THE RULE IN BROWNE V DUNN, UNDERTAKING TO CALL EVIDENCE, AND THE COLLATERAL FACT RULE: HOW THEY AFFECT THE CONDUCT OF CROSS EXAMINATIONS

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1. General Rule: broad scope for cross- examination touching upon matters relevant to issues in the dispute before the court:

- A trial is, above all else, a search for the truth
- *Wigmore on Evidence*: cross examination is "*beyond any doubt the greatest legal engine ever invented for the discovery of the truth"*
- Per Major and Fish JJ in Lyttle *v The Queen* [2004] 1 S.C.R. 193 at para. 1:

  *"Cross-examination may often be futile **and** sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice **and** an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."*

- *Sopinka and Lederman "The Law of Evidence in Canada"* at para 16.99:

  "To accomplish these ends, counsel is given wide latitude and there are, accordingly, very few restrictions placed on questions that may be asked or the manner in which they may be put. Any question which is relevant to the substantive issues or to the witness' credibility is allowed…"

2. However there are professional ethical limits to this wide power of cross-examination, designed to ensure that it is not abused:

- Per Lord Reid in *Rondel v Worsley [1969] 1 A.C.* 191 cited in Lyttle *v The Queen* [2004] 1 S.C.R. 193 at para. 66:

  "*Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, **and** ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, **and** to the public, which may **and** often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. . . .* "[Emphasis added.]

3. The rule in *Browne v Dunn (1893) 6 R. 67* (H of L) is a common sense application of such a duty. It is based on a basic sense of fairness to witnesses and parties.

- The rule requires that, if the cross-examiner intends to impeach the credibility of the witness by means of extrinsic evidence, he or she must give that witness notice of their intention to do so.
- Such "notice of intention" is done, in a typical trial, during cross-examination, by confronting, or bringing to that witnesses' attention, the details of the contradictory extrinsic evidence.
- Per Lord Herschell :

> *"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, **and** not to take his **evidence** **and** pass it by as a matter altogether unchallenged, **and** then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; **and**, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play **and** fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, **and** it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, **and** afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling."*

- The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case: *Lyttle v The Queen* supra, at para 65
- In *Lyttle v The Queen* the Supreme Court of Canada affirmed that this rule remains a sound principle of General application.
- Consequently, it is not open to the examiner or cross-examiner **to put as a fact, or even a hypothetical fact that which is not and will not become part of the case as admissible evidence** : *Lyttle v The Queen* supra, at para 60.
- The rule applies not only to contradictory extrinsic evidence, but to closing argument as well: per Lord Halsbury in *Browne v Dunn:*

> *"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."*

4. There is a crucial distinction, however, which must be drawn between questions put on cross-examination that relate to and rely on inadmissible evidence and **cross examination on unproven facts.**

- Where, on cross-examination, counsel seeks to elicit or determine if there are facts which may exist, within the witness' knowledge, which may serve to explain, undermine or change the effect of the witness' evidence, then, in the trial judge's discretion, cross examination may be allowed. Per Binnie J. in *R v Shearing [2002] 3 S.C.R. 33 at paras 121-122:*

> *"in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions **and** innuendo in an effort to crack the untruthful witness . . .".*

- Such questions may be allowed where counsel can demonstrate a **good faith basis** for asking such questions: see *Lyttle v The Queen* supra, at para. 46 to 48:

> *"46 This appeal concerns the constraint on cross-examination arising from the ethical **and** legal duties of counsel when they allude in their questions to disputed **and** unproven facts. Is a good faith basis sufficient or is counsel bound, as the trial judge held in this case, to provide an evidentiary foundation for the assertion?*
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> *47 Unlike the trial judge, **and** with respect, we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for reticent witnesses to concede suggested facts -- in the mistaken belief that they are already known to the cross-examiner **and** will therefore, in any event, emerge.*
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> *48 In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, **and** the purpose for which it is used. Information falling short of admissible **evidence** may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper **and** prohibited."*

5. However, there is a **serious danger in cross-examining on unproven facts**. Here is where experience and a sound sense of judgment are vital.

- Cross-examining counsel must, in those circumstances necessarily ask questions in circumstances where he or she does not know the answer
- Or, counsel may have to ask a question, and be left without the means to contradict the answer.
- This is where counsel may run afoul of another rule of evidence: **the collateral fact rule**.
    - Jessup, J.A. in *R v Bencardino (1973) 15 C.C.C. (2d) 342,* citing Lord Radcliffe in *Fox v General Medical Council [1960] 1 W.L.R. 1017 at 1023:*

> *"An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth."*

- See *Sopinka and Lederman, "The Law of Evidence in Canada"* at para 16.133:

> *"The admissibility of previous inconsistent statements is governed, to some degree, by the traditional collateral fact rule, which limits the adducement of extrinsic evidence by way of rebuttal to an answer given by a witness in cross-examination to matters which are relevant only to the substantive issues in the case. Consequently, a previous contradictory statement, the making of which has been denied by the witness in cross-examination, will be admitted only if it relates to matters of substance and not to collateral issues. If it relates to the latter, the cross-examiner must accept the witness' evidence as final and is precluded from adducing the contradictory statement in evidence. Sections 20 and 21 of the Ontario Evidence Act specifically incorporate this restriction…Thus the former statements must be sufficiently connected to the material issues in the case to come within the requirements of these provisions. Accordingly, prior oral or written statements made by a witness relating to collateral matters cannot be proved under these provisions."*

6. So what does all this mean to you as counsel, and how do you apply it to a given fact situation?

- It means this: **Think and be careful about how you phrase questions that are designed to impeach the credibility of a witness in your case. Think about whether or not you need to confront a witness with contradictory evidence you intend to lead later on: otherwise you may be precluded from doing so.**
- **It also means that if you confront a witness about the existence or non-existence of a certain set of facts, or the existence of a prior inconsistent**

statement made by the witness to someone else, you may be prevented by the trial judge, where an objection is made, unless you <u>give an undertaking to call that evidence.</u>

- **This is where you must be careful, for if you call that evidence to fufill you undertaking, then that evidence is of course subject to full cross-examination. You must be certain it will hold up and not fizzle out on you.**
- Examples: *Fox v General Medical Council [1960] 3 All E.R. 225,* in the context of disciplinary proceedings against a physician the following form of question was considered proper, even though counsel did not subsequently lead any evidence to establish the fact of seduction of a patient:

  Q: Did you seduce her in surgery very soon after that…?

  A: I did not.

  - Note that the question is open ended. It provoked a simple denial. Since there was a denial, the fact wa not proven.
  - What if the form of the question had been "*You seduced her in the surgery very soon after didn't you?"* or "*I suggest to you that you seduced her in the surgery very soon after- isn't that so"*- assuming that there is a good faith basis for the question- it probably doesn't run afoul of the rule in *Browne v Dunn.*
  - But what is the question had been: *"Ms."A" says that you seduced her in the surgery very soon after, isn't that true?"*. In this case, the trial judge would properly ask counsel for an undertaking to call such evidence as a precondition to allowing the question, assuming the fact of seduction was one of the substantive issues in the case.
- An example of how failure to adhere to the rule will prevent a party from later adducing contradictory evidence is *Erco Industires Ltd. V Allendale Mutual Insurance Co. 62 O.R. (2d) 766 (Ont. C.A.):*

  Damage occurred at a phosphorus plant due to liquid phosphorus leaking from a furnace, and a claim was made under an insurance policy. The policy excluded liability for the cost of repairing a

fault which permitted accidental escape of molten metal. An issue arose as to the cause of the leak; the insurer's theory was that the damage resulted from molten ferrophosphorus leaking through a carbon block crucible and then dissolving the exterior steel plate. The trial judge, after a trial lasting nine weeks, found for the insurer on this issue. The plaintiff had sought to adduce new evidence, in reply, to contradict the defendant's expert witness on a point not challenged in cross-examination. The plaintiff also sought to call new evidence on a point known to be in issue before the trial. The trial judge denied leave.

On appeal to the Ontario Court of Appeal, **held,** dismissing the appeal, the judge was right to refuse leave, as fairness would then require the defendant to be given a further opportunity of answering the reply, prolonging the trial unduly.

- Another example from the world or real trials that demonstrates the pitfalls: I recently conducted a jury trial on a wrongful dismissal action. The issue was whether the employee was constructively dismissed, or had quit. A letter, the authenticity of which was questioned by the defence, set out some proposed terms of employment. It was alleged by the plaintiff that this letter had been authored by the company's deceased president. One of the important factual issues that the plaintiff testified to in chief concerned a promise which had been made by the deceased president of the company to transfer, over time, a partial ownership in the company. The defendant company's counsel suggested in cross-examination, that the deceased president had never mentioned a transfer of shares to the company's solicitor, who would have been in a position to know. I had information, from my pre-trial investigations, which suggested that the company's solicitor's evidence on this point was otherwise. I objected to the question, citing the rule in *Browne v Dunn.* The trial judge asked counsel if he was prepared to call such evidence. Counsel was forced to do so. The next day, as part of the defence case, the solicitor was called to give evidence. Because he had been called to testify about confidential solicitor-client communications between himself and the company's deceased president, I obtained a ruling that privilege had been waived. That opened up the lawyer's files, including letters, memoranda, drafts of agreements, dockets, notes etc. Cross-examination based on that file showed that the contested letter was in fact drafted by the lawyer, and a similar copy was in his file. In addition, the lawyer agreed that the deceased

president actually did raise the question of ownership with the lawyer, but that they lawyer persuaded him not to go ahead with the proposal. This corroborated the plaintiff's evidence and greatly bolstered his credibility. The jury accepted his version of events. He won the case.

- **The essential point you must take from all this is that the <u>safest route</u>, (until experience gives you the "wherewithal" to depart from this suggestion) by and large, be prepared to substantiate any suggestion or contradictory fact you put in cross-examination to a witness. If it is a prior inconsistent statement, be prepared to prove it if it is denied. If it is the existence or non-existence of a certain fact or thing, be prepared to prove it. If you are not, for whatever reason, in a position to do so, then you are gambling on the witness' answer.**
- **The converse is also true: if you intend to lead contradictory extrinsic evidence relevant to the matters in issue, you should cross examine the witness by confronting them with that evidence. If you fail to do so, you may find that you will be unable to lead that evidence later.**