THE COLLATERAL FACTS BAR: A DEFENCE OF THE CATEGORICAL APPROACH

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The collateral facts bar excludes evidence that contradicts a witness on collateral factual matters, in order to save time and avoid confusion of issues. A collateral matter is often said to be one that relates to the credibility of the witness. Stated in this form, the rule against proof of collateral facts is difficult to apply because many matters which relate to the credibility of a witness seem to be proper matters for independent proof. So, some commentators and courts have proposed a principled approach, according to which contradicting evidence would not be categorized as collateral or not but would be admitted or excluded based on a case-by-case assessment of the advantages and disadvantages of hearing it. But if the categorical approach is stated properly, to exclude contradicting evidence as collateral when its only function in the trial is to impeach the witness's credibility and to admit it otherwise, a principled approach becomes unnecessary. Moreover, a principled approach to collateral facts may create the mischief the collateral facts bar is supposed to avoid. The categorical approach has all the resources it needs to distinguish between admissible and inadmissible contradicting evidence.

L'exclusion des faits incidents consiste à exclure les preuves qui contredisent un témoin sur des questions incidentes afin d'accélérer les procédures et d'éviter la confusion entre les questions à trancher. Souvent, on dit des questions incidentes qu'elles touchent à la crédibilité du témoin. Formulée en ces termes, la règle d'exclusion des faits incidents est difficile à appliquer, car de nombreuses questions liées à la crédibilité du témoin semblent bien se prêter à la preuve indépendante. Certains observateurs et tribunaux ont donc proposé une méthode raisonnée selon laquelle les preuves contradictoires ne seraient plus catégorisées comme des questions incidentes ou non, mais seraient admises ou exclues selon une évaluation au cas par cas des avantages et inconvénients de les entendre. Cependant, si la méthode par catégorisation est formulée correctement, c'est-à-dire comme l'exclusion des preuves contradictoires à titre de faits incidents lorsqu'elles n'ont pour seule fin au procès de contester la crédibilité du témoin et d'admettre la preuve dans les autres cas, la méthode raisonnée devient superflue. De plus, la méthode raisonnée risque d'engendrer le méfait que l'exclusion des faits incidents vise précisément à éviter. La méthode par catégorisation met en

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place toutes les ressources nécessaires pour établir la distinction entre les preuves contradictoires admissibles et celles qui ne le sont pas.

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I. Introduction

The collateral facts bar is easy to state but difficult to apply. After a witness has testified, the opposing party may not lead other evidence to contradict the witness's testimony on a factual issue that is collateral. The rationale for the collateral facts bar is also easy to state. The exclusion of contradictory evidence concerning collateral factual matters is intended to save time and to avoid creating an excessive number of issues for the fact-finder to resolve. But what is a collateral factual issue? That is not so easy to say. Judicial and scholarly efforts to define collateral matters range from the succinct to the elaborate, but such categorical definitions have been criticized for preventing proof of matters that any reasonable fact-finder would want to hear in assessing the credibility and reliability of the witness. And so it has been proposed that Canadian courts should adopt a principled approach to the collateral facts bar, as they have adopted a principled approach to other common law rules of evidence.[2] On a

[2] On the principled approach in general, see Sidney N Lederman, Michelle K Fuerst, & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at ch 1 [Lederman, Fuerst & Stewart]; David Paciocco, Palma Paciocco, & Lee

categorical approach, a trial judge classifies the factual issue as collateral or not and excludes or admits the contrary evidence in accordance with this classification. On a principled approach, a trial judge would not have to classify the factual issue but instead would consider whether admitting the contradictory evidence would excessively prolong the trial and create confusion of issues. The judge would apply the rationale for the collateral facts bar—saving time and avoiding confusion of issues—directly on a case-by-case basis, rather than indirectly through a categorial definition, to decide whether a factual issue was collateral.[3]

While there is something to be said for a principled approach, the need to adopt a principled approach to the collateral facts bar is less urgent here than it might have been in other areas of evidence law. The categorical approach to collateral facts has a well-defined structure that is in welcome contrast to some other common law rules of evidence but remains sufficiently flexible to accommodate situations that at first sight may appear to benefit from a principled approach. On the other hand, abandoning the categorical approach would invite the very dangers that the collateral facts bar in its traditional form was meant to control.

II. The Rule and the Rationale

The collateral facts bar arises in situations like the following. Defence counsel cross-examines a Crown or plaintiff's witness.[4] The witness gives an answer that defence counsel knows can be contradicted with the testimony of another witness. During the defence case, can defence

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Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 11–16 [Paciocco, Paciocco & Stuesser].

[3] The most articulate exposition of a principled approach to the collateral facts bar is David Paciocco, "Using the Collateral Facts Rule with Discretion" (2002) 46:2 Crim LQ 160 [Paciocco]. See also Casey Hill, David M Tanovich, & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed, Release 5 (Toronto: Thomson Reuters, 2024) at §6.21 [Hill, Tanovich & Strezos].

[4] The collateral facts bar does not apply to cross-examination on collateral matters. Put another way, "the collateral facts rule does not prevent parties from asking collateral questions. It prevents parties from disproving collateral answers." *R v Dent*, 2023 ONCA 460 at para 108. See also *R v MacIsaac*, 2017 ONCA 172 at para 58. There are, unfortunately, cases mistakenly holding that the collateral facts bar does apply to cross-examination (see, for example, *R v Turner*, 2023 CMAC 6 at para 29, mistakenly stating that "cross-examination on a collateral issue … is inappropriate"). The fact that a matter is collateral does, however, weigh in favour of a trial judge's exercise of discretion to limit cross-examination: see, for example, *Kolapully v Myles*, 2024 ONCA 350 at paras 37–44 [*Kolapully*]; *R v Khanna*, 2016 ONCA 39 at para 9. See also Paciocco, *supra* note 3 at 171–172.

counsel lead the contradicting evidence?[5] The collateral facts bar says that if the witness's answer concerns a collateral matter, then the contradicting evidence cannot be led; but if the witness's answer concerns a matter that is not collateral, then the contradicting evidence may be led. The rationale for the rule is straightforward. Hearing evidence on collateral matters will take time and will complicate the fact-finder's task. If the contradicting evidence is heard, the fact-finder will have to resolve an additional factual matter for the purpose of assessing the credibility and reliability of the witness's testimony, yet that matter may be only tenuously related to the material facts in issue. Moreover, allowing proof of one collateral matter can spawn other collateral matters: if the fact-finder is allowed to hear the defence's contradicting witness, should the Crown or plaintiff be allowed in turn to cross-examine the contradicting witness on other matters and, in reply, to contradict the contradicting witness on a matter that may now be several times removed from the material facts at issue? (If not, why not?) The collateral facts bar is a rule-based method of implementing the common law view that the probative value of hearing contradictory evidence on a collateral matter—its value in assessing the credibility and reliability of the original witness—is outweighed by the prejudicial effect of that evidence on the proper conduct of the trial—consumption of time and confusion of issues.

III. A Categorical Approach to Collateral Facts

A) Defining Collateral Facts

But what is a collateral factual matter? The Supreme Court of Canada's decision in *R v Krause* is often cited on this point, but unfortunately the *Krause* definition is unhelpful. The Court said that a matter was collateral if it is "not determinative of an issue arising in the pleading or indictment or not relevant to matters which must be proved for the determination of

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[5] As in *Attorney-General v Hitchcock* (1847) 154 ER 38, [1847] 1 Exch 91 [*Hitchcock*] and *Piddington v Bennett and Wood Pty Ltd* [1940] HCA 2; 63 CLR 533 [*Piddington*]. The collateral facts bar applies to any party in criminal or civil proceedings. If it is Crown counsel cross-examining a defence witness, then the issue is whether the Crown can call the contradicting witness in reply (as in *R v Melnichuk*, 1997 CanLII 383 (SCC), [1997] 1 SCR 602, rev'g 104 CCC (3d) 160 (Ont. CA) [*Melnichuk*] [subsequent references to Melnichuk are to the Court of Appeal's decision] and *R v P(G)*, 112 CCC (3d) 263 (Ont. CA), 1996 CanLII 420 (ONCA). If counsel for co-accused A is cross-examining the witness of co-accused B, then the issue is whether A can call the contradicting witness in A's case or in reply (as the case may be). I assume the collateral facts bar also applies when the cross-examining party is the same party who called the witness but has cross-examined the witness as hostile, adverse, or pursuant to s 9(2) of the *Canada Evidence Act*, RSC 1985, c C-5. The rationales for the rule would apply in such a case.

the case …"[6] This formulation can be read as defining collateral facts very broadly or very narrowly, but either reading is very problematic. If read broadly as insisting that a matter is collateral unless it is "determinative" of a material issue or directly relevant only to such an issue, it sets far too high a standard for saying that that issue is not collateral; indeed, an unrealistically high standard for any rule of admissibility. On the other hand, if the reference to "relevant to matters which must be proved" is read as saying nothing that might be helpful to the factfinder in determining the material issues is collateral, then collateral facts are defined too narrowly. On this reading, a factual issue is collateral only if it is not relevant;[7] but then the *Krause* definition is toothless, because evidence going to credibility and reliability is always relevant, and evidence that is for other reasons irrelevant should be excluded for that reason alone. Similarly, it is sometimes said, focusing on what is not admissible rather than what is, that the matter is collateral if it goes "to the credibility of the witness."[8] But, like the first reading of the *Krause* formulation, this statement defines collateral facts too broadly and so is too restrictive of the kind of evidence that can be led in contradiction of a witness.

Many kinds of perfectly acceptable contradictory proof go to the credibility of the witness; contradicting a witness on the material facts of the case can be very damaging to the witness's credibility, yet no one thinks that the collateral facts bar excludes this kind of proof. For the purposes of the policy behind the collateral facts bar, it matters *how* the contradiction goes to the credibility of the witness.

Rather than defining collateral facts along the lines of *Krause*, the categorical formulation of the collateral facts bar distinguishes between three different ways in which a contradiction can cast doubt on the

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6 *R v Krause*, 1986 CanLII 39 (SCC), [1986] 2 SCR 466 at 475. For a brief discussion of the collateral facts bar oriented around the *Krause* formulation, see Matthew Gourlay et al, *Modern Criminal Evidence* (Toronto: Emond, 2022) at 383–384. The discussion in Lederman, Fuerst & Stewart, *supra* note 2 at ¶¶16.277 to 16.282, attempts (not entirely successfully) to blend the *Krause* approach with the categorical approach argued for in this paper.

7 Similarly, an early edition of Phipson's textbook states that "[a] party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on irrelevant matters." Sidney L Phipson, *The Law of Evidence*, 6th ed (London: Sweet & Maxwell, 1921) at 481 [original emphasis]. The problem with this formulation is, of course, that the original witness should not have testified about an irrelevant matter in the first place. More recent editions of Phipson adopt Pollock CB's formulation discussed below: see, for example, MN Howard, *Phipson on Evidence*, 15th ed (London: Sweet & Maxwell, 2000) at 262.

8 Paul Roberts & Adrian Zuckerman, *Criminal Evidence*, 2nd ed (Oxford: Oxford University Press, 2010) at 352 [Roberts & Zuckerman].

credibility and reliability of a witness and identifies only one of those as a collateral factual matter.[9] Any evidence that contradicts a witness may cast doubt on the witness's credibility and reliability; whether the contradiction relates to a collateral factual issue depends on what additional probative value, if any, the evidence has. If the contradicting evidence does more than merely demonstrate a contradiction, then it has probative value beyond its effect on the witness's credibility and reliability in answering the question asked and is not collateral. This additional probative value can arise in two ways. First, if the factual issue is a material fact in issue, then the contradicting evidence is relevant and admissible quite apart from any value it may have in casting doubt on the witness's credibility or reliability. I make this point not because it is controversial (it is not[10]) but because it shows that it is not right to say that evidence is collateral merely because it affects a witness's credibility. Second, if the contradicting evidence concerns the witness's testimonial qualities in relation to the material facts in issue—the witness's ability to perceive, recollect, or narrate the material aspects of their testimony or the witness's sincerity in relation to those aspects—then the factual issue is not collateral. This kind of evidence is not direct evidence of the material facts and would be irrelevant if the witness had not testified. But it is relevant not only because it affects the witness's credibility or reliability but also because it is directly connected to the witness's narrative of the material facts. The contradicting evidence, if believed, derives its probative value not merely from showing that the witness was lying or mistaken about a random fact and is therefore less credible or reliable in general, but from showing that there is a reason to think that the witness was lying or mistaken in recounting the material facts in issue and is less credible or reliable in his or her testimony about those facts. This kind of evidence is therefore not collateral. It is a matter

9 This exposition of the categorical approach largely follows Hamish Stewart et al, *Evidence: A Canadian Casebook*, 5th ed (Toronto: Emond Publishing, 2020) at 410–418, and Stanley A Schiff, *Evidence in the Litigation Process*, 4th Master ed (Toronto: Carswell, 1993) at 785–807 [Schiff]. The author of the most recent edition of Cross's textbook does not attempt a definition: "it is impossible to devise an exhaustive means of determining whether a question is collateral …": Roderick Munday, *Cross and Tapper on Evidence*, 13th ed (Oxford: Oxford University Press, 2018) at 327 [Munday].

10 See Paciocco, *supra* note 3 at 164. See also *R v McIntosh*, 1999 CanLII 1403 (ONCA), 141 CCC (3d) 97. The accused was charged first degree murder. The witness in question was an eyewitness to the victim's death and was the only possible alternative suspect. He was cross-examined as to his words and conduct at the scene of the incident on the previous day. The evidence contradicting his answers given in cross-examination was not collateral, the court held, because it did not merely contradict the witness but also went to "his propensity, motive, and opportunity to kill [the victim]" (at para 87). See also *United States v Delgado-Marrero*, 744 F 3d 167 (1st Cir 2014), where evidence excluded by the trial judge under the collateral facts bar was held on appeal to be evidence of the material facts in issue (it was relevant to and probative of a defence of entrapment) and so "anything but collateral" (at 182).

"directly affecting the story of the witness touching the issue before the [court]."[11] The problem with the *Krause* formulation and with other formulations that make undifferentiated reference to credibility is that they implausibly characterize this second type of contradiction as collateral and therefore inadmissible.[12]

If the contradictory evidence does not relate to the material facts in one of these two ways—if it is relevant *only* because it goes to the credibility or reliability of the witness's answer to a question asked in chief or in cross-examination—then the factual matter is collateral, and the contradictory evidence should not be admitted. As it is sometimes put, cross-examining counsel must accept the witness's answers on such matters as final.[13] Only this third type of contradiction should be subject to the collateral facts bar.

Several classic efforts to define non-collateral matters are worded so as to permit not only the first but also the second type of contradiction, that is, evidence that, though relevant only because it relates to the witness's credibility, does so with respect to their ability to perceive, narrate, and recall the material facts in issue. In an often-quoted passage, Pollock CB attempted to define what was not collateral as follows:

> The test of whether an inquiry is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your own part to prove in evidence—if it have such a connection with the issue, that you would be allowed to give it in evidence—then it is a matter on which you may contradict him.[14]

Or, as Wigmore put it, a factual issue is not collateral if "the fact, as to which error is predicated, [could] have been shown in evidence for any purpose independently of the contradiction … "[15] The Supreme Court of Canada, not entirely consistently with it said in *Krause*, endorsed this approach in *R v R(D)*.[16] More succinctly, one might say, as the Court of Appeal of Newfoundland and Labrador has said, "evidence which depends

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11 *Hitchcock*, *supra* note 5 at 42.

12 Roberts & Zuckerman, *supra* note 8 at 359, that this sort of evidence is excluded by what they call "the standard interpretation" of the collateral facts bar "because it only relates to the credit of the witness and not (directly) to the [material facts]." If they are right, then there is something seriously wrong with "the standard interpretation." See also Paciocco, *supra* note 3 at 165–168.

13 Lederman, Fuerst & Stewart, *supra* note 2 at ¶16.277; Paciocco, Paciocco & Stuesser, *supra* note 2 at 600.

14 *Hitchcock*, *supra* note 5 at 42. See also Paciocco, *supra* note 3 at 169.

15 John Henry Wigmore, *Evidence in Trials at Common Law, vol 3A* (Boston: Little Brown & Co, 1970) at §1003.

16 *R v R(D)*, 1996 CANLII 207 (SCC), [1996] 2 SCR 291 at para 42 [*R(D)*].

for its relevance *entirely* on the fact that it contradicts the testimony of a witness, is collateral."[17]

All of these formulations are efforts to identify contradictory evidence that has relevance not only because it contradicts the witness but also for another purpose, namely, probative value on the material facts or probative value on the witness's testimonial qualities in relation to the material facts. That is, they permit the first and second type of contradiction described above and exclude only the third. Of course, a party can lead evidence about the material facts in issue apart from their value in contradicting an opposing party's witness. A party can also lead evidence about facts that might have interfered with an opposing party's witness's ability to perceive, remember, and sincerely narrate the facts in issue. Although this kind of evidence would be irrelevant if this witness had not testified, its relevancy goes beyond its value in contradicting the witness in general by undermining the probative value of the witness's narrative of the material facts. Only the third kind of contradiction—evidence that does nothing more than cast doubt on the witness's credibility and reliability in general—is excluded. Following Schiff,[18] I will refer to this test as the "Pollock-Wigmore" formulation of the collateral facts bar.

The Pollock-Wigmore formulation is preferable to the *Krause* formulation and to related formulations that speak too casually of relevancy and credibility. It serves the purpose of the rule by excluding evidence that is tenuously related to the material facts in issue but admitting evidence that, though relevant only because the particular witness has testified, has probative value in relation to the material facts in issue because it is relevant to that witness's recounting of those facts. Yet it is also stated with sufficient precision to function as a rule rather than a standard involving balancing or a multi-factorial test.

B) Supposed Exceptions to the Rule

The Pollock-Wigmore approach also helps to rationalize rules that are commonly referred to as exceptions to the collateral facts bar because it shows that many of them are not. The following forms of proof are often listed as exceptions:[19]

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[17] *R v Ryan*, 2011 NLCA 53 at para 34 *per* Justice Hoegg [emphasis added]. See also *R v CF*, 2017 ONCA 480 at para 58 [*CF*]; *R v Prebtani*, 2008 ONCA 735 at para 130; Paciocco, *supra* note 3 at 165.

[18] Schiff, *supra* note 9 at 792.

[19] This list is based on Hill, Tanovich & Strezos, *supra* note 3 at §6:9 through §6:16, and Lederman, Fuerst & Stewart, *supra* note 2 at ¶16.282 to ¶16.300; it is not meant to be exhaustive but merely to show that the rules most commonly cited as "exceptions" to the collateral facts bar can be accommodated within the Pollock-Wigmore formulation.

- To show the witness's bias or partiality;
- To show a physical or mental condition that affects the witness's credibility;
- To prove that the witness made a prior inconsistent statement;
- To prove the witness's criminal report (if denied); and
- To prove that the witness has a reputation for untruthfulness.

The first three of these are not exceptions on the Pollock-Wigmore approach. Evidence showing that a witness is biased against a party is not relevant only because it contradicts any testimony the witness may have given denying partiality; it is also relevant because it may show the witness's reasons for narrating the fact in issue the way they did. If the evidence related to the witness's partiality in relation to someone uninvolved in the litigation, the issue would indeed be collateral. Similarly, evidence that the witness could not see the material facts they have testified to does not merely contract their testimony that they saw something or another but that they saw the material facts in issue. Again, if the thing they said they saw was unrelated to the facts in issue, evidence tending to show that they could not have seen it would be collateral. If the witness said that he jumped out of bed and ran outside to see what was happening and then described the material facts, evidence showing that the witness was unable to run would not be collateral; but if the witness said he ran at a time wholly unconnected with the facts in issue, for example, claiming that he ran the Boston Marathon in 1989, evidence showing that he was incapable of running in 1989 would be collateral. And both cross-examination and independent proof of prior inconsistent statements are limited by the statutory requirement that the statement be "relative to the subject matter of the case."[20] This statutory requirement ensures that the subject-matter of a prior inconsistent will not be collateral.

Thus, the first three of these supposed exceptions are examples of the second form of contradiction permitted by the Pollock-Wigmore formulation. The facts proved under these rules are not collateral.

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[20] This phrase originated in the Criminal Procedure Act 1865 (UK), 28 & 29 Vict c 18 (also known as Lord Denman's Act), s 4 ("relative to the subject matter of the indictment or proceeding") and now appears in, among other statutes, *Canada Evidence Act*, RSC 1985, c C-5, ss 10(1) and 11 ("relative to the subject matter of the case"); *Evidence Act*, RSO 1990, c E23, ss 20, 21 ("relative to the subject matter in question"); and *Alberta Evidence Act*, RSA 2000, c A-18, ss 22, 23 ("… the matter in question"). See also the discussion of this issue in *Trecartin v R*, 2018 NBCA 49.

The fourth exception—proof that a witness has a criminal record, where the witness denies it[21]—appears to be a true exception to the collateral facts bar because the only purpose of proving the witness's criminal record is to damage their credibility in general. But it should be noted that, according to the background assumption that witnesses with criminal records are generally less credible than witnesses without criminal records, it is not just the contradiction but also the fact of the record that is relevant.[22] If that is the right way to understand this rule, then proof of a witness's criminal record, where the witness denies it, is not an exception but an example of the second form of contradiction permitted under the Pollock-Wigmore formulation. In any event, this rule exists by virtue of statute[23] and so is available whether, at common law, the record is categorized as a collateral fact or not.

The fifth suggested exception—evidence of a bad reputation for truthfulness—has nothing to do with the collateral facts bar. It is not evidence contradicting anything the witness says in their testimony.[24] As Lederman et al. point out, the foundational English case recognizing this form of proof "does not indicate that it is a condition precedent to the introduction of this contradictory evidence that the subject of the contradictory evidence be put to the witness."[25] The sparse Canadian authorities on point do not suggest that evidence of a witness's bad reputation for veracity is led to contradict the witness's assertion of their good character for truthfulness.[26]

C) McCormick's Linchpin

Although it encompasses many situations often regarded as exceptions, the Pollock-Wigmore formulation does not seem to capture all the situations in which a court might want to receive evidence that rebuts a witness's previous testimony. It is possible to imagine a witness including in his or her narration of the facts in issue a detail which, though collateral in the Pollock-Wigmore sense, is so significant to the witness that disproving it would cast significant doubt on the witness's narrative. For this reason, McCormick proposed an additional category of permissible contradiction. He referred to this kind of evidence as proof of a fact that would have the

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21 The record may, of course, be proved even if the witness does not deny it.

22 *R v Gonzague* (1983), 4 CCC (3d) 506 (Ont CA) [*Gonzague*].

23 E.g. *Canada Evidence Act*, s 12(2); *Evidence Act*, RSBC 1996, c 124, s 15(1).

24 Questioning a witness as to their own reputation for truthfulness is probably impermissible under any circumstances.

25 Lederman, Fuerst & Stewart, *supra* note 2 at ¶16.292. The case in question is *Mawson v Hartsink* (1802), 4 Esp 102.

26 See particularly *Gonzague*, *supra* note 22 at 511–512.

effect of "pull[ing] out the linchpin of the witness's story"[27]; I will therefore refer to it as "linchpin contradiction." As McCormick put it, "to prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, despite the fact that it does not meet the test of admissibility apart from contradiction."[28] Critically, the linchpin contradiction relates to the witness's recounting of the material facts in issue; it does not extend to contradiction on factual matters, important as they may be to the witness, that are unconnected to the material facts.

D) A Restatement of the Categorical Approach

With McCormick's addition to the Pollock-Wigmore formulation, the categorical approach to the collateral facts bar may be stated as follows:

- A witness may, in general, testify about and be cross-examined on a collateral factual matter.

- The opposing party may call contradicting evidence on a factual matter that is not collateral (subject to all the other rules of evidence).

- The opposing party may not call evidence contradicting the witness on a collateral factual matter.

- A factual matter is collateral if the sole purpose of calling contradictory evidence is to impeach the witness's credibility or reliability by means of the contradiction alone.

- A factual matter is not collateral if, apart from any value it may have in casting doubt on the witness's credibility or reliability by contradiction, (i) it is directly relevant to the material facts in dispute or, (ii) it is relevant to the witness's sincerity, narration, perception, and recollection in testifying to the material facts in dispute, or (iii) it is so central to the witness's narrative of the material facts that the contradictory proof will cast serious doubt on the credibility or reliability of that narrative.

All of these rules are subject to the trial judge's power to exclude contradicting evidence that is more prejudicial than probative.

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27 Charles T McCormick, *Handbook on the Law of Evidence* (St Paul: West, 1954) at 102 [McCormick].

28 *Ibid*.

E) Towards a Principled Approach?

The categorical formulation may seem rather complicated. As is typical of the common law rules of evidence, it is structured as a rule excluding relevant evidence with exceptions to the exclusion.[29] Experience suggests that the distinction between what is collateral and what is not can be difficult to apply. The collateral facts bar is motivated entirely by process concerns. The testimony of a contradicting witness takes time in court and creates additional factual issues for the jury to resolve. Moreover, the opposing party is, of course, permitted to challenge the credibility of the contradicting witness, and so the issue of whether the contradicting witness can, in turn, be contradicted may arise. Preventing the contradicting witness from testifying—requiring the cross-examining party to accept the original witness's answer as final—avoids all of these process concerns. So, perhaps it would be better to dispense entirely with the complex apparatus of the categorical approach. Instead, whenever the issue of the admissibility of contradicting evidence comes up, trial judges could apply the rationale for the rule directly: that is, take a principled approach. Rather than characterizing the subject matter of the witness's testimony as collateral or not collateral, a trial judge would ask whether, in the specific circumstances of the case before him or her, the contradicting evidence was sufficiently important to justify the process concerns; in other words, whether the probative value of the contradicting witness's evidence would outweigh its prejudicial effect.[30] The probative value would be a function of the importance of the original witness's credibility and the cogency and reliability of the contradicting evidence; the prejudicial effect would be a function of the additional court time to hear the evidence (and any further evidence that might be led in response to it) and the cognitive load on the fact-finder that the contradictory evidence would create.

Moreover, if we accept McCormick's linchpin contradiction as a feature of the traditional rule, then the difference between the categorical approach and the principled approach seems to diminish, as a trial judge must inevitably exercise some degree of discretion and judgment in determining whether a particular factual matter is significant enough to the witness's narrative of the material facts in issue to constitute such a linchpin.

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29 " … [T]he law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions … " *R v Graat*, 1982 CanLII 33 (SCC), [1982] 2 SCR 819 at 835 *per* Justice Dickson [*Graat*].

30 Put another way, contradicting evidence would not be excluded because it was characterized as collateral; rather, it would be characterized as collateral if excluded as excessively prejudicial.

David Paciocco (speaking extrajudicially) has proposed resolving the collateral facts problem along these lines.[31] As he put it some years ago, "[w]hether … 'collateral' questions can be asked, and 'collateral' answers contradicted, should depend on nothing more than the case-by-case assessment of the trial judge as to whether it is worth it."[32] His approach finds some support in recent decisions of the Court of Appeal for Ontario. Notably, in *R v CF* the Court suggested that where "credibility is central to the case against an accused" the collateral facts bar might be relaxed,[33] at least where the probative value of the contradictory proof outweighs its prejudicial effect.[34] Moreover, adopting a principled approach to the collateral facts bar would be in line with the general trend of Canadian evidence law over the last 40 years or so.[35]

A principled approach to collateral facts might indeed have some advantages. Nevertheless, I suggest in the next section that a principled approach is unnecessary because the categorical approach has the resources to deal with the type of case that the principled approach is meant to address.

IV. A Defence of the Categorical Approach

The categorical approach to collateral facts has the great advantage of requiring judges (and counsel) to be clear about why the evidence in question is relevant: how exactly does it contribute to proof or disproof of the material facts in issue? It has the further advantage, directly related to its rationale, of avoiding protracted proceedings by cutting off lines of inquiry that are only remotely related to the facts in issue. The principled approach promises to promote these advantages by directly applying the policy behind the categorical facts bar on a case-by-case basis. But the case law suggests that a principled approach is not necessary for this purpose and moreover, creates its own dangers. This analysis suggests that there are few, if any, cases where the categorical approach will misclassify evidence in the sense of excluding that which should be admitted (or admitting that which should be excluded). Moreover, the temptation to relax standards

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31 Paciocco, *supra* note 3. See also *R v Kiss*, 2018 ONCA 184 at para 67 *per* Justice Paciocco, suggesting a principled approach in *obiter dicta*; Paciocco, Paciocco & Stuesser, *supra* note 2, at 600–605; Roberts and Zuckerman, *supra* note 8 at 363; Lederman, Fuerst, & Stewart, *supra* note 2 at ¶16.300. The *obiter dicta* of Justices Côté and Rowe dissenting in *R v Samaniego*, 2022 SCC 9 at para 134 might be read as supporting a principled approach (though they might instead be read as describing the policy basis of the categorical approach).

32 Paciocco, *supra* note 3 at 160.

33 *CF*, *supra* note 17 at para 60.

34 *Ibid* at para 62.

35 *Supra* note 2.

of admissibility, inherent in the principled approach, may consume time and cause confusion of issues—the very dangers the collateral facts bar is meant to control.

Accordingly, I will defend the categorical approach to traditional facts by discussing five cases. The first four show the benefits of the categorical approach, even in one case often cited as showing the limits of a categorical approach. The fifth case, a leading case supporting a principled approach, illustrates the dangers rather than the benefits of adopting a principled approach.

A) *Melnichuk*: An Application of the Categorical Approach

The dangers of allowing proof of collateral matters and the value of the categorical approach in avoiding them are well-illustrated by *R v Melnichuk*. The accused was charged with fraud in relation to a mortgage document. He testified and denied any dishonesty in the preparation of the document. In cross-examination, Crown counsel "asked the [accused] whether he had ever held himself out as a chartered accountant."[36] The accused replied that he had not. Crown counsel then showed him a document, referred to as the "Wizard's Work Shop" document, in which the accused was referred to as a chartered accountant. The accused said that he had not prepared that document. Over the objection of defence counsel, in reply the Crown was permitted to call the accused's ex-wife, Mrs. Mills, who testified that she had found the Wizard's Work Shop document in the accused's office in the former matrimonial home, supporting the inference that the accused's response to the Crown's question was false. In an effort to rebut this inference, the defence then called two witnesses from the Wizards Work Shop:

> Both [witnesses] testified that they operated the company which had employed the [accused] to prepare certain financial records. They had prepared the document showing the [accused] as a chartered accountant on the "assumption" that he was a chartered accountant. They further testified that when the [accused] saw the document, he told them that he was not a chartered accountant and refused to sign the document.[37]

The trial judge found the accused to be an unbelievable witness, specifically rejecting his explanation for the appearance of the words "chartered accountant" on the Wizard's Work Shop document, and convicted him as charged. The accused's appeal was ultimately allowed, and a new trial

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36 *Melnichuk*, *supra* note 5 at 177.

37 *Ibid*.

was ordered on the basis that the trial judge should not have permitted the Crown to contradict the accused's answer to Crown counsel's question.

The question whether the accused had ever represented himself as a chartered account was a classic collateral issue, in that it was relevant only to his general credibility as a witness. It had no bearing on the material facts in dispute—the alleged mortgage fraud—or on the accused's testimonial qualities in relation to those material facts. Nor was it a linchpin of the accused's testimony: it was completely unrelated to his narrative of the material facts in issue. Permitting the Crown to contradict his denial by calling Mrs. Mills to contract the accused prolonged the trial, not only because of the time required to hear her evidence but also because of the time required to hear the evidence of the defence witnesses who contradicted her contradiction. The trial judge, as fact-finder, was required to make credibility findings not only in respect of the accused but also in respect of the two witnesses that he called to support his original answer on a factual matter that had nothing to do with the material facts in dispute.[38] The categorical approach leads straightforwardly to the conclusion that Mrs. Mills's testimony, and the further factual dispute that it created, should have been excluded. Adopting a principled approach might well lead to the same conclusion, but there would be no advantages to doing so.

B) *McDonald*: The Bias of the Witness

The collateral facts bar is often said to have several exceptions, and the mere existence and significance of these exceptions may seem to support the adoption of a principled approach. As noted above, one of those supposed exceptions is for contradicting evidence that shows the bias of the witness.[39] But, on the Pollock-Wigmore formulation of the collateral facts bar, this kind of contradiction is not collateral at all because it belongs in the second permissible category of contradiction: evidence that affects the credibility of the witness, not in general, but in their recounting of the material facts in issue. Evidence showing bias derives its probative value not merely from its contradicting effect on the witness's testimony but

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[38] There is no indication in the report as to why the trial judge did not believe the two defence witnesses, who had no apparent interest in supporting the accused's explanation for the appearance of the words "chartered accountant" in the Wizard's Workshop document.

[39] Paciocco, *supra* note 3 at 166; Roberts & Zuckerman, *supra* note 8 at 355; Lederman, Fuerst & Stewart, *supra* note 2 at ¶16.283. In *Hitchcock*, *supra* note 5 at 142–143, the Court held that evidence showing bias, that is, evidence concerning "whether [a witness] does not stand in such a relation to [the opposite party] as is likely to affect him, and prevent him from having an unprejudiced state of mind … ," was not collateral but a proper matter for both cross-examination and independent proof.

also and perhaps more importantly from the demonstration of the bias itself, which goes to the witness's sincerity in narrating the material facts.

R v McDonald provides a good illustration.[40] The accused was charged with sexual assault and other offences. The accused testified and denied the offences. His sister was also called as a defence witness. She gave evidence in support of the accused's version of events. Crown counsel cross-examined the sister about an earlier incident in which the accused and his sister had each been charged with aggravated assault on the other. The Crown put to her a prior statement she had made to Constable Palfy arising from that incident to the effect that she would never testify against her brother. She denied making the statement, and the Crown called Palfy to prove it, pursuant to s. 11 of the *Canada Evidence Act*. After the defence closed its case, the Crown sought to recall Palfy to testify about his conversation with the sister—this time, not merely to prove the statement but to demonstrate her bias—and to call other evidence concerning the earlier incident between the accused and the sister. The trial judge refused to admit this evidence on the ground that it was collateral. The accused was convicted on some counts but acquitted on others. On the Crown's appeal from the acquittals, the Court of Appeal ordered a new trial. The Court agreed with the trial judge that some evidence concerning the earlier incident was irrelevant but held that the contradiction between the sister's testimony to the effect that she was unbiased and her earlier statement that she would never testify against him tended to show her bias and so was not collateral.[41] The result fits easily within the categorical approach, and a principled approach is not required.

C) *Piddington*: A Counter-example to the Categorical Approach?

The Australian case of *Piddington v Bennett and Wood Ply Ltd*[42] is often cited as an instance of the categorical approach to collateral facts gone

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40 *R v McDonald*, 2007 ABCA 53.

41 "Bias of the witness … is not collateral" and may be proved in rebuttal (*ibid* at para 12). Confusingly, in the next paragraph, the court refers to evidence of bias as an exception to the collateral facts bar (*ibid* at para 13). It is more straightforward and entirely in keeping with the purpose of the collateral facts bar to characterize evidence going to the witness's bias as not collateral in the first place. It would not have been necessary for the Crown to recall Palfy for this purpose, as the sister's statement was already in evidence (*ibid* at para 16). To the extent that the statement had to be admitted for its truth (i.e. to show that the sister was biased, as opposed to merely showing that she had previously made a statement inconsistent with her trial testimony), it may have been admissible under the state of mind exception to the rule against hearsay (see *ibid* at para 17 for the Court's not entirely clear analysis of the hearsay issue).

42 *Piddington*, *supra* note 5.

awry, a case where the formalism of a categorical approach led to the exclusion of probative evidence that the fact-finder should have been able to consider.[43] I agree that the ruling in *Piddington* is doubtful, but the problem is not that the Court characterized the fact in question as collateral. That fact was whether a purported eyewitness to an accident was in fact present at the scene. All members of the Court recognized that this factual issue was not collateral. The problem lies rather in the Court's holding that the evidence in question was not relevant to the witness's presence or absence at the scene. Accordingly, a principled approach to the collateral facts bar would have made no difference to their decision.

The plaintiff, Piddington, was injured when he was struck by a motor vehicle driven by an employee of the defendant's, on Phillip Street in Sydney, New South Wales. The issues at trial (by judge and jury) were whether the defendant's employee had been negligent and, if so, whether the plaintiff had been contributorily negligent.[44] The case for the plaintiff included the testimony of two eyewitnesses to the accident, Donnellan[45] and Davis, and of a police constable who made some observations of the scene after the accident. The defendant called the driver and passenger of the motor vehicle, as well as another bystander. The collateral facts issue arose as follows. Defendant's counsel cross-examined Donnellan, suggesting to him that he had not witnessed the accident at all. "He was [then] asked what he was doing in Phillip Street at the time. His answer was 'I was after doing a message for Major Jarvis.'"[46] In particular, he testified that he had attended at the Bank of New South Wales on Hunter Street[47] to conduct a transaction on behalf of Major Jarvis. While he could not recall just what the transaction was, he testified that he witnessed the accident while on his way home from the bank.[48] The defendant, over the

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[43] Roberts & Zuckerman, *supra* note 8 at 353; Munday, *supra* note 9 at 327; Lederman, Fuerst & Stewart, *supra* note 2 at ¶16.298.

[44] Under the law of New South Wales at the relevant time, the plaintiff's contributory negligence would be a complete bar to recovery.

[45] The witness's name is spelled "Donnellan" in the headnote and "Donellan" in the reasons for judgment. "Donnellan" is the standard spelling of this Irish family name, and I use it here, except in quotations from the reasons for judgment.

[46] *Piddington*, *supra* note 5 at 544 *per* Chief Justice Latham dissenting.

[47] According to Google Maps, Hunter Street runs slightly northwest for about 600 meters, from Macquarie Street in the east to George Street in the west. Philips Street runs south for about 400 meters from Hunter Street, starting one block west of Macquarie Street and ending in front of St James' Church. "The accident occurred … a little north of the intersection of [Phillip Street] with Martin Place" (*Piddington*, *supra* note 5 at 553 *per* Justice Dixon), that is, about 100 meters south of Hunter Street.

[48] His evidence was not consistent as to whether the transaction took place before or after the accident, but it seems that his considered conclusion was that he observed the accident after performing the transaction: *Piddington*, *supra* note 5 at 545 *per* Chief Justice

plaintiff's objection, called as a witness the bank manager, who testified that on the day of the accident, there was no record of any transaction involving Major Jarvis's account; however, he also testified that "there might be many reasons for a person going into the bank" without a record's having been made.[49] The jury returned a verdict for the defendant. They may well have found that the bank manager's testimony cast doubt on Donnellan's account of the accident. The High Court of Australia, in a 3-2 decision, held that the bank manager's testimony had been improperly admitted and that it might have prejudiced the plaintiff's case; therefore, a new trial was ordered.

The decision in *Piddington* has been criticized as an instance of an approach to collateral facts that "in attempting to foreclose contextualized judgments of probative value on the facts … overreaches itself and consequently threatens to work injustice."[50] On closer inspection, however, the problem with *Piddington* is not the majority's understanding of the collateral facts rule but its understanding of relevancy. Donnellan's presence or absence at the scene was not a material fact, and whether he was there or not would have been irrelevant had he not been called as a witness to the accident. But he could not have been a witness to the accident unless he was there at the time. Once Donnellan's presence at the scene was challenged, evidence tending to show that he was or was not there was not collateral, and was therefore a proper subject matter for proof by either party, because it went to his ability to perceive the material facts in issue.[51] Leading evidence that he was not there is a perfect example of the second form of contradiction permitted by the categorical approach. If the defendant had a witness who was prepared to testify that Donnellan was not there at the time of the accident (because, for example, he was somewhere else), that witness's evidence would undoubtedly have been admitted. On the categorical approach, that fact was therefore not collateral.

All the judges in *Piddington* recognized that Donnellan's presence or absence at the scene of the accident was a proper matter for proof

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Latham dissenting. The evidence was that Donnellan lived on Phillips Street, so it was unsurprising that he would be in the vicinity of the accident at any time.

49 *Ibid* at 547.

50 Roberts & Zickerman, *supra* note 8 at 353, see also 354. See also Munday, *supra* note 9 at 327.

51 McCormick cites a case with a similar fact pattern as an example of linchpin contradiction. See McCormick, *supra* note 27 at 102, citing *East Tennessee V & G Ry Co v Daniel*, 91 Ga 768, 18 SE 2 (1893). Such fact patterns seem to me to fit more comfortably into the second type of contradiction permitted by the Pollock-Wigmore formulation of the rule in that proof that a witness was not present to see what he or see claims have seen undermines his or her ability to have perceived the material facts in question.

by the parties.[52] The difficulty in the decision is one of relevancy, not of collateral facts. The bank manager's evidence, if accepted, did not directly show that Donnellan was not present at the scene of the accident; it was circumstantial evidence that he was not present. As with all circumstantial evidence, the question is whether the inference from that evidence, if accepted, to the target fact is strong enough to make the evidence relevant to the fact. The majority held that the inferential connection was too weak, and accordingly, the bank manager's evidence was irrelevant to Donnellan's presence at the scene.[53] The dissenters were of the view that the evidence was relevant, though of little weight.[54] Given the very low standard for relevancy,[55] the dissenters seem to be right: the question whether Donnellan was or was not in the bank near the scene of the accident shortly before it occurred would seem relevant to his presence at the scene, though perhaps not very probative. *Piddington* is therefore not a misapplication of the categorical approach to collateral facts; it is a disagreement about the relevancy of the bank manager's evidence to a factual issue that all the judges agreed was not collateral. If, as the minority thought, the bank manager's evidence helped to show that Donnellan was not present, then on a proper application of the categorical approach, it

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[52] *Piddington*, *supra* note 5 at 545–546 *per* Chief Justice Latham dissenting, at 551 *per* Justice Starke dissenting, at 554 *per* Justice Dixon, at 557 *per* Justice Evatt, and at 567 *per* Justice McTiernan.

[53] *Ibid* at 553 *per* Justice Dixon, at 559 *per* Justice Evatt (there was "no logical relevancy between … the absence of Donellan from the scene of the accident and … his *absence* from a different place at a different time of day"), and at 567 *per* Justice McTiernan (the evidence was "incapable of contradicting any fact upon which proof of the opportunity which the witness had of observing the accident depended").

[54] *Ibid* at 547 *per* Chief Justice Latham dissenting ("The circumstance whether [Donnellan] went to the bank or not for Major Jarvie was … a fact which had a bearing on the probability or improbability of the truth of his evidence as to his presence at the place of the accident.") and at 552 *per* Justice Starke dissenting ("The evidence of [the bank manager] established a fact, slight in itself, but which together with others might afford a solid basis for inferring that Donellan was not present at the accident."). The evidence was relevant to Donnellan's ability to perceive the material facts of the case. Intriguingly, the defendant's eyewitness is described as having seen "the accident from the point where Donellan described himself as standing" (at 541 *per* Chief Justice Latham). The report does not indicate whether either counsel asked this witness whether she saw Donnellan—a question that would have been obviously relevant and not collateral, given Donnellan's testimony and the manner in which he was cross-examined. In contrast, if the fact in issue had been whether he been to the bank on some other day (e.g. the day before or day after), the contradicting evidence would have had no relevance except to his credibility and reliability in general and would have been collateral on any view.

[55] At least in Canadian law. I can't say whether the standard of relevancy in the law of New South Wales in 1940 was equally low, but assuming it was, the difference of opinion in *Piddington* is best understood as a difference in the application of even a very low standard of relevancy for circumstantial evidence.

should have been admitted as relevant to a fact that was not collateral. Resorting to a principled approach is not required. Moreover, if the majority truly believed that Donnellan's presence or absence at the bank was irrelevant to his presence or absence at the scene of the accident, a principled approach would have made no difference to their reasoning: on that view, the contradiction between Donnellan's testimony in cross-examination and the bank manager's testimony would be on a matter that was so tenuously connected to the facts in issue that its probative value could scarcely justify the time and confusion of issues that permitting it would cause.

D) *Brown*: Linchpin Contradiction

I turn now to *R v Brown*,[56] a case that poses a challenge to the categorical approach but that can be accommodated within it. The accused, Brown, was charged with murder. The Crown's principal witness was Ellen McGillock. She testified that she saw Brown and another man, Sherrick, commit the murder, and that she saw them again the next day attempting to remove some evidence from the scene of the crime. Sherrick had been previously charged with and acquitted of the murder of Hogan.[57] But the defence did not allege that Sherrick was responsible for Hogan's murder; he was not, as we would now say, a third-party suspect. On the contrary, the defence wanted to give Sherrick an alibi and to that end, called a witness named Dolan who would have testified that on the day of the murder, Sherrick was visiting him at a location about 50 miles from the scene of the crime. But the trial judge refused to allow Dolan to testify about this issue, ruling that the defence should call Sherrick instead and that if the Crown challenged Sherrick's account, the defence could then call Dolan. Sherrick was called and testified that he had nothing to do with Hogan's murder and was not present when it occurred. The Crown did not cross-examine him. In light of the trial judge's ruling, the defence did not seek to recall Dolan.

What possible relevance could Dolan's testimony about the absence of Sherrick, a man whose involvement in the crime was immaterial, have had? The purpose of this evidence could only have been to undermine McGillock's credibility or reliability by showing a contradiction between her testimony and Dolan's testimony. Thus, Sherrick's presence or absence at the scene was collateral in the Pollock-Wigmore sense. It did not speak to the material facts in issue. The Crown was not required to prove Sherrick's involvement to establish Brown's guilt, and moreover, by choosing not

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56 *R v Brown* (1861), 21 UCQB 330.

57 The report does not indicate whether, at Sherrick's trial, the Crown alleged that he acted together with Brown.

to cross-examine Sherrick, the Crown made a deliberate choice not to press its theory that Sherrick was involved before the jury. Similarly, the defence did not allege that Sherrick was involved. Thus, Sherrick's presence or absence was immaterial. Nor did the evidence of Sherrick (or the proposed evidence of Dolan) speak to any of McGillock's specific testimonial qualities.[58] Dolan's evidence was not about McGillock at all and so could not show that there was some specific factor that interfered with her ability to perceive, recollect, or narrate the events in question; nor did it show any bias against Brown. If the jury accepted Dolan's evidence, they would have to conclude that McGillock was lying or mistaken in her narration of the murder, but that conclusion would derive solely from the contradiction, not from proof of any specific testimonial problem with her evidence. Moreover, the factual question of whether Sherrick was at Dolan's residence or at the scene of the crime creates exactly the kind of prejudice to the trial process that the collateral facts bar is intended to avoid. It would take some time to prove, and it would introduce another factual dispute that the jury had to deal with, which might in turn produce additional factual issues for the jury to resolve: did Dolan accurately recall the day Sherrick came to see him? Did Dolan have any biases in favour of Brown? And yet, it seems absurd to refuse to allow the jury to hear Dolan's testimony. If McGillock was thoroughly convinced that Brown and Sherrick committed the crime together, and if the defence could show that Sherrick was nowhere near the crime scene, then McGillock's testimonial reliability would be in serious doubt.[59]

One way to approach this problem would be through a principled approach: a trial judge could determine whether hearing Dolan's testimony would have a sufficiently important impact on McGillock's credibility to justify the additional time required and issues created. But another way to approach it is to treat Sherrick's participation in the murder as the McCormick linchpin of McGillock's testimony. It was central to her narrative of the material facts in issue; if the crime happened the way she described it, Sherrick must have been there; if he was not, her narrative of the crime was seriously in doubt—notwithstanding that Sherrick's involvement was immaterial. Dolan's testimony was a linchpin contradiction of McGillock's testimony and was therefore admissible under the categorical approach.

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58 An alibi for Sherrick would, of course, support the inference that there was something awry with McGillock's testimonial qualities, but it was not evidence about those testimonial qualities. It, therefore, was not a contradiction of the second kind.

59 Brown was convicted. On a case stated, the Court (including the trial judge himself) held that the trial judge had erred in rejecting Dolan's evidence, and a new trial was ordered. At the second trial, Dolan's evidence was received, but Brown was convicted again.

E) *CF*: The Dangers of a Principled Approach

Finally, I turn to *CF*, a case that moves towards a principled approach and that has been cited in that spirit.[60] Unfortunately, *CF* illustrates not the advantages but the dangers of a principled approach to collateral facts.

The accused CF was originally charged with six counts of sexual exploitation in relation to two sisters, FM and MM.[61] At his first trial (by judge and jury), the accused was convicted on four counts (two in relation to each complainant) and was acquitted on two counts. One of the counts on which the accused was acquitted related to MM and was referred to as "the mouse incident." The accused's appeal from his convictions was allowed, and a new trial was ordered.

At the second trial of these four counts (by judge alone), the accused sought permission to cross-examine MM on the mouse incident and, anticipating that she would repeat her allegations from the first trial, to call witnesses to support his version of what had happened. The purpose of this strategy was "to undermine [MM's] credibility and reliability concerning the sexual exploitation charges at the second trial."[62] The Crown ultimately chose not to object to the cross-examination on this matter, provided the defence did not object to any re-examination; but the Crown argued that any evidence that the accused might call to contradict MM's account of the mouse incident would be inadmissible owing to the collateral facts bar.[63] The trial judge disagreed and permitted all of the following evidence concerning the mouse incident: the cross-examination of MM, the defence's contradictory evidence, and the Crown's further evidence (including re-examination of MM) in support of MM's version.

The testimony about the mouse incident was as follows. A number of guests were staying overnight at the accused's cottage. MM testified that while sleeping on the floor, she was startled by a mouse. She was then invited to sleep in the bed that the accused shared with his wife, KF; later, the accused touched her sexually. She awoke the next morning in the accused's bed. The Crown called another witness who testified that after MM was startled by the mouse, the accused and KF invited MM to sleep in their room. However, the accused and two other defence witnesses testified that they had not heard anyone invite MM into the master bedroom and

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60 *Kolapully*, *supra* note 4; *R v GAR*, 2022 BCSC 844.

61 He was also charged with four counts of sexual assault, but at the first trial, verdicts of acquittal on these counts were directed.

62 *CF*, *supra* note 17 at para 20.

63 *Ibid* at para 21.

that in the morning she was sleeping on a couch.[64] None of this evidence had any relevance to the offences the accused was charged with, except to the extent that it affected MM's credibility in general.

The trial judge accepted MM's evidence that she had spent the night of the mouse incident in the master bedroom. The trial judge made no finding as to whether the accused sexually touched MM at that time, no doubt because the accused's acquittal at the first trial estopped the Crown from making that allegation again.[65] But, ultimately, she found the witnesses' testimony concerning the mouse incident to be of little assistance in resolving the credibility issues: "[s]he concluded that this finding neither compromised nor enhanced MM's credibility on the exploitation allegations."[66] The accused was convicted on the four counts charged.

On appeal, the accused argued, among other grounds, that the trial judge had not correctly handled the evidence concerning the mouse incident.[67] The Court of Appeal recognized that the mouse incident was collateral in the traditional sense. Thus, if the categorical approach as outlined above applied, the defence would have been permitted to cross-examine M.M. on the mouse incident,[68] but the evidence led by the defence to contradict her testimony on that evidence would have been inadmissible (and there would then have been no basis for admitting the evidence led by the Crown to support her version of the incident).[69] The Court nevertheless declined to interfere with the trial judge's decision to admit it, [70] holding that the contradictory evidence had been properly admitted. Justice Huscroft said:

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64 *Ibid* at paras 25–29.

65 *Ibid* at para 22. A finding that MM slept overnight in the master bedroom was not necessarily inconsistent with the acquittal; a finding that the accused touched the complainant sexually would have been.

66 *Ibid* at para 39.

67 Specifically, the argument was that the trial judge had committed the *Morin* error (*R v Morin*, 1992 CanLII 89 (SCC), [1992] 1 SCR 771) in relation to the mouse incident. It would have been difficult for the accused to argue that the trial judge had erred in permitting the admission of the evidence of collateral facts because that argument would have been directly contrary to the position the accused took at trial.

68 The proposed line of cross-examination should probably have been the subject of a s 276 application. It is not clear from the Court of Appeal's reasons whether or not there was such an application at trial. The fact that the cross-examination concerned a matter that was collateral should have weighed against the success of a s 276 application.

69 *CF*, *supra* note 17 at para 59.

70 *Ibid* at para 62; see also para 23, summarizing the trial judge's approach to the issue.

> The collateral fact rule is not absolute. As the Supreme Court recognized in *R v R (D)*, [1996] 2 SCR 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.[71]

Lest this holding open the floodgates, he added that "it was open to the trial judge to conclude that the probative value of the evidence outweighed its prejudicial effect."[72] Moreover, he distinguished two previous cases where an accused had been refused permission to cross-examine, and then to contradict with other evidence, complainants on allegations of sexual assault that resulted in acquittals on the basis that the "prior sexual assault allegations in those cases were made against third parties, and the court was rightly concerned about confusing the process by introducing a litany of marginally relevant issues for the trier of fact to decide."[73] These references to balancing probative value and prejudicial effect and to the specific circumstances of each case are classic markers of a principled approach to admissibility of evidence.

The Court of Appeal was undoubtedly correct to dismiss the accused's appeal on this ground. The accused, having been given permission to contradict the complainant's account of the mouse incident with other evidence, could not (and did not) complain that the Crown was entitled to lead its own evidence supporting her version. Moreover, this factual issue, in the end, had no real impact on the trial judge's findings concerning the material facts in issue. But it is not necessary to take a principled approach to collateral facts to reach that result. A more satisfactory holding would have been that the issue was indeed collateral—or, perhaps, that the cross-examination on the mouse incident should not have been permitted in the first place, at least not without a s. 276 application—but that the trial judge's handling of the issue occasioned no substantial wrong or miscarriage of justice.

The problem with *CF* is that its discussion of the collateral fact issue is not well-supported by authority and invites the very dangers the collateral

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71 *Ibid* at para 60.

72 *Ibid* at para 62.

73 *Ibid* at para 64. The two cases are *R v Riley*, 11 OR (3d) 151, 1992 CanLII 7448 (ONCA), and *R v B(AR)*), 41 OR (3d) 361, aff'd [2000] 1 SCR 781, 1998 CanLII 14603 (ONCA). Paciocco, *supra* note 3 at 174–175, argues that *B(AR)* is best interpreted as an instance of a principled approach in that the trial judge's refusal to permit cross-examination on a collateral issue (and to admit contradicting evidence) was upheld as an exercise of the trial judge's power to exclude evidence on the basis that its prejudicial effect outweighs its probative value. That may be, but this power is available to a trial judge apart from any principled approach. A principled approach shows its true power when it admits evidence that would have been excluded under a categorical approach.

facts bar was meant to avoid. *R(D)*, the case cited in support of a more relaxed approach to the admissibility of contradictory evidence, on its facts concerns the permissibility of a certain line of cross-examination rather than the collateral facts bar itself, but in any event, as noted above, it endorses the categorical approach rather than a principled approach. The accused was charged with sexual and other offences against three children. A therapist who was "an expert in the behavioural, social, and emotional characteristics of sexually abused children" had been present when the complainants had been interviewed by the police and testified as a Crown witness. The issue was whether the therapist could be cross-examined about "the interview techniques employed during those interviews using unproved copies of the transcripts of those interviews" with a view to "discredit[ing] the child witnesses, or prov[ing] that the children had been coached or manipulated."[74] The Court held that this cross-examination should have been permitted. To this extent, the collateral facts bar did not arise because the issue for the Court was the permissibility of cross-examining the therapist, not the admissibility of evidence that would have contradicted her (or any of the child witnesses). But the Court went on to say that the accused "would have been entitled to lead evidence on the effect of the interview techniques on the memories of the children and accordingly, met the test in *Attorney-General v Hitchcock*."[75] That is because the factual question of whether the witness's narration (or any other testimonial quality) had been affected by the techniques used in the previous interviews concerned their narration of the material facts in issue; contradicting evidence therefore fell under the second kind of contradiction described above. In short, *(R.D.)* endorses the Pollock-Wigmore approach.[76] It does not stand for the proposition that "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"[77] but for the proposition that evidence concerning the coaching or manipulation of a witness's account of the material facts in issue is not collateral. If the question whether such evidence could be used to contradict a witness had arisen, it would have fallen under the second type of contradiction permitted by the categorical approach.

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74 *R(D)*, *supra* note 16 at para 41.

75 *Ibid* at para 43.

76 *Ibid* at para 42.

77 *CF*, *supra* note 17 at para 60. The basis for this statement is, presumably, the comment at para 43 of *R(D)*, *supra* note 16, that "[a]ny evidence that might have cast doubt on the children's credibility, or that might show that the children had been subjected to coaching and manipulation, was evidence that would have been crucial to the appellants' case." But this comment is embedded in a standard statement and application of the categorical approach to the collateral facts bar. It would be hazardous to read it as authorizing a wholly new approach to collateral facts.

V. Conclusion

The common law's categorical rules of admissibility are complex and, in some cases, lead to what seems to be the wrong result, excluding evidence that seems probative and not particularly damaging to the trial process. The principled approach to the law of evidence in Canada promises to simplify and improve questions of admissibility by focusing the attention of counsel and trial judges directly on the advantages and disadvantages of admitting particular pieces of evidence in the context of specific trials, rather than indirectly through categorical rules.[78] Whether the principled approach has kept its promise, even in areas of evidence law where it is highly developed, is questionable.[79] So if a traditional approach can already do what a principled approach promises to do, then there is no reason to ask it for that promise. Taking a principled approach to the collateral facts bar is unnecessary. The categorical approach, as outlined in part II.B above, classifies factual issues as not collateral in precisely the cases where it is worth the court's time to explore them further and classifies them as collateral when it is not. The categorical approach as it stands is well-suited to achieve the purposes of the law of evidence.

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[78] See, for example, the contrast that Justice Dickson drew between the common law of evidence with its "cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions" and "broad principles" of admissibility, applied on a case-by-case basis. *Graat*, *supra* note 29 at 835.

[79] To develop this point properly would require (at least) another paper, but reading *R v Charles*, 2024 SCC 29, concerning the admissibility and use of corroborative evidence in a *voir dire* to determine the admissibility of a hearsay statement on the substantive reliability branch of the principled approach, prompts the thought that the principled approach to hearsay may have developed a structure as cumbersome as the categorical approach it was supposed to simplify.