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Vagueness, Inconsistency and Less Respect for Charter Rights of Accused at the Supreme Court in 2012-2013

Don Stuart*

I. INTRODUCTION

I have often lauded the Supreme Court of Canada for achieving a much better balance than politicians between the rights of accused and society's interests in enforcing tough criminal laws. The Court's recent record, however, gives cause for alarm respecting issues of undue vagueness and inconsistency, and shows diminishing resolve in protecting the Charter¹ rights of accused. In this context the Court never speaks these days, as did Chief Justice Dickson, of courts being the "guardians of the Constitution."² The Court has also conspicuously avoided even addressing some Charter issues important to accused.

My main exhibits are the Court's controversial rulings in *Mabior*,³ *Maybin*,⁴ *Prokofiew*⁵ and *Nedelcu*,⁶ with *A. (D.I.)*⁷ and *S. (N.)*⁸ invoked in aid to show rampantly inconsistent approaches to judicial notice.

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.). The role was recently relied on by McLachlin C.J.C. in asserting Métis land rights in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 13, 2013 SCC 13 (S.C.C.).

³ *R. v. Mabior*, [2012] S.C.J. No. 47, [2012] 2 S.C.R. 584 (S.C.C.) [hereinafter "*Mabior*"].

⁴ *R. v. Maybin*, [2012] S.C.J. No. 24, [2012] 2 S.C.R. 30 (S.C.C.) [hereinafter "*Maybin*"].

⁵ *R. v. Prokofiew*, [2012] S.C.J. No. 49, [2012] 2 S.C.R. 639 (S.C.C.) [hereinafter "*Prokofiew*"].

⁶ *R. v. Nedelcu*, [2012] S.C.J. No. 59, [2012] 3 S.C.R. 311 (S.C.C.) [hereinafter "*Nedelcu*"].

⁷ *R. v. A. (D.I.)*, [2012] S.C.J. No. 5, [2012] 1 S.C.R. 149 (S.C.C.) [hereinafter "*A. (D.I.)*"].

⁸ *R. v. S. (N.)*, [2012] S.C.J. No. 72, [2012] 3 S.C.R. 726 (S.C.C.) [hereinafter "*S. (N.)*"].

II. *R. v. MABIOR* (HIV DISCLOSURE)⁹

This carefully justified unanimous decision achieves a compromise built on refining the majority decision of Cory J. in *R. v. Cuerrier*¹⁰ that fraud will only vitiate consent under section 265(3) of the *Criminal Code*¹¹ in cases of assault and sexual assault where the fraud involves a significant risk of serious harm. The Court has again sensibly rejected the approach of L'Heureux-Dubé J. in *Cuerrier* that any fraud to induce consent will result in criminality. So proven lies such as “I love you”, “Trust me”, “I will be faithful” or “I will buy you a fur coat” (the extravagant example that engaged the Court in *Cuerrier*) will not result in criminal sanctions. In *Mabior*, the Chief Justice decided that consent to sexual intercourse with an HIV-positive accused will be not be vitiated by the fraud of non-disclosure where there is no realistic possibility of transmission of HIV because of a low viral count AND a condom was used. The first obvious vagueness in the approach is that there is no definition provided of what constitutes a low viral count, which will clearly therefore require expert testimony in every case, a situation the Court expressly sought to avoid.

The *Mabior* ruling has already lead to strident criticism in the media from two very different interest groups. Those who see HIV-positive persons as a vulnerable and marginalized group cannot see why non-disclosure of HIV status where there is a low viral count should result in serious criminality given that anti-retroviral treatment results in an 89 per cent to 96 per cent reduction in the general low risk of HIV transmission for one sexual act of 1 in 1,250.¹² These advocates argue that any forced disclosure of HIV status will discourage HIV testing and inhibit sexual autonomy inherent in truthful but inhibiting disclosures such as “I am HIV-positive but the risk of transmission is low so the risk is very small.” It is also not clear to these critics why the Court decided that the only way an HIV-positive individual engaging in sexual activity can avoid serious criminality for non-disclosure of a low viral count is to wear a condom. In contrast, the Manitoba Court of Appeal’s approach in the court below to the anti-retroviral advances was not to criminalize non-disclosure of a low viral count OR any case of non-disclosure where a condom was

⁹ Compare the more favourable comment by Janine Benedet, “Fraud Vitiating Consent to Sexual Activity after *Mabior* and C. (D.)” (2012) 96 C.R. (6th) 33.

¹⁰ [1998] S.C.J. No. 64, [1998] 2 S.C.R. 371 (S.C.C.) [hereinafter “*Cuerrier*”].

¹¹ R.S.C. 1985, c. C-46.

¹² See data referred to at paras. 97, 100 and 101 of *Mabior*, *supra*, note 3.

used. So the Supreme Court is much tougher and broader in its approach to criminalization.

A different criticism is advanced by advocates for sexual assault complainants. Since the approach to consent has long been established as subjective, surely, it is argued, the serious life-threatening risk of HIV transmission, however low, should always be disclosed to allow for informed consent. It is clear that in most of the HIV cases before the courts, the complainants have testified that they would never have consented had they known about the HIV status. These advocates would no doubt welcome the 80 per cent risk reduction promised by the Supreme Court's requirement that condoms always be used.¹³

The vehemence and strength of the arguments from these opposed camps suggest that the Supreme Court had to arrive at a compromise on the present state of medical knowledge and that it could not satisfy all competing concerns. Yet the language the Court uses is glaringly inconsistent with its conclusions. Chief Justice McLachlin, undoubtedly our most powerful and prolific Chief Justice in Canadian history, is eloquent in justifying the Court's approach. She relies on the rule of law requirement of clear notice of criminality ("Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice"¹⁴), on the need to avoid criminal laws being too broad and on Charter values of "equality, autonomy, liberty, privacy and human dignity".¹⁵ However, it is hard to see how any of these notions pointed to the broad criminalizing solution the Court actually adopted.

The current rhetoric of Charter values ("Charter lite" would be a better term) is particularly disquieting if one believes in the rule of law. This "Charter values" rather than "rights" discourse is growing increasingly unruly and apparently does not include the presumption of innocence and fair trial values. These "Charter lite" assertions bypass the rigour of actually meeting established tests for Charter breaches. In the case of equality rights, after anxious debate¹⁶ the majority of the Court has determined that the controlling test of discrimination to establish a section 15 breach does NOT involve having to point to an effect on dignity. So why is "dignity" relevant to Charter "values"?

¹³ *Id.*, at para. 98.

¹⁴ *Id.*, at para. 14.

¹⁵ *Id.*, at para. 45.

¹⁶ *Quebec (Attorney General) v. A.*, [2013] S.C.J. No. 5, 2013 SCC 5 (S.C.C.).

These broad principles of no retrospectivity, avoiding broad criminal sanctions and Charter values were also not addressed in the ruling of the Chief Justice for the 6-3 majority in *R. v. A. (J.)*¹⁷ that advance consent to sexual conduct while unconscious is not a valid consent in law. The uncontradicted evidence in that case was that the adult complainant freely and consciously consented to erotic asphyxiation involving anal penetration during transitory unconsciousness.

III. *R. v. MAYBIN* (INTERVENING CAUSE)¹⁸

Maybin is the first Supreme Court case to fully confront the issue of how courts should decide whether an intervening cause breaks the chain of causation in the case of offences where an element to be proved is the causing of a consequence. The end result is that the Court widens the approach to causation and the already excessively wide net of manslaughter.¹⁹ In my view, it was unwise to leave the test of intervening cause untethered.

In the court below, the B.C. Court of Appeal divided on whether the test for intervening cause breaking the chain of causation should be that of no reasonable foreseeability or whether there was an intentional act of an independent actor. It was expected that the Supreme Court would adopt one of these or another approach. Instead, the Supreme Court decided that neither test is to be preferred and that both are merely analytical aids and do not alter the *Smithers/Nette* test of whether the accused was a “significant contributing cause” of the victim’s death.

In focusing on the language of “significant contributing cause” the Supreme Court glosses over the complexity of *R. v. Nette*,²⁰ where Arbour J. for the 5-4 majority preferred the language of significant contributing cause but indicated that terminology was up to the trial judge, leaving it open for resort to the language in *R. v. Smithers*²¹ of a contributing test outside the *de minimis* range. Justice L’Heureux-Dubé for the minority on the law in *Nette* objected to the “significant”

¹⁷ [2011] S.C.J. No. 28, [2011] 2 S.C.R. 440 (S.C.C.).

¹⁸ See critical comments by Ben Snow, “A Cause for Concern: Incoherence in the Doctrine of Intervening Cause” (2012) 92 C.R. (6th) 241 [hereinafter “Snow”] and Gerry Ferguson, “Causation and the Mens Rea for Manslaughter: A Lethal Combination” (2013) 99 C.R. (6th) 351 [hereinafter “Ferguson”].

¹⁹ See Ferguson, *id.*, for a careful analysis of why our manslaughter law is far too wide.

²⁰ [2001] S.C.J. No. 75, [2001] 3 S.C.R. 488 (S.C.C.) [hereinafter “*Nette*”].

²¹ [1977] S.C.J. No. 58, [1978] 1 S.C.R. 506 (S.C.C.) [hereinafter “*Smithers*”].

adjective as unnecessarily narrowing the *Smithers* test. The Court in *Maybin* ought to have made it crystal clear that it was opting for the test of the significant contributing test, as did Doherty J.A. in *R. v. Talbot*.²² Arguably, the Court should have rested content with the test for all cause issues and not have gotten mired in issues of intervening cause.

The Court, however, went further. In doing so, it is unfortunate that the Court in *Maybin* did not adopt a binding test for when a cause is intervening to break the chain of causation. “Analytical aids” that are helpful but not determinative leave trial counsel and trial judges at sea. The same ambiguity arises in the jurisprudential approach in *R. v. Stone*²³ identifying three non-determinative factors for distinguishing the sane automatism defence from a finding of not criminally responsible on account of mental disorder.

In *Nette* Arbour J. said that it was not necessary to address the factual and legal cause issues separately, but this is what the Court does in *Maybin*. Yet neither the reasonable foreseeable nor independent actor test is to be determinative on the issue of legal causation. Explain that to a jury or to law students!

The Court furthermore toughens the reasonable foreseeable approach to one of reasonable foreseeability of a risk rather than of the particular intervention.²⁴ Here, reasonable foresight of someone intervening to beat up the victim sufficed to hold the original actor criminally responsible for the death. With Finch C.J.B.C. in dissent in the court below, this is hard to find on the evidence before the Court. The Court notes that this approach is consistent with the fault requirement for unlawful act manslaughter — reasonable foresight of non-trivial bodily harm adopted in *R. v. Creighton*.²⁵ It is not clear how this analysis will work in non-homicide cases where subjective *mens rea* is required. Presumably in murder cases these intervening act cases will be resolved not on *Maybin* but on the Charter *mens rea* requirement of actual foresight of the likelihood of death established in *R. v. Martineau*.²⁶

²² [2007] O.J. No. 427, 44 C.R. (6th) 176 (Ont. C.A.).

²³ [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.).

²⁴ See Snow, *supra*, note 18.

²⁵ [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

²⁶ [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

The independent act approach is also pragmatically changed to one where this does not absolve the accused where the act of another was a direct result of the accused's act.²⁷ How is this to apply to more difficult cases such as where the victim of a minor assault is taken by ambulance to hospital for a precautionary check and death is caused by dangerous driving of the ambulance driver, bad treatment by an intervening good Samaritan or negligent medical treatment at the hospital? The Court points to existing *Criminal Code* provisions declaring that some of these intervening causes do not break the chain of causation (for example, section 225 respecting improper treatment applied in "good faith"). The Court does not address whether fundamental principles of justice under section 7 of the Charter should be applied to prevent such clearly excessive extensions of the law of manslaughter. In *Nette*, Arbour J. referred to legal causation reflecting "fundamental principles of criminal justice such as the principle that the morally innocent should not be punished".²⁸ Hopefully this is not the last word on intervening cause and prosecutorial discretion will be exercised with restraint where multiple causes are at play in cases more sympathetic than *Maybin*.

IV. CHARTER AVERSE

In some cases the current Supreme Court is conspicuously ducking rather than guarding Charter standards.

In *R. v. Ryan*²⁹ the Court indicated that it was not the role of the Court to fill gaps in what Parliament has done — in that case in its codification of the defence of self-defence. The Court overlooks that in *R. v. Ruzic*³⁰ it held that defences required no more deference to Charter scrutiny that when reviewing fault requirements and further declared that moral involuntariness was a Charter standard under section 7. How that plays out for abused persons who act in agonizing situations was regrettably left unaddressed in *Ryan*.

In *R. v. Bouchard-Lebrun*,³¹ involving toxic psychosis induced by drugs, the Supreme Court rejected the defence of extreme intoxication to

²⁷ See Snow, *supra*, note 18.

²⁸ *Nette*, *supra*, note 20, at para. 45, quoted in *Maybin*, *supra*, note 4, at para. 16.

²⁹ [2013] S.C.J. No. 3, 2013 SCC 3 (S.C.C.). See Criminal Reports comments by Stephen Coughlan, Archie Kaiser, and Carissima Mathen and Michael Plaxton.

³⁰ [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.).

³¹ [2011] S.C.J. No. 58, 2011 SCC 58 (S.C.C.).

a charge of aggravated assault by simply applying section 33.1 of the *Criminal Code*. In enacting section 33.1 Parliament purported to remove the Court's *R. v. Daviault*³² defence of extreme intoxication "akin to insanity or automatism" from offences of general intent which affect bodily integrity. The Court in *Bouchard-Lebrun* simply noted the lack of Charter challenge. Since the Court's majority decision in *Daviault* was squarely based on the view that this limited and rare defence was required by the Charter, it seems far too deferential and meek for the Court to have avoided the Charter issue in this way. The Court should have ordered a new hearing to decide whether the Court is still committed to the *Daviault* principles it declared 15 years ago.

I turn now to consider the Charter rulings in *Prokofiew* and *Nedelcu*. Both the key majority judgments were written by Justice Michael Moldaver. Justice Moldaver is certainly to be commended for his hard work since his appointment in already producing many judgments for the Court in the field of criminal law. He brings considerable criminal law expertise and experience to the Court but he has never been known as a Charter enthusiast.³³ In these two Charter judgments he has left too much to the discretion of trial judges and has unnecessarily diminished Charter rights for accused. Both judgments unfortunately necessitate careful parsing and analysis to reveal their reality.

V. R. V. PROKOFIEW³⁴ (COMMENTS ON THE ACCUSED'S SILENCE AT TRIAL)

Section 4(6) of the *Canada Evidence Act*³⁵ has long provided that "[t]he failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution".

The Supreme Court's divided majority opinion in *Prokofiew* has read down section 4(6) to allow instructions on trial silence, but has left this to the largely unfettered discretion of trial judges. This has further and unnecessarily weakened the right to silence.

³² [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) [hereinafter "*Daviault*"].

³³ See Michael Moldaver, "Long Criminal Trials: Masters of a System They Are Meant to Serve" (2006) 32 C.R. (6th) 316 and my reply, "The Charter is a Living Tree Not a Weed to be Stunted – Justice Moldaver Has Overstated" (2006) 40 C.R. (6th) 280.

³⁴ *Supra*, note 5.

³⁵ R.S.C. 1985, c. C-5.

1. The Courts Below

The trial judge, relying on *dicta* of Sopinka J. for the Supreme Court in *R. v. Crawford*³⁶ and *R. v. Noble*,³⁷ concluded that section 4(6) of the *Canada Evidence Act* prohibited him from telling the jury that they could not use the accused's silence at trial as evidence against him. The trial judge made it clear that, but for his understanding of the prohibition in section 4(6), he would have given a remedial instruction. The jury convicted the appellant and his co-accused. The accused appealed, *inter alia*, arguing that section 4(6) was unconstitutional.

The appeal was dismissed by Doherty J.A. on behalf of a unanimous five-person panel of the Ontario Court of Appeal.³⁸ Justices Feldman, MacPherson, Blair and Juriansz concurred. The court held that Sopinka J.'s comments were *obiter* and should not be followed given earlier pronouncements from the Supreme Court. The Supreme Court had held that section 4(6) did not preclude comments not prejudicial to the accused and permitted a trial judge to tell a jury that an accused who does not testify is exercising his or her constitutional right and that no adverse inference can be drawn from that failure to testify. However, the Court of Appeal held, on consideration of the entirety of the instructions on the presumption of innocence and reasonable doubt, that this was a case for the curative proviso under section 686(1)(b)(iii) of the *Criminal Code*. The jury would have to understand that guilt had to be established on the evidence and that the accused's silence at trial could not be used to infer the accused's guilt.

2. The Supreme Court

The Supreme Court dismissed the appeal. The 5-4 division in the Supreme Court is importantly not just over the application of the curative proviso. The majority agreed with the Ontario Court of Appeal that this was a case for the curative proviso. The minority judgment of Fish J. reads as if he thought he was writing for a majority. This seems apparent from the enigmatic and opaque opening paragraphs of the majority judgment of Moldaver J. (Deschamps, Abella, Rothstein and Karakatsanis JJ. concurring) as follows:

³⁶ [1995] S.C.J. No. 30, [1995] 1 S.C.R. 858 (S.C.C.).

³⁷ [1997] S.C.J. No. 40, [1997] 1 S.C.R. 874 (S.C.C.) [hereinafter "*Noble*"].

³⁸ [2010] O.J. No. 2498, 100 O.R. (3d) 401 (Ont. C.A.).

Largely for the reasons given by Doherty J.A., I would dismiss Mr. Prokofiew's further appeal to this Court. I have had the benefit of reading the reasons of my colleague Justice Fish and I agree with much of his analysis. Where I disagree with him is in the result. I will explain our disagreement and why the appeal should be dismissed, but before doing so, I will address the matters on which my colleague and I agree — albeit with some additional observations.³⁹

Although it is the majority judgment that is binding on how judges are to proceed in future cases, in order to understand what the Court decided it will be helpful to first consider what Fish J. decided on section 4(6) and the right to silence.

3. Minority in the Result

According to Fish J. (McLachlin C.J.C. and LeBel and Cromwell JJ. concurring), the Court of Appeal for Ontario correctly held that section 4(6) prohibits comments *prejudicial to the accused* but not the remedial instruction requested by defence counsel and contemplated by the judge. *Dicta* to the contrary by Sopinka J. were indeed *obiter* and should not be followed given earlier Supreme Court judgments.

Noble had established that a trier of fact may not draw an adverse inference from the accused's failure to testify and that the accused's silence at trial may not be treated as evidence of guilt. To do so would violate the presumption of innocence and the right to silence. It would to that extent and for that reason shift the burden of proof to the accused, turning the accused's constitutional right to silence into a "snare and a delusion".⁴⁰ The Crown had argued that *Noble* should be overruled but Fish J. held that there was no persuasive reason to do so. In his view *Noble* is a recent and important precedent regarding a fundamental constitutional principle; the decision was constitutionally mandated and had not proven unworkable in practice. Nothing of significance had occurred since 1997 to cause the Court to reconsider its decision. On the issue of directions in jury trials, the minority offered the following advice:

In short, s. 4(6) of the *Canada Evidence Act* does not prohibit an affirmation by the trial judge of the accused's right to silence. And, in appropriate circumstances, an instruction that no adverse inference may

³⁹ *Prokofiew, supra*, note 5, at paras. 1-2.

⁴⁰ *Noble, supra*, note 37, at para. 72.

be drawn from the silence of the accused at trial is not a prohibited “comment” on the accused’s failure to testify within the meaning of that provision.⁴¹

Trial judges must take care to ensure that the right to silence becomes neither a snare nor a delusion (*Noble*, at para. 72). To this end, whenever there is a “significant risk” — as the trial judge found in this case — that the jury will otherwise treat the silence of the accused as evidence of guilt, an appropriate remedial direction ought to be given to the jury. That was not done here.⁴²

Justice Fish concluded that the trial judge erred in law in this case in failing to give the jury the remedial instruction requested by defence counsel and there was also a conceded error in admitting hearsay evidence. The Crown had not discharged its burden on the curative proviso. This opinion on the curative proviso did not carry the Court.

4. Majority Decision

According to Moldaver J. for the majority, the Court was in agreement that section 4(6) of the *Canada Evidence Act* does not prohibit a trial judge from affirming an accused’s right to silence. More specifically, the majority added the following remarks:

In so concluding, I should not be taken — nor do I understand my colleague to suggest — that such an instruction must be given in every case where an accused exercises his or her right to remain silent at trial. Rather, it will be for the trial judge, in the exercise of his or her discretion, to provide such an instruction *where there is a realistic concern that the jury may place evidential value on an accused’s decision not to testify*.⁴³

In cases where the jury is given an instruction on the accused’s right to remain silent at trial, the trial judge should, in explaining the right, make it clear to the jury that an accused’s silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case. In other words, if, after considering the whole of the evidence, the jury is not satisfied that the charge against the accused has been proven beyond a reasonable doubt,

⁴¹ *Id.*, at para. 79.

⁴² *Id.*, at para. 94.

⁴³ *Id.*, at para. 3 (emphasis added).

the jury cannot look to the accused's silence to remove that doubt and give the Crown's case the boost it needs to push it over the line.⁴⁴

This case provided an example, the majority held, of a situation where such an instruction would be warranted — a cutthroat defence case where one accused testifies and points the finger at the other, while the other exercises his right not to testify. In such cases where there is a risk of counsel misleading the jury on a co-accused's right to remain silent at trial, trial judges would, held Moldaver J., do well to spell out the governing principles and ensure that counsel's remarks conform to those principles. In this case remedial instruction would have been preferable. However, considering the instructions on the presumption of reasonable doubt, this was a case for the curative proviso.

Justice Moldaver adds that it might be helpful to explain how a jury may use a lack of contradictory evidence in deciding whether the Crown has proved its case beyond a reasonable doubt:

Juries are also told that in deciding whether the Crown has proved its case to the criminal standard, they are to look to the whole of the evidence — and, having done so, they may only convict if they are satisfied, on the basis of evidence they find to be both credible and reliable, that the Crown has established the accused's guilt beyond a reasonable doubt. In coming to that conclusion, a jury may not use an accused's silence at trial as evidence, much less evidence of guilt, and, where appropriate, the jury should be so instructed.⁴⁵

That said, in assessing the credibility and reliability of evidence upon which the Crown can and does rely, *a jury is entitled to take into account, among other things, the fact that the evidence stands uncontradicted, if that is the case — and the jury may be so instructed. Of course, the fact that evidence is uncontradicted does not mean that the jury must accept it, and an instruction to that effect should be given.*⁴⁶

5. Comment

The Supreme Court's judgments do not give clear guidance to trial judges. It is at least made clear that the majority view in *Noble* has been re-asserted. It is a fundamental constitutional principle that no adverse inference can be drawn from trial silence.

⁴⁴ *Id.*, at para. 4.

⁴⁵ *Id.*, at para 10.

⁴⁶ *Id.*, at para 11 (emphasis added).

The Court has also read down section 4(6) to make it clear that instructions can be given to juries on this Charter principle. It was a stretch for the Supreme Court to decide that a clearly worded statutory prohibition against “comment” does not mean what it says and permits comments not prejudicial to accused. The Supreme Court ought to have been forthright and declared section 4(6) unconstitutional.

What is distressingly unclear is when instructions should be given. The only clear pronouncement from either judgment is that there must be a direction in cutthroat defence cases like *Prokofiew* when defence counsel is making hay of the silence of a co-accused. But more generally, the majority say that an express direction is only required when “there is a realistic concern that a jury may place evidential value on the accused’s decision not to testify”.⁴⁷ How is a trial judge to determine that? Furthermore, the majority determines that a trial judge can instruct the jury that the Crown evidence is uncontradicted, coupled with the instruction that this does not mean that the jury must accept it. That would allow an indirect and perhaps not-so-subtle comment on the fact that an accused did not testify. Would it be appropriate where Crown witnesses have been vigorously and effectively cross-examined? Either of these possible instructions is now left to the largely unfettered discretion of trial judges.

We need to avoid any inkling of the 1840 theft trial at the Old Bailey where the trial lasted about three minutes and the jury direction was, “Gentlemen, I suppose you have no doubt. I have none.”⁴⁸

The Supreme Court has again acknowledged the fundamental right to silence but given it no teeth.⁴⁹ Opinions do differ as to the determination that no adverse inference can be drawn from trial silence. Recall that it was Chief Justice Lamer who led the dissent in *Noble*. He expressed the view that where there is overwhelming evidence and the accused stays silent at trial, an adverse inference can be drawn. But once the current Supreme Court adopted the majority position on *Noble* it should, in my view, have required a direction to the jury as to that right *in every case*. Of course some judges may now wish to take that position since the matter has been left to unfettered discretion. On the other hand, given the application of the proviso in *Prokofiew* it is very difficult to assess when

⁴⁷ *Id.*, at para. 3.

⁴⁸ Tom Bingham, *The Rule of Law* (London; New York: Allen Lane, 2010), at 91.

⁴⁹ See especially *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) (s. 7 right to silence subsumed by the voluntary confession rule).

appeal courts should reverse a trial judge who gave no instruction on the right to silence, even in cutthroat defence cases.

VI. *R. v. NEDELUCU*⁵⁰ (USE IMMUNITY)

In essence the full Court first confirms the basic ruling of Binnie J. for a unanimous Court in *R. v. Henry*⁵¹ that use immunity under section 13 of the Charter only applies where an accused gave incriminating evidence under compulsion at a prior proceeding. However, Moldaver J. for a 6-3 majority held that the trial judge had not erred in permitting the Crown to cross-examine the accused on civil discovery statements because the statements were not incriminating, as “incriminating evidence” only refers to evidence the Crown could (if permitted) use in subsequent proceeding to prove or assist in proving one or more essential elements of the offence charged.

This effectively reversed the clear bright line approach under *Henry* that previously compelled testimony is always inadmissible even if tendered for credibility, a pragmatic decision widely applauded by judges and commentators.

1. The Lower Courts

The accused was charged with dangerous driving causing bodily harm and impaired driving causing bodily harm. He took a fellow employee, P, for a motorcycle ride on company property. There was a crash. P was not wearing a helmet and suffered permanent brain damage. The victim and his family brought a civil suit against the accused and he was examined for discovery. In his discovery answers on oath, the accused indicated that he had no memory of the accident until he woke up the next day in hospital. At the criminal trial 14 months later, he gave a detailed account of how the accident occurred. The trial judge allowed the Crown to cross-examine on the statement as to credibility on the basis that section 13 of the Charter did not apply to compelled discovery evidence in a civil case. The accused was not afforded the protection of section 13 of the Charter because his situation did not meet the *quid pro*

⁵⁰ *Supra*, note 6. See also the comments of Paul Calarco, “*R. v. Nedelcu*: Whatever Happened to a Large and Liberal Interpretation of the Charter?” (2013) 96 C.R. (6th) 438 and Lisa Dufraimont, “Section 13 Use Immunity After *R. v. Nedlecu*” (2013) 96 C.R. (6th) 431 [hereinafter “Dufraimont”].

⁵¹ [2005] S.C.J. No. 76. [2005] 3 S.C.R. 609 (S.C.C.) [hereinafter “*Henry*”].

quo rationale of compulsion. The accused had given his discovery evidence to further his own private interest in a civil action against him. Relying in part on the contradictions between the accused's two accounts, the trial judge concluded that the accused's entire testimony regarding the accident was unreliable. The accused was convicted and appealed.

The Ontario Court of Appeal allowed the appeal, quashed the conviction and ordered a new trial. The court, relying on *Henry*, held that under section 13 of the Charter an accused's compelled testimony on civil discovery is inadmissible at the subsequent criminal trial for purposes of incrimination or for testing credibility. The protection was not only available where the prior testimony assists the Crown. The accused had been compelled to testify on the examination for discovery solely for the benefit of the plaintiffs. *Quid pro quo* had a wider meaning than that given by the trial judge. Any other proceeding in section 13 included royal commissions, statutory boards and tribunals, bankruptcy proceedings and other forms of judicial and quasi-judicial proceedings. The trial judge's distinction between criminal and non-criminal interrogatories was not relevant.

2. The Supreme Court

The majority of the Supreme Court allowed the Crown appeal, set aside the order for a new trial and restored the conviction.

According to Moldaver J. (McLachlin C.J.C., Deschamps, Abella, Rothstein and Karakatsanis JJ., concurring) section 13 of the Charter embodies a *quid pro quo*: a witness who has given incriminating evidence under compulsion at a prior proceeding (the *quid*) is protected from having that evidence used to incriminate him or her at a subsequent proceeding (the *quo*), except in a prosecution for perjury or the giving of contradictory evidence. Consequently, a party seeking to invoke section 13 protection must first establish that he or she provided "incriminating evidence" under compulsion at a prior proceeding. In this context "incriminating evidence" means evidence that the Crown could use in a subsequent proceeding, if it were permitted to do so, to prove or assist in proving one or more of the essential elements of the offence charged. The time to determine whether the evidence given at a prior proceeding should be characterized as "incriminating" is when the Crown seeks to use the evidence at a subsequent hearing.

On its own, held Moldaver J., the accused's discovery evidence indicating that he remembered nothing from the accident could not have been used by the Crown to prove or assist in proving one or more of the essential elements of the criminal charges he was facing. It was therefore not incriminating evidence and did not trigger the protection of section 13. In theory, if the Crown were able to prove that the accused concocted his discovery evidence, that finding would constitute evidence of consciousness of guilt from which guilt could potentially be inferred. However, the mere possibility that otherwise non-incriminating evidence could be converted into incriminating evidence if the Crown took added steps was not enough to trigger the application of section 13. Moreover, the use of the accused's discovery evidence to test his credibility, and nothing else, could not convert his discovery evidence into incriminating evidence.

Where evidence of an accused's non-incriminating prior testimony is introduced by the Crown, trial judges must provide juries with clear instructions on the use they can make of the evidence given at the prior proceeding. In this case, unless the accused adopted his discovery testimony, the jury would be told that they could not use his discovery evidence for its truth, but only to test his credibility. The jury would also be told that if they were to reject the accused's trial evidence, they could not use that rejection to bolster the Crown's case but would simply remove his evidence from their consideration.

Justice Moldaver suggests that trial judges will have little trouble discerning whether evidence given by the accused as a witness in a prior proceeding is incriminating. Where the evidence is found to be incriminating, section 13 will apply and the evidence will be inadmissible for any purpose (other than a prosecution for perjury or giving contradictory evidence).

Justice LeBel, with Fish and Cromwell JJ. concurring, dissented in part. Cross-examination of the accused on his evidence given in civil discovery infringed his right against self-incrimination and should be excluded.

Justice LeBel spoke for the whole Court in holding that a witness who is statutorily compellable is "compelled" to testify for the purposes of section 13. Whereas evidence from an accused who decides to testify is voluntary because the accused has a constitutional right not to testify, evidence from any other witness is not voluntary in the same sense even if the witness decides to testify on his or her own volition. In this case, the accused was statutorily compellable to give evidence on examination for discovery and therefore his evidence was compelled. Whether the

accused freely decided to attend the discovery proceeding was irrelevant to this conclusion.

However, in dissent, LeBel J. held that the distinction between using prior compelled testimony to impeach credibility and using it to incriminate the accused was unworkable and that there can be no such distinction in practice in the context of section 13. The distinction was abandoned in the recent, unanimous decision of the Supreme Court in *R. v. Henry* and it should not be reintroduced. It was true that section 13 sometimes operates to protect accused persons from impeachment by their prior testimony even when they have given conflicting testimony or there is evidence that they have lied under oath. Laying criminal charges for perjury was the appropriate way to deal with witnesses who tailor their evidence to suit their needs in each particular proceeding.

The majority's approach to section 13 would require courts to conduct *voir dire*s to determine whether the statements of an accused are "innocent" or "incriminating", which will encumber the trial process and render section 13 dubious in theory and uncertain in practice. Uncertainty about how evidence might be used in future proceedings would discourage witness candour and reduce the scope of section 13 protection for previously compelled witnesses.

3. Comment

The new *Nedelcu* definition of incrimination for section 13 protection turning on the nature rather than the use of the evidence seems contrived and unstable. If the Crown is introducing evidence as in *Nedelcu* that the accused previously said he remembered nothing and now he remembers everything in detail, the purpose is, of course, to cast doubt on credibility and indirectly to admit the evidence to incriminate. The unanimous Court in *Henry* may not have expressly ruled on this issue⁵² but Binnie J. clearly stated that the distinction between evidence that incriminated and evidence that went to credibility had proved difficult to draw in this context and should be avoided. This position was reminiscent of the Supreme Court's decision long ago in *R. v. Piché*⁵³ that it was wise to avoid any attempt to distinguish between inculpatory and exculpatory statements for the purposes of the voluntary confession rule.

⁵² See Dufraimont, *supra*, note 50.

⁵³ [1970] S.C.J. No. 59, [1971] S.C.R. 23 (S.C.C.).

Given *Nedelcu*, it is to say the least ironic that McLachlin C.J.C. for the Court in *Sriskandarajah v. United States of America; Nadarajah v. United States of America*⁵⁴ relies on *Henry* for only rejecting prior precedent in exceptional cases. The Court was not prepared to change its previous jurisprudence on extradition. The Court held that extradition does not violate the right of citizens to remain in Canada under section 6(1) of the Charter, even when the foreign state's claim of jurisdiction is weak or when there is a realistic possibility of prosecuting in Canada. To hold otherwise would amount to overruling three previous decisions of the Court. The Court, said the Chief Justice, does not lightly depart from the law set out in the precedents:

Adherence to precedent has long animated the common law. ... It is an established rule to abide by former precedents, where the same points come again in litigation. ... The rule of precedent, or *stare decisis*, promotes predictability, reduces arbitrariness, and enhances fairness, by treating like cases alike. Exceptionally, this Court had recognized that it may depart from its prior decisions if there are compelling reasons to do so: *R. v. Henry*. ... The benefits must outweigh the costs. For instance, compelling reasons will be found when a precedent has become unworkable, when its validity has been undermined by subsequent jurisprudence or when it has been decided on the basis of considerations that are no longer relevant.⁵⁵

There was no such justification offered in *Nedelcu* for departing from *Henry*. As the minority pointed out, the majority provide no compelling reasons for reversing that recent bright line decision widely supported by judges and commentators.

The courts will now be faced with difficult section 13 *voir dire*s trying to apply the *Nedelcu* distinction. The guarantee against use immunity has been substantially weakened.

There now appears to be more protection available in invoking the protection of section 5(2)) of the *Canada Evidence Act*. However, the witness and/or counsel will have to know enough to assert this protection. It is not automatic as was section 13 of the Charter as interpreted in *Henry*.

⁵⁴ [2012] S.C.J. No. 70, [2012] 3 S.C.R. 609 (S.C.C.).

⁵⁵ *Id.*, at paras. 18-19.

VII. JUDICIAL NOTICE

*R. v. Spence*⁵⁶ should be the controlling authority on judicial notice. Justice Binnie for a unanimous Court, including McLachlin C.J.C., was at pains to establish principles upon which all issues of judicial notice are to be based. The Court is cautious. The closer any matter is to the dispositive fact, the less scope there is to be for judicial notice. If the matter relates to adjudicative issues the strict Morgan “gold standard” set out by McLachlin C.J.C. in *R. v. Find*⁵⁷ is to be applied. For judicial notice the facts have to be “(1) so notorious or generally accepted as not to be the subject of debate among reasonable people; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”.⁵⁸

When it comes to social or legislative facts the Court opens the door a little wider. However, a judge must still ask whether the alleged fact would be accepted by a reasonably informed reasonable person as not subject to reasonable dispute. Justice Binnie expresses a preference for social science evidence to be presented by experts subject to cross-examination.

In *R. v. A. (D.I.)*⁵⁹ the Court was interpreting the competency provision in section 16 of the *Canada Evidence Act* which allows adult witnesses with a low mental age to testify if they cannot understand an oath or solemn affirmation but can communicate and if they promise to tell the truth. The Chief Justice for the majority decided that there is to be no abstract inquiry into the person’s understanding of truth or the nature of a promise. The majority applies the empirical research and recommendations of Professor Nick Bala respecting competency hearings for young children which had directly resulted in Parliament enacting a new and separate section 16.1 of the *Canada Evidence Act*. The majority chose not to address Binnie J.’s strong and detailed dissenting complaint in *A. (D.I.)* that this completely ignored judicial notice tests. There was indeed no evidence before the Court of any research involving mentally challenged adults.

⁵⁶ [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 (S.C.C.).

⁵⁷ [2001] S.C.J. No. 34, [2001] 1 S.C.R. 863 (S.C.C.).

⁵⁸ *Id.*, at para. 48.

⁵⁹ *Supra*, note 7.

In contrast, in *R. v. S. (N.)*⁶⁰ McLachlin C.J.C., again speaking for the majority, confronted the issue of whether a complainant in a sexual assault trial should be required to remove her niqab (Muslim veil) for cross-examination. She refuses to consider social science evidence of interveners that cast doubt on whether assessing demeanour is a reliable way to assess credibility. The Chief Justice is blunt and dismissive:

The only evidence in the record is a four-page unpublished review article suggesting that untrained individuals cannot accurately detect lies based on the speaker's facial cues. This material was not tendered through an expert available for cross-examination, Intervenors have submitted articles for or against a connection, but they are not part of the record and not supported by expert witnesses, and so are more rhetorical than factual.⁶¹

VIII. CONCLUSION

It is a tall order to expect a Court of nine hard-working and expert jurists with a mind-boggling docket to always achieve consensus, clarity and consistency. These recent decisions, however, raise concerns that go to the legitimacy of the rule of law. And there are few signs that the Supreme Court is properly protecting the Charter rights of accused.

⁶⁰ *Supra*, note 8.

⁶¹ *Id.*, at para. 20.

