid Pro Quo

27. The well established purpose of s. 13 of the *Charter* was described by Arbour J. in *R. v. Noël* in the following terms:

> Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. [in his dissent in *Noël* in the Québec Court of Appeal] 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. If the evidence proffered is less than full and frank, the witness is subject to prosecution for perjury or for the related offence of giving contradictory testimony. In the United States, a different arrangement is in place: faced with the prospect of self-incrimination, the witness can claim the Fifth Amendment, and refuse to provide the incriminating answer. The state then has to dispense with his evidence altogether. As the United States Supreme Court stated in *Malloy v. Hogan*, 378 U.S. 1 (1964), at pp. 7-8: "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." See generally *McCormick on Evidence* (5th ed. 1999), vol. 1, at pp. 450-518.

> 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. 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. This is what makes a statement given in a judicial proceeding different from a statement to a person in authority, which is governed by rules of admissibility that are relevant to the special concerns related to that type of statement, and also different from all other out-of-court declarations and admissions.

R. v. Noël, [2002] 3 S.C.R. 433 at ¶ 21-22;
R. v. Henry, supra at ¶ 22-23

(b) The Quid Pro Quo and Potentially Untruthful Testimony

28. Contrary to what is suggested in paragraph 48 of the Appellant's Factum, the *quid pro quo* does not "fall apart" if the testimony at the prior proceeding is not "full and frank." The application of s. 13 does not depend on some sort of *ex post facto* credibility assessment by the trial Judge. This is not to say that giving untruthful testimony does not have consequences. As Arbour J. explained in the quote reproduced *supra,* "[i]f the evidence proffered is less than full and frank, the witness is subject to prosecution for perjury or for the related offence of giving contradictory testimony." She elaborated on this point later in her reasons:

> This *quid pro quo* under which witnesses lost their important common law right to refuse to incriminate themselves in exchange for a use immunity attached to their compelled answers to incriminating questions is of course not a form of contract with an individual witness but a rule of public law under which the erosion of the privilege against self-incrimination is compensated by appropriate safeguards. If one were to pursue a contract analogy, as my colleague Justice L'Heureux-Dubé suggests I do, <u>the remedy for the "breach" is provided for in the "contract": the witness may be prosecuted for perjury or for the offence of giving contradictory evidence</u>. More appropriately, I would suggest, s. 5 is a rule of public law which contemplates the possibility of an untruthful witness and which provides the appropriate response to such an eventuality by withdrawing the

> protection to the explicit extent provided for in the section. In that sense at least the protection is not absolute. [Emphasis added].

Were it otherwise, a trial Judge would have to determine whether the prior testimony was true before determining whether an accused is entitled to the protection of s. 13. The difficulties inherent in attempting to perform such an *ex post facto* credibility assessment based on a transcript are obvious.

R. v. Noël, supra at ¶ 24;
R. v. Henry, supra at ¶ 50

29. More importantly, if a witness does not know at the time of testifying whether or not the testimony will be later be admissible against her, s. 13 will fail to achieve its objective of encouraging witnesses to give full and frank testimony. That objective can only be achieved if the witness can rely on the protection of the section with certainty, as was explained by Professor Ives in "*R. v. Henry*: A Welcome Retreat from an overly broad interpretation of s. 13 of the Canadian Charter of Rights and Freedoms"*:*

> It is not unreasonable to assume that the societal interest in encouraging witnesses to come forward and give truthful testimony is best served by guaranteeing individuals that their testimony will not come back to haunt them at their own trial, and that this is best accomplished by granting full testimonial immunity to the witness.[8]

D. Ives, "*R. v. Henry*: A Welcome Retreat from an overly broad interpretation of s. 13 of the Canadian Charter of Rights and Freedoms" (2006), 10 *International Journal of Evidence and Proof* 212 at pp.219-220.

[8] At paragraph 58 of its factum, the Appellant cites this same article in support of the opposite conclusion. While the article is not entirely clear, it appears that the views relied upon by the Appellant are those which the author ascribes to "those who believe a witness should not be able to change his or her . . . testimony" rather than the views of the author herself.

(c) The Prior Testimony Need Not "Assist the Crown"

30. The trial Judge in this case was of the view that the *quid pro quo* only exists where the prior testimony was used to "assist the Crown" and since the prior testimony in this case was given in the course of civil proceedings between private individuals, the Respondent was not entitled to the protection of s. 13. With respect, there is nothing in the jurisprudence that supports this interpretation (nor does the Appellant suggest otherwise, as is made clear in paragraphs 44 to 47 of its factum). The very language of the section is very broad and clearly states that it applies to "other proceedings". In *R. v. Dubois,* the first case in which this Court considered s. 13, McIntyre J. (dissenting, but not on this point), stated:

> There is a social interest in encouraging people to come forward to give evidence, not only in court but on other occasions in the tribunals and proceedings referred to above. That interest is not served where witnesses in testifying expose themselves to the danger of self-incrimination because of such testimony. [Emphasis added].

The "other occasions in the tribunals and proceedings referred to above" were listed in the preceding paragraph as "Royal commissions, statutory boards and tribunals, `in bankruptcy' proceedings, and many other forms of judicial and quasi-judicial proceedings".

> *R v. Noel, supra* at ¶22;
> *R. v. Dubois,* [1985] 2 S.C.R. 350 at ¶77-78, *per* McIntyre J., dissenting;
> Judgment of the Court of Appeal for Ontario, *Appellant's Record,* Vol. I, at ¶ 30-35, pp.64-67

(ii) R. v. Kuldip: The Distinction Between Incrimination and Impeachment

31. The distinction between incrimination and impeachment, which the Appellant wishes to have this Court draw in the context of s. 13, played an integral part in the development of the jurisprudence. The distinction was first adverted to in *R. v. Mannion,* but the Court found it unnecessary to pronounce on the issue. It was considered fully in *R. v. Kuldip,* where a majority of

the Court concluded that there ought to be a distinction of the type the Appellant is now requesting. In coming to this conclusion, the majority considered but ultimately disagreed with concerns expressed by Martin J.A. in the Ontario Court of Appeal's judgment in that case. Writing for four members of a panel of seven, Lamer C.J.C. stated:

> 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. While simplicity in these manners is generally preferable to complexity, the policy reasons underlying the need for a jury to have before it all the relevant information related to the charge (discussed by this Court in *R. v. Corbett*, [1988] 1 S.C.R. 670) clearly outweigh the benefits of simplicity in these circumstances.
>
> An accused has the right to remain silent during his or her trial. However, if an accused chooses to take the stand, that accused is implicitly vouching for his or her credibility. Such an accused, like any other witness, has therefore opened the door to having the trustworthiness of his\her evidence challenged. An interpretation of s. 13 which insulates such an accused from having previous inconsistent statements put to him\her on cross-examination where the only purpose of doing so is to challenge that accused's credibility, would, in my view, "stack the deck" too highly in favour of the accused.

The Appellant's arguments in this case mirror the analysis in *Kuldip.* In short, the Appellant wishes to have *Kuldip* once again represent the law in this area.

R. v. Mannion, [1986] 2 S.C.R. 272 at ¶ 8;
R. v. Kuldip, [1990] 3 S.C.R. 618 at ¶ 29-30

32. One of the reasons why Martin J.A. was uncomfortable with the distinction between impeachment and incrimination was because the distinction was not recognized in the context of s. 5 of the *Canada Evidence Act*. In his reasons in *Kuldip*, he stated:

> . . . [Section] 13 of the *Charter* has the effect of making the protection afforded by s. 5(2) available to a witness whether or not he objects as required by s. 5(2). As I have endeavoured to show, where the evidence of the witness in the prior proceeding is protected by s. 5(2), the evidence cannot be used in a subsequent criminal proceeding against him either for the purpose of incriminating him directly or for the purpose of impeaching his credibility. Although it is true that in *R. v. Mannion, supra*, the Crown sought to use the appellant's prior testimony to incriminate him by showing that it displayed a consciousness of guilt, I do not read the judgment of the Supreme Court of Canada as holding that s. 13 of the *Charter* applies only where the prior evidence is used to incriminate the accused, as opposed to attacking his credibility. If the effect of s. 13 of the *Charter* were so restricted, the unfairness or inequality that s. 13 of the *Charter* was designed to remove would be perpetuated: the sophisticated witness who objected to answering under s. 5(2) would be afforded protection against the subsequent use of his evidence not only to incriminate him directly, but also to attack his credibility, whereas the unsophisticated witness who failed to object because he was unaware of the protection afforded by s. 5(2) would not be protected by s. 13 of the *Charter* against the subsequent use of his evidence to attack his credibility. Section 5 of the *Canada Evidence Act*, of course, remains in force.

Lamer C.J.C. disagreed with Martin J.A.'s interpretation of s. 5 of the *Canada Evidence Act*. This was part of the reason why he ultimately concluded that s. 13 of the *Charter* did not prohibit the use of prior testimony for the purposes of impeachment. Wilson J., writing for herself and La Forest and L'Heureux-Dubé JJ., agreed with Martin J.A.'s reasons.

> *R. v. Kuldip* (1988), 40 C.C.C. (3d) 11 at 22-23 (Ont. C.A.), rev'd *supra*, at ¶ 32-43, *per* Lamer C.J.C., at ¶ 47, *per* Wilson J., dissenting;
> *Canada Evidence Act,* R.S.C. 1985, c. C-5

(iii) *R. v. Noël: The Distinction is Narrowed*

33. Twelve years after *Kuldip,* this Court in *R. v. Noël* revisited the concerns expressed by Martin J.A. in *Kuldip.* Writing for an eight-member majority, Arbour J. stated:

> In *Kuldip*, Martin J.A. writing for the Court of Appeal for Ontario, had canvassed the state of the law on the scope of the protection offered by s. 5 of the *Canada Evidence Act*. In *obiter* (since s. 5 had not been invoked), Lamer C.J. rejected the interpretation of s. 5 offered by the Court of Appeal for Ontario. <u>In my view, the interpretation of Martin J.A. was the correct one and it should inform our understanding of the scope of s. 13</u>. [Emphasis added].

While the Court in *Noël* maintained the distinction between impeachment and incrimination, it held that prior testimony could only be used for impeachment purposes if there was "no possibility" that the trier of fact would use it to draw an inference of guilt. As explained *infra,* in this case not only was there a possibility that the trier of fact could use the prior testimony to draw an inference of guilt, the Crown in fact asked for such an inference to be drawn.

R. v. Noël, supra at ¶ 31, 51-54

(iv) <u>*R. v. Henry: The Distinction is Eliminated*</u>

34. The concerns expressed by Martin J.A. in *Kuldip* were again considered in *Henry,* which was decided three years after *Noël* and 15 years after *Kuldip.* Writing for a unanimous Court in *Henry*, Binnie J. stated:

> *Kuldip* can be seen as an attempt by the Court to put the brakes on *Mannion*, but in its unwillingness to reconsider its reasoning in *Mannion*, the Court was required to resort to reliance on the sometimes difficult distinction between the purposes of impeachment of credibility and incrimination. Although this distinction is well established in the law (see *e.g. R. v. Calder*, [1996] 1 S.C.R. 660, at para. 25), its practicality in this particular context is frequently questioned. It is worth setting out in full what was said by Arthur Martin J.A., writing in *Kuldip*, when it was before the Ontario Court of Appeal:
>
>> Furthermore, in my view, where the prior evidence is used ostensibly to impeach the accused's credibility only, it nevertheless does assist the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to draw a clear line between cross-examination on the accused's prior testimony for the purpose of incriminating him and such cross-examination for the purpose of

> impeaching his credibility. If the court concludes on the basis of the accused's contradictory statements that he deliberately lied on a material matter, that lie could give rise to an inference of guilt.

> In Martin J.A.'s view, successful invocation of s. 5(2) of the *Canada Evidence Act* ought to exclude the prior testimony of the witness for any purpose, including impeachment of credibility. Arbour J., writing in *Noël* in the context of incriminating statements made by a current accused at the earlier trial of somebody else, agreed with this interpretation (paras. 31-33) except for her acceptance of *Kuldip* in the very limited case of statements innocuous when made at the first trial and still innocuous with respect to the issue of guilt at the second trial (paras. 30 and 45). This, she observed, is the only outcome consistent with the *quid pro quo* that lies at the heart of s. 13 (para. 25), which should be interpreted in a manner "co-extensive with that of s. 5(2) of the *Canada Evidence Act*" (para. 34).

R. v. Henry, supra at ¶ 35

35. After a thorough analysis of the existing jurisprudence, including *Kuldip* and *Noël,* Binnie J. concluded that the distinction between impeachment and incrimination ought to no longer exist in the context of s. 13:

> I would go further. Even though s. 13 talks of precluding the use of prior evidence "to incriminate that witness", and thus implicitly leaves the door open to its use for purposes other than incrimination such as impeachment of credibility (as *Kuldip* accepted), <u>experience has demonstrated the difficulty in practice of working with that distinction</u>. If, as *Noël* held, and as Arthur Martin J.A. observed in *Kuldip*, the distinction is unrealistic in the context of s. 5(2) of the *Canada Evidence Act*, it must equally be unrealistic in the context of s. 13 of the *Charter*. Accordingly, by parity of reasoning<u>, 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"</u>. [Emphasis added].

Thus, in the 15 years between *Kuldip* and *Henry* "experience had demonstrated" that the distinction between impeachment and incrimination was unworkable.

R. v. Henry, supra at ¶ 50;
J. Stribopoulos, "Has Everything Been Decided? Certainty, the *Charter* and Criminal Justice" (2006), 34 S.C.L.R. (2d) 381 at pp.396-398

36. While the distinction between impeachment and incrimination may continue to exist in other circumstances, this Court has always held that it is a distinction that must be approached with great caution. While this Court in *Calder* recognized the distinction in the context of s. 24(2) of the *Charter,* it noted that the distinction had been "eroded" in recent years and held that only in "very limited circumstances" would a statement that would have otherwise been excluded pursuant to s. 24(2) be admitted for the purpose of impeachment. Moreover, the decision in *Calder* was based, in part, on the Court's earlier judgment in *Kuldip,* what has now been overtaken by *Henry,* resulting in even further "erosion" of the distinction. Indeed, all of the cases cited by the Appellant on this point pre-date *Henry.*

> *R. v. Calder*, [1996] 1 S.C.R. 660 at ¶ 24-35;
> H. Stewart and E. Bussey, "The Privilege Against Self-Incrimination: Too Strong, Too Weak, or Both?" (2005), 9 Can. Crim. L. Rev. 369 at p. 378

D. The "Truth Seeking" Function of the Courts

37. Nothing has changed since *Henry.* The fact that an application of s. 13 may impede the truth-seeking function of a trial or even result in "wrongful acquittals" is a concern that is by no means new to the s. 13 jurisprudence, or to *Charter* jurisprudence in general. Canadian courts' decisions upholding *Charter* rights routinely lead to stays of proceedings or the exclusion of evidence that might otherwise have resulted in a conviction. While this may be unfortunate in the short term, adjudicating *Charter* issues requires courts to look beyond the case before them and to consider the long-term effects of their decisions. In any event, unlike individuals who obtain a "windfall" as a result of a breach of ss. 8, 9, 10(*a*), 10(*b*) or 11(*b*), individuals who could have been impeached on prior testimony but for the operation of s. 13 may still be subject to prosecution for perjury or the giving of contradictory evidence.

R. v. Grant, [2009] 2 S.C.R. 353 at ¶ 67-69

38. In *Henry* and its progenitors, this Court has always been fully cognizant of the potential of s. 13 to have an impact on the truth-seeking function of the Court. In the introduction to his reasons in *Henry,* Binnie J. stated:

> The protective policy of s. 13 must be considered in light of the countervailing concern that an accused, by tailoring his or her testimony at successive trials on the same indictment, may obtain through unexposed lies and contradictions an unjustified acquittal, thereby bringing into question the credibility of the trial process itself. Effective cross-examination lies at the core of a fair trial.

In *R. v. Noël,* Arbour J. stated:

> Section 13 of the *Charter*, whatever its scope, will be viewed by some as standing in the way of the truth-finding process. However, it has never been the case in our criminal justice system that the search for truth could be pursued at all costs, by all means. This was best stated in the classic words of Vice-Chancellor Sir J. L. Knight Bruce:
>
> > The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . Truth, like all other good things, may be loved unwisely -- may be pursued too keenly -- may cost too much. [See *Pearse v. Pearse* (1846), 1 De G. & Sm. 12, 63 E.R. 950, at p. 957.]
>
> In this light, the prohibition against any reference to prior incriminating evidence also reflects a more fundamental principle, which is at the heart of s. 13. That principle is the trade-off between the right of the state to compel, under the threat of legal sanctions, the evidence of each and every one of us, under oath, in public, in a court of law, and the need for the state to prove its case without the compelled self-incriminating evidence of the accused. That trade-off, reflected in s. 13 of the *Charter*, is a critical feature of the administration of justice that courts are required to protect and uphold.

L'Heureux-Dubé J.'s dissent in *Noël* arose out of her concern that the majority's interpretation of s. 13 could operate in such a way as to suppress the truth. The Appellant in essence asks this Court to now adopt that dissent. The Court declined to do so in *Noël,* declined to do so in *Henry,* and should decline to do so in this case.

> *R. v. Henry, supra* at ¶ 3;
> *R. v. Noël*, at ¶ 58, *per* Arbour J., at ¶ 64-94, *per* L'Heureux-Dubé J., dissenting

39. The fictitious indignant juror conjured up by the Appellant in paragraph 71 of its factum could exist in relation to virtually any criminal *Charter* case. A juror who learns after an acquittal that the accused had given prior inconsistent testimony that had been excluded because of s. 13 of the *Charter* would likely have the same reaction as a juror who learns that an inculpatory statement was excluded because of a s. 10(*b*) violation or that physical evidence was excluded because of a s. 8 breach. Such a reasonable juror may initially question the result, but once she comes to appreciate the importance of protecting *Charter* rights in the long term, she would come to appreciate why the court ruled in the way it did. Jurors are routinely told not to speculate about what goes on in the courtroom during their absence and to apply the law as explained by the trial judge, even if they do not understand it or disagree with it. There is no reason to think that jurors' appreciation of these principles cease once the trial is over.

40. Unlike the situation where the remedy for other *Charter* breaches compromises the truth-seeking function of the court (*e.g.,* where evidence is excluded because of a *Charter* violation), the harm to the truth-seeking function of the Court which is necessitated by an application of s. 13 can be redressed in that the individual can be prosecuted for perjury or the giving of contradictory

evidence. Although s. 13 may prohibit the admission of prior inconsistent testimony, this does not mean that accused can change their stories "with impunity", as the Appellant suggests. Rather, they do so at their own peril. The fact that a conviction for perjury may carry a lesser penalty than a conviction for the offence for which the accused is being tried[9] does not mean that a prosecution for perjury is "not good enough", as the Appellant suggests.[10] The penalty for perjury, which can be up to 14 years imprisonment, is significant. Furthermore, in determining an appropriate penalty, a sentencing court will consider the effect of the perjury and the nature of the proceedings in which it took place.

R. v. Jackson, [2010] B.C.J. No. 1341 at ¶ 11 (C.A.);
R. v. Johnson, [1996] N.B.J. No. 478 at ¶ 12-13 (C.A.);
R. v. Jordan, [1986] A.J. No. 610 (C.A.);
R. v. Morgan, [1979] N.J. No. 2 (C.A.)

E. Juman v. Doucette

41. This Court's decision in *Juman v. Doucette* has little to do with this case. *Juman v. Doucette* was about the scope of the implied undertaking rule. It was not about s. 13 of the *Charter.* While it is true that Binnie J. cited the trial ruling in this case, it must be recalled that the trial Judge dealt with two distinct arguments, one of which related to s. 13 and one of which related to the implied undertaking rule. Binnie J. specifically cited paragraphs 49 to 51 of the ruling, which is in the portion dealing with the implied undertaking rule, *not* s. 13 of the *Charter.*

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

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[9] In the case at bar, a perjury conviction carries a higher maximum penalty (14 years) than dangerous driving causing bodily harm (10 years), the offence with which the Respondent is charged.

[10] See Appellant's Factum at ¶ 75-78.

42. In paragraph 50 of the trial Judge's ruling, a portion of which is paraphrased by Binnie J. in *Juman,* he stated:

> On the other hand, if the introduction of the evidence is denied, a significant mischief could ensue. The excluding of relevant evidence <u>for reasons not related to a *Charter* protection</u>, or pursuant to any of the improper or restricted uses of evidence mandated in the criminal law and procedure or in the *Rules of Civil Procedure*, would permit a person accused of an offence to give differing versions of the events at his civil and subsequent criminal trials. With impunity, he could tailor his evidence to suit his needs in each particular proceeding. [Emphasis added].

At this point in the ruling, the trial Judge had already concluded (erroneously, it is submitted) that s. 13 of the *Charter* did not prohibit the use of the discovery transcript and was considering the *alternative* argument of whether its use was prohibited for some other reason, namely, the existence of the implied undertaking rule.

> Ruling (Ontario Superior Court of Justice), *Appellant's Record,* Vol. I, at ¶ 50, p.25;
> *Juman v. Doucette, supra* at ¶ 41

43. The Court of Appeal was of the view that *Juman v. Doucette* had no application to this case:

> The court in *Juman* was discussing general categories of exceptions to the implied undertaking rule. The fourth such category, under which the court's comments appeared at para. 41, was "Impeaching Inconsistent Testimony". There is no reference to the *Charter* at this point in the judgment.
>
> Indeed, there was no *Charter* issue in *Juman*. Although the appellant had raised before the chambers judge sections 7, 11(c) and 13 of the *Charter*, they were not in issue, or at least, not in serious issue on the appeal to the Supreme Court of Canada. Binnie J., writing for the court, said at para. 1 of his reasons:
>
>> The principal issue raised on this appeal is the scope of the "implied undertaking rule" under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained.

> In para. 54 of his reasons, Binnie J. observed that "[t]he appellant's statutory or *Charter* rights are not in peril in the present appeal and her claims to Charter relief at this stage were properly dismissed."
>
> 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 that 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 to this case.

This analysis, it is submitted, was correct.

> Judgment of the Court of Appeal for Ontario, *Appellant's Record,* Vol. I, at ¶ 42-45, pp.69-70; *Juman v. Doucette, supra* at ¶ 1, 41

44. *Henry* makes it very clear that s. 13 of the *Charter* prohibits the use of prior compelled testimony, regardless of whether it is relied on for incrimination or impeachment. In coming to this conclusion, the Court clearly and consciously decided to depart from its earlier view in *Kuldip.* Surely, if Binnie J. had intended in *Juman* to alter his clear *dicta* in *Henry* and restore *Kuldip,* he would have said so.

45. Contrary to the submission in paragraph 74 of the Appellant's Factum, there is no inconsistency between this Court's approach in the s. 24(2) jurisprudence and this Court's approach to s. 13. Section 24(2) applies in cases where there has been a breach of the accused's *Charter* rights and the court must determine an appropriate remedy. The court never has to do this with s. 13, because unlike other sections of the *Charter,* s. 13 is only engaged at the time of trial. In other words, the trial court is always in a position to prevent the breach before it occurs, so issues about the appropriate remedy never arise.

IV. THE CROWN RELIED ON THE PRIOR TESTIMONY TO INCRIMINATE THE RESPONDENT

A. The Crown's Position at Trial

46. Even if this Court were to resurrect the distinction between incrimination and impeachment, the Respondent's discovery transcript would have been inadmissible since Crown counsel at trial wished to rely on it to incriminate the Respondent. While the Appellant submits in this Court that the Respondent's discovery testimony was not incriminating ("What is incriminating about remembering nothing? Nothing."),[11] this was *not* the Crown's position at trial, as Crown counsel made clear in the course of her submissions:[12]

> CROWN COUNSEL: And perhaps with Mr. Nedelcu's case, where there is such a huge, what I would respectfully suggest, is a huge contradiction, and even though it goes directly towards credibility, as per *Henry* now, <u>it could still, to a degree, be given some weight towards incrimination</u>.
>
> . . . .
>
> THE COURT: <u>So it can be used as positive evidence of guilt</u>.
>
> CROWN COUNSEL: <u>Right</u>.
>
> THE COURT: And here you're saying if it's – it's so big . . . .
>
> CROWN COUNSEL: So aggravating.
>
> THE COURT: It's so big a difference it obviously goes to credibility <u>but can also be used to imply guilt. Is that what you're saying</u>?
>
> CROWN COUNSEL: <u>That would be my position</u> and I think that's what *Henry* suggests, that there can be a root there. It can be given weight and it makes sense, because there is such a contradiction, then it's aggravating because it perhaps gives light onto . . . the *mens rea* and the approach taken . . . by the defendant.

---

[11] See Appellant's Factum at ¶ 56.

[12] At trial, the Crown's primary argument in favour of the admissibility of the discovery transcript was that the Respondent had voluntarily attended the discovery. The trial judge rejected this argument, as did the Court of Appeal.

[Emphasis added].

Thus, even if this Court were to overrule *Henry* in the manner suggested by the Appellant, the discovery testimony should have been inadmissible at trial given the Crown's intention to rely on it to incriminate the Respondent.

Submissions at trial, *Appellant's Record,* vol. III, pp. 50-51

B. The Requirement in Noël That There be "No Possibility" of Incrimination

47. In *R. v. Noël,* which maintained the distinction between impeachment and incrimination, Arbour J. stated:

> If there is any indication that the Crown is using the prior evidence to incriminate the accused directly, as in *Dubois, supra*, or indirectly as in *Mannion, supra*, or that the prior evidence was such that it contained, subjectively or objectively, an element of self-incrimination, s. 13 is activated and all reference to the testimony is prohibited, even for the sole purpose of challenging the credibility of the accused. In my view, *Kuldip* is limited to cases where the reference to the prior evidence is exclusively for impeachment purposes and carries no other risk of incrimination. In other words, the cross-examination would be permitted when there is no possibility that the jury could use the content of the prior testimony to draw an inference of guilt, except to the limited extent that a finding that the accused has been untruthful under oath could be damaging to his defence. [Emphasis added].

Given the Crown's position at trial, it cannot be said there was "no indication that the Crown was using the prior evidence to incriminate the accused directly". As a result, according to *Noël,* "all reference to the testimony is prohibited, even for the sole purpose of challenging the credibility of the accused." Thus, to succeed on this appeal, the Appellant needs this Court to overrule not only *Henry,* but *Noël* as well.

R. v. Noël, supra at ¶ 54

C. Distinguishing Impeachment and Incrimination

48. The difference between the Crown's position at trial and in this Court illustrates the difficulty adverted to by Martin J.A. in *Kuldip* of distinguishing between incrimination and impeachment. Contrary to the suggestion in paragraphs 61 to 65 of the Appellant's Factum, the conclusion in *Henry* that the distinction was unworkable was not based on a lack of faith in the ability of jurors to understand the distinction. Rather, it was based on a broad interpretation of s. 13 and the term "incriminate." As Martin J.A. pointed out, where prior testimony is used to impeach an accused, "it nevertheless does assist the Crown in its case and, in a broad sense, may help to prove guilt." Furthermore, as Martin J.A. also pointed out, a conclusion that the accused deliberately lied on a material matter could also give rise to an inference of guilt. That is precisely the use the Crown wished to make of the evidence in the case at bar.

> *R. v. Kuldip* (Ont. C.A.), *supra* at p. 23;
> *R. v. Henry, supra* at ¶ 35;
> H. Stewart and E. Bussey, *supra* at p. 317;
> J. Stribopoulos, *supra* at pp.392-393

49. In *R. v. Dubois,* Lamer J. (as he then was), writing for a majority of this Court, stated:

> I am also of the view that any evidence the Crown tenders as part of its case against an accused is, for the purpose of s. 13, incriminating evidence. The Crown tenders evidence to support its case and obtain a conviction; it knows best what is incriminating. In a sense, the Crown could be said to be estopped from arguing that the evidence it tenders to that end is not incriminating. Since in this case, the Crown is tendering the evidence as part of its case, which clearly comes within the meaning of "used to incriminate", we need not here address the question of whether those words include resort to the previous testimony for the purpose of cross-examining the accused, were the latter to choose to take the stand again in his or her own defence. [Emphasis added].

In the case at bar, the Crown at trial clearly wished to use the discovery testimony not only to impeach the Respondent, but also to establish his guilt. It therefore became part of the Crown's case.

For the purpose of s. 13, it was incriminating evidence, and the Crown should be estopped from arguing otherwise.

R. v. Dubois, supra at ¶ 37

V. <u>CONCLUSION</u>

50. Like thousands of civil litigants in Canada, the Respondent was required to give evidence in the course of the discovery process. This Court's unanimous decision in *R. v. Henry* prohibited the Crown from relying on that testimony for any purpose at the Respondent's criminal trial, an outcome that was plainly foreseen by the Court. While the operation of s. 13 of the *Charter* may sometimes have an impact on the court's truth-seeking function, after careful consideration this Court concluded that that was the price that must be paid to give effect to the purpose of s. 13, which was to encourage litigants in *future* cases to give full and frank testimony. The protection of constitutional values sometimes comes with a price, and it is this Court's role to determine what that price should be. While it is unsurprising that the state is unhappy with the Court's conclusion, this is no basis for reversing a principled, careful and thoughtful judgment of a unanimous panel of this country's highest Court.

PART IV – SUBMISSIONS ON COSTS

51. The Respondent makes no submissions as to costs.

PART V - ORDER REQUESTED

52. It is respectfully requested that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

P. ANDRAS SCHRECK

Of Counsel for the Respondent

CANDICE SUTER

Of Counsel for the Respondent

DATED at Toronto, this 3rd day of February, 2012.

PART VI - TABLE OF AUTHORITIES

I. CASES

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II. <u>ACADEMIC COMMENTARY</u>

D. Ives, " *R. v. Henry*: A Welcome Retreat from an overly broad interpretation of s. 13 of the Canadian Charter of Rights and Freedoms" (2006), 10 *International Journal of Evidence and Proof* 212.	29
P. Sankoff, "*R. v. Nedelcu:* The Role of Compulsion in Excluding Incriminating Prior Testimony under Section 13 of the *Charter"* (2011), 83 C.R. (6^{th}) 55	21
H. Stewart and E. Bussey, "The Privilege Against Self-Incrimination: Too Strong, Too Weak, or Both?" (2005), 9 Can. Crim. L. Rev. 369	36, 48
J. Stribopoulos, "Has Everything Been Decided? Certainty, the *Charter* and Criminal Justice" (2006), 34 S.C.L.R. (2d) 381 at pp.396-398	35, 48

PART VII – LEGISLATIVE PROVISIONS

Canadian Charter of Rights and Freedoms

13. A witness who testifies in any proceedings has the righ 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.

Charte canadienne des droits et liberté

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.

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

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

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

Loi sur la preuve au Canada
L.R.C. 1985, ch. C-5

5.(1) Nul témoin n’est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l’incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l’instance de la Couronne ou de qui que ce soit.

(2) Lorsque, relativement à une question, un témoin s’oppose à répondre pour le motif que sa réponse pourrait tendre à l’incriminer ou tendre à établir sa responsabilité dans une procédure civile à l’instance de la Couronne ou de qui que ce soit, et si, sans la présente loi ou toute loi provinciale, ce témoin eût été dispensé de répondre à cette question, alors, bien que ce témoin soit en vertu de la présente loi ou d’une loi provinciale forcé de répondre, sa réponse ne peut être invoquée et n’est pas admissible en preuve contre lui dans une instruction ou procédure pénale exercée contre lui par la suite, sauf dans le cas de poursuite pour parjure en rendant ce témoignage ou pour témoignage contradictoire.

Insurance Act
R.S.O. 1990, c. I.8

252. (1) Every motor vehicle liability policy issued in Ontario shall provide that, in the case of liability arising out of the ownership or, directly or indirectly, out of the use or operation of the automobile in any province or territory of Canada, in a jurisdiction of the United States of America or in any other jurisdiction designated in the *Statutory Accident Benefits Schedule*,

(a) the insurer is liable up to the minimum limits prescribed for that province, territory or jurisdiction if those limits are higher than the limits prescribed by the policy;

(b) the insurer will not set up a defence to a claim that could not be set up if the policy were a motor vehicle liability policy issued in that province, territory or jurisdiction; and

(c) the insured, by acceptance of the policy, constitutes and appoints the insurer as the insured's irrevocable attorney to appear and defend in any province or territory of Canada, any jurisdiction of the United States of America or any other jurisdiction designated in the *Statutory Accident Benefits Schedule* in which an action is brought against the insured arising out of the ownership, use or operation of the automobile.

(2) A provision in a motor vehicle liability policy in accordance with clause (1) (c) is binding on the insured.

Loi sur les assurances
L.R.O. 1990, ch. I.8

252. (1) La police de responsabilité automobile établie en Ontario stipule qu'en cas de responsabilité découlant de la propriété ou, directement ou indirectement, de l'usage ou de la conduite de l'automobile dans une province ou un territoire du Canada, dans un ressort des États-Unis d'Amérique ou dans un ressort désigné dans l'*Annexe sur les indemnités d'accident légales :*

a) l'assureur est tenu à sa garantie jusqu'aux limites minimales prescrites dans cette province, ce territoire ou ce ressort, si ces limites sont supérieures à celles stipulées dans la police;

b) l'assureur n'invoquera aucune défense contre une demande de règlement qu'il ne pourrait invoquer si la police était une police de responsabilité automobile établie dans cette province, ce territoire ou ce ressort;

c) l'assuré, en acceptant la police, constitue et nomme irrévocablement l'assureur son fondé de pouvoir aux fins de comparution et de défense dans une province ou un territoire du Canada, dans un ressort des États-Unis d'Amérique ou dans un ressort désigné dans l'*Annexe sur les indemnités d'accident légales* où une action découlant de la propriété, de l'usage ou de la conduite de l'automobile est intentée contre l'assuré.

(2) Une clause conforme à l'alinéa (1) c) dans une police de responsabilité automobile lie l'assuré.

Rules of Civil Procedure
R.R.O. 1990, Reg. 194, Rule 31.04

31.03(1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8).

31.04(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

(a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or

(b) the defendant has been noted in default.

34.15(1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

(a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;

Régles de procédure civile
R.R.O. 1990, Règlement 194

31.03(1) Une partie à une action peut interroger une fois au préalable une partie opposée; elle ne peut l'interroger une seconde fois qu'avec l'autorisation du tribunal. Elle peut toutefois interroger plus d'une personne, conformément aux paragraphes (2) à (8).

31.04(2) La partie qui désire interroger au préalable un défendeur peut lui signifier un avis d'interrogatoire, conformément à la règle 34.04, ou un questionnaire, conformément à la règle 35.01, uniquement après :

a) soit la remise de la défense par le défendeur et, à moins que les parties ne conviennent autrement, la signification d'un affidavit de documents par la partie interrogatrice;

b) soit la constatation en défaut du défendeur.

34.15(1) Si une personne ne se présente pas à l'heure, à la date et au lieu fixés pour un interrogatoire dans l'avis d'interrogatoire ou l'assignation ou à l'heure, à la date et au lieu convenus par les parties, ou qu'elle refuse de prêter serment, de faire une affirmation solennelle, de répondre à une question légitime, de produire un document ou un objet qu'elle est tenue de produire ou de se conformer à une ordonnance rendue en application de la règle 34.14, le tribunal peut :

a) en cas d'objection jugée injustifiée à une question, ordonner ou permettre à la personne interrogée de se présenter à nouveau, à ses propres frais, pour répondre à la question, auquel cas elle doit répondre aussi aux autres questions légitimes qui découlent de sa réponse;

(b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;

(c) strike out all or part of the person's evidence, including any affidavit made by the person; and

(d) make such other order as is just.

(2) Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person.

b) rejeter l'instance ou radier la défense, selon le cas, si cette personne est une partie ou, dans le cas d'un interrogatoire préalable, une personne interrogée à la place ou au nom d'une partie;

c) radier, en totalité ou en partie, la déposition de cette personne, y compris un affidavit;

d) rendre une autre ordonnance juste. R.R.O. 1990, Règl. 194, par. 34.15 (1).

(2) Un juge peut déclarer coupable d'outrage au tribunal la personne qui ne se conforme pas à l'ordonnance rendue en application de la règle 34.14 ou du paragraphe (1).

FORM 34A
***Courts of Justice Act*, R.S.O. 1990, c. C.43**

notice of examination

(To be used only for a party to the proceeding, a person to be examined for discovery or in aid of execution on behalf or in place of a party or a person to be cross-examined on an affidavit. For the examination of any other person, use a summons to witness (Form 34B).)

(General heading)

notice of examination

TO *(Name of person to be examined)*

YOU ARE REQUIRED TO ATTEND, on (*day*), (*date*), at (*time*), at the office of (*name, address and telephone number of examiner*), for (*choose one of the following*):

[ ] Cross-examination on your affidavit dated (*date*)

[ ] Examination for discovery

[ ] Examination for discovery on behalf of or in place of (*identify party*)

[ ] Examination in aid of execution

[ ] Examination in aid of execution on behalf of or in place of (*identify party*)

(Examination for discovery of a party or a person examined on behalf or in place of a party)

FORMULE 34A
***Loi sur les tribunaux judiciares,* L.R.O. 1990, Ch. C.43**

avis d'interrogatoire

(À utiliser seulement dans le cas d'une partie à l'instance, de la personne qui doit subir un interrogatoire préalable ou à l'appui d'une exécution forcée à la place ou au nom d'une partie, ou d'une personne qui doit être contre-interrogée sur l'affidavit. Dans le cas de l'interrogatoire d'une autre personne, utiliser une assignation (formule 34B).)

(titre)

avis d'interrogatoire

À : *(nom de la personne à interroger)*

VOUS ÊTES REQUIS(E) DE VOUS PRÉSENTER, le *(jour)*, *(date)*, à *(heure)*, au bureau de *(nom, adresse et numéro de téléphone de l'interrogateur)*, pour la tenue *(choisir l'une des options suivantes)*:

[ ] d'un contre-interrogatoire sur votre affidavit en date du *(date)*

[ ] d'un interrogatoire préalable

[ ] d'un interrogatoire préalable au nom ou à la place de (désigner la partie)

[ ] d'un interrogatoire à l'appui d'une exécution forcée

[ ] d'un interrogatoire à l'appui d'une exécution forcée au nom ou à la place de (désigner la partie)

(Interrogatoire préalable d'une partie ou d'une personne interrogée au nom ou à la place d'une partie)

YOU ARE REQUIRED TO BRING WITH YOU and produce at the examination the documents mentioned in subrule 30.04 (4) of the Rules of Civil Procedure, and the following documents and things: *(Set out the nature and date of each document and give particulars sufficient to identify each document and thing.)*

VOUS ÊTES REQUIS(E) D'APPORTER AVEC VOUS et de produire lors de l'interrogatoire les documents mentionnés au paragraphe 30.04 (4) des Règles de procédure civile, de même que les objets et documents suivants : *(indiquer la nature et la date de chaque document et donner suffisamment de précisions pour permettre d'identifier chaque document et objet.)*

(Other examinations)

(Autres interrogatoires)

YOU ARE REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things: *(Set out the nature and date of each document and give particulars sufficient to identify each document and thing.)*

VOUS ÊTES REQUIS(E) D'APPORTER AVEC VOUS et de produire lors de l'interrogatoire les objets et documents suivants : *(indiquer la nature et la date de chaque document et donner suffisamment de précisions pour permettre d'identifier chaque document et objet.)*

(Date) *(Name, address and telephone number of examining solicitor or party)*

(date) *(nom, adresse et numéro de téléphone du procureur ou de la partie interrogatrice)*

TO: *(Name and address of solicitor or of person to be examined)*

DESTINATAIRE : *(nom et adresse du procureur ou de la personne à interroger)*