The Use of Family Court Evidence in Criminal Proceedings

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Introduction

Evidence given in a family court proceeding can have serious impacts at a criminal trial, especially for the accused.

This paper will outline how evidence given in prior family law proceedings (including both oral testimony and documentary evidence) can be used in subsequent criminal proceedings.[1]

The starting point of this discussion is the *Charter*, which provides express protection against self-incrimination in sections 11(c), 11(d), and 13, as well as residual protection under section 7. The primary focus of this paper will be on section 13, which specifically protects against the use of evidence from a prior proceeding to incriminate an accused in a subsequent proceeding.

The Supreme Court of Canada has provided guidance on when evidence is "compelled" and "incriminating" for the purposes of section 13. However, there is a paucity of case law that deals specifically with evidence given in a prior family law proceeding.

Below, I will provide an overview of the leading section 13 cases and outline how the principles enunciated in these cases may apply when the prior proceeding is a family law proceeding. Finally, I will list some key points that family law practitioners should know if they are working with a client who is currently facing, or may in the future, face criminal charges.[2]

The Charter

Overview

Three rights outlined in the *Canadian Charter of Rights and Freedoms* are implicated when evidence given in a family law proceeding is sought to be tendered at a criminal trial. Sections 11(c), 11(d), and 13 all provide express protection against self-incrimination, and section 7 provides some residual protection.

First, when it comes to evidence given by the accused in a prior family court proceeding, there is section 11(c):

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[1] Different rules of evidence may apply in family law proceedings. This paper is focused on the rules of evidence in a criminal trial. As such, this paper will not discuss whether and how evidence given in a prior criminal proceeding can be used in a subsequent family law proceeding.

[2] I am indebted to the work of Bruce Manson in Legal Aid Memo ZC13-3, "Use of Family Law Testimony in Criminal Proceedings", which forms the basis of much of this paper and the accompanying presentation.

> Every person charged with an offence has the right
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> …
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> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

Section 11 rights only exist for an accused, and they afford specific protection against the use of the accused's evidence from a prior proceeding in a manner that would violate the 'right to remain silent' in a criminal trial. Unlike section 13, which applies only to *compelled* evidence given in a prior proceeding, section 11(c) also prevents non-compelled evidence from a prior proceeding from being used in a subsequent case (*R v Henry*, 2005 SCC 76, at paras 26, 39).

Second, there is the more general right against self-incrimination in section 13:

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

Section 13 only affords protection when the evidence from a prior proceeding is being used "to incriminate" in a subsequent criminal proceeding. As such, it affords protection to the accused person in a subsequent proceeding, not witnesses.

Third, section 7 provides general "derivative use immunity" with respect to testimony from a prior proceeding. Derivative use immunity requires evidence to be excluded if it could not have been obtained if not for the compellability of the witness, or the significance of the evidence could not have been appreciated but for the testimony (*R v S(RJ)*, [1995] 1 S.C.R. 451, 1995 CarswellOnt 2, at para 196; *British Columbia (Securities Commission) v Branch*, [1995] 2 S.C.R. 3, 1995 CarswellBC 171, at paras 7-9).

The right against self-incrimination is a principle of fundamental justice that underpins section 7. Section 7 therefore provides residual protection beyond those set out in the more specific sections of the *Charter* (i.e. sections 11(c), 11(d), and 13 (*R v White*, [1999] 2 S.C.R. 417, at para 44)). Evidence given in a prior proceeding may not trigger section 13 protection, but it may nonetheless attract protection under section 7 or a statutory provision preventing the use of certain evidence in subsequent criminal proceedings, such as statements made by an accused at a bail hearing regarding the offence (see e.g. *R v Mallory*, 2007 ONCA 46, at paras 171-176).

<u>Section 13</u>

The bulk of the analysis below will focus on section 13, as it prevents compelled evidence given in a prior proceeding from being used to incriminate an accused in a subsequent criminal proceeding. Of course, the *Charter* rights outlined above are all interconnected.

Section 13 has been discussed in many cases, and inconsistencies and unworkable distinctions began to emerge in the case law over time. However, the Supreme Court of Canada attempted to address these issues and clarify the law in *R v Henry*, 2005 SCC 76 ("*Henry*"), which involved an accused who had volunteered to testify at his first and second criminal trials.

The Supreme Court of Canada again addressed section 13 in *R v Nedelcu*, 2012 SCC 59 ("*Nedelcu*"), but this time in the context of evidence from a prior *civil* proceeding being used in a subsequent criminal proceeding,

In both cases, the Court was clear that section 13 protects against the use of testimony from prior proceedings only if it is "compelled evidence" (or compellable) in the earlier proceeding and is "incriminating evidence" in the subsequent proceeding.

R v Henry

Henry explored whether an accused who testified voluntarily at his retiral for first-degree murder could be cross-examined on the different version of events given by the accused during the first trial.

Binnie J explained that section 13 cannot be understood in isolation from section 5 of the *Canada Evidence Act*, RSC 1985, c. C-5, requiring witness to answer all questions, including incriminating ones. Section 5(2), however, outlines that incriminating answers cannot be used or admissible in any other proceedings. Both the statutory and constitutional protections, Binnie J confirmed, are part of a *quid pro quo*—witnesses are compelled to answer questions, and in exchange they receive the guarantee that their answers will not be used against them in subsequent proceedings (*Henry*, at paras 22, 59).

Compelled prior testimony cannot be used in subsequent criminal proceedings for any purpose (to incriminate or impeach credibility). But if the accused's prior testimony was given voluntarily, then it can be used to cross-examine the accused in the subsequent proceedings (*Henry*, at paras 43, 49-50).

Furthermore, section 13 protection is automatic and does not need to be expressly claimed in the prior proceeding, and it applies even if the witness is unaware of the right (*Henry*, at para 23).

R v Nedelcu

Nedelcu is the most recent Supreme Court of Canada decision providing in-depth guidance on the admissibility of evidence given in a prior proceeding. The Court confirmed that section 13 can prevent the Crown from using evidence from a prior *civil* proceeding in a subsequent criminal proceeding.

Nedelcu involved an accused who got into a motorcycle accident while riding with a passenger who was not wearing a helmet. The accused was charged with impaired driving and dangerous driving causing bodily harm, and he was also sued for damages.

During the examination for discovery in the civil claim, Nedelcu claimed that he had no memory. The Crown wanted to cross-examine him on this statement at the criminal trial.

The Supreme Court of Canada unanimously agreed that Nedelcu was statutorily compellable at the examination for discovery (*Nedelcu*, at para 1). However, there was a split about how *Henry* should be applied with respect to the requirement outlined in section 13 that the evidence be used "to incriminate".

Moldaver J, writing for majority, concluded that Nedelcu was not entitled to the protection of section 13 because his statement about not remembering anything could not be used to prove guilt. While admitting this statement could damage Nedelcu's credibility and result in his evidence being rejected, this was not sufficient to turn the statement into an incriminating one for the purposes of section 13.

The majority emphasized the need to focus on the "quid"—that is, whether the evidence in the prior proceeding is incriminating—rather than just focusing on whether or not the evidence was compellable. Whether or not the evidence is incriminating is determined at the time the Crown seeks to use the evidence—not when the evidence was given. This means that evidence that seems innocuous or even exculpatory at the time it is given "may become 'incriminating evidence' at the subsequent proceeding, thereby triggering the application of s. 13" (*Nedelcu*, at paras 16-17).

Lebel J, in dissent, held that section 13 should be given a broader interpretation. He concluded the evidence should have been excluded in accordance with *Henry*, in which the Court agreed that the use of compelled evidence is to be restricted to prosecutions for perjury or the giving of contradictory evidence. Those who lie under oath should be dealt with through such prosecutions. Lebel J cautioned that the distinction created by the majority between incriminating and innocuous evidence is as unworkable as the distinction between using evidence to impeach credibility and to incriminate, which the Court abolished in *Henry*.

While the Court in *Henry* adopted a broader interpretation of section 13 and focused on the compelled nature of the evidence, *Nedelcu* suggests a stricter adherence to the wording of section 13. If a statement from an earlier proceeding is to be excluded it must be both: a) compelled and b) incriminating. If these criteria are met, the statement cannot be used for any purpose in a subsequent criminal proceeding.

Admitting Statements from Prior Proceedings

<u>Meaning of Other Proceedings</u>

Section 13 encompasses evidence given in "any proceedings" from being used to incriminate in subsequent proceedings—it is not limited to criminal proceedings (*Henry*, at para 23). Therefore, section 13 would provide protection against the use of evidence from a prior family law proceeding, as long as that evidence was a) compelled and b) incriminating.

Generally, for evidence to be protected, it must have been made before a tribunal or an officially constituted public body. This could include evidence given in:

- Examination for discovery (*Nedelcu*)
- Parole hearings (*R v Carlson*, 1984 CarswellBC 539 (SC), at para 9)[3]
- Professional disciplinary hearings (*R v Tyhurst*, 1993 CarswellBC 2836 (SC), at para 55)
- Inquiries (*Branch*)
- Foreign trials (*King v Drabinksy*, 2008 ONCA 566, at para 26 ["*King*"])

Section 13 does not apply to statements given in less formal circumstances, such as statements to police officers (*R v Henderson*, 1993 CarswellNS 106 (CA), at paras 13-19). Similarly, if a KGB statement is given but no charges were laid, section 13 is inapplicable (*L(D) v New Brunswick (Minister of Family and Community Services)*, 2007 NBQB 218, at paras 32-33) and the evidence can be admitted.

Meaning of Compelled

Whether evidence is compelled evidence is not based upon whether the witness felt subjectively required to testify or provide evidence (*Nedelcu*, at para 104). Instead, "compelled evidence" captures testimony that comes from a statutorily compellable witness.

In *Henry*, the accused who chose to testify at his first trial and retiral was not compelled and therefore did not receive section 13 protection (at para 43). Nobody can force the accused to testify—it is a voluntary choice.

The situation is different for other witnesses, who are generally required to give evidence if called. In *Henry*, Binnie J also noted that "[f]or present purposes, evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena" (at para 34). Similarly, Lebel J (dissenting on other grounds) explained in *Nedelcu*, at para 103:

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

Even if a subpoena was not issued, evidence will still be viewed as statutorily compelled if, in theory, the witness could have been served with one and required to give evidence. As discussed in *Nedelcu*, at para 104:

[3] This case was decided well before *Henry* and *Nedelcu*, and it is not clear if evidence given at a parole hearing would still be considered "compelled" for the purposes of section 13.

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

It is also unfair to characterize testimony of a defendant/respondent as voluntary on the basis that that party has the choice to simply respond. In *Nedelcu*, Lebel J outlined that the *Rules of Civil Procedure* allowed for service of a notice of examination after a defendant had been noted in default, so an examination for discovery could have been required even if the accused did not file a statement of defence. That the plaintiff did not resort to the procedure to compel the defendant to give evidence is irrelevant; it is the existence of a statutory route by which to compel the witness to give evidence that rendered the witness compellable. Since there was a mechanism in place to require Nedelcu to testify, Nedelcu's evidence in the prior civil proceeding was compelled (*Nedelcu*, at para 108).

Furthermore, there is a distinction between a tactical and legal compulsion to testify. Just because a person may feel required to testify for practical or tactical reasons, this does not mean his or her evidence is compelled for the purposes of section 13. As the Ontario Court of Appeal found in *R v Boss*, 1988 CarswellOnt 101, at para 71:

> the tactical obligation which an accused may feel to testify does not constitute a legal obligation or compulsion to testify. The use of the word "compelled" in s. 11(c) indicates to me that the section is referring to a legal compulsion.... The decision whether or not to testify remains with the accused free of any legal compulsion.

Where there is neither a legal obligation nor an evidentiary burden on the accused, pressure to testify does not violate the right against self-incrimination or the right to a fair trial (see *R v Darrach*, 2000 SCC 46, at paras 47-49). The same may be true in certain civil proceedings, for example, in bankruptcy proceedings where the accused made a choice to voluntarily declare bankruptcy (*R v Morris*, 2012 ONSC 1185, at paras 29-33).

<u>Meaning of incriminating</u>

As reaffirmed in *Henry, "*[i]ncriminating evidence means 'something 'from which a trier of fact may infer that an accused is guilty of the crime charged'" (*Henry*, at para 25).

Moldaver J further clarified the meaning of incriminating in *Nedelcu*, at para 9:

> …it can only mean evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, i.e. to

> prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried.

Evidence given at a prior proceeding may seem exculpatory or innocuous at the time, but it can become incriminating evidence at the subsequent proceeding and therefore attract section 13 protection (*Nedelcu*, at para 17). For example, if a witness in a robbery trial says that he was present at the scene of the robbery but not involved, and at his own trial denies being present, then the prior testimony would be incriminating, as it is evidence that could prove the element of identity (*Nedelcu*, at para 18).

The majority in *Nedelcu* held that "I … remember nothing" is not incriminating as it could not prove or assist in proving one or more essential elements (*Nedelcu*, at para 20).

An accused can be cross-examined on non-incriminating evidence to test the accused's credibility. Just because an accused could have his or her credibility impeached and be convicted as a result, this does not convert non-incriminating evidence into incriminating evidence, according to the majority (*Nedelcu*, at paras 21-24).

Oral vs. Documentary Evidence

Case law has focused on oral testimony, and the law is less clear about whether documentary evidence given in a prior proceeding is protected under section 13.

In *Henry*, Binnie J described section 13 as a protection against "*testimonial* self-incrimination" (at para 2, emphasis added). As such, it is not clear to what extent *Henry* applies to documentary evidence.

Lebel J (dissenting on other grounds) in *Nedelcu* noted that there is a distinction between oral evidence and other types of evidence, at para 75:

> Self-incrimination can be of two types: testimonial and non-testimonial. Testimonial self-incrimination refers to using oral evidence of the accused against the accused, either by forcing the accused to testify at his or her own trial (covered by s. 11(c) of the *Charter*), or by using prior testimony of the accused in another proceeding (embodied in s. 13 of the *Charter*). Non-testimonial self-incrimination refers to the proffering of other types of incriminating evidence by the accused, such as blood or breathalyzer samples: see e.g. *Attorney General of Quebec v. Begin*, 1955 CanLII 54 (SCC), [1955] S.C.R. 593; *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889. In the instant case, we are concerned with testimonial self-incrimination, specifically the right enshrined in s. 13.

Nedelcu and *Henry* were concerned with oral testimony only, and therefore the Supreme Court of Canada did not need to rule on the admissibility of documentary evidence from a prior proceeding.

The Ontario Court of Appeal stated that a person who files an affidavit is a "witness" and the affidavit is classified as "evidence" under section 118 of the *Criminal Code*, with respect to Part

IV of the Code (*King*, at para 33). However, the principle against self-incrimination under section 7 certainly does not elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigative proceeding (*R v Fitzpatrick*, [1995] 4 S.C.R. 154, 1995 CarswellBC 904, at para 50).

If the document "carrie[s] testimonial quality," it may attract protection under section 13 and be inadmissible in a subsequent criminal proceeding (*R v Baksh*, 2005 CarswellOnt 3106 (Sup Ct of J), at para 80 ["*Baksh*"]).

Examples of Documentary Evidence Found to Attract Section 13 Protection

- An affidavit of an accused from a prior criminal trial (*Baksh*, at para 80)
- An affidavit from a bail hearing (*R v Buxbaum*, 1989 CarswellOnt 89 (CA), at para 13; *United States v Graham*, 2004 BCSC 1768, at paras 92-98; *R v Sicurella*, 1997 CarswellOnt 4763 (Ct of J), at paras 43, 46)
- An affidavit prepared for a criminal appeal (*R v Hanna*, 2010 ONCJ 552, at paras 109-111)
- Affidavits and deposition filed in civil actions in another country (*King*, at paras 26-34)
- Documents from bankruptcy proceedings (*R v Gobuty*, 1997 CarswellOnt 543 (Ct of J), at paras 5-7)
- Affidavits and transcripts of cross-examination from a judicial review (*Merck & Co v Apotex Inc*, 1998 CarswellNat 560 (FC (TD), at paras 18-21)
- A Securities Commission settlement agreement (*R v Iyer*, 2014 ABQB 356, at paras 44-72)

Examples of Admissible Documentary Evidence

- An agreed statement of fact from a prior criminal trial (*Baksh*, at paras 79, 119, aff'd *R v Baksh*, 2008 ONCA 116, at para 3)

  Note: There may be some exceptions, such as if there are limitations placed on the admission, ambiguity in the admissions, or if the prejudicial impacts would outweigh the probative value (*Baksh*, at paras 98, 100, 105-106)

- An agreed statement of fact filed at Financial Services Commission hearing and trial (*R v Link*, 2012 SKQB 484, at paras 12-16)
- Business records that existed prior to and independently of state compulsion, such as those created during the ordinary course of business (*R v Hayes*, 2003 CarswellOnt 5463 (CA), at paras 71-73)

Compellable Evidence in Family Law Proceedings

<u>Relevance of Provincial Legislation</u>

Criminal proceedings are governed by the *Canada Evidence Act*. However, section 40 acknowledges that provincial laws of evidence can also apply to criminal proceedings.

In some cases, provincial laws may limit the use of evidence in a subsequent proceeding. For example, the *Evidence Act*, RSO 1990, c E.23 outlines:

> 9 (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).
>
> (2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature.

There is some uncertainty as to whether provincial laws can limit the admissibility of evidence in criminal proceedings. In some instances, provincial laws cannot affect admissibility rules incorporated in the *Criminal Code* (see *R v Albright*, [1987] 2 S.C.R. 383, 1987 CarswellBC 292, at paras 29-31; *Bisaillon c Keable*, [1983] 2 S.C.R. 60, 1983 CarswellQue 384, at paras 153-154; *Marshall v R* (1960), [1961] 1 S.C.R. 123, 1960 CarswellOnt 23, at para 8).

However, when provincial statutes compel testimony, it can engage *Charter* rights. In *Nova Scotia (Minister of Community Services) v M(DJ)*, 2002 NSCA 103, at para 22, an individual whose name was proposed to be entered into a child abuse registry was deemed to be compellable under the provincial *Evidence Act*, RSNS 1989, c 154, which triggered the individual's section 7 rights. In such a case, it would be unfair to allow this evidence to be used in a subsequent criminal proceeding to incriminate an accused, and section 13 would likely apply.

In conclusion, if the evidence in the prior proceeding is compelled (either by a federal or provincial law), then it is likely to attraction section 13 protection if it would also be incriminating in the subsequent criminal proceeding.

Implied Undertaking Rule

In addition to protection under section 13, there may be protection against the use of evidence from a prior family law proceeding in a subsequent criminal proceeding under provincial laws, including the *Family Law Rules* and the *Child and Family Services Act*, RSO 1990, c C.11.

Certain provincial statutes may limit (or attempt to limit) the use of evidence in a subsequent proceeding. For example, section 45(10) of the *Child and Family Services Act* limits who can have access to a transcript of a hearing to a party or a party's counsel, and the *Family Law Rules*

limit the use that can be made of certain evidence and information under Rule 20(24), specifically that obtained under Rules 13, 19, and 20. This of course does not necessarily prevent the evidence from being used in a subsequent proceeding.

There is also an implied undertaking in certain proceedings; however, the implied undertaking rule is not a bar to persons who are not party to it, and so discovery transcripts are not privileged and exempt from seizure (*R v Nedelcu*, 2007 CarswellOnt 1851 (Sup Ct of J), at paras 53-54). The police can apply for a search warrant, and the Crown can compel a witness to produce a copy of documents or transcripts in his or her possession (*Doucette (Litigation Guardian of) v Wee Watch Day Care Systems Inc*., 2008 SCC 8, at paras 55-57).

The *Family Law Rules* attempt to limit the use that can be made of information obtained in one proceeding in a subsequent proceeding (see e.g. Rule 20(24)-(25)). However, evidence given in prior proceedings that is subject to an implied undertaking might also be relevant to subsequent non-criminal proceedings involving the parties, and it may be admissible in those proceedings. There is discretion to lift the undertaking if public interest outweighs the privacy rights protected by the undertaking or where the deponent gives contradictory testimony in different proceedings (*Piche v Chiu*, 2013 BCSC 747, at paras 17- 27).

The implied undertaking rule does not prevent an accused from providing evidence given in prior civil proceedings to defence counsel for use in the cross-examination of a witness (*S.C. v. N.S.*, 2017 ONSC 5566 (Div Ct.), at paras 29, 35, rev'g 2017 ONSC 353 ["*S.C.*"]). Section 13 does not apply since the witness is not being incriminated, and instead admissibility turns on whether the trial judge determines that the probative value of the evidence outweighs its prejudicial effects (*S.C.*, at paras 29, 35). The trial judge will determine the admissibility of evidence obtained in a prior proceeding, not another judge in another court (*S.C.*, at paras 36-39). Prior judicial authorization is not needed for the accused to provide evidence from a prior proceeding to defence counsel.

However, recent changes to the "rape shield" provisions of the *Criminal Code*, make it more difficult in sexual assault cases for an accused to cross-examine a complainant on certain topics and records.

<u>Who is Compellable in a Family Law Proceeding?</u>

To trigger section 13, there needs to be a statutory provision that could be invoked to require the party or witness to testify in the prior proceeding.

In *Nedelcu*, the Court agreed that Nedelcu was compelled under the *Rules of Civil Procedure* to provide testimony. Non-party witnesses were also found to be compellable (*Nedelcu*, at para 103). As such individuals are still considered compelled even if they do not attend under a subpoena, including police officers (*R v Desjourdy*, 2012 ONCJ 648, at paras 29-37).

Moreover, in *Ontario Psychological Association v Mardonet*, 2015 ONSC 1286 ["*Mardonet*"], Perell J held that evidence can be considered compelled even if it is part of the party's case in-chief. The principle against self-incrimination is engaged even when there is no court order

requiring defendants to provide evidence (*Mardonet*, at para 27). Even if a defendant is not compelled to deliver an affidavit, "a witness is, nevertheless, regarded as under compulsion if the witness is statutorily compellable to give evidence" (*Mardonet*, at para 28). Case law has established "that a person examined at a civil trial or an examination for discovery or an affiant in civil proceedings is treated as a compelled witness" (*Mardonet*, at para 29).

Perell J held that "only witnesses who may waive their non-compellability are voluntary witnesses." such as an accused who chooses to testify (*Mardonet*, at para 31). While a party rarely summonses or subpoenas the opposing party, the opposing party is still statutorily compellable (*Mardonet*, at para 32). As a result, the evidence of the defendants was found to be compelled as the defendants were compellable throughout the action.

A similar conclusion was reached in *R v Kazman*, 2017 ONSC 5300, at para 98, and Appendix O at para 16. The officer/director of a corporate party (not a named defendant himself) filed an affidavit to support the release of frozen assets to carry on business. Justice Spies found that the deponent was technically compellable and that the affidavit was therefore compelled evidence, citing *Mardonet*. But contrary to *Nedelcu*, Spies J found that the affidavits (which were found to be incriminating) could still be used to impeach credibility if there was inconsistent testimony (*Kazman*, Appendix O, at paras 16-19).

Whether section 13 is engaged turns on whether there is a statutory provision that could require the person to testify. The *Evidence Act*, RSO 1990, c E.23, s 8(1) acknowledges that parties in a proceeding in Ontario are generally compellable:

> The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the spouses of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.

(But see also sections 8(2), 10 re adultery).

A specific set of rules apply in family law proceedings, specifically the *Family Law Rules*, O Reg 114/99. These rules are different than the *Rules of Civil Procedure* governing the civil action at issue in *Nedelcu*. However, the *Family Law Rules* (just like the *Rules of Civil* Procedure) may require parties to provide information in certain circumstances, specifically:

- Rule 13: financial disclosure
- Rule 19: document disclosure
- Rule 20: questioning a witness and disclosure
- Rule 23(3): summons to witness
- Rule 23(11): calling an opposing party as a witness at trial
- Rule 27(11)-(22): financial examination where payment order in default

In family law proceedings, a person or party may be obligated to provide information and/or evidence prior to trial. However, under Rule 20, evidence is only compelled in certain

circumstances. Rule 20(3) outlines that in child protection cases,: "a party is entitled to obtain information from another party about any issue in the case." However, in other cases, parties are only entitled to obtain information from another party or person with a court order, or (in the case of a party) with the other party's consent (Rules 20(4)-(5)). If the party consents when there would be no basis for a court order, then the evidence may not be considered compelled. The court can also order that a person provide details about information in an affidavit or net family property statement, per Rules 20(7) and 13(13). Rule 20(18) sets out that individuals can be questioned on a broad range of topics, and there are consequences for the failure to answer questions, such as a contempt order (Rule 20(19)).

At a family law trial, parties and witnesses are compellable. Witnesses can be served with a summons to compel their attendance (Rules 23(3), 23(7)). Similarly, Rule 23(11) specifically allows a party to call the opposing party as a witness, and there are also consequences for the failure to do so (Rule 23(12)).

Even outside of trial, evidence and information may be required too. If a payment order is in default, the payor can be required to submit to a financial examination (Rule 27(11)(a)).

There are also circumstances where a party or witness may be compelled to provide documentary evidence. If a party is required to provide information under Rules 20(3), 20(5), 20(7), this can be done through an affidavit, and as such, the affidavit evidence would (similar to oral testimony given under these rules) likely be treated as compelled evidence.

Similarly, the court can order a person to bring documents or other things relevant to the case (Rule 20(16)). There are also requirements to provide sworn financial statements in claims for support, property, or exclusive possession of the matrimonial home and its contents (Rule 13(1)), as well as net family property statements for claims under Part I of the *Family Law Act* (Rule 13(14)). If this information is insufficient, a party can be ordered to give the information or file a new financial statement (Rules 13(11), 13(17)).

Parties, with some exceptions, are also obligated to provide affidavits of documents (Rule 19(1)). The other party is entitled to access the documents listed unless the documents are privileged (Rule 19(2)). The court can order one party to give another party an affidavit or access to a particular document (Rule 19(10)(a)). Documents can also be required as part of a financial examination, and the payor under examination may also be required to serve a financial statement, or face consequences (Rules 27(11)(b)-(c)) and 27(19)-(21)).

So, while different rules govern family law proceedings and civil actions, the reasoning in *Nedelcu* and *Henry* should still prevent evidence from a prior family law proceeding from being used to incriminate an individual in a subsequent criminal trial. If there is a rule that could be invoked to compel a person to provide evidence and that person can be ordered to provide the specific evidence or face consequences, then the evidence cannot be used to incriminate that person in a subsequent criminal trial.

In conclusion, the affidavits and *viva voce* evidence of plaintiffs/applicants, defendants/respondents, and non-party witnesses may, in many cases, be deemed to be

compelled in family law proceedings by virtue of the *Family Law Rules*. This is because, at least in theory, witnesses and parties could be required through a summons to provide evidence. While the *Family Law Rules* may require affidavits and evidence for certain motions (for example under Rules 14-16), evidence given in those circumstances may not be compelled.[4] As in *Darrach*, these types of motions involve voluntary participation, and providing evidence in these kinds of motions could be classified as a tactical decision rather than a legal compulsion.

Plaintiffs/Applicants vs. Defendants/Respondents

The challenge for plaintiffs/applicants is that they chose to commence the proceedings, so it is arguable that the evidence in their case was given voluntarily and for their own benefit (similar to an accused choosing to testify at his or her own trial). This could mean that the evidence is therefore available for impeachment at a subsequent trial (*Henry*, at paras 42-43). As outlined above, even though a party may feel subjectively compelled to testify for practical or tactical reasons, this is not sufficient to offend Charter protections against self-incrimination.

A plaintiff is different from an accused because, as explained in *Mardonet*, parties are still compellable even though it might be unusual for the opposing party to call the plaintiff/applicant.

Nedelcu, *Mardonet* and *Kazman* were all concerned with defendants, and it is unclear whether the evidence of a plaintiff would be afforded the same treatment. However, under Rule 53.07 of the *Rules of Civil Procedure*, a *party* can be compelled to testify at trial by the opposing party; it would seem unprincipled to draw a distinction between plaintiffs and defendants. It may be unusual for a defendant to call a plaintiff, but the plaintiff is nonetheless compellable. As such, there is an argument that the plaintiff's evidence could also be deemed to be compelled.

Stays

Under section 7 of the *Charter*, a person can apply for a stay of civil proceedings pending the completion of a criminal trial, but this is limited to "extraordinary or exceptional circumstances" (*Falloncrest Financial Corp v Ontario*, 1995 CarswellOnt 910 (CA), at paras 14-15). A constitutional exemption can also be sought to avoid testifying in a proceeding where the predominant purpose for calling the witness is to obtain incriminating information against the witness, rather than evidence to further that proceeding (*Treat Canada Ltd v Leonidas*, 2012 ONCA 748, at para 45).

Evidence given in family law proceedings may be relevant at a criminal trial, but this may not provide grounds to stay or adjourn family court proceedings. Several cases have denied adjournments, citing or alluding to section 13 (but without in-depth discussion of how it applies to the family proceedings).

In *Meola v Griffiths*, 2012 ONSC 6439, the court refused to grant an adjournment until one party's criminal trial was completed. The applicant argued that he would experience prejudice because he had to disclose facts relevant to the criminal trial to respond to the false allegations

[4] This is the position taken by Bruce Manson in Legal Aid Memo ZC13-3.

resulting in an effective exclusive possession of the family home. This, he argued, would provide the respondent/complainant an opportunity to tailor her evidence at trial. However, the court found it was not in the best interests of the child to adjourn the matter until the criminal proceedings were completed. One of the reasons cited in support of this decision was the existence of the statutory protections against self-incrimination (section 13). However, no analysis was provided as to how section 13 would apply (at paras 7-12).

See also *Martin v Royal*, 2012 ONCJ 202, at para 24; *Children's Aid Society of the District of Thunder Bay v. S.D. and C.D.*, 2010 ONCJ 721, at para 17; *Children's Aid Society of Ottawa v JP*, 2012 ONSC 3420, at para 15; *Children's Aid Society of the Region of Peel v. M.H.*, 2015 ONCJ 756, at para 447.

The concern about prejudice caused by other witnesses having the opportunity to tailor their evidence was also dismissed in *Manitoba (Director of Child and Family Services v. G.(J.L.L.) Estate*, 2017 MBCA 27, at para 19:

> The hearing judge's concern about the father being seriously prejudiced because the social worker might testify at the criminal trial about what the father said at the hearing, if it was conducted first, was speculative and, more importantly, did not take into account the statutory and constitutional protections against compelled self-incrimination that the father enjoys for testimony he may give at the hearing…

The exceptional or extraordinary circumstances needed to stay or adjourn a proceeding pending a criminal process cannot be inconsistent with the best interests of the child (*Manitoba (Director of Child and Family Services v. G.(J.L.L.) Estate*, 2017 MBCA 27, at paras 17-18). As such, in family law proceedings, it appears that there is a high threshold for a stay or adjournment to be granted, given the assumed protections an accused would receive in the criminal trial. Of course, as discussed above, it is up to the trial judge—not a family court judge—to rule on the admissibility of evidence from a prior proceeding in a subsequent criminal proceeding.

Conclusion

Evidence given in family law proceedings can come back to haunt an accused. However, section 13 may provide some protection against the use of evidence from a prior family proceeding in a subsequent criminal proceeding if: a) it is compelled and b) it is incriminating.

While the Supreme Court of Canada has provided guidance on the general application of section 13, there is a paucity of case law that provides specific guidance on when evidence is compelled in the family law context.

So what should family law practitioners know?

1. There is a risk that any evidence given in a family court proceeding could later be used against someone in a criminal proceeding (an accused, complainant, or witness);

2. There is a greater chance section 13 will prevent such evidence from being used to incriminate an accused if there is a *Family Law Rule* (or other statutory provision) that makes the evidence compellable;

3. There is a greater risk that a plaintiff/applicant's evidence will be admissible in a subsequent criminal proceeding than a respondent/defendant's evidence would be;

4. Documentary evidence from a prior family law proceeding could be used at a subsequent criminal proceeding to incriminate the accused—again, it is more likely that section 13 would prevent this outcome if the document had to be produced or disclosed pursuant to the *Family Law Rules* or another statute;

5. Witnesses, including complainants, have fewer protections and can be cross-examined on evidence from a prior family proceeding if the probative value outweighs the prejudicial effects (note: there is a particular procedure that needs to be followed to cross-examine complainants on prior sexual activity); and

6. When in doubt, contact a criminal lawyer.