

The Collateral Facts Bar

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A. The Rule and its Rationale

- A witness may be cross-examined about collateral issues (subject to the trial judge's discretion to curtail questioning that is abusive, repetitive, or of low probative value)

BUT

- The opposing party is not permitted to lead independent evidence contradicting the witness on a collateral factual issue.
- Put another way: if an issue is collateral, the cross-examining party must accept the witness's answer on that issue.



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- The collateral facts bar is intended to control the scope of the trial by removing time-consuming and distracting side issues from the trier of fact's consideration.
- It does that by preventing a party from contradicting another party's witnesses on factual issues that are only tenuously connected with the facts in issue.



- Note that the collateral facts bar does not apply directly to cross-examination; put another way, it is generally permissible to cross-examine a witness on collateral matters.
- The collateral facts bar applies when the opposing party seeks to lead evidence that contradicts what the witness said (in chief or in cross-examination)
- Having said that ... if a factual issue is collateral, a trial judge may take that into account in exercising their discretion to limit cross-examination (see, for example, *Kolapully v. Myles*, 2024 ONCA 350)



- The rule is easy to state, and its rationale is clear, but it is not always easy to apply.
- “Collateral” does NOT mean “irrelevant”. If the evidence is irrelevant, it should be excluded in any event.
- So ... just what is a “collateral” fact?



- At the moment, Canadian case law illustrates two approaches to determining whether a factual issue is collateral:
- The traditional or categorical approach
- A principled or case-by-case approach
- The Supreme Court of Canada has, in the past, adopted the categorical approach, but has not recently considered the question.



B. The Categorical Approach

- A fact is collateral if evidence of that fact is relevant only because it damages the witness's credibility or reliability by showing a contradiction between their testimony and another fact.
- And so, a fact is not collateral if evidence of that fact is relevant not only because it damages the witness's credibility or reliability but also for another reason.



A judicial definition

- “... evidence which depends for its relevance entirely on the fact that it contradicts the testimony of a witness, is collateral”. *R. v. Ryan*, 2011 NLCA 53 at para. 34, *per* Hoegg J.A., emphasis added.
- See also
 - *R. v. P.(G.)* (1996), 112 C.C.C. (3d) 263
 - *R. v. MacIsaac*, 2017 ONCA 172 at paras. 58-59



A scholarly definition

- “*Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?*”
- If so, the fact is not collateral; if not, the fact is collateral
- J.H. Wigmore, *Evidence*, vol. 3A (Chadbourn rev. 1970) at §1003; see also *Attorney General v. Hitchcock* (1847), 154 E.R. 38.



- Put another way:
- independent evidence introduced solely to contradict the witness is inadmissible (collateral)
- independent evidence that contradicts a witness is admissible for that purpose if it would also be admissible for another purpose (not collateral). For example:
 - Evidence concerning the facts in issue
 - Evidence concerning the witness's ability to remember, perceive, or narrate the facts in issue



A simple example

- The issue is whether it was safe for the defendant to proceed through an intersection at a certain time. Plaintiff's case is that the light was red; defendant's case is that the light was green.
- Plaintiff's witness, a bookkeeper who happens to have witnessed the incident, testifies in chief:
 - “The light was red.”
- Defendant seeks to show that the light was green.
- Consider the following q&a in cross-examination:



- Q1: I put it to you that the light was green.
- A1: No, I'm sure it was red.
- Q2: But your view was obstructed by a moving van, wasn't it?
- A2: No, there were no other vehicles in the intersection.
- Q3: You once falsely told a Mrs Mills that you were a chartered accountant, isn't that right?
- A3: Certainly not. That is an outrageous suggestion. I have never misrepresented my professional credentials.



- Can the defendant lead evidence, as part of its case to show
 - That the light was green?
 - That there was a moving van in the intersection?
 - That the witness represented himself as a chartered accountant (e.g., by calling Mrs Mills to testify to that effect)?

- Which of these factual issues is “collateral”?



- On the categorical approach:
- If the independent evidence shows only that the witness has been untruthful, it is collateral and inadmissible.
- But if the independent evidence shows that the witness has been untruthful about something related to the case, so that the evidence has value in addition to showing the witness's untruthfulness, it is not collateral and admissible.



- Therefore:
- The defendant can lead evidence to show
 - That the light was green: that's the material issue on which he was called to testify
 - That there was a moving van in the intersection: that evidence relates to this witness's ability to perceive the facts at issue
 - Note that the presence or absence of the moving van may seem at first to be collateral because it is not a material fact in issue and is relevant only because of its impact on this witness's reliability (ability to perceive); but it is relevant to this witness's ability to perceive the very facts in issue and therefore is not collateral



- But the defendant cannot lead evidence to show
 - That the witness once represented himself as a chartered accountant
 - That fact has nothing to do with the facts of the case or with the witness's ability to perceive, remember, or narrate those facts. If itself believed, it shows only that his testimony was false, but in respect of a fact that is entirely unrelated to the material facts in issue. The question whether the witness once represented himself as a chartered accountant is a collateral factual issue, and evidence contradicting his answer on that issue is inadmissible.



Compare *R. v. Melnychuk*, [1997] 1 S.C.R. 602, rev'g 104 C.C.C. (3d) 160 (Ont. C.A.):

- The accused was charged with fraud in relation to a forged mortgage document. The accused testified and denied any dishonesty. In cross-examination, Crown counsel asked if he had ever held himself out as a chartered accountant. He denied the suggestion. Crown counsel showed him a document (the “Wizards Workshop” document) in which he was referred to as a chartered accountant. He explained that he had not prepared the document himself.



- Over defence objection, the Crown was permitted to call Ms Mills, the accused's ex-wife, in reply. She identified the Wizards Workshop document as one that she had found in the accused's home office.
- The defence then called two witnesses, including Mr Duke, the principal of Wizards Workshop, who said that someone in their office had prepared the document on the assumption that the accused was a chartered accountant and that when he showed the accused the document, the accused said he was not a chartered accountant and refused to sign it.
- The accused was convicted. The trial judge found that he was "in many ways ... a stranger to the truth."



- On appeal to the Ontario Court of Appeal, the appeal was dismissed 2:1.
- Doherty J.A. dissented. He held that the issue of whether the accused had identified himself as a chartered accountant to Wizards Workshop was collateral and that, while the cross-examination of the accused on this point was permissible, the Crown should not have been permitted to call Ms Mills in reply.
- On further appeal to the S.C.C., the appeal was allowed and a new trial ordered on the basis of Doherty J.A.'s dissent.



- What if the evidence tends to show a witness's bias or partiality?
- Some authorities treat his kind of evidence as collateral, but say that it is admissible under an exception to the collateral facts bar
- But Wigmore thought it was not collateral; see also *R. v. MacDonald*, 2007 ABCA 53.
- Evidence contradicting the witness's claim that he or she is not biased or partial is relevant not only to contradict the witness but also to prove the bias, which goes to his or her sincerity about the matters in issue; so it is not collateral.



- What if the witness is untruthful about a fact that is collateral in Wigmore's sense but so central to his/her narration concerning the material facts that disproving it seriously undermines credibility?
- McCormick argued that this kind of contradiction should be permitted; he referred to it as “pull[ing] out the linchpin of the story” (Charles T. McCormick, *Handbook of the Law of Evidence* (1954) at p. 102).
- See, for example, *R. v. Brown* (1861), 21 U.C.Q.B. 330:



- The accused was charged with murdering Hogan.
- Sherrick had previously been charged and acquitted of this murder
- McGillock, the Crown's principal witness, testified that the accused and Sherrick, acting together, murdered Hogan
- At Brown's trial, the defence did not allege that Sherrick was involved in any way in the murder.
- The defence wanted to call a witness named Dolan to give alibi evidence for Sherrick (not the accused)



- The trial judge refused to permit the defence to call Dolan but ruled that the defence could call Sherrick and, if the Crown challenged Sherrick's evidence, the defence could then call Dolan
- The defence called Sherrick, who testified he had nothing to do with the murder
- The Crown chose not to cross-examine Sherrick
- The accused was convicted



- On appeal (by way of stated case), a new trial was ordered; Dolan should have been permitted to testify
- Suggested rationale:
- Sherrick's presence or absence from the scene was a collateral fact in Wigmore's sense but was a "linchpin" of McGillock's narrative of the crime; evidence of his presence or absence at the scene was therefore admissible.



So, on the categorical approach, ask:

Is the factual issue collateral in Wigmore's sense?

- If not, that is, if proof of the fact does more than simply demonstrate a contradiction with the witness's testimony, it is admissible.
- If so, that is, if all proof of the fact does is demonstrate a contradiction, it is collateral and inadmissible (unless, in a rare case, it is the MacCormick "linchpin" of the witness's narration of the material facts).



C. Towards a Principled Approach?

- What would a “principled approach” look like?
- Rationale for the rule: proof that a witness lied about something is time-consuming and creates a distracting side-issue for the fact finder
- A principled approach would link the question of admissibility directly to the rationale for the rule:



- “If the contradiction is probative enough to outweigh the prejudice it may cause, admit it.” [Paciocco, Paciocco, and Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at p. 604.]
- An example of applying the rationale of a rule on a case-by-case basis



- In *R. v. S.B.*, 2016 NLCA 20, rev'd on other grounds 2017 SCC 16, the Court rejected Paciocco & Stuesser's proposal. At para. 23, Rowe J.A. for the majority said:
- “The approach is difficult for a judge to administer; as well, it is almost impossible for counsel to predict whether evidence on a collateral fact will or will not be admitted. Also, by its nature it deflects the trial away from whether the accused committed the offence as charged into a potentially far ranging and extensive series of inquiries into the background of witnesses, notably complainants.”



- The Ontario Court of Appeal has been more receptive:
- *R. v. C.F.*, 2017 ONCA 480 *per* Huscroft J.A.:
- “The collateral fact rule is not absolute. As the Supreme Court recognized in *R. v. R.(D.)*, [1996] 2 S.C.R. 291, evidence that undermines a witness’s credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused.” (para. 60)
- On the facts, “... it was open to the trial judge to conclude that the probative value of the evidence outweighed its prejudicial effect and that rebuttal evidence should be permitted.” (para. 62)
- The reference to probative value and prejudicial effect is the hallmark of a principled approach.



- See also *R. v. Kiss*, 2018 ONCA 184 at para. 67 *per* Paciocco J.A. in *obiter dicta*: “... the rigid conception of what facts are collateral embraced in *Krause* may have been overtaken by a more principled approach that does not treat sufficiently important evidence about credibility as collateral”, referencing *R.(D.)* and *C.F.*
- See also *R. v. G.A.R.*, 2022 BCSC 844, referencing *C.F.* on a s. 276 application.



- In my view, the reasoning in *C.F.* rests on a misunderstanding of what was at issue in *R.(D.)*
- *R.(D.)* was not a case about the collateral facts bar. The issue in the case was the permissible scope of an expert's opinion concerning the testimonial qualities of children. His proposed testimony would not have contradicted what the child witnesses had said.
- To the extent that *R.(D.)* does comment on the collateral facts bar, it is consistent with the categorical approach outlined above (see para. 42).



- Moreover, what happened at the trial in *C.F.* is a perfect illustration of the dangers of allowing contradiction on collateral issues: the defence and the Crown led evidence challenging and supporting the complainant's account of an incident that was not charged. The evidence in question was not otherwise admissible and in the end the trial judge found it unhelpful in assessing the complainant's credibility.



- Nevertheless ... given the development of the principled approach in general, it is possible at some point the Supreme Court of Canada will adopt some version of Paciocco and Stuesser's principled approach to collateral facts.
- *C.F.* and *Kiss* have arguably laid the groundwork for that development.



D. Further reading

- David Paciocco, “Using the Collateral Facts Rule with Discretion” (2002) 46 C.L.Q. 160.
- Hamish Stewart, “The Collateral Facts Bar: A Defence of the Categorical Approach” (2026) 104 Can. Bar Rev. 55

