A MISSED OPPORTUNITY IN *R V LANGAN*: APPELLATE REVIEW OF PRIOR CONSISTENT STATEMENTS POST-*KHAN*

Samuel Mazzuca[1]

The traditional rule against prior consistent statements continues to be mired in rigidity and unnecessary complexity. The courts continue to admit and use prior consistent statements for the truth of their content and by extension, for the impermissible purpose of bolstering a witness's credibility. Juries continue to be improperly instructed on the proper uses and misuses of such statements. Despite warnings from provincial appellate courts across the country, counsel continue to tender prior consistent statements without articulating a precise basis upon which they should be admitted. This article attempts to shed light on this issue by reviewing appellate caselaw in the post-Khan era. In R v Khan, the concurring set of reasons put forth a framework for replacing the traditional rule with a principled approach to admissibility. Yet, the courts have been reluctant to embrace this principled approach. The Supreme Court of Canada had an opportunity to directly deal with this issue in R v Langan, however, it decided to sidestep this issue entirely. This article assesses the impacts of this decision and further argues that adopting a principled approach would ease many of the common issues with which courts struggle when assessing the admissibility and use of prior consistent statements.

La règle traditionnelle contre la déclaration antérieure compatible demeure enlisée dans la rigidité et une complexité inutile. Les tribunaux continuent d'admettre les déclarations antérieures compatibles en y ajoutant foi et, de ce fait, de les appliquer indûment de manière à confirmer la crédibilité du témoin. Les jurys continuent de recevoir des instructions perpétuant ces tares sur les bonnes et les mauvaises applications de ces déclarations. Malgré les mises en garde des cours d'appel provinciales du pays, les juristes continuent de faire valoir les déclarations antérieures compatibles sans arguments précis pour en justifier l'admission. Dans cet article, l'auteur tente de mieux comprendre cette problématique par un examen de la jurisprudence d'appel postérieure à l'arrêt Khan. Dans cet arrêt, les motifs concordants ont établi

[1] B.A. (Hons.), J.D., Crown Counsel, Ontario Ministry of the Attorney General. The comments expressed herein are solely those of the author in their personal capacity and should not be attributed to the Ontario Ministry of the Attorney General or the Government of Ontario. The author wishes to thank the anonymous reviewers for taking the time to review the article and for their helpful comments. Special thanks to Catalina Cardenas for her several careful and considerate reviews. Any errors that remain are, of course, mine.

un cadre pour le remplacement de la règle traditionnelle par une méthode raisonnée; une méthode que les tribunaux demeurent pourtant réticents à adopter. La Cour suprême du Canada a eu l'occasion de traiter cette question directement dans R c. Langan, mais elle a décidé de complètement l'éluder. L'auteur évalue les répercussions de cette décision, et fait valoir qu'une méthode raisonnée aplanirait bon nombre de difficultés courantes qui posent problème aux tribunaux au moment d'évaluer l'admissibilité des déclarations antérieures compatibles pour les appliquer.

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Introduction

The age-old adage that "a lie can be repeated just as easily as the truth" is a widely accepted animating norm underlying the traditional rule against the admission of prior consistent statements. Generally stated, repetition alone does not enhance credibility and reliability. However, the courts continue to struggle with the rule against prior consistent statements, either explicitly or implicitly, admitting and using them for the truth of their content and by extension, for the impermissible purpose of bolstering a witness's credibility. Juries continue to be improperly instructed on the proper uses and misuses of such statements. Despite warnings from provincial appellate courts across the country, counsel continue to tender

prior consistent statements without specifying a precise basis upon which they should be admitted. This all begs the question: why does this issue continue to arise?

This article attempts to provide an answer by critically reviewing appellate caselaw in the post-*Khan* era[2]. This date was not selected arbitrarily. Rather, it represents a period of time after which a concurring set of reasons by Doherty J.A. of the Court of Appeal for Ontario, comprehensively outlined a framework for a principled approach to the admissibility of prior consistent statements. At issue in *Khan* was the admissibility of the complainant's statement at the police station to a female officer that she had already been searched three times. The complainant's in-court testimony presented her as a reluctant complainant who had done nothing to initiate the allegations against the accused, and that she was only testifying because she had been subpoenaed. On her evidence, the police initiated the sexual assault investigation and carried it forward to trial. The trial judge found, and the majority of the Court of Appeal affirmed, that her statement was admissible under the narrative as circumstantial evidence exception to the rule against prior consistent statements. In the majority's view, the trial judge had used the prior consistent statement for the permissible purpose of evaluating the context in which the initial complaint arose. In particular, the fact and timing of the complaint's statement and its spontaneity could be used for the permissible purpose of assessing the truthfulness of the complainant's in-court testimony. Justice Doherty also held that the statement was admissible. In so doing, he outlined a framework for a principled approach to the admissibility of prior consistent statements. In his view, the complainant's statement tended to confirm her trial evidence to the effect that she was a disinterested, reluctant complainant with no real interest in the outcome of the trial. It was therefore, relevant to a proper assessment of her credibility.

While the inquiries into admissibility and use are separate and distinct, in my view, they are coextensive as the former consideration can influence the latter. Based on logic and common sense, it stands to reason that if a prior consistent statement is admitted for an improper purpose, it will likely be used for that improper purpose. Similarly, if a prior consistent statement is admitted under one of the traditional categorical exceptions to the rule, without a rigorous vetting process, as well as proper understanding of that exception, this can increase the likelihood that the statement will be misused. Conversely, under a principled approach, requiring counsel to articulate the relevance and materiality of a prior

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[2] Post-2018 caselaw, as the decision in *R v Khan*, 2017 ONCA 114, leave to appeal refused, [2017] SCCA No 139, 2017 CarswellOnt 12136 [*Khan*], was released on February 13, 2017.

consistent statement can mitigate against its improper use. In a trial by jury, it can both alert the trial judge to the existence of a prior consistent statement and to the content required in an instruction. I do not suggest that a principled approach is a panacea to curing the confusion regarding the admissibility and use of prior consistent statements. Rather, it is a useful approach to admissibility that can simplify unnecessary complexity and safeguard against misuse errors.

I believe that this principled approach could function in two different manners. First, much like the principled exception to the hearsay rule, this principled approach could operate alongside the traditional categorical exceptions to the rule[3]. Alternatively, this principled approach could be implemented in a manner similar to the approach governing the admissibility of similar fact evidence. Under this approach, all the traditional categorical exceptions would be eliminated in favour of a singular principled approach[4].

In my view, the latter approach is preferable as it would always require counsel tendering a prior consistent statement to argue with specificity, the relevance of and purpose for each statement. This would help draw clear boundaries around the admission and use of the statements, rather than counsel arguing that such statements are admissible under one of the traditional exceptions, and/or alternatively, under the principled approach. I believe that a principled exception that maintains traditional categories of admission, risks creating further confusion around the proper admission and use of prior consistent statements[5]. This risk is particularly heightened with respect to statements admitted under the narrative and narrative as circumstantial evidence categories.

Regardless of which approach one believes to be preferable, the Supreme Court of Canada in *R v Langan* missed a perfect opportunity to adopt any sort of principled approach[6]. The intervener Criminal Lawyers' Association ("CLA"), and to a large extent the Attorney General of Ontario ("AGO"), in that case urged the court to consider adopting a principled approach as a means to lessen the rigidity and complexity of the rule[7]. Their submissions drew from the concurring reasons in *R v Khan*. They argued that the principled approach should examine the following factors:

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3 Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queen's LJ 11 at 34–35 [Dufraimont, "Realizing"].

4 *Ibid* at 28–29.

5 *Ibid* at 34–39.

6 *R v Langan*, 2020 SCC 33 [*Langan*].

7 *R v Langan*, 2020 SCC 33 (Factum of the Intervener, Criminal Lawyers' Association, at paras 9–14) [CLA Factum]; *R v Langan*, 2020 SCC 33 (Factum of the Intervener, Attorney General of Ontario, at paras 20–21) [AGO Factum].

relevance, materiality and probative value[8]. Both intervenors also urged the court to require a judicial vetting procedure in every case in order to force the party seeking to tender the prior consistent statement to clearly and specifically articulate the basis upon which it should be received[9]. However, the court simply ignored all of these concerns. Instead, in a short, two-sentence judgment, the court allowed the as of right appeal from the bench, substantially for the reasons of Chief Justice Bauman of the Court of Appeal for British Columbia[10].

I argue that this was a missed opportunity. Part I outlines my review of appellate jurisprudence, where the issue regarding the admissibility and/or use of a prior consistent statement was raised as a ground of appeal. This review examined two types of decisions. First, appellate decisions reviewing the admission and use of a prior consistent statement in a trial by judge alone. And second, appellate decisions reviewing the admission of, and jury instruction on, the use and misuse of a prior consistent statement. I expand on a few representative appellate decisions that highlight the common difficulties that trial judges and counsel encounter in articulating the basis for admission and the proper use of a prior consistent statement. This research tends to demonstrate that courts, and counsel alike, continue to struggle with the rule and its exceptions—particularly with the narrative as circumstantial evidence exception. These issues are further compounded where a prior consistent statement is admitted under more than one exception.

I begin Part II by discussing the *Langan* decision and the submissions made by the intervenors in that case. I then draw from my research and analysis to argue that a shift towards a principled approach would help to alleviate some of these complexities. In my view, in addition to the factors urged upon the court by the intervenors, any principled approach should also consider the prejudicial effect of the statement. I conclude by suggesting that the court's decision in *Langan* represents a missed opportunity where the traditional categorical admissibility rule could have been simplified by adopting a more flexible principled approach. Ultimately, the ethos of this article is consistent with the sentiment recently expressed by the Court of Appeal in *R v King* that "[t]he criminal law is not calling for more complexity. If anything, it is calling out for simplicity"[11].

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8 See e.g. CLA Factum, *supra* note 7 at para 9; AGO Factum, *supra* note 7 at para 21.

9 See e.g. CLA Factum, *supra* note 7 at para 15; AGO Factum, *supra* note 7 at para 19. See also *R v Langan*, 2020 SCC 33 (Factum of the Respondent at para 64) [Respondent Factum].

10 *Langan*, *supra* note 6.

11 *R v King*, 2022 ONCA 665 at para 183.

Part I: Dissecting Lingering Problems

A) The Current Framework

The current rule presumes prior consistent statements to be inadmissible. The rationale underlying this presumption lies in the generally accepted principle that repetition and consistency alone do not enhance credibility. However, as with any rule, there are some exceptions. Under the traditional rule there are at least seven recognized categorical exceptions under which a prior consistent statement can be admitted[12]. If a statement does not fit into one of these categorical exceptions, then it is inadmissible. For present purpose, I will concentrate on three of the more commonly utilized categorical exceptions that arose in my caselaw review: 1) pure narrative; 2) narrative as circumstantial evidence; and 3) recent fabrication. Even where a prior consistent statement is properly admitted, it must not be used for the truth of its content or for the purpose that consistency alone enhances credibility[13].

The pure narrative exception permits a prior consistent statement to be admitted to assist the trier of fact in understanding the chronology of events, how the matter came to the knowledge of police and/or the conduct of the complainant[14]. Under the narrative as circumstantial evidence exception, the fact that a prior consistent statement was made is admissible to assist the trier of fact in assessing a witness's truthfulness and/or reliability[15]. Importantly, the statement is not admitted under this exception for the truth of its content, but rather, it is the "circumstances surrounding the making of the statement that can assist in judging the credibility or reliability of the in-court claims being made by the witness"[16]. Finally, the recent fabrication exception allows a statement to be introduced to neutralize an argument that an allegation has been fabricated[17]. The use of the prior consistent statement is circumscribed by the exceptional category under which it is admitted. The courts continue to assess admissibility according to this traditional rules-based approach.

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12 See David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2022) at para 19.08 (i.in *rebuttal* of an allegation of *recent fabrication*; ii.as evidence of *prior identification*; iii.as evidence of *recent complaint*, iv.as part of the *res gestae*; v.as evidence of the *physical*, *mental* or *emotional* state of the declarant; vi.as evidence of *narrative*; and vii.as evidence of *narrative as circumstantial evidence*) [Watt]; David M Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) Can Crim L Rev 181 at 182–183 [Paciocco, "Perils"].

13 Watt, *supra* note 12 at para 19.08.

14 *R v MC*, 2014 ONCA 611 at para 64.

15 *R v F(JE)*, 26 CR (4th) 220 at 241, [1993] OJ No 2489.

16 Paciocco, "Perils", *supra* note 12 at 199–200.

17 *Khan*, *supra* note 2 at para 28.

In an attempt to simplify the unnecessary complexity and rigidity of the categorical traditional approach to the rule against prior consistent statements, Justice Doherty in *Khan* outlined a principled admissibility framework. First, if a prior consistent statement is being admitted for the truth of its content, then it must be admissible under one of the exceptions to the hearsay rule[18]. Second, if the statement is being admitted as a prior consistent statement, courts should look to the principles of relevance, materiality and probative value, rather than attempting to "pigeonhole" a statement into one of the traditional categorical exceptions to the rule[19]. The principled approach would require a tendering party to identify with specificity the purpose for which the statement is being offered, its materiality to a live issue at trial and that it has some probative value in respect of the purpose for which it is offered[20]. A simplified principled approach would not necessarily change "the circumstances in which [a] prior statement would be admitted," but rather would focus trial judges on the proper use of the statement[21]. Unfortunately, the courts have been reluctant to adopt and implement a principled approach. As the review of the appellate caselaw demonstrates, this unwavering commitment to the traditional rule-based approach to prior consistent statements has continued to produce many of the same admissibility and use errors associated with this approach.

B) The Framework for a Principled Approach

In considering the framework for a principled approach, a useful parallel can be drawn to the admission of similar fact evidence. As Justice Binnie documented in *R v Handy*, the law of propensity evidence had become mired with unnecessary complexity with counsel attempting to "squeeze propensity evidence into a pre-authorized pigeon hole or recognized 'category'" which led to "overwhelmingly" prejudicial evidence to gain admission[22]. This problem, identified by the court in *Handy*, mirrors many of the current issues with the traditional rule dealing with prior consistent statements. Thus, the court simplified the admissibility standard as such:

> Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context

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18 *Ibid*, at paras 60, 63.

19 *Ibid*, at paras 59, 61–65.

20 *Ibid*, at paras 61–65.

21 *Ibid*, at para 59.

22 *R v Handy*, 2002 SCC 56 at para 57 [*Handy*]. See also Hamish Stewart, "Justice Frank Iacobucci and the Revolution in the Common Law of Evidence" (2007) 57 UTLJ 479 at 481–483 [Stewart].

> of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception[23].

The fundamental premise underlying the principled approach was that "evidence of misconduct beyond what is alleged in the indictment [does] no more than blacken [the accused's] character"[24]. In other words, an inference from the "similar facts" that the accused has the general propensity or disposition to do the type of acts charged and is therefore guilty of the offence.

A similar formula could be transposed onto the admission of prior consistent statements which would clarify the admissibility standard and in turn, alleviate issues relating to their use. A comparable formula was put forth by Justice Doherty in *Khan* and urged upon the Supreme Court in *Langan*. My formulation simply reinforces the principle of prejudicial effect. A balancing of probative value against prejudicial effect can serve to screen out some prior consistent statements altogether. At the very least, it can reduce the number of statements being admitted and relied upon. The exercise of considering prejudicial effect would involve identifying the real risks associated with the admission of the statement(s). One such consideration could include the likelihood that the admission of the statement(s) may lead to the prohibited inference that repetition and consistency alone enhance credibility and/or reliability. It may also involve a consideration of whether this prejudicial effect could be effectively mitigated, for example, through a targeted jury instruction specifically addressing the risks associated with that particular statement. Simply stated, the principled approach would be as follows:

> Prior consistent statements are presumptively inadmissible. The onus is on the party tendering the statement to clearly identify its relevance and the material issue to which it is directed. Finally, the party must satisfy the trial judge on a balance of probabilities that, in the context of the particular case, the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

Underlying this principled approach is the premise that repetition does not make the allegation true, nor does it enhance credibility. Replacing an intricate web of rules governing the admissibility of prior consistent statements with basic principles that trial judges apply on a daily basis would alleviate the excessive complexity in this area of law and mitigate against misuse errors.

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23 *Handy*, supra note 22 at para 55.

24 *Ibid* at para 116.

C) Caselaw Review

I searched for reported Canadian appellate decisions in English and French that had a prior consistent statement issue listed as a ground of appeal. The caselaw review covers the period from 2018–2023, inclusive, and relied on the databases of Westlaw, Lexis Advance and CanLII. The review examined both trial by judge alone cases, as well as trial by jury cases. In the trial by jury cases, the main issue on appeal was the failure to provide a limiting instruction on the use and misuse of the prior consistent statement. One limitation to this search category was that I did not have the benefit of the entire jury instruction, but rather the description of it provided by the appellate court. In cases involving a trial by judge alone, the ground of appeal related to either the admissibility of the prior consistent statement and/or its use by the trial judge in their analysis. This caselaw review did not include summary conviction appeal decisions.

I found a total of 166 appeals where the issue of a prior consistent statement was raised as a ground of appeal[25]. Within these cases, there was a total of 19 allowed appeals from conviction where the new trial order related to the issue of a prior consistent statement issue. Within these 19 appeals, 14 were trial by judge alone,[26] and 5 involved trials by jury[27]. The total number of 19 does not include cases where the court applied the curative proviso[28].

As I will discuss in more detail below, this case sample demonstrates the continued shortfall of using the traditional categorical approach to the rule against prior consistent statements. The two most common errors relate to (1) admissibility and use with respect to statements admitted under the narrative as circumstantial evidence exclusion, and (2) statements being admitted under multiple exclusionary categories. The caselaw review also highlights the importance of requiring a judicial vetting process, more akin to a pre-trial *voir dire*, for the admissibility of the statements.

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[25] I ran a broad search of all cases in those three databases using: "prior consistent statement" AND "error" OR "proviso"; "prior consistent statement"; "prior inconsistent statement". I narrowed all the results by our time period of 1 January 2018 to 30 June 2023.

[26] See Appendix A. These cases are: *R v Castro Wunsch*, 2023 ABCA 160; *R v MA*, 2021 BCCA 215; *R v NP*, 2021 BCCA 25; *Bright v R*, 2020 NBCA 79; *R v Cooke*, 2020 NSCA 66; *R v RP*, 2020 ONCA 637; *R v AV*, 2020 ONCA 58; *R v GJS*, 2020 ONCA 317; *R v AS*, 2020 ONCA 229; *R v DK*, 2020 ONCA 79; *R v Grant*, 2019 BCCA 369; *R v Willis*, 2019 NSCA 64; *R v Nault*, 2019 ABCA 37; *R v Gill*, 2018 BCCA 275.

[27] See Appendix B. These cases are: *R v Freedland*, 2023 ONCA 386; *R v SKM*, 2021 ABCA 246; *R v WEG*, 2021 ONCA 365; *R v DC*, 2019 ONCA 442; *R v Joynt*, 2018 ONCA 856.

[28] See e.g. *R v Qhasimy*, 2018 ABCA 228; *R v MP*, 2018 ONCA 608.

D) Common Error: Narrative as Circumstantial Evidence

The narrative as circumstantial evidence exclusion permits a trial judge to evaluate the circumstances surrounding the making of the statement to decide whether it can in fact assist in assessing the credibility or reliability of the witness' in-court claims[29]. As aptly described by Justice Paciocco writing extrajudicially, it is not the "'hearsay part' of the prior consistent statement block that is available" but rather it is the "'declaration part' that is used to support relevant and permissible circumstantial inferences"[30]. However, as the caselaw review shows, trial judges continue to admit and rely upon the "hearsay block" of the prior consistent statements to evaluate a witness's credibility and/or reliability. As appellate courts have continued to emphasize, the reference to drawing inferences from the "context and content" of the prior consistent statement does not permit consideration of the hearsay block of the statement; rather, the content "is merely a reference to what was said"[31].

As an illustrative example of this error, the Court of Appeal of Alberta in *R v Castro Wunsch* allowed an appeal from conviction holding that the trial judge had improperly used the complainant's prior consistent statements for the truth of their content in order to both bolster her credibility and to support a finding of subjective non-consent. This case engenders some of the representative errors and misconceptions that arise when considering the narrative as circumstantial evidence exception. It also highlights how errors at the admissibility stage can then permeate through to a trial judge's analysis. Both these considerations support a shift to a principled approach to admissibility.

The allegations at trial involved a claim of workplace sexual assault. The complainant testified that her supervisor perpetrated multiple, escalating sexual assaults against her in his office over the course of one workday. The accused testified. He denied some of the sexual activity but admitted that that he and the complainant engaged in some consensual intimate touching throughout that day. The material issue at trial was consent, and ultimately, the credibility of both the complainant and accused was critical[32]. The prior consistent statements at issue were text messages exchanged between the complainant and her friend. These text messages were sent the morning of the alleged sexual assault and "were written in a casual and abrupt manner convey[ing] the complainant's fear,

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29 Paciocco, "Perils", *supra* note 12 at 199–200.

30 *Ibid.*

31 See e.g. *R v Castro Wunsch*, 2023 ABCA 160 at para 39 [*Castro Wunsch*].

32 *Ibid* at para 2.

confusion, and disbelief about what may have already happened, and what may have still been happening to her at that time"[33].

The trial judge asked the Crown to explain the purpose for which the text messages should be received. The trial Crown responded:

> [A]s narrative as circumstantial evidence, which is something different than just simply plain narrative evidence, but narrative [as] circumstantial evidence which doesn't allow you to use it in—like entire—like as for the truth of its contents, but it allows you to use it in a—you know, there is a subtle distinction of sort of a lesser kind of quality to the evidence, but for very important purposes as it relates to the in-court testimony, a credibility assessment of the witness, the complainant in this case primarily[34].

The failure of the Crown's response to articulate a proper basis for admissibility was further aggravated by its invitation to the trial judge to impermissibly use the consistency between the content of the text messages and the complainant's in-court testimony as an important piece of evidence in evaluating the complainant's credibility and reliability[35]. Defence counsel's response was equally unhelpful. While the defence objected to the admission of the text messages for the purpose identified by the Crown, they also conceded that the text messages could serve some future purpose that had not yet been contemplated[36]. The trial judge admitted the text messages under the narrative as circumstantial evidence exception as being relevant to the complainant's state of mind on the day of the alleged sexual assault, which in the trial judge's view, contributed to the complainant's credibility[37].

These responses capture some of the confusion surrounding the narrative as circumstantial evidence exclusionary category, its evolving complexity and the way in which it has developed to improperly function as a catch-all basin for the admission of prior consistent statements.

In her reasons admitting the prior consistent text messages, the trial judge incorrectly suggested that this exclusionary category functioned like the "modern equivalent of the traditional *res gestae* exception to the rule against hearsay"[38]. In my view, these comments speak to a much deeper problem with the ever-growing complexity of evidence law, more broadly, and the rule against prior consistent statements, more specifically.

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33 *Ibid* at para 23.
34 *Ibid* at para 14.
35 *Ibid* at para 21.
36 *Ibid* at paras 15–16.
37 *Ibid* at paras 23, 31.
38 *Ibid* at paras 34, 36.

Troubling also was the improper manner in which the trial judge used the prior consistent statements. Not only did she use the text message exchanges for the truth of their content to bolster the complainant's credibility, but also as an indicium that the complainant "did not subjectively consent to what was happening at the office that day"[39]. This improper use occurred despite the trial judge having warned herself against using the texts to prove that the complainant was telling the truth at trial simply because she said the same or similar things in her text messages.

It is worthwhile recalling the trial judge's initial reason for admitting the text messages. These statements were admitted to "support reasonable inferences" about the complainant's state of mind. However, the complainant's state of mind and the manner in which the sexual assault was disclosed were not disputed issues at trial[40]. As the Court of Appeal emphasized, there was no issue about whether the complainant reached out to her friend for help. There was some conflicting evidence about whether she was actually crying and panicked during parts of the day. However, the text messages could not resolve this conflict because the trial judge's hearsay ruling precluded her from relying on the complainant's text messages for the truth of their content.

At trial, the central issues in dispute were whether the complainant consented to the sexual activity in question, and relatedly, the complainant's intention in sending the text messages that she did to her friend. Given the trial judge's hearsay ruling, the complainant's text messages could not be used to resolve these issues. In other words, the hearsay ruling precluded the trial judge from using the text messages as evidence that "[the complainant] was upset and scared, that she did want help, [and] most significantly, that Mr. Castro-Wunsch had sexually assaulted her"[41]. Instead, to make a determination on these issues the trial judge was required to assess each of the witnesses' credibility, particularly in light of their divergent recounting of events of that day. However, the trial judge's reasons make clear that she impermissibly relied on the text messages for the truth of their content. This issue of trial judges relying on prior consistent statements for the truth of their content is not an isolated event, and frequently arose in my review of the caselaw dealing with the narrative as circumstantial evidence category[42].

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39 *Ibid* at para 33.

40 *Ibid* at para 32.

41 *Ibid* at para 33.

42 See e.g. *R v DK*, 2020 ONCA 79 at para. 43; *Bright v R*, 2020 NBCA 79 at paras 39–42.

This case underscores the wisdom of adopting a principled approach that would require counsel to clearly articulate a basis upon which the statements should be received, as well as the material issue to which they are directed. In so doing, a trial judge would be better equipped from the outset to understand the 'why' underlying the question of admissibility, as well as 'how' the statement can be used in resolving a material issue. Rather, in *Castro Wunsch*, the Crown pigeon-holed the text messages into an exclusionary category and the text messages were admitted without further scrutiny, nor proper guidance on their use and the live issues to which they were directed. Arguably, counsels' responses only further compounded the confusion and suggested to the trial judge that the text messages could partially be used for the truth of their content.

Some opponents of the principled approach may correctly point out that currently, under the categorical rule-based approach, counsel is already required to clearly articulate the basis for the admission of a prior consistent statement. The current approach already requires more than merely reciting a categorical exception. In other words, nothing would really be gained by adopting a principled approach.

While this may be true, eliminating the categorical exceptions under which a statement may be admitted, can serve to shift the focus of the admissibility analysis from technical categories of admissibility to broader principles. As *Castro-Wunsch* assists in illuminating, such a shift in the analysis would be particularly beneficial where a statement is being admitted under the narrative as circumstantial evidence exclusion because this categorical exception has proven to be confusing and difficult to understand for both counsel and trial judges' alike. The adoption of a principled approach would shift the broader conception of the admissibility analysis from categorical rules to principles. Neither counsel, nor trial judges, would be required to consider the categorical exceptions to admissibility and whether a statement can fit into one of these exceptions. Instead, all parties can focus their analysis on principles with which they work on a daily basis and which are generally better understood. Their attention can be diverted to the substance of the statement and the issues to which it is relevant, rather than to whether a statement can be admitted under a categorical exception. Admittedly, counsel's attention should already be on the substance of a statement and the purpose for its admission, rather than on technical rules. Nevertheless, a total elimination of the categorical rule-based approach can once and for all rid the analysis of any lingering concerns about understanding the categorical exceptions to the rule against prior consistent statements.

E) Common Error: Multiple Categories of Admissibility

Trial judges continue to commit misuse errors when a prior consistent statement is admitted under more than one exception to the rule. This can fairly be attributed to the added layers of complexity when dealing with statements being admitted and used for multiple different purposes. For example, in *R v DK*, the trial judge admitted the complainant's "forced intercourse" utterance to the hospital's gynecologist under the recent fabrication and narrative as circumstantial evidence exceptions"[43]. The trial judge then remarked in his analysis that the utterance "greatly assisted" him in evaluating the complainant's credibility and reliability[44].

On appeal, the court ordered a new trial on this ground. The utterance was held to be inadmissible under the recent fabrication exception because defence counsel never suggested to the complainant in cross-examination that she had recently fabricated the alleged sexual assault[45]. Nor was it admissible under the narrative exclusion as it was unnecessary to explain the narrative of events[46]. While it may have been admissible under the narrative as circumstantial evidence exclusionary category, the trial judge failed to explain the manner in which he used the utterance to assist in his credibility and reliability findings[47]. The Court of Appeal could only discern from the reasons that he considered the utterance for the truth of its content and that its value stemmed from the consistency in the repetition of the same allegation made at trial.

The added issues and complexity that arise in instances where a prior consistent statement is admitted under several categorical exceptions is also evident in *R v Bright*[48]. In that case, the trial judge held that the complainant's sexual assault disclosure to several different people, which generated many prior consistent statements, was admissible under three of the categorical exceptions. However, the trial judge failed to articulate the purpose for which the statements were being admitted and the manner in which these statements were being used.

For example, the trial judge referred to all the statements as one when analysing the defence's allegation of recent fabrication. This was improper as not all of the statements were capable of rebutting this allegation[49]. Further, the trial judge's reasons suggest that "the truthfulness" of the

43 *R v DK*, 2020 ONCA 79 [*DK*].
44 *Ibid* at paras 20, 42, 46.
45 *Ibid* at para 39.
46 *Ibid* at para 40.
47 *Ibid* at para. 41.
48 *Bright v R*, 2020 NBCA 79 [*Bright*].
49 *Ibid* at para 35.

complainant's allegations was enhanced by the consistency in these prior statements[50]. Again, this suggestion violates the fundamental principle that repetition alone does not enhance credibility. The reasons also failed to clearly articulate how "the timing and context" of the prior consistent statements yielded probative inferences about the complainant's credibility and reliability[51]. This is an error that repeats itself in the caselaw and that tends to support the inference that the lack of articulation around the use and the value to be derived from a prior consistent statement can be attributed to a more general lack of understanding about the narrative as circumstantial evidence exception.

These cases also emphasize the difficulty that trial judges experience when prior consistent statements are admissible and in fact are admitted under more than one exclusion. The need for a trial judge's reasons to articulate which statement is being used and how it is being used becomes even more salient. Otherwise, it becomes susceptible to being misused. This would be facilitated if counsel were required, in some form of rigorous vetting procedure, such as a pre-trial *voir dire*, to identify with specificity which statements are being admitted for what purpose and then how these statements are to be used.

F) Procedural Safeguard: Rigorous Pre-Trial Vetting Procedure

Cases such as *R v DC* and *R v SKM* highlight the importance of requiring a rigorous vetting process, such as a pre-trial *voir dire*, and the trickle through effect that the failure to do so can have on the misuse of a statement[52]. In both instances, the trial judges' never inquired into the basis for the admission of any of the complainants' prior consistent statements. In *DC,* these statements included substantive details about the allegations, and were made by the complainant to her family doctor and her mother[53]. Similarly, in *SKM*, the trial judge undertook "no scrutiny" of the prior consistent statements which contained specific details as to the allegations and were made to numerous people—many of whom testified confirming the statements were made and their content[54]. In both cases, the trial Crowns in their closing submission further aggravated the failure to conduct a rigorous pre-trial *voir dire* by inviting the jury to rely upon the consistencies between the complainants' prior disclosure and their in-court testimony to infer that they were credible and reliable[55]. The Crown

50 *Ibid* at para 40.

51 *Ibid* at para 41.

52 *R v DC*, 2019 ONCA 442 [*DC*]; *R v SKM*, 2021 ABCA 246 [*SKM*].

53 *DC*, *supra* note 52 at para 25.

54 *SKM*, *supra* note 52 at para 26.

55 *DC*, *supra* note 52 at para 27; *SKM*, *supra* note 52 at para 30.

in *DC* even went so far as to suggest that the jury could rely upon the prior consistent statements for the truth of their content[56]. Needless to say, the complete absence of any limiting instruction on the use and misuse of prior consistent statements constituted a reversible error.

These cases provide an illustrative example of how the failure to conduct a rigorous admissibility *voir dire* can permeate the rest of a trial and culminate in reversible errors in instructing a jury. The complainant's prior statements in *DC* may well have been admissible under the pure narrative exception as they could have aided the jury in understanding the complainant's delay in disclosure[57]. The statements may well have also been admissible under the recent fabrication exception given that defence alleged that the complainant was motivated to lie in order to frustrate the accused's family law custody proceedings[58]. The appellant in *SKM* conceded that the prior consistent statements were admissible under the narrative as circumstantial evidence exception[59].

However, the failure to alert to any basis for their admission obfuscated the trial judge's duty to properly and adequately charge the jury. In *DC*, it may have been that the trial judge simply did not turn his mind to the issue of prior consistent statements since the Court of Appeal's judgment makes no reference to any guidance that he gave to the jury in his instruction. This conclusion is further supported by the fact that the trial judge did properly instruct the jury on the use of prior inconsistent statements. In *SKM,* the court concluded that "the trial judge simply did not consider whether a limiting instruction was required"[60]. A pre-trial *voir dire* may well have alerted the trial judge to the need for a limiting instruction. The Court of Appeal in *DC* confirmed that "[t]he Crown did not identify the purpose underlying the admission of the prior consistent statements made by the complainant"[61]. Similarly, the absence of a rigorous pre-trial vetting procedure was noted by the Court of Appeal in *SKM*, where it commented that "none" of the exceptions to the presumptive rule "were argued in this case"[62]. Cases such as *DC* tend to support the view that any principled approach should require a pre-trial judicial vetting procedure, more akin to a *voir dire*, to ensure that trial judges are alive to the issues relating to a prior consistent statement so that they can discharge their duty of properly instructing the jury.

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56 *DC*, *supra* note 52 at para 28.
57 *DC*, *supra* note 52, at para 14.
58 *Ibid* at para 13.
59 *SKM*, *supra* note 52 at para 20.
60 *Ibid* at para 27.
61 *DC*, *supra* note 52, at para 13.
62 *SKM*, *supra* note 52 at para 25.

We see the court's acknowledgment regarding the procedural importance of conducting a rigorous pre-trial *voir dire* in *R v MA*[63]. While the appeal was allowed on other grounds, the Crown conceded that the trial judge had erred in failing to require trial counsel to "first identify the content of the statements, the context in which they were made, and the purpose for which they were being tendered"[64]. In itself, an acknowledgment of this procedural error is significant as it speaks to the necessity of a judicial vetting procedure. The importance of undertaking a procedural vetting process can also be gleaned from instances where counsel on appeal have acknowledged that a prior consistent statement should have been the subject of a *voir dire* prior to being admitted[65].

However, as evidenced by decisions such as *Castro-Wunsch*, this pre-trial process alone and in itself is not a sufficient safeguard because the narrative as circumstantial evidence exclusionary category is unnecessarily complex. A pre-trial *voir dire* is really only valuable if the exclusionary rule itself is properly understood by counsel and trial judges alike. This conclusion is evident from instances where a pre-trial *voir dire* is held and a prior consistent statement is admitted under the narrative as circumstantial evidence exclusion, but nevertheless issues arise on appeal regarding the proper admission and use of the statement. This problem speaks to a deeper issue of the exception itself being largely misunderstood. Nevertheless, in considering the adoption of a principled approach to admissibility, a rigorous pre-trial judicial vetting process, more similar to a *voir dire*, should become the norm. Otherwise, the risk becomes that prior consistent statements are being admitted and relied upon by trial counsel without any meaningful indication explaining why they are being admitted and how they should be used by the trial judge.

Part II: A Blundered Opportunity

A) The Stakes in *Langan*

The Supreme Court in *Langan* was presented with a perfect opportunity to fundamentally alter the complex rule against prior consistent statements by shifting to a simplified principled approach. At issue was the admissibility of text messages between the complainant and the accused. Many of the impugned text messages were sent after the alleged sexual assault and contained critical details about live issues at trial that were in dispute. In the text messages, the complainant told the accused that she had said 'no' several times and that he must have had sex with her while she was asleep

63 *R v MA*, 2021 BCCA 215 [*MA*].

64 *Ibid* at para 22.

65 *R v RM*, 2022 ONCA 850 at para 50.

because they did not have sex while she was conscious[66]. The trial judge "failed to analyze the admissibility or proper use of the text messages"[67]. The text messages figured prominently in the Crown's cross-examination of the accused, attacking his credibility by raising several inconsistencies between his in-court testimony and his text messages[68]. Ultimately, he was convicted at trial of sexual assault.

The Court of Appeal for British Columbia split 2-1 on the trial judge's use of the text messages as prior consistent statements. The court was unanimous that the text messages were capable of admission, noting that the questions of admissibility and use involve two separate inquires. The majority held that the text messages were admissible as admissions against interest by the accused and that some of these text messages were admissible under the narrative as circumstantial evidence category[69]. The majority however highlighted that the trial judge's failure to analyze the admissibility and use to be made of the text messages made it difficult to discern how he had used them. The majority concluded though that the trial judge had used the text messages for the improper purpose of corroborating the complainant's in-court testimony[70]. In particular, it emphasized the trial judge's comments that the complainant's "testimony was also consistent with her text messages in setting out her recollection of how the night unfolded"[71]. When the reasons were considered as a whole and in context, and in light of the fact that there was no vetting of the text messages, it was apparent to them that the trial judge had fallen into error by relying on the prior consistent statements for the truth of their content and for an improper purpose.

In contrast, Chief Justice Bauman writing in dissent also found that the text messages were capable of admission, but he concluded that the trial judge had not erred by using them for an improper purpose. One of the live contested issues at trial was the complainant's credibility in relation to her narrative of events. Chief Justice Bauman concluded that the fact, timing and context of her statements helped to resolve this specific credibility issue as it related to her narrative of events[72]. Importantly, he emphasized that it was defence counsel who had attempted to use those text messages in an effort contradict her narrative of events and diminish her credibility[73]. Thus, he concluded that the trial judge's reference to

66 *R v Langan*, 2019 BCCA 467 [*Langan* CA].
67 *Ibid* at paras 24, 33, 40, 43, 61.
68 *Ibid* at paras 43, 49.
69 *Ibid* at paras 43–44.
70 *Ibid* at paras 50
71 *Ibid* at para 47.
72 *Ibid* at para 95.
73 *Ibid* at paras 96, 102.

"consistency" between the complainant's in-court testimony and the text messages was not indicative of the trial judge using that consistency to improperly bolster her credibility[74]. Instead, the trial judge was responding to defence counsels' submissions and appropriately using the text messages to assess the conduct of the complainant and her truthfulness in describing the events.

Squarely before the Supreme Court was an opportunity to not only address the rules governing the admission of prior consistent statements, but also, importantly, the requirement for a mandatory pre-trial vetting process, such as a *voir dire*. Amongst the many intervenors were the CLA and AGO, both of whom largely urged the court to adopt some type of principled approach to admissibility[75]. The CLA argued that the principled approach should consider factors such as relevance, materiality and probative value[76]. The AGO emphasized the need to require "some form of articulation of purpose and some form of judicial vetting … although a full *voir dire* with evidence may not be necessary in every case"[77]. The AGO's approach appeared to be an attempt to urge a more practical pre-trial judicial vetting process to contrast against the respondent's argument in favour of requiring a *voir dire* with full argument before trial in every case[78]. The AGO's submissions also highlighted that a lack of clarity on the proper procedural vetting process continued to "[compound] the confusion about appropriate uses [of prior consistent statements]"[79]. The parties drew from the concurring reasons of Justice Doherty in *Khan* to urge a shift towards a principled approach, as well as to identify the principles that should be adopted when assessing admissibility. Unfortunately, the Supreme Court did not address these submissions. I believe that this decision was a missed opportunity to replace the rigid and unnecessarily complex rule-based approach to the admission of prior consistent statements.

B) Why a Principled Approach?

In my view, the most significant benefit to adopting a principled approach lies in its ability to flexibly adapt to the particular circumstances of any given case, rather than having "rigid rules that command specific outcomes"[80].

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74 *Ibid* at paras 102–104.

75 CLA Factum, *supra* note 7 at paras 9-14; AGO Factum, *supra* note 7 at paras 20–21.

76 CLA Factum, *supra* note 7 a para 11.

77 AGO Factum, *supra* note 7 at para 19.

78 Respondent Factum, *supra* note 9 at para 64.

79 AGO Factum, *supra* note 7 at para 19.

80 Dufraimont, "Realizing", *supra* note 3 at 17; Robert J Currie, "The Evolution of the Law of Evidence: Plus Ça Change ...?" (2011) 15 Can Crim L Rev 213 at 218–219;

As has already been argued by several scholars, a shift towards a principled approach to admissibility has been largely successful in ridding many areas of evidence law of its rigidity. However, the results have been mixed with respect to complexity. As argued by Lisa Dufraimont, the lack of success with respect to complexity can largely be attributed to implementation of a principled approach rather than the underlying principles themselves[81]. As I previously mentioned, this concern has largely informed my position favouring the adoption of a standalone principled approach rather than having a principled exclusion operating alongside a traditional rule. The continued complexity of hearsay provides an example of the pitfalls with the latter approach.

Another substantial benefit to adopting a principled approach would be a shift away from all parties "thoughtlessly" and "mechanically" applying rules that "they do not understand"[82]. The traditional rule against prior consistent statements is not only mired in rigidity but also in unnecessary complexity. This excessive complexity references the "technical quality" of the traditional exclusionary categories, whereas the rigidity reflects the difficulty in applying and properly adapting these dense and technical rules to a particular set of circumstances[83]. These issues unnecessarily complicating the rule against prior consistent statements were recognized in the concurring reasons in *Khan* and had been previously acknowledged by Justice David Paciocco in his oft-cited article "The Perils and Potential of Prior Consistent Statements: Let's Get It Right".

Any principled approach should include a pre-trial procedural mechanism to vet prior consistent statements. In *Langan*, the respondent, the CLA and the AGO, were all in agreement that some form of judicial screening mechanism should be required when a prior consistent statement is being tendered. Whether this procedural mechanism must always take the form of a *voir dire* with full arguments is a matter of degree. Nevertheless, the caselaw review supports the addition of a procedural mechanism more akin to a *voir dire* with full arguments, particularly in cases involving a trial by jury. In such cases, where a new trial was ordered, all but one case had some form of rigorous procedural vetting process[84]. Similarly, for trials by judge alone, more than 50 percent involved instances

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Stewart, *supra* note 22.

81 Dufraimont, "Realizing", *supra* note 3 at 34.

82 Dufraimont, "Realizing", *supra* note 3 at 27; Stewart, *supra* note 22 at 481–483.

83 Dufraimont, "Realizing", *supra* note 3 at 13–16.

84 See e.g. *R v Freedland*, 2023 ONCA 386; *R v SKM*, 2021 ABCA 246; *R v DC*, 2019 ONCA 442; and *R v Joynt*, 2018 ONCA 856.

where the prior consistent statements underwent no rigorous form of pre-trial screening procedure[85].

The requirement for a procedural screening mechanism more closely resembling a pre-trial *voir dire* with full arguments would help facilitate several positive outcomes. First, on a more theoretical level, a more formalized and rigorous vetting process can help to assure "the adjudicator that the accused has been treated fairly" and that "the appropriate level of caution has been taken" with respect to consideration of presumptively inadmissible evidence[86]. Second, it would alert the trial judge to not only the existence of a prior consistent statement, but also the special considerations governing its admissibility and use. The research tends to support this conclusion particularly in jury cases where there was a failure to provide a limiting instruction. Third, a more rigorous procedural screening mechanism would assist trial judges to assess the scope of the prior consistent statements being tendered to decide whether they are truly necessary to achieve their stated purpose. In many instances, the sheer volume of prior consistent statements contributed to the reversible error. Finally, a pre-trial *voir dire* with full arguments would better ensure that counsel tendering the statement articulate a proper basis for its admission and alert the trial judge to the material issues to which it is directed. This procedure would be facilitated through the replacement of the rigid and excessively complex rule-based admissibility analysis with flexible principles that trial judges and counsel regularly apply in other contexts. In so doing, a trial judge can be better equipped to use the statement for its proper purpose. This exercise can be particularly useful in cases where a prior consistent statement is being received for several different purposes.

In a majority of the cases where an appellate court had ordered a new trial, the error related to the use, rather than the admissibility of the prior consistent statement[87]. In other words, the statement was capable of admission, but it was used for an improper purpose. Given the coextensive relationship between admissibility and use, this suggests that parties continue to struggle with understanding the contours of the categorical exceptions to the rule. Rather than mechanically applying rigid and complex rules, applying simplified principles would shed light on the intended purpose of the prior consistent statement. From this exercise, a

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85 See e.g. *R v NP*, 2021 BCCA 25; *Bright v R.*, 2020 NBCA 79; *R v Cooke*, 2020 NSCA 66*; R v RP*, 2020 ONCA 637; *R v AS*, 2020 ONCA 229; *R v Grant*, 2019 BCCA 369; *R v Nault*, 2019 ABCA 37; and *R v Gill*, 2018 BCCA 275.

86 Shawn Moen, "Seeking More Than Truth: A Rationalization of the Principled Exception to the Hearsay Rule" (2011) 48:3 Alta L Rev 753 at 770.

87 See e.g. *R v Castro Wunsch*, 2023 ABCA 160; *Bright v R.*, 2020 NBCA 79; *R v Cooke*, 2020 NSCA 66; *R v RP*, 2020 ONCA 637; *R v AV*, 2020 ONCA 58; *R v GJS*, 2020 ONCA 317; *R v DK*, 2020 ONCA 79; and *R v Nault*, 2019 ABCA 37.

trial judge could then assess the materiality of the statement and weigh its probative value against its prejudicial effect. This is a common exercise in which trial judges regularly partake.

This suggestion must not be mistaken as a panacea, but rather a better option than the current traditional rule-based approach. Trial judges too are human and make errors. The hope would be that the flexibility and simplicity of a principled approach would reduce these errors and foster a greater understanding of the law of prior consistent statements.

Conclusion

In conclusion, I have argued that the post-*Khan* caselaw supports the contention that courts adopt a principled approach to the admissibility of prior consistent statements. I have also shown the Supreme Court's missed opportunity in *Langan* to bring much needed clarity to the rule. Rather than address the issues put before it by the parties, the court decided to side-step the problem altogether. This choice has continued to have a rippling effect.

A principled approach resembling that of similar fact evidence would help to alleviate much of the unnecessary complexity and rigidity associated with the current rule against prior consistent statements. The flexibility of applying commonly understood evidence law principles, such as relevance, materiality, probative value and prejudicial effect, would better safeguard against the improper admission of such statements. A principled approach would allow trial judges to deal in concepts and principles that are better understood, and that are more apt to adapting to the unique circumstances of a particular case. This approach is preferable to the current rigid and technical rule-based approach, whereby counsel regularly attempt to "pigeon-hole" a statement into one of the categories of exclusion. The literature review also supports the proposition that the narrative as circumstantial evidence exclusion remains commonly misunderstood by trial judges and counsel alike, in part due to its excessive complexity. The common issues identified in this article that are associated with admissibility and use become magnified when a statement is admitted under more than one exclusionary category. A principled approach would help to reduce the rigidity and complexity associated with the current rule.

The caselaw review also supports the requirement of a more rigorous pre-trial judicial vetting process. Some have argued that this procedural requirement must always assume the form of a full evidentiary *voir dire*, while others support approaching the issue on a case-by-case basis. I believe that the caselaw review tends to support the former approach to

the latter. In trial by jury cases, this procedure would help to alert the trial judge to the existence of a prior consistent statement and the need for both a use and misuse instruction. In a judge-alone case, this requirement would provide much needed clarity to the admissibility process, which in turn would help mitigate against common use errors. Though not a panacea, adopting a principled approach would go a long way in preventing many of the commonly identified admissibility and use errors associated with the rule against prior consistent statements.

APPENDIX A
TRIAL BY JUDGE ALONE—NEW TRIAL ORDERED

Case	Prior Consistent Statement—Content	Formal Vetting Procedure?	Applicable Exclusions	Error Admissibility/ Use
R v Castro Wunsch, 2023 ABCA 160	Text messages to the complainant's friend.	Yes	NCE	Use
R v MA, 2021 BCCA 215	The complainant's statements to her friend and two doctors.	Yes	NCE	Adm.
R v NP, 2021 BCCA 25	Instagram and Facebook messages.	No	NCE	Adm.
Bright v R, 2020 NBCA 79	The complainant's disclosure to her friend and the subsequent disclosures to her counsellor.	No	PN, RF, NCE	Use
R v Cooke, 2020 NSCA 66	The complainant's disclosure (or lack thereof) to EHS and the attending physician.	No	PN	Use
R. v R.P., 2020 ONCA 637	The sister's testimony about the complainant's emotional state and disclosure.	No	RF	Use
R v AV, 2020 ONCA 58	The complainant's disclosure to several different authorities.	Yes	RF	Use
R v GJS, 2020 ONCA 317	The complainant's statements to her mother and sister about the allegations.	Yes	RF	Use
R v AS, 2020 ONCA 229	The complainant's account of events offered during her police interview that she had bruises on her calves.	No	N/A	Adm.

R v DK, 2020 ONCA 79	The complainant's "forced intercourse" utterance to a gynaecologist and obstetrician.	Yes	RF, NCE	Adm.
R v Grant, 2019 BCCA 369	The complainant's statement to police on the afternoon after the alleged events.	No	N/A	Adm.
R v Willis, 2019 NSCA 64	The complainant's disclosure of the alleged sexual assault to several family members and to a police officer.	Yes	PN, RF	Adm.
R v Nault, 2019 ABCA 37	The key witness's 911 call reporting that the accused had started a fire in his duplex.	No	N/A	Use
R v Gill, 2018 BCCA 275	The witness's statement that the appellant had told her that he had been stabbed right prior to the shooting.	No	NCE	Adm.

APPENDIX B
TRIAL BY JUDGE SITTING WITH A JURY—FAILURE TO PROPERLY INSTRUCT—NEW TRIAL ORDERED

Case	Prior Consistent Statement—Content	Formal Vetting Procedure?	Applicable Exclusions	Aggravating Features
R v Freedland, 2023 ONCA 386	Key witness's detailed statement to police about the alleged events.	No	N/A	Credibility—central issue PCS elicited by Crown PCS included substantive details
R v SKM, 2021 ABCA 246	Complainant's statements to family members about the alleged assaults.	No	PN	PCS relied upon by Crown TJ specifically referenced PCS the jury instruction Testimonial reliability—central issue
R v WEG, 2021 ONCA 365	Complainant's three statements about alleged assault, including a video re-enactment made for police.	Yes	RW	PCS included substantive details PCS final things heard by jury before the Crown closed its case PCS non-direction aggravated by the two instructions given on the proper use of PIS
R v DC, 2019 ONCA 442	Complainant's statements to her family doctor and her mother about the alleged assaults.	No	RF, NCE	Credibility—central issue PCS relied upon by Crown PCS elicited by Crown PCS included substantive details
R v Joynt, 2018 ONCA 856	Complainant's statements to several witnesses about the alleged assaults.	No	PN	Credibility—central issue PCS relied upon by Crown PCS elicited by Crown PCS included substantive details