SASKATCHEWAN
LAW REVIEW

Admitting "Protected Statements" to Impeach Credibility After *R. v. Henry*

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I. INTRODUCTION AND ILLUSTRATION

An individual is charged with the murder of an acquaintance. She is taken into custody. The court orders a psychiatric assessment to determine whether she is fit to stand trial. The accused meets with a doctor for an assessment of her mental capacity. In that assessment, the accused speaks openly with the doctor and shares information relevant to the upcoming trial.

Evidence from the assessment is available to the court and to the prosecution for the purpose of assessing mental health. The accused is found fit and the trial proceeds. On cross-examination, the prosecutor finds an inconsistency between what the accused told the doctor in the earlier assessment and the testimony that the accused provides on the witness stand. The question, then, is this: is what the doctor and the accused discuss in treatment or an assessment confidential? Should the contents of an assessment be admissible in criminal proceedings against the accused?

The general rule is that statements an accused makes to a doctor during a court-ordered assessment are "protected statements" and are not admissible to prove guilt.[1] However, s. 672.21(3)(f) of the *Criminal Code* carves out a controversial exception. It allows a prosecutor to use these "protected statements" to attack the accused's *credibility* on cross-examination. Hence, a prosecutor may use a "protected statement" to prove that an accused is lying, but *not* to prove that an accused is guilty. This is a very difficult, if not impossible, distinction for the trier of fact to draw.[2]

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1 See generally *Criminal Code*, R.S.C. 1985, c. C-46, s. 672.21 [*Criminal Code*].

2 Consider, for example, a jury that hears a confession of a graphic murder. How can a jury be asked to distinguish between using the confession to show that the accused is a liar and not using the confession to show that the accused is a murderer? Further, in a broader sense, to impeach credibility in many cases gives rise to a

In the decision of *R. v. Henry*,[3] the Supreme Court of Canada goes so far as to say that, in the context of prior testimony, such a distinction is "unworkable."[4] The question addressed here is whether, in light of *Henry*, s. 672.21(3)(f) is also "unworkable." Should s. 672.21(3)(f) be revisited?

First, it is necessary to consider the subsection in its context. Second, we must consider the recent decision of *Henry*. Third, we should explore the possibility that s. 672.21(3)(f) may be subject to challenge under the *Canadian Charter of Rights and Freedoms*.[5] Fourth and finally, it is necessary to consider the intended and actual effect of the subsection. This paper argues that its negative impact outweighs its benefits and therefore, *a fortiori*, it should be held unconstitutional, or that the legislature should repeal the subsection.

II. SECTION 672.21(3)(f) EXPLANATION AND INTERPRETATION

Before considering the constitutionality of s. 672.21(3)(f), it may be useful to examine the context, legislative history, and judicial interpretation of the subsection.

A. SECTION 672.21(3)(f)

What are "protected statements"? As previously illustrated, occasionally a court orders that an accused have her mental capacity assessed.[6] During that assessment, an accused speaks with a specified medical professional.[7] Statements made by an accused "during the course and for the purposes of an assessment or treatment"[8] are called "protected statements." The general rule is that "protected statements" are not admissible as evidence without the accused's consent.[9] There are, however, several exceptions to this general rule. Some of these exceptions are obviously warranted. For instance, "protected statements" are always admissible in court to determine whether an accused is fit to stand trial,[10] to determine whether the accused is not criminally responsible because of mental disorder or automatism,[11] or in

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strong inference of guilt. As we will see, it is very possible that juries cannot, or simply refuse to, draw such a distinction.

3 2005 SCC 76, [2005] 3 S.C.R. 609.

4 *Ibid.* at para. 42.

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

6 This may be for various purposes, including fitness to stand trial or for a defence of insanity. See generally *Criminal Code*, *supra* note 1, s. 672.21.

7 *Ibid.*, s. 672.21(1).

8 *Ibid.*

9 *Ibid.*, s. 672.21(2).

10 *Ibid.*, s. 672.21(3)(a).

11 *Ibid.*, s. 672.21(3)(e).

making a disposition placement decision.[12] These exceptions seem fitting since the purpose of the assessment is to assess an accused's mental health. That being said, s. 672.21(3)(f) contains a more controversial exception.

Subsection 672.21(3)(f) declares that "protected statements" are admissible in criminal proceedings to *challenge the credibility* of an accused where that accused gives testimony that is inconsistent with a previous "protected statement."[13] Hence, where an accused tells a different story on the witness stand than he did in his assessment, a prosecutor is allowed, under s. 672.21(3)(f), to use that accused's "protected statements" to show that he is not trustworthy.[14] The prosecutor may *not*, however, use these statements to prove that the accused is guilty. The legislative history of s. 672.21(3)(f) explains why this troublesome distinction was drawn.

B. LEGISLATIVE HISTORY

The history of s. 672.21 is best understood in light of the mischief it was intended to remedy and the debate surrounding its enactment. Issues surrounding the admissibility of evidence from the psychiatric assessment of an accused are not new. Leading up to the 1992 enactment of s. 672.21, it was becoming increasingly clear that the common law would not protect an accused's confidentiality when he spoke with a psychiatrist. It had been established that a statement from a medical report could not be admitted without admitting the entire report,[15] that a psychiatrist testifying about an accused's mental state could not claim privilege,[16] that an admission to a psychiatrist was *not* subject to the confessions rule,[17] and also that, while voluntariness was relevant where a mental health facility allowed a police interview,[18] ultimately the contents of court-requested interviews would be admissible in court.[19] Consequently, and with good reason, most defence lawyers found it to be in the best interests of their clients that they not speak to a court-appointed psychiatrist. Unfortunately, where an accused refused to submit to an assessment,

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12 *Ibid.*, s. 672.21(3)(b).

13 *Ibid.*, s. 672.21(3)(f).

14 Note that the inconsistency must relate to a "material particular," which essentially means that it must be testimony that is important to a material issue in the case.

15 *R. v. Hawkes* (1915), 25 D.L.R. 631, 9 Alta. L.R. 182 (Alta. C.A.).

16 *R. v. Potvin* (1971), 16 C.R.N.S. 233 (Quebec C.A.).

17 *R. v. Perras*, [1972] 5 W.W.R. 183, 8 C.C.C. (2d) 209 (Sask. C.A.).

18 *R. v. Conkie*, 9 A.R. 115, [1978] 3 W.W.R. 493 (Alta. C.A.).

19 *R. v. Bonds* (1991), 49 O.A.C. 156, 13 W.C.B. (2d) 415. Note that in this case the Court quickly disposed of a *Charter* argument, noting that the issue had not been raised at trial. They provided very limited analysis.

the trier of fact was, and remains, entitled to draw an adverse inference from the refusal.[20]

In light of these and other developments, the mental disorder provisions of the *Criminal Code* were substantially and thoughtfully revised by 1991 amendments.[21] In a speech delivered in the House of Commons on October 4, 1991, former justice minister Kim Campbell described the debate surrounding s. 672.21(3)(f):

> At present there is a risk that incriminating statements made to a doctor during a court-ordered psychiatric assessment may be used as evidence against the accused. As a result, many defence counsels advise their clients to refuse to answer questions during such assessment. This deprives the doctor of a very important source of information about the accused and undermines the effectiveness of the court order.
>
> At the same time, concern has been expressed by prosecutors that completely prohibiting the use of this evidence would deprive the court of important information needed to learn the truth about the accused and the offence.[22]

Hence, in tabling s. 672.21(3)(f) Parliament sought to balance the state's interest in its search for truth and the accused's interest in confidentiality, thereby preserving and facilitating court-ordered assessments. Parliament saw this compromise as effective, because it would prevent the accused from incriminating himself during an assessment, but would still allow the use of prior "protected statements" to show that the accused was not a credible witness. Proulx J.A. for the Quebec Court of Appeal suggested that s. 672.21(3)(f) was a "codification of the principles set out by the Supreme Court"[23] in the cases of *R. v. Mannion*[24] and *R. v. Kuldip*.[25] The distinction drawn in these decisions, a distinction upon which s. 672.21(3)(f) is founded, was abandoned by the Supreme Court of Canada in *Henry*.

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20 *R. v. Sweeney (No. 2)* (1977), 76 D.L.R. (3d) 211, 16 O.R. (2d) 814 (Ont. C.A.). This case has been distinguished in several decisions, but never overruled. See *R. v. Fitzgerald* (1982), 37 O.R. (2d) 750, 70 C.C.C. (2d) 87 (Ont. C.A.); *R. v. Chapelle* (1980), 52 C.C.C. (2d) 32 (Ont. H.C.); and *R. v. Worth* (1995), 23 O.R. (3d) 211, 98 C.C.C. (3d) 133 (Ont. C.A.).

21 *An Act to amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, S.C. 1991, c. 43.

22 *House of Commons Debates*, vol. III, 3rd sess., 34th Parl., at 3296, as cited in *R. v. G. (B.)* [1999] 2 S.C.R. 475 at para. 38, 174 D.L.R. (4th) 301 [*G. (B.)*].

23 *R. v. G. (B.)* (1997), 119 C.C.C. (3d) 276, 10 C.R. (5th) 235 (Quebec C.A.), as cited in *G. (B.), ibid.* at para. 10.

24 [1986] 2 S.C.R. 272, 31 D.L.R. (4th) 712.

25 [1990] 3 S.C.R. 618, 114 N.R. 284.

Hence, s. 672.21(3)(f) was drafted to address concerns that court-ordered psychiatric assessments might lead to self-incrimination. This possibility would frustrate the purpose of such an examination, because an accused would likely refuse the assessment. However, subsequent judicial interpretation casts serious doubt over whether the subsection is achieving this purpose.

C. JUDICIAL INTERPRETATION

The leading case on s. 672.21(3)(f) is the Supreme Court of Canada's decision in *R. v. G. (B)*. In *G. (B.)*, an accused was charged with sexual assault.[26] Upon his initial arrest, the police interrogated him and obtained a confession.[27] At a subsequent court-ordered mental health assessment, a psychiatrist asked the accused to explain his earlier confession to the police and the accused confirmed the confession.[28] However, a second psychiatric evaluation revealed that the initial confession the accused had made to the police was involuntary.[29]

At trial, the prosecution sought to lead evidence of these confessions as part of its case-in-chief. However, in a *voir dire*, the trial judge would not allow either the police confession or the subsequent psychiatric confession to be admitted.[30] The earlier confession was obtained illegally, and the later confession was a "protected statement."[31] The accused later testified. The Crown, wielding s. 672.21(3)(f) as a powerful weapon, cross-examined the accused on his prior "protected statement."[32] The accused was convicted.

The Quebec Court of Appeal overturned the conviction, holding that the first confession was obtained illegally and was inadmissible for any purpose, even under s. 672.21(3)(f).[33]

The Supreme Court agreed, and upheld the Court of Appeal's decision.[34] They set aside the conviction and ordered a new trial.[35] Bastarache J., writing for the majority, confirmed that the accused's initial police confession was obtained in violation of the confessions rule, because it was involuntary.[36] Hence the confession was inadmissible for any purpose.[37]

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26 *G. (B.)*, *supra* note 22 at para. 3.
27 *Ibid.*
28 *Ibid.* at para. 4.
29 *Ibid.* at para. 5.
30 *Ibid.* at para. 6.
31 *Ibid.*
32 *Ibid.* at para. 7.
33 *Ibid.* at para. 11.
34 *Ibid.* at para. 53.
35 *Ibid.*
36 *Ibid.* at para. 19.
37 *Ibid.* at paras. 31-33.

The question, then, was what about the later confession to the psychiatrist, which was based on the first confession? Bastarache J. held that the accused's subsequent confession to the psychiatrist was derivative and "contaminated" by the illegality of his prior confession.[38] Consequently, both confessions were inadmissible for any purpose.[39]

A central issue in *G. (B.)* was the constitutionality of s. 672.21(3)(f). While the subsection allows the admission of "protected statements" to challenge credibility, the Court found the confessions rule to be a principle of fundamental justice enshrined by s. 7 of the *Charter*.[40] It should be noted, however, that subsequent decisions seem to suggest that the voluntary confessions rule remains a common-law rule. For instance, in *R. v. Oickle*[41] the Supreme Court of Canada explains that "the confessions rule has a broader scope than the *Charter*."[42]

Regardless, in *G. (B.)* the Court found that s. 672.21(3)(f) was subject to the confessions rule. Hence, where a "protected statement" is also an involuntary confession, it will not be admissible under s. 672.21(3)(f).[43] Bastarache J. reasoned as follows:

> To reintroduce an involuntary statement in this way would run counter to the most fundamental aspect of trial fairness. In many cases, as here, the guilt of the accused will depend solely on his or her credibility and on that of the other witnesses. To allow the statement to be used, even for the limited purpose of undermining the credibility of the accused, could lead to abuse and serious injustice. That is why the traditional rule, which is still in force in Canadian law, must be interpreted in such a way that no use may be made of an inadmissible statement at any stage whatsoever of the trial.[44]

McLachlin J. (as she then was), dissenting, declared that the accused's statement had been properly admitted for the limited purpose of challenging the credibility of the accused. In her view, the clear intention of Parliament was that s. 672.21(3)(f) operate notwithstanding

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38 *Ibid.* at paras. 22-26.

39 *Ibid.*

40 *Ibid.* at para. 28, citing *R. v. Whittle*, [1994] 2 S.C.R. 914 at 931, 116 D.L.R. (4th) 416.

41 2000 SCC 38, [2000] 2 S.C.R. 3.

42 *Ibid.* at para. 30. See also paras. 28-29.

43 Therefore it was not necessary for Bastarache J. to determine whether the later statement was either involuntary or whether a psychiatrist was a so-called person in authority. The latter is likely confirmed in later case law (see part 4.A of this article).

44 *G. (B.)*, *supra* note 22 at para. 33.

the confessions rule.[45] Further, she commented that this section would likely "pass constitutional muster,"[46] and noted that:

> The common law distinguishes between tendering evidence for the purpose of incrimination and referring to evidence for the purpose of challenging credibility. It has long recognized that when an accused puts his or her credibility in issue by taking the stand, a range of otherwise inadmissible evidence is admissible to impeach that credibility. This is neither unfair nor unjust.[47]

McLachlin J. (as she then was) also declared that "the use of statements otherwise inadmissible for the purpose of challenging credibility was upheld as constitutional in *Kuldip*."[48] While her argument may have been compelling at the time *G. (B.)* was argued, the decision of *Henry* abandons the *Kuldip* distinction and questions the admissibility of protected statements, which would be otherwise inadmissible, for the limited purpose of challenging credibility.

Subsequent judicial interpretation of s. 672.21(3)(f) considers flexible conceptions of trial fairness and the court's discretionary role as gatekeeper. For instance, in *R. v. Edwards*,[49] a unanimous Ontario Court of Appeal not only allowed "protected statements" to be admissible to challenge credibility, but also to prove guilt. In *Edwards*, the Court held that the accused had consented to the statements' admission when he himself placed them before the jury in his evidence.[50] This decision was based on implied consent and trial fairness.[51] The Court also found that the statements were voluntary, and thus found it unnecessary to determine whether a psychiatrist was a person in authority.[52] In contrast, the strict approach to excluding "protected statements" was applied in *R. v. Genereux*.[53] In that case, the prosecution was unaware of s. 672.21 and led a "protected

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45 *Ibid.* at para. 68.
46 *Ibid.* at para. 71.
47 *Ibid.*
48 *Ibid.* at para. 82.
49 (2004), 72 O.R. (3d) 135, 25 C.R. (6th) 160 (Ont. C.A.).
50 *Ibid.* at para. 50.
51 By analogy see *R. v. Stone*, [1999] 2 S.C.R. 290, 173 D.L.R. (4th) 66 per Binnie J., the majority concurring on this point. See also *R. v. David* (2003), 61 O.R. (3d) 1, 7 C.R. (6th) 179 (Ont. C.A.). Both of these cases seek trial fairness by refusing to allow an accused to use an assessment in such as way as to present a distorted or prejudicial picture.
52 *Edwards, supra* note 49 at para. 59.
53 (2000), 140 O.A.C. 165, 54 C.C.C. (3d) 362 (Ont. C.A.).

statement" in their examination-in-chief; the accused's conviction was set aside on appeal.[54]

To summarize, s. 672.21 generally prevents "protected statements" from being admitted for the purpose of proving that an accused is guilty. Section 672.21(3)(f) allows these statements to be used on cross-examination to challenge credibility. The Supreme Court's decision in *G. (B.)* suggests that s. 672.21(3)(f) is subject to the confessions rule. However, as will be seen, s. 672.21(3)(f) is a legislative compromise which is founded on a faulty distinction. The decision of *R. v. Henry* calls into question both its efficacy and its constitutionality.

III. *R. v. HENRY*

A. *R. v. HENRY*

In *R. v. Henry*, the Supreme Court of Canada re-orients the scope of s. 13 protection.[55] *Henry* is a complex judgment with widespread implications.[56] For the purpose of this inquiry there are several relevant considerations. First, the facts of the case and the procedure the case followed to reach the Supreme Court of Canada are important. The second relevant consideration is the Supreme Court's evaluation of previous s. 13 jurisprudence and its statement that the protection against self-incrimination extends only to compelled testimony.[57] Third, the Court's decision to overrule its previous jurisprudence is significant. Fourth, and most importantly, it is necessary to consider the Court's rationale for rejecting its previous jurisprudence, specifically the *Kuldip* distinction. Indeed, in *Henry*, the Court explains that the distinction between using prior testimony to attack credibility and using prior testimony to prove guilt is "unworkable."[58]

The facts of *Henry* are pertinent, as is the process the case followed to reach the Supreme Court of Canada. *R. v. Henry* involved "a

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54 *Ibid.* at para. 38.

55 See generally *Henry, supra* note 3.

56 It should be noted that the analysis the Court undertakes in *Henry* is complex. It will only be examined insofar as it is relevant to s. 672.21(3)(f). Suffice it to say that part of the reason that the distinctions discussed in this case have been overruled is that they are overly technical and complex. For a complete examination of the case, and a more in-depth consideration, see generally: Hamish Stewart, "*Henry* in the Supreme Court of Canada: Reorienting the s. 13 Right against Self-incrimination" (2006), 34 C.R. (6th) 112; Don Stuart, "Annotation" (2006), 33 C.R. (6th) 215; Gary Trotter, "*R. v. Henry*: Self-Incrimination and Self-Reflection in the Supreme Court" (2006) 34 Supreme Ct. L.R. (2d) 409. For a fictitious court case addressing the issue see also John J. Walsh, Q.C., "Cross-Examination by the Prosecutor: Stopping Transgressions" (2007) 11 Can. Crim. L. Rev. 301.

57 Note that in so doing, the Court seems to have modified a provision related to s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (*CEA*). Essentially, the Court held that s. 5 of the *CEA* was largely concurrent with the protection offered by s. 13.

58 *Henry, supra* note 3 at para. 42.

botched rip off of a marijuana-growing operation."[59] At his first trial, the accused testified voluntarily and relayed specific details about the events in question.[60] However, his conviction was overturned on appeal and a new trial was ordered. The issue on re-trial was whether the accused was guilty of manslaughter or murder.[61] In his subsequent trial, the accused again took the stand. This time, however, the accused claimed that he had no memory of the events in question.[62]

The prosecutor elected to cross-examine the accused and questioned him about his prior testimony. Although this prior testimony would have generally been excluded by virtue of s. 13 of the *Charter*, the prosecutor relied on the decision of *R. v. Kuldip*, which states that a prosecutor is entitled to introduce prior inconsistent testimony for the limited purpose of challenging credibility. Relying on *Kuldip*, the prosecutor questioned the accused about his former testimony and the obvious discrepancies between the former testimony and the testimony with which the accused was presently providing the court.[63] The accused was again convicted of murder.

The accused appealed the conviction. He relied on the decisions of *R. v. Noël*[64] and *R. v. Allen*,[65] which limit the use of previous inconsistent testimony for the purposes of impeaching credibility.[66] The appeal reached the Supreme Court of Canada.

In the course of delivering its judgment in *Henry*, the Supreme Court of Canada sets out to re-orient the scope of s. 13 protection. In reviewing its previous decisions, the Court reaches several conclusions. First, in *R. v. Dubois*,[67] the Court had properly ruled that prior testimony was not admissible as part of the Crown's case-in-chief.[68] This was good law and should remain. However, in the later case of *R. v. Mannion*, the Court applied *Dubois* to exclude prior *voluntary* testimony, a decision which proved to be problematic.

After the decision of *Mannion*, it seemed unjust that an accused could voluntarily testify and then later take the stand and change his story. In *Kuldip*, the Supreme Court ruled that previous testimony could only be used for the limited purpose of impeaching credibility.[69]

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59 *Ibid.* at para. 5.
60 *Ibid.* at para. 7.
61 *Ibid.* at para. 5.
62 *Ibid.* at para. 7.
63 *Ibid.*
64 2002 SCC 67, [2002] 3 S.C.R. 433 [*Noël*].
65 2003 SCC 18, [2003] 1 S.C.R. 223.
66 *Ibid.* at para. 4.
67 [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503.
68 The Court notes that among other things, this would violate the accused's rights under 11(d) and 11(c) of the *Charter*.
69 *Supra* note 25.

After the decision of *Kuldip*, the Court saw it unjust that attacking credibility may lead inextricably to guilt. Therefore, in *Noël*, the Court ruled that an accused could only be cross-examined on previous testimony which was "innocuous."[70]

In summarizing post-*Mannion* jurisprudence, the Court concluded that over time "courts have struggled to work with the distinction between impeachment of credibility and incrimination in ways that...[have] become *'unduly and unnecessarily complex and technical'*."[71] Consequently, the failure to distinguish between voluntary and involuntary testimony has "given rise to a number of distinctions and sub-distinctions *that in the end have proven unworkable.*"[72]

In *Henry*, Binnie J. finds *Mannion* to be the root of the problem.[73] The underlying purpose of s. 13 is to protect an accused from being *compelled* to incriminate herself. In *Mannion*, the Court failed to distinguish between voluntary and involuntary testimony. Since *Mannion* excluded prior *voluntary* testimony, it had not been decided in accordance with the underlying purpose of s. 13. Therefore, the Court finds that insofar as it extends s. 13 protection to voluntary testimony, *Mannion* ought to be overruled.[74]

Most significant for the purposes of this inquiry is that the Court also abandons the "unworkable" credibility exception that was drawn in *Kuldip*.[75] This distinction is a product of the misdirected decision in *Mannion*. One might also argue that the distinction is also inherently unstable. *Kuldip* asks the trier of fact to hear prior testimony. However, the prior testimony is not admissible to prove guilt, but is only admissible to prove that an accused is not a credible witness. Indeed, as Binnie J. states, there are those who "view with scepticism the idea that the trier of fact can truly isolate the purpose of impeaching credibility from the purpose of incrimination."[76] Further, in considering *Noël* at the Quebec Court of Appeal, Fish J.A. (as he then was) noted that "[e]ven for those trained in the law, the use in cross-examination of evidence obtained from the accused as a witness in other proceedings involves a firm grasp of a subtle distinction in theory that is often difficult to apply in practice."[77]

Clearly, the "credibility exception" drawn in *Kuldip* is troubling, both in theory and in practice. To attack credibility is to attempt to prove guilt. In many instances, guilt or innocence may depend almost

70 *Supra* note 64 at para. 47.
71 *Henry, supra* note 3 at para. 45 [emphasis added].
72 *Ibid.* at para. 42 [emphasis added].
73 *Ibid.* at para. 45.
74 *Ibid.* at para. 43.
75 *Ibid.* at para. 48.
76 *Ibid.* at para. 8.
77 *R. v. Noël* (2001), 156 C.C.C. (3d) 17, 2001 R.J.Q. 1464 (Que. C.A.) at para. 169 [*Noël* C.A.].

exclusively on the credibility of the accused. As Martin J.A. observes, "[i]f 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.*"[78] Section 13 of the *Charter* protects an individual from self-incrimination. However, when a prior statement is admitted to challenge credibility, it theoretically indirectly proves guilt. Hence, the admission of such statements, even for the limited purpose of impeaching credibility, could be seen as indirectly causing the accused to incriminate herself.

The credibility exception is also troubling in practice. How is a trier of fact to hear previous testimony and then to ignore its content? This concern is amplified in a jury trial. There is a possibility that a jury may fail to grasp the difficult distinction. There is also a possibility that a juror may *refuse* to apply the distinction. As Fish J.A. (as he then was) notes, the danger that the principle will be misapplied in practice is "not just hypothetical, but real."[79]

In support of this suggestion of real danger, Fish J.A. (as he then was) refers to the trial transcript. In *Noël*, the Crown had presented its case and final instructions had been given. During deliberation, the jurors sent a question to the judge, in which the jury assumed certain facts as true.[80] However, these facts arose from prior testimony, and were only admissible for the purpose of challenging credibility. The jurors had utilized this inadmissible testimony, despite a clear warning that it was admissible only to challenge credibility. Fish J.A. (as he then was) notes that:

> [The jury question] pre-supposed "facts" that were not in evidence. The question thus demonstrated, incontrovertibly in my view, that despite the judge's instructions, the jury had failed to grasp the distinction it was bound by *Kuldip* to apply.[81]

Although this is may appear to be an isolated instance, the content of juror deliberation is not accessible to the public.[82] It is not difficult to imagine that many juries, behind closed doors, have questioned the efficacy of such a difficult and tenuous legal distinction. Indeed, in at least one instance, prior testimony had been utilized for the prohibited purpose of proving guilt. In light of these many concerns,

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78 *R. v. Kuldip*, (1988), 40 C.C.C. (3d) 11, 240 A.C. 393 (Ont. C.A.), cited in *Henry*, *supra* note 3 at para. 35 [emphasis added].

79 *Noël* C.A., *supra* note 77 at para. 169.

80 *Ibid.* at para. 173.

81 *Ibid.* at para. 174.

82 *Criminal Code*, *supra* note 1, s. 649 makes the disclosure of jury proceedings a criminal offence.

the Supreme Court saw fit in *Henry* to abandon the distinction drawn in *Kuldip*.

In summary, in *R. v. Henry*, the Court overruled its previous judgments. In so doing, the Court brought clarity to the law surrounding s. 13 protection against self-incrimination. The Court considered the credibility exception drawn in *Kuldip* and found the distinction to be troubling in theory, because attacking credibility often tends to prove guilt. The distinction is also troublesome in practice, since a trier of fact, specifically the jury, may be unable or even unwilling to draw such a distinction. Hence, the Court abandoned the distinction, and declared that drawing a distinction between the use of prior exculpatory statements for challenging credibility and using prior exculpatory evidence to prove guilt is "unworkable."

Section 672.21(3)(f) is a codification the distinction drawn in *Kuldip*. After *Henry*, there are serious doubts about this distinction. Given these doubts, it is possible that s. 672.21(3)(f) could be subject to challenge under the *Charter*.

B. SUBSEQUENT DEVELOPMENTS

At the time this article was written, *Henry* was a relatively recent decision. Although it has been applied in several cases, few decisions have direct relevance to the issue at hand. *R. c. Talon*[83] was a straightforward case that followed *Henry*.[84] Referring to *Henry*, a Quebec court found that it did not matter that the testimony was offered voluntarily so long as it was ultimately enforceable by a subpoena.[85] Further, while in *R. v. Blizzard*,[86] s. 13 protection was extended to a bail hearing, in the recent decision *R. v. Nedelcu*,[87] The Ontario Superior Court of Justice refused to extend s. 13 protection to the civil discovery process. Despite the fact that the production of documents was compelled by statute, the Court found that there was no *quid pro quo* with the Crown.[88] Therefore, discovery evidence compelled by statute was admissible in later *criminal* proceedings.[89]

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83 2006 QCCS 3030, 39 C.R. (6th) 64, per Bourque J.C.S. (Que. S.C.).

84 In following *Henry*, *Talon* excluded the prior compellable testimony of an accused in his subsequent trial. However, that accused had made an agreement with the Crown in another proceeding, engaging in a *quid pro quo* with the Crown. As a result, he was offered s. 13 protection.

85 *Ibid.*

86 2006 NBQB 231, [2007] 305 N.B.R. (2d) 227.

87 (2007), 46 M.V.R. (5th) 129, 41 C.P.C. (6th) 357 (Ont. S.C.J.).

88 *Ibid.* at para. 27.

89 In this case, an accused charged with dangerous and impaired driving challenged the admissibility of evidence obtained in a prior examination for discovery in related civil proceedings. The Court, applying *Henry*, acknowledged that the statements were compelled. However, the Court held that these statements involved no *quid pro quo* with the Crown. The civil discovery process was merely designed to further a litigant's private interests in a civil action, hence the Crown

IV. HOW DOES SECTION 672.21(3)(f) OPERATE IN LIGHT OF THE *CHARTER*?

When a prosecutor attempts to introduce a "protected statement," defence counsel might oppose, and in seeking exclusion, advance the following arguments. First, counsel might argue that the "protected statement" is an involuntary confession and therefore inadmissible for any purpose. Second, counsel might advance an argument that s. 672.21(3)(f) offends s. 13 of the *Charter*. Either of these arguments would be bolstered by examining the principles underlying the *Charter* protection against self-incrimination.[90]

A. TO WHAT EXTENT IS SECTION 672.21(3)(f) SUBJECT TO THE VOLUNTARY CONFESSIONS RULE?

The voluntary confessions rule is a common-law rule which holds that the Crown must prove, on a balance of probabilities, the voluntariness of a statement that an accused has made to a person in authority.[91] While it is clear that the confessions rule has not been brought entirely within the ambit of the *Charter* protection, *G. (B.)* states that s. 672.21(3)(f) is subject to the confessions rule by virtue of s. 7 of the *Charter*.[92] Hence, where a "protected statement" is an involuntary confession, it will not be admitted for any purpose.[93]

As a preliminary note, in the recent decision of *R. v. Singh*[94] the Supreme Court equates the scope of the voluntary confessions rule with the *Charter* right to silence. However, the Court stresses that it is referring to instances involving police interrogation of a detained accused.[95] While the *Charter* right to silence and the common-law confessions rule overlap, the protection they offer is not synonymous.[96]

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had no interest and there was no *quid pro quo*: *ibid.* at paras. 15-17, 27. Interestingly, in *Smith v. The Queen*, [2007] WASCA 163 (Supreme Court of Western Australia), *Henry* was also followed by an Australian Court in interpreting a similar provision in s. 68(3) of the *Australian Securities and Investments Commission Act* 2001 (Cth.).

90 This section will serve only to flag the issues. It is by no means the author's intention to provide a detailed or comprehensive constitutional analysis. It will be later suggested in s. 5 of this article that perhaps the most viable solution is that this section be repealed by Parliament.

91 Ron Delisle *et al.*, *Evidence: Principles and Problems*, 8th ed. (Scarborough: Thomson Carswell, 2007) at 761.

92 *G. (B.)*, *supra* note 22 at paras. 43-44.

93 For an informative article on the credibility exception before *Henry*, and for relevant information on s. 672.21 assessments provided by a doctor active in the area, see generally Jonathan D. Gray, "'Protected Statements' and Credibility under Section 672.21(3)(f) of the Criminal Code" (2000-2001) 44 Crim. L.Q. 71.

94 2007 SCC 48, [2007] 3 S.C.R. 405.

95 *Ibid.* at paras. 8, 25.

96 See *Oickle*, *supra* note 41 at paras. 28-30.

Indeed, at least in the context of *Singh*, the *Charter* right to silence seems to focus on post-detention interrogation.[97] The common-law confessions rule, on the other hand, extends beyond detention. Its scope may well extend to the rare cases where court-ordered psychiatric evaluations occur outside of custody. Further, under the common-law confessions rule, the burden is on the accused to demonstrate voluntariness beyond a reasonable doubt.[98] While in light of *Singh* one may argue that involuntary statements are inadmissible for any purpose, given the above it would be wise for counsel to argue that a "protected statement" is an involuntary confession and therefore inadmissible for any purpose.[99]

The entire scope of the voluntary confessions rule need not be examined here. It is important to note that "protected statements" may well be involuntary and are almost certainly made to persons in authority.

To be admissible, a statement must be voluntary. The test for voluntariness is two-pronged. First, a confession must not be induced or coerced. A court will consider all surrounding circumstances, including oppressive conditions, inducements, threats or promises, and police trickery.[100] Second, a confession must be the product of an operating mind. An accused must have sufficient cognitive capacity to understand what she is saying, and that what is being said can be used as evidence in proceedings against her.[101]

The circumstances surrounding the administration of "protected statements" create a haze of uncertainty surrounding voluntariness. It has been estimated that 95 per cent of assessments occur in custody.[102] Indeed, an assessment is ordered for the very reason that an accused's mental state is called into question. While an accused may ultimately recover and be found fit to stand trial, this does *not* mean that the accused had an operating mind at the time of any particular assessment. Further, a court may consider promises by psychiatrists that "things will go better for you if you cooperate." A court may also consider medical conditions that affect cognitive capabilities or interruptions to the administration of medications, which are compounded by anxieties about new surroundings and fear of impending prosecution.

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97 See generally *Singh*, *supra* note 94. See also *R. v. Hebert*, [1990] 2 S.C.R. 151, 47 B.C.L.R. (2d) 1.

98 See generally *Oickle*, *supra* note 41.

99 However, it may also be useful to argue that the *Charter* right to silence and the underlying principle against self-incrimination ought to bolster any argument under the voluntary confessions rule or under s. 13 of the *Charter*.

100 See generally *Ibrahim v. R.*, [1914] A.C. 599 (P.C.).

101 *Whittle*, *supra* note 40 at 932, 939.

102 Gray, *supra* note 93 at 72.

This myriad of factors must be examined in light of each specific confession. These factors stand to affect not only voluntariness, but also reliability.[103] Clearly, it may be very difficult for the Crown to prove on the balance of probabilities that "protected statements" are voluntary.

It is not enough that a statement is involuntary; it must also be made to a person in authority. A person in authority is anyone "formally engaged in the arrest, detention, *examination* or prosecution of the accused."[104] Further, an individual may be a person in authority where an accused subjectively believes that this individual can control the proceedings, and where such a belief is reasonable in the circumstances.[105] Consequently, where the accused reasonably believes that "refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment,"[106] then that individual might rightly be seen to be a person in authority. Hence, a police officer, a prison guard, "[a] parent, *doctor*, teacher or employer all may be found to be a person in authority if the circumstances warrant."[107]

One must then ask whether "protected statements" are made to persons in authority. A psychiatrist acting pursuant to s. 672.21 is very likely part of the so-called "examination" process, especially where an accused is in custody. Further, given the apparent position of power a court-ordered psychiatrist exerts over an accused, it is likely that the accused would perceive her as being a person in authority, and that such a perception would not be objectively unreasonable.[108]

In many circumstances, "protected statements" are both made involuntarily and made to persons in authority. Thus, in many instances, s. 672.21(3)(f) will violate the confessions rule. Therefore, by virtue of *G. (B.)*, these statements will not be admitted. However, this may not be enough. In light of *Henry*, it may no longer be prudent to admit "protected statements" at all. Indeed, it may well be time to consider whether s. 672.21(3)(f) is inconsistent with the s. 13 protection against self-incrimination.

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103 In *Oickle*, *supra* note 41 at para. 32, the Court found that the confessions rule was not only intended to protect the accused from self-incrimination, but was imperative due to concern over false confessions and a recognition that "involuntary confessions are more likely to be unreliable."

104 *R. v. Hodgson*, [1998] 2 S.C.R. 449 at para. 32, 163 D.L.R. (4th) 577 [emphasis added].

105 *Ibid.* at paras. 33-34.

106 *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27 at para. 38.

107 *Hodgson*, *supra* note 104 at para. 36 [emphasis added].

108 For a useful exploration of the role of the psychiatrist and for confirmation that she is indeed a "person in authority," see Gray, *supra* note 93.

B. IS SECTION 672.21(3)(f) INCONSISTENT WITH SECTION 13 OF THE *CHARTER*?

It is possible that s. 672.21(3)(f) is inconsistent with s. 13 of the *Charter*, which reads:

> 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.[109]

This article will entertain arguments against extending s. 13 protection to court-ordered psychiatric evaluations, and second, it will argue that "protected statements" are compelled testimony involving a *quid pro quo* with the Crown.

A prosecutor may argue that s. 672.21(3)(f) is constitutional and that s. 13 protection ought not extend to court-ordered psychiatric evaluations. Indeed, the Supreme Court in *G. (B.)* affirms that there is a difference between the scope of s. 13 of the *Charter* and the scope of protection offered by the confessions rule.[110] The former rule is concerned with witnesses, and the latter with confessions. One could argue that statements made to a court-ordered psychiatrist are not "testimony" in the traditional sense. Further, if "protected statements" are testimony in "any proceedings," then s. 672.21(1), which protects these statements would have been unecessary, since such statements would already have been protected by s. 13 of the *Charter*. Further, *prima facie*, the compulsion and *quid pro quo* required by *Henry* is absent in s. 672.21 assessments.

However, defence counsel may advance a compelling argument that s. 672.21(3)(f) is unconstitutional. *Henry* states that s. 13 has three requirements. First, there must be testimony in "any proceedings."[111] Second, that testimony must be compelled.[112] Third, these statements must involve some sort of *quid pro quo* with the Crown.[113]

There is a strong argument to be made that statements an accused makes in the course of a court-ordered mental health assessment are testimony in "any proceedings." Section 13 of the *Charter* prevents compelled testimony in "any proceedings" from being used in any "other proceedings." Clearly, a criminal trial constitutes "other proceedings." Accordingly, the crux is whether statements provided in a s. 672.21 assessment constitute "any proceedings" for the purpose

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109 *Charter*, *supra* note 5, s. 13.
110 *Oickle*, *supra* note 41 at para. 30.
111 *Henry*, *supra* note 3 at para. 23.
112 *Ibid.* at paras. 33, 46, 60.
113 *Ibid.* at paras. 33, 59.

of s. 13. In other words, should s. 13 protection be extended to court-ordered mental health assessments? The Supreme Court of Canada has suggested that the term "any proceedings" be given a "large and liberal interpretation so as to cover any kind of proceeding, whether adjudicative or investigative."[114] A *voir dire* has been found to constitute "other proceedings"[115] under s. 13, as has a bail hearing.[116] There is also some indication that a preliminary inquiry constitutes "any proceedings."[117] Given these examples, an argument can be made that an investigative mental health assessment that is closely related to the criminal trial process is "any proceedings" for the purpose of s. 13.

It could be argued that s. 672.21 assessments are compelled. *Henry* states that s. 13 protection only extends to compelled testimony, which includes testimony compelled by subpoena.[118] While a mental health assessment is not enforceable by subpoena, it could be argued that these assessments are, nonetheless, still compelled. According to *Sweeney*, when an accused refuses to undergo an assessment, the trier of fact may draw an adverse inference of guilt from that refusal.[119] Clearly, this adverse inference creates a strong incentive for an accused to undergo assessment. Indeed, in *R. v. Noble*,[120] the Supreme Court held that drawing an adverse inference from an accused's failure to testify is tantamount to compelling that accused to testify. Since *Sweeney* imposes a similar burden on the accused, a very strong argument could be made that mental health assessments are compelled.

Court-ordered mental health assessments involve a *quid pro quo* with the Crown. In *R. v. Nedelcu*, the court found that the Crown had no interest in the outcome of civil litigation. Hence, there was no *quid pro quo* with the Crown, and s. 13 did not apply.[121] The same could hardly be said of a court-ordered mental health assessment. Clearly, the Crown has an interest in these proceedings. The Crown has a duty to avoid wrongful convictions as well as a duty to ensure that individuals are not made to stand trial when they are not fit to stand trial. A court-ordered mental health assessment assists the Crown in discharging these duties. Consequently, it is likely that s. 672.11 involves a *quid pro quo* with the Crown.

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114 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425 at 481, 67 D.L.R. (4th) 161.

115 *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 66.

116 *R. v. Sicurella* (1997), 14 C.R. (5th) 166, 120 C.C.C. (3d) 403 (Ont. Prov. Ct.).

117 *R. v. Lucas* (1995), 129 Sask. R. 141, 97 C.C.C. (3d) 89 (Sask. Q.B.); but see also *R. v. Yakeleya* (1985), 46 C.R. (3d) 282, 9 O.A.C. 284 (Ont. C.A.).

118 *Henry*, *supra* note 3 at para. 34.

119 *Sweeney*, *supra* note 20 at paras. 14-16.

120 [1997] 1 S.C.R. 874, 146 D.L.R. (4th) 385.

121 *Supra* note 87 at 495-96.

If s. 672.21(3)(f) is inconsistent with s. 13 of the *Charter*, it is fairly certain that it will not be upheld under s. 1. In *G. (B.)*, Bastarache J. noted that the purpose of the subsection was to encourage frank discussion with a psychiatrist, while enhancing the search for truth.[122] After Henry, it would be difficult to argue that the subsection is designed to impair the right against self-incrimination as little as possible, or that there is a rational connection between the ends sought and the means employed.[123] Section 672.21(3)(f) is not tailored to impair the right against self-incrimination as little as possible, because it is based on a faulty distinction that allows the admission of previous statements to prove guilt. Further, the provision is not rationally connected to the purposes of encouraging frank discussion or enhancing the search for truth. Section 672.21(3)(f) does not encourage frank discussion, because of the possibility, as confirmed in *Henry*, that these statements will ultimately be used to prove guilt. Because of this risk, defence counsel may discourage her client from speaking openly in a court-ordered assessment. The admission of such statements, especially where an accused is not being forthright, stands to distort the search for truth. Under the guise of the "search for truth," the Crown ought not be allowed to found its case on the compelled testimony of an accused.

In summary, defence counsel could advance an argument that s. 672.21(3)(f) offends s. 13 of the *Charter*. The underlying purpose of s. 13 is the protection from compelled self-incrimination. Given a broad and purposive interpretation, it is almost certain that s. 672.21(3)(f) offends s. 13 of the *Charter*. An accused is compelled to speak to the psychiatrist, because of his fear that an adverse inference will be drawn from his silence. While s. 672.21(3)(f) limits the use of "protected statements" to attack credibility, the protection is illusory. After *Henry*, what has long been suspected is confirmed—s. 672.21(3)(f) allows prior testimony in through the "back door." These protected statements may well be used to incriminate and prove guilt. Further, and from a practical point of view, the purpose of a court-ordered mental health assessment is to inquire into the mental health of an accused. This process is essential to the integrity of the trial process. An accused ought to be entitled to an open and frank assessment, which is independent of the adversarial search for ultimate guilt or innocence. To allow the admission of these compelled (and potentially involuntary) statements runs contrary to the unifying principles against self-incrimination.

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122 *Supra* note 22 at paras. 26-27.

123 See generally *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

C. CHARTER CONSIDERATIONS: GENERAL COMMENTS

The constitutionality of s. 672.21(3)(f) has been briefly examined previously in this article. It has been suggested that, by virtue of *G. (B.)*, the section is subject to s. 7 in many instances. Further, it has been argued that the provision may also be unconstitutional under s. 13. The fact that s. 672.21(3)(f) may be subject to attack under two sections of the *Charter* is not surprising. By compelling or coercing testimony which may be admissible to prove guilt, the section runs contrary to the unifying principles of criminal justice and organizing principles of the *Charter*. Indeed, s. 672.21(3)(f) is inherently offensive to the principle against self-incrimination, which should inform any constitutional review and encourage a finding that the subsection is of no force or effect.

The principle against self-incrimination is not a law, but rather a principle which animates and underlies Canadian criminal jurisprudence. Former chief justice Lamer describes this principle as a "general organizing principle of criminal law."[124] Indeed, in *Henry*, Binnie J. states that:

> The right against self-incrimination is of course one of the cornerstones of our criminal law. The right to stand silent before the accusations of the state has its historical roots in the general revulsion against the practices of the Star Chamber, and in modern times is intimately linked to our adversarial system of criminal justice and the presumption of innocence.[125]

This principle finds expression in both the voluntary confessions rule and s. 13 of the *Charter*, which share similar characteristics. Both act to prevent the state from conscripting or compelling the accused to assist in building the case against her. However, these rules also vary in their application. The voluntary confessions rule generally extends protection to statements originating outside the courtroom and applies

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124 *R. v. Jones*, [1994] 2 S.C.R. 229 at 249, 114 D.L.R. (4th) 645.

125 *Supra* note 3 at para. 2. The root of the common law's disdain for compelled self-incrimination lies in the oath *ex officio*, introduced by the ecclesiastical courts of England in 1236 and adopted by the Court of Star Chamber in 1487. This oath required an accused to swear before God that he would truthfully answer all questions of the inquisitorial judge. The accused was required to swear the oath *ex officio* before even hearing the charges against him. As a result, an accused was faced with the option of eternal punishment, perjury charges, or self-incrimination.

Faced with such a dilemma, a young puritan named John Lilburne declined to take the oath *ex officio*. He was tortured and imprisoned, declaring in pamphlets smuggled out of prison that such an oath was against God's laws and the self-protective law of nature. Liburne's refusal would eventually lead to his death. See Delisle, *supra* note 90 at 469-71.

to statements made by an accused to persons in authority. On the other hand, s. 13 applies to compelled testimony and extends to "any proceedings," which generally, but not exclusively, includes testimony which is derived from or closely related to the trial process. While these protections have a different scope, it is not unforeseeable that certain forms of interaction with the state, such as a court-ordered psychiatric evaluation, may attract both the confessions rule and s. 13 protection.

Further, the justifications for the voluntary confessions rule and the principle against self-incrimination are pertinent, as they stem from larger moral societal concerns. There is a growing awareness that testimony which is compelled, induced, coerced, or otherwise involuntary is inherently unreliable.[126] There is a significant possibility that these involuntary and unreliable confessions have an ability to distort which greatly outweighs their ability bring clarity. Such statements might even lead to a serious miscarriage of justice.

Consequently, it is suggested here that the *Charter* analysis of s. 672.21(3)(f) should be animated by the foundational principle against self-incrimination, of which both the confessions rule and s. 13 of the *Charter* are merely outward manifestations. Indeed, while in *R. v. White*, Iacobucci J. notes that "[t]he principle against self-incrimination demands different things at different times,"[127] in the context of court-ordered psychiatric evaluations, nothing short of total exclusion ought to be acceptable. Indeed, given a broad and purposive interpretation of s. 13 of the *Charter*, in light of the adverse inference compulsion *Sweeney* presents, and in light of the unworkable distinction s. 672.21(3)(f) asks the trier of fact to draw, as animated by the over-arching principle against self-incrimination, "protected statements" ought be utilized only for the limited purpose of assessing mental health, such that there is no reasonable possibility that these statements be used to attempt to prove guilt.

V. SHOULD SECTION 672.21(3)(f) BE REPEALED?

Even if s. 672.21(3)(f) is not found unconstitutional, Parliament should take prompt action and repeal it. While proponents argue that the subsection is necessary, it should be repealed, because it is based on an unworkable distinction that is unfair to the accused. Additionally, it creates a chilling effect that undermines the purpose of psychiatric assessments and results in confusion and uncertainty.

Proponents of the subsection may argue that it is essential to enhance the search for truth. They assert that where a court determines that a statement is voluntary, it should be admitted, as an accused

126 See generally *Oickle*, *supra* note 41.

127 [1999] 2 S.C.R. 417 at para. 45, 174 D.L.R. (4th) 111.

ought not be allowed to tell one story to the psychiatrist and then change his story in the courtroom. However, such arguments cannot succeed—any benefit to the search for truth is outweighed by the potential for distortion through inherent unfairness and unreliability.

First, s. 672.21(3)(f) should be repealed, because the distinction it draws is unworkable. This section requires a trier of fact to consider evidence of guilt for the purpose of impeaching credibility. It is a codification of the distinction drawn in *R. v. Kuldip* and *R. v. Noël*. *Henry* states that these distinctions were a product of confusion—the distinction drawn in these cases is troubling in theory and unworkable in practice. This distinction may confuse jurors or simply result in jurors refusing to apply it.

Second, this section could operate in a way that is unfair to the accused. A trier of fact is entitled to draw adverse inference based on an accused's refusal to speak to a court-ordered psychiatrist. Further, the "testimony" provided by a psychiatrist may well be more than mere statements, but observations of behaviour.[128] Such examinations are unfair to the accused and are extremely intrusive. Further, aside from the reality that information attained from these assessments may be used to prove guilt, an accused stands to be deprived of the benefit of an accurate assessment of his mental health. Such unfairness acts to hinder, as opposed to enhance, the very search for truth the provision was intended to assist.

Third, this looming possibility of self-incrimination produces a chilling affect that will hinder honest and frank discussions with a psychiatrist. Prior to the decision in *Henry*, the Court noted in *G. (B.)* that if s. 672.21(3)(f) "does in fact allow previously excluded evidence to be reintroduced indirectly, accused persons will refuse to answer some of their psychiatrist's questions for fear this evidence may be reintroduced at trial."[129] This concern is further echoed in *R. v. K. (D.)*,[130] where a court refused to admit protected statements even for the purpose of sentencing:

> [T]he intention of Parliament was to create an opportunity for the open flow of information from the accused to the professionals performing the assessment. If there continues to be a risk that some of the communications that flow from the accused to the assessment team are open to uses beyond those enumerated in the *Code* accused persons might not participate in the process.[131]

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128 Gray, *supra* note 93 at 72.
129 *G. (B.)*, *supra* note 22 at para. 41.
130 (1999), 70 C.R.R. (2d) 294 (Ont. S.C.J.).
131 *Ibid.* at para. 17.

Clearly, the Court recognizes, because of the possibility that s. 672.21 assessments may be used to prove guilt, an accused would be wise not to participate. This result frustrates the purpose of the section and does not support the search for truth. It does not encourage an accused to discuss his situation with a psychiatrist. On the contrary, involuntary, unreliable and extremely prejudicial "protected statements" put to the trier of fact for the supposed purpose of attacking credibility discourage the cooperation of the accused.

Finally, s. 672.21(3)(f) causes confusion and uncertainty, as it has become increasingly complex and technical, and is already subject to distinctions and sub-distinctions. "Protected statements" are not admissible to prove guilt, but s. 672.21(3)(f) is an exception which admits them for a limited purpose. That limited purpose is further limited by the confessions rule. This is further confused by the uncertainty pertaining to the scope of *Charter* rights, the questionable mental state of an accused in custody, and the possibility that s. 13 may also constrict the operation of s. 672.21(3)(f). The clear wording of s. 672.21 may indeed prove a trap for the unwary prosecutor. Such confusion and uncertainty stands to prolong and confuse litigation, diverting attention from the true issues at hand.

VI. CONCLUSION

Section 672.21(3)(f) was enacted to strike a balance between facilitating psychiatric assessments and accommodating the court's search for truth. It is becoming increasingly clear that the subsection is not capable of serving this function. In light of the recent decision in *R. v. Henry*, s. 672.21(3)(f) needs to be revisited, either through judicial review on *Charter* grounds or through parliamentary repeal.