REVERSING THE PRESUMPTION: ADMITTING PRIOR INCONSISTENT STATEMENTS FOR THEIR TRUTH

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The traditional bar against admitting witnesses' prior inconsistent statements for their truth has been the subject of longstanding criticism. The availability of the declarant for cross-examination at trial, the critique runs, allows the parties to test the statements' reliability and prevents triers of fact from giving them undue weight. While the Supreme Court of Canada has endorsed this critique and admitted prior inconsistent statements under the principled hearsay exception, such statements are still subject to a presumption of exclusion that can only be rebutted in a voir dire considering multiple doctrinal factors. We argue for the reversal of this presumption based on two insights. First, many common law jurisdictions have discarded the traditional rule and made prior inconsistent statements at least presumptively admissible. Second, our statistical and qualitative analyses of reported Canadian cases show that such statements are admitted far more often than they are excluded, especially when there is a meaningful opportunity to cross-examine the witness. These developments suggest that it is past time for Canada to make prior inconsistent statements presumptively admissible as non-hearsay. This presumption would be rebutted only when meaningful cross-examination is impossible.

La position traditionnelle contre l'admission, pour leur contenu véridique, de déclarations antérieures incompatibles est depuis longtemps critiquée. D'après les critiques, la possibilité de contre-interroger le déclarant au procès permet aux parties de mettre en doute la crédibilité des déclarations et d'éviter que le juge des faits leur attribue une importance indue. Bien que la Cour suprême du Canada ait déjà accepté cette critique en admettant des déclarations antérieures incompatibles au titre de l'exception fondée sur des principes à la règle du ouï-dire, ces déclarations restent assujetties à une présomption d'exclusion qui ne peut être réfutée que par un voir-dire en tenant compte de plusieurs facteurs doctrinaux. Les auteurs plaident pour l'abandon de cette présomption en raison des deux observations suivantes. Premièrement, beaucoup de provinces et de territoires de common law se sont défaits de la règle traditionnelle et ont permis l'admission des déclarations

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antérieures incompatibles, à tout le moins selon une présomption d'admissibilité. Deuxièmement, les analyses statistiques et qualitatives effectuées des cas signalés au Canada indiquent que ces déclarations sont admises beaucoup plus souvent qu'elles sont rejetées, surtout lorsqu'il est réellement possible de contre-interroger le témoin. Au vu de ces évolutions, il serait plus que temps pour le Canada de rendre les déclarations antérieures incompatibles admissibles par présomption sans recours à l'exception de ouï-dire. Cette présomption ne serait réfutable que lorsqu'il est impossible de mener un contre-interrogatoire solide.

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1. Introduction

Every day in Canadian courtrooms, witnesses take the stand and provide a version of events radically different from what they first told the party who called them to testify. While this can occur in any type of litigation, it is most common with witnesses called by the Crown in criminal prosecutions. Complainants in domestic abuse cases, for example, commonly provide horrifying details of violence to police immediately after an event but change their story when it comes time to testify in court. "I fell", they might say. Or "I started the fight", or "there was no fight; I only went to the police because I felt betrayed, upset, or stressed out". Similarly, inconsistent stories are often told in other types of cases by prosecution witnesses affiliated with the accused.

What happens next often depends on whether the Crown attorneys who called these witnesses believe that a reasonable prospect of conviction still exists. If they decide to proceed, the most common response is to have the witnesses declared adverse, followed by questioning on their previously recorded statements to impugn their credibility, and then applications to admit the statements as exceptions to the hearsay rule. As previous inconsistent statements are presumptively inadmissible for their truth, this latter step is always accompanied by a *voir dire*. The parties will then argue about the quality of the recording, the importance of it being taken under oath, and whether it meets the standard of threshold reliability required for admission under the "principled" hearsay exception. After going through these motions, the court will most often admit the statement, with the witness subsequently being cross-examined by the defence.

This well-known procedure stems from the Supreme Court of Canada's 1993 decision to classify all out-of-court statements adduced for the truth of their contents as hearsay, even when the witness is present and available to testify.[2] Sensible as this decision might have seemed at the time, it is questionable whether it serves any purpose today other than to clutter busy courtrooms with superfluous applications. Treating prior inconsistent statements as presumptively inadmissible, in our view, is not justified as a matter of principle. As evidence scholars have argued for over a century, the hearsay rule's most important function is to mitigate the threat to adjudicative accuracy arising from the inability to cross-examine a live and present declarant. In the scenario described above, this cross-examination is fully available.

The present Canadian approach to the substantive admissibility of prior inconsistent statements is ripe for revision in light of two developments outlined in this article. First, legislative reforms in many common law jurisdictions have altered the definition of hearsay to exclude most (if not all) out-of-court statements made by a testifying witness, thereby making them presumptively admissible. Second, a comprehensive statistical analysis of reported Canadian decisions since 1993 reveals that such statements are admitted far more often than they are excluded, especially when there is a meaningful opportunity to cross-examine the witness. These developments suggest that it is past time for Canada to make prior inconsistent statements presumptively admissible as non-

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2 *R v B (KG)*, 1993 CanLII 116 (SCC) [*KGB*]. As discussed in Part 2 below, the origin of this classification predates this decision. Nonetheless, faced with an opportunity to declare prior inconsistent statements non-hearsay or presumptively admissible, the Court in *KGB* balked, reinforcing the historical classification, albeit with a newfound flexibility to admit in specified circumstances.

hearsay. This presumption would be rebutted only when meaningful cross-examination is impossible.

The remainder of this article proceeds as follows. In Part 2, we review the development of the current Canadian position, which subjects prior inconsistent statements to a presumption of exclusion, rebuttable by establishing "threshold" reliability based on the statement's inherent trustworthiness and its ability to be tested at trial. Part 3 examines the law in comparable jurisdictions, including those that have made prior inconsistent hearsay presumptively admissible. In Part 4, we examine the findings from our statistical survey of Canadian jurisprudence. While this data reveals a strong preference for admission when the witness can be meaningfully cross-examined, it also shows a lingering reluctance to admit inherently unreliable statements despite such cross-examination. Part 5 critiques this reluctance, arguing that principle, policy, and doctrine support the admission of dubiously reliable statements that can be tested through cross-examination. In our view, such statements are not truly hearsay, or at least not the type of hearsay that the rule was designed to address. We accordingly propose that the current common law rule be altered to make prior inconsistent statements presumptively admissible for their truth, subject to exclusion where there is no functional ability to cross-examine and minimal inherent reliability. This change, in our view, would improve both adjudicative accuracy and efficiency. Part 6 concludes.

2. Canadian Law

A) Before *KGB*

Before the Supreme Court's decision in *KGB*,[3] Canadian courts interpreted the common law hearsay rule as prohibiting the admission of witnesses' prior inconsistent statements for the truth of their contents.[4] Such statements were (and still are) generally admissible to impeach their credibility, provided the party calling the witness follows the applicable procedures.[5] But previous statements inconsistent with a witness's testimony, which would rarely have been made under oath and even more

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3 *Ibid.*

4 *Ibid* at 755–64; *McInroy et al v The Queen*, 1978 CanLII 175 (SCC) [*McInroy*] at 614–20, Estey J, concurring; *Deacon v The King*, 1947 CanLII 38 (SCC) [*Deacon*] at 534, Kerwin J, 537–38, Rand J.

5 See e.g., *Canada Evidence Act*, RSC 1985, c C-5, ss 9 (impeaching the credit of a party's own witness); 10–11 (cross-examination of opposing party's witness on previous statements).

rarely subject to contemporaneous cross-examination, were considered too unreliable to be considered by the trier of fact in deciding liability.[6]

This approach had long been subject to trenchant criticism.[7] Many academic commentators,[8] law reform bodies,[9] and judges[10] argued that prior inconsistent statements should be admissible for their truth in at least some circumstances. The critique had two main components: first, that cross-examining witnesses on their prior statements at trial gives triers of fact an adequate basis to assess the statements' reliability;[11] and

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6 See *Deacon*, *supra* note 4 at 537–38, Rand J. See also Peter Sankoff, *The Law of Witnesses and Evidence in Canada*, vol 2, looseleaf (Toronto: Thomson Reuters, 2019), § 14.4(k). The rule was (and still is) subject to the admissions exception to the hearsay rule, i.e., any statement made by a party (including a party witness's prior inconsistent statement) is admissible for its truth. See *R v Mannion*, 1986 CanLII 31 (SCC) at 278; *KGB*, *supra* note 2 at 762.

7 See generally Bruce P Archibald, "Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All" (1999), 25 Queen's LJ 1 at 3–4.

8 See John Henry Wigmore, *Evidence in Trials at Common Law*, vol 3A (revised by James H Chadbourn) (Boston and Toronto: Little, Brown and Company, 1970), §1018(b); Edmund M Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177 at 193 at 192–93; Lee Stuesser, "Admitting Prior Inconsistent Statements for Their Truth" (1992) 71 Can Bar Rev 48 at 53–62; Charles T McCormick, "The Turncoat Witness: Previous Statements As Substantive Evidence" (1946–47) 25 Texas L Rev 573; John W Strong, ed, *McCormick on Evidence*, 4th ed by Kennet S Brown *et al* (St. Paul: West, 1979) vol 2 at 117–20.

9 See e.g., Canada, Law Reform Commission, *Report on Evidence* (Ottawa: The Commission, 1975), Draft Evidence Code, s 28; Canada, Uniform Law conference, *Report of the Federal/Provincial Task Force on the Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 315–16; New South Wales, Law Reform Commission, LRC 29, *Report on the Rule Against Hearsay* (1978) at 34–35; American Law Institute, *Model Code of Evidence* (1942), r 503; United Kingdom, Law Reform Committee, *Thirteenth Report (Hearsay Evidence in Civil Proceedings)* (London: Her Majesty's Stationary Office, 1968) at para 37.

10 See e.g., *McInroy*, *supra* note 4 at 614–20, Estey J, concurring (statements admissible for credibility under s. 9(2) of the *Canada Evidence Act* also admissible for their truth); *Di Carlo v United States*, 6 F2d 364 at 368 (2d Cir, 1925), certiorari denied, 268 U.S. 706, 45 S. Ct. 640 (1925) [*Di Carlo*] ("There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court."); *United States v De Sisto*, 329 F2d 929 at 933 (2d Cir, 1964), certiorari denied, 377 US 979 (1964) [*De Sisto*] ("The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as "pious fraud,' "artificial,' "basically misguided,' "mere verbal ritual,' and an anachronism "that still impede(s) our pursuit of the truth.'") [internal citations omitted].

11 See e.g., Wigmore, *supra* note 8 at §1018(b) (rationale for excluding hearsay does not apply to prior inconsistent statements because there is "ample opportunity to test him as to the basis for his former statement"); *Di Carlo*, *supra* note 10 (noting that the witness "is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other

second, that it was unrealistic to expect triers of fact to consider such statements only in assessing credibility and not in determining liability.[12]

B) The Supreme Court's Decision in *KGB*

In *KGB*, the Supreme Court of Canada accepted much of this critique and decided that a witness's prior inconsistent statements could sometimes be admitted under its newly-developed "principled" hearsay exception.[13] This exception renders hearsay evidence admissible when it is both "reasonably necessary"[14] and sufficiently reliable.[15] However, in his decision for the majority in *KGB*, Chief Justice Lamer concluded that these

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times"); Strong, *supra* note 8 at 118 ("The principal reliance for achieving credibility is no doubt cross-examination …."); Morgan, *supra* note 8 at 196 (if a witness "concedes that he made the statement but now swears that it wasn't true, the experience in human affairs which the average trier brings to a controversy will enable him to decide which story represents the truth in the light of all the facts, such as the demeanor of the witness, the matter brought out on his direct and cross-examination, and the testimony of others"); Stuesser, *supra* note 8 at 58 ("Cross-examination cannot prevent perjury but is remains our most effective trial means to detect deceit.").

12 See e.g. *McInroy*, *supra* note 4 at 616–17, Estey J, concurring (finding it "anomalous" that the trier of fact may "make use of the prior inconsistent statement only in determining whether to believe the witness's evidence in court" given that it may then "find that the testimony of the witness given in court is not credible and none of his statements will then be applied in the determination of the truth"); *De Sisto*, *supra* note 10 ("to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable"); Morgan, *supra* note 8 at 193 (describing the idea that juries will limit their use of prior inconsistent statements to assessing credibility as a "pious fraud"); Stuesser, *supra* note 8 at 57 ("To say to a juror, who has found a witness to be totally discredited by a prior inconsistent statement, that the statement only goes to credibility and cannot be used for its truth brings our common sense notion of justice into disrepute.").

13 *KGB*, *supra* note 2 at 765–74. See also *R v U (FJ)*, 1995 CanLII 74 (SCC) [*UFJ*] at paras 28–30, 37–39. The general principled exception to the hearsay rule was first outlined in *R v Khan*, 1990 CanLII 77 (SCC) [*Khan*] and *R v Smith*, 1992 CanLII 79 (SCC) [*Smith*].

14 *Khan*, *supra* note 13 at 546. See also *Smith*, *supra* note 13 at 933–34.

15 *Khan, supra* note 13 at 547. See also *Smith*, *supra* note 13 at 933. A hearsay statement meeting the standard of threshold reliability under the principled approach may still be excluded by virtue of the operation of other evidentiary rules (including the hearsay rule itself in the context of an out-of-court statement relaying another out-of-court statement, i.e., "double" hearsay). In other words, as Lamer CJC stated in *KGB*, *supra* note 2 at 784 "if the witness could not have made the statement at trial … for whatever reason, it could not be made admissible through the back door … under the reformed prior inconsistent statement rule". See also *R v Couture*, 2007 SCC 28 (CanLII) [*Couture*] (spousal incompetence); *R v Hoffman*, 2021 ONCA 781 (double hearsay); *R v Moo*, 2009 ONCA 645 (character evidence); *R v M(M)*, 2001 CanLII 24102 (ONCA) (residual exclusionary discretion).

prerequisites for admission had to be "adapted and refined" in the context of prior inconsistent statements, "given the particular problems raised by the nature of such statements."[16]

These problems related exclusively to the principled exception's "reliability" criterion. Necessity, the Chief Justice noted, is automatically satisfied for all prior inconsistent statements. While the declarant is technically available to testify, the inconsistency of the prior statement with their present testimony makes the former effectively unavailable as evidence at trial.[17] This "recanting" of the prior statement is accordingly always sufficient to establish necessity.[18]

Reliability posed greater difficulty. "The reliability concern," the Chief Justice wrote, "is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered."[19] As a consequence, "*additional* indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence."[20] There must, in other words, be adequate "substitutes" for the traditional safeguards of the oath, presence, and contemporaneous cross-examination.[21]

For the first safeguard, the Chief Justice suggested that police statements should be made: (*i*) "under oath, solemn affirmation, or solemn declaration; and (*ii*) following the administration of an explicit warning to the witness of his or her amenability to prosecution if it is discovered that he or she has lied."[22] But neither condition was mandatory. On occasion, [o]ther circumstances "may serve to impress upon the witness

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16 *KGB*, *supra* note 2 at 783.

17 *Ibid* at 796–99.

18 *Ibid* at 799. See also *UFJ*, *supra* note 13 at paras 34, 36.

19 *Ibid* at 786–87.

20 *Ibid* at 787 [emphasis added].

21 *Ibid*.

22 *Ibid* at 791. Justice Lamer went on to suggest that oaths and their analogues could readily be administered by justices of peace present at police stations or by an "Officer in Charge" with the status of a commissioner for oaths: *ibid* at 791–92. It is not clear, however, that either of these alternatives is practical. In his concurring reasons, Justice Cory asserted that neither oaths nor warnings should be conditions for admissibility; it should be sufficient that "the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement": *ibid* at 812–21, 828, Cory J.

the importance of telling the truth, and in so doing provide a high degree of reliability to the statement."[23]

The second safeguard, presence, is more easily substituted. Videorecording, Chief Justice Lamer observed, not only provides an accurate record but also gives the trier of fact "access to the full range of non-verbal indicia of credibility."[24] "In a very real sense," he concluded, "the evidence ceases to be hearsay in this important respect since the hearsay declarant is brought before the trier of fact."[25] As with oaths and warnings, in "exceptional circumstances," other substitutes for presence, such as "the testimony of an independent third party who observes the making of the statement in its entirety," could provide the "requisite reliability."[26]

Cross-examination of the declarant at trial will generally serve as a sufficient proxy for the third safeguard: contemporaneous cross-examination. Though the lack of contemporaneous cross-examination is the "most important of the hearsay dangers" associated with prior inconsistent statements, it is also "the most easily remedied by the opportunity to cross-examine at trial."[27] This assumes, however, that the cross-examination at trial is "full and effective."[28] This implies that the cross-examination will elicit testimony allowing the trier of fact to "weigh both statements in light of the witness's explanation of the change."[29] As Chief Justice Lamer later pointed out in *UFJ*, the situation is different "where a witness does not recall making an earlier statement, or refuses to answer questions."[30] Such circumstances "may impede the jury's ability to assess the ultimate reliability of the statement."[31]

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23 *Ibid* at 792.

24 *Ibid* at 793.

25 *Ibid.*

26 *Ibid* at 794. In his concurring reasons, Justice Cory argued that given the trier of fact's ability to observe the declarant's demeanour at trial, the lack of a video recording of the prior statement should not be fatal; the evidence should be admissible when there is a "complete and comprehensive record" of the statement "together with satisfactory evidence of the circumstances of the interview and the demeanour of the witness": *ibid* at 825, Cory J.

27 *Ibid.*

28 *Ibid*, quoting *California v Green*, 399 US 149 at 159 (1970).

29 *KGB*, *supra* note 2 at 799. See also *UFJ*, *supra* note 13 at para 46 ("If the witness provides an explanation for changing his or her story, the trier of fact will be able to assess both versions of the story, as well as the explanation.").

30 *UFJ*, *supra* note 13 at para 46.

31 *Ibid.*

Summarizing the above principles in *KGB*, the Chief Justice concluded that the reliability criterion will be satisfied if:

(i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation,

(ii) the statement is videotaped in its entirety, and

(iii) the opposing party … has a full opportunity to cross-examine the witness respecting the statement ….

"Alternatively," he continued, "other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires."[32] Lastly, Chief Justice Lamer held that even where the prerequisites (or sufficient substitutes) have been met, the trial judge retains a discretion to exclude the statement if it was "the product of coercion in any form" or its admission would otherwise "bring the administration of justice into disrepute."[33]

C) After *KGB*

Soon after its decision in *KGB*, the Supreme Court signalled that the reliability criterion would be interpreted more flexibly (and more in line with the general principled exception set out in *Khan* and *Smith*) than a plain reading of *KGB* might suggest. In *UFJ*, it found that a recanting complainant's police statement alleging sexual abuse was admissible even though it was neither video recorded nor made under oath or after warnings of the penal consequences of lying to police.[34] "Cross-examination alone," Chief Justice Lamer wrote for the majority, "goes a substantial part of the way to ensuring that the reliability of a prior inconsistent statement can be adequately assessed by the trier of fact."[35] In addition, the complainant's prior statement in *UFJ* bore a "striking" similarity to the accused's own (later recanted) confession, such that "it is unlikely that two people would

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32 *Ibid* at 795–96. See also *R v Clarke*, 1994 CanLII 1314 (ONCA) (prior inconsistent statement admitted in form of preliminary inquiry testimony).

33 *UFJ*, *supra* note 13 at 802 [internal citation omitted]. The Chief Justice noted that while the discretion to exclude statements induced by coercion was analogous to the confessions rule, for prior inconsistent statements, the trial judge need only be satisfied of voluntariness on a balance of probabilities (except for statements of an accused made to a person in authority): *ibid* at 801–02.

34 *Ibid*.

35 *Ibid* at para 39.

have independently fabricated them."[36] As there was no indication that this similarity could have arisen from collusion or contamination, the only reasonable inference was that both statements were true.[37]

Because the result in *UFJ* turned largely on the striking similarity between the declarant's statement and that of the accused, the Chief Justice concluded that it was not necessary to decide "if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission."[38] But foreshadowing future developments, he took note of the Court's "principled and flexible" approach to hearsay and suggested that "other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that *cross-examination alone* provides significant indications of reliability."[39]

In *R v Khelawon*, the Court signalled even more strongly that *KGB*'s "substitutes" for the traditional reliability safeguards are not mandatory.[40] In every principled exception case, necessary hearsay can be admitted if it (*i*) has sufficient inherent reliability (i.e., there are good reasons to believe it is true) or (*ii*) can be adequately tested.[41] In subsequent decisions the Court labeled these categories "substantive" and "procedural" reliability, respectively.[42] Threshold reliability may also be reached by combining sufficient degrees of both types.[43] Factors relating to substantive reliability

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36 *Ibid* at paras 41, 51.

37 *Ibid* at paras 40–45, 53–54. Chief Justice Lamer noted, however, that while admissibility requires that trial judges must be "convinced on a balance of probabilities that the statement is likely to be *reliable*," they "need not be satisfied that the prior statement is *true* and should be believed in preference to the witness's current testimony": *ibid* at para 50 [emphasis added]. As discussed below, potentially untrustworthy hearsay may be admitted if can adequately tested, especially through cross-examination at trial.

38 *Ibid* at para 45.

39 *Ibid* [emphasis added].

40 2006 SCC 57 at para 45 [*Khelawon*] ("neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria").

41 *Ibid* at paras 49, 61–72.

42 See *R v Bradshaw*, 2017 SCC 35 [*Bradshaw*] at paras 27–32, Karakatsanis J and paras 107–13, Moldaver J, dissenting.

43 *Ibid* at para 32, Karakatsanis J and paras 111–12, Moldaver J, dissenting. Curiously, Karakatsanis J stated for the majority in *Bradshaw* that neither substantive nor procedural reliability would "on its own" have justified admission in *FJU*. This is not accurate. While Lamer CJ concluded in *FJU* that threshold reliability was met after considering *both* the prior statement's "striking similarity" to the accused's confession (substantive reliability) the full opportunity to cross-examine the declarant (procedural reliability), he did not find that the latter could not have justified admission on its own. As noted in the text above, he stated only that it was not "necessary in this case to decide

include the circumstances in which the statement was made[44] and the existence and strength of any corroborating evidence.[45] Factors relating to procedural reliability include those identified in *KGB*, i.e., whether the statement was recorded, made under oath or after warnings were issued, and subject to cross-examination (either contemporaneously or at trial).[46]

Though *R v Khelawon* did not involve prior inconsistent statements (the declarants were unavailable to testify), Justice Charron noted for the Court that *KGB* and *UFJ* merely "provide guidance—not fixed categories—on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility."[47] She also stressed that cross-examining the declarant at trial "goes a long way to satisfying the requirement for adequate substitutes," describing this safeguard as the "most important contextual factor" justifying admission in *KGB*.[48]

Applying this approach eighteen months later in *R v Devine*, Justice Charron found for a unanimous Court that the ability to fully cross-examine a recanting witness (who had provided an explanation for why her testimony differed from her prior, video-recorded police statement) was sufficient *on its own* to justify admission.[49] Though other indicia of reliability were asserted, Justice Charron found that cross-examining the witness provided a "sufficient basis for assessing the statement's truth and accuracy.[50]

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if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statement": *UFJ*, *supra* note 13 at paras 45, 53.

44 Such factors include whether the statement was made spontaneously, naturally, and without suggestion; there was a motive to fabricate; it was made contemporaneously with the events; the declarant was cognitively impaired; the statement was against the declarant's interests; and the declarant was likely too young to have had any other source of knowledge of the facts alleged. See David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 164.

45 According to the majority in *Bradshaw*, corroborating evidence may only be considered in establishing threshold reliability "the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement": *Bradshaw*, *supra* note 42 at paras 4, 44. See also *R v McMorris*, 2020 ONCA 844 at paras 32–34.

46 *Khelawon*, *supra* note 40 at para 79; *R v Hawkins*, 1996 CanLII 154 (SCC*)* at paras 76–79, Lamer CJ and Iacobucci J.

47 *Khelawon*, *supra* note 40 at para 79.

48 *Khelawon, supra* note 40 at paras 66, 76. See also *Couture*, *supra* note 15 at paras 92, 95; *Bradshaw*, *supra* note 42 at para 126, Moldaver J dissenting.

49 2008 SCC 36 at paras 28–29.

50 *Ibid* at paras 5, 28–29.

In its subsequent decision in *R v Youvarajah*, in contrast, the Court found that effective cross-examination was impeded by the witness's claimed memory lapses and assertion of lawyer-client privilege.[51] The Crown accordingly failed to "elicit an explanation" for its witness's "about-face from the assertions that tied the appellant to the murder."[52] Given that the prior statement was not video-recorded, made spontaneously or under oath, or uttered in the declarant's own words, Justice Karakatsanis concluded for the majority that it lacked sufficient procedural reliability.[53] As it was also lacking sufficient substantive trustworthiness, she concluded, it was not safe to admit.[54] Despite these frailties, however, she noted that "a full and complete opportunity to cross-examine would have provided a genuine basis on which to assess the reliability" of the prior statement.[55]

Prior inconsistent statements are therefore admissible for their truth where the party adducing them establishes a "threshold" degree of reliability, whether substantive, procedural, or a combination of both. While this is a flexible standard incorporating many different factors, meaningful cross-examination strongly favours admission. The Supreme Court has not gone so far, however, as to decree a bright-line rule mandating admission in such circumstances. In the next two sections, we examine whether adopting such a rule would be advisable in light of developments in comparable jurisdictions and detailed empirical data on the application of the present rule in Canada.

3. Prior Inconsistent Statements in Comparable Jurisdictions

As discussed, at common law, the hearsay rule strictly prohibited the admission of prior inconsistent statements for their truth. Some common law jurisdictions have retained or codified this rule with little, if any, modification. In Scotland, for example, prior inconsistent statements cannot serve as "evidence of fact" in criminal trials.[56] The common law

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51 2013 SCC 41 at paras 41–54.

52 *Ibid* at para 49.

53 *Ibid* at paras 49–54.

54 *Ibid* at paras 55–76. In dissent, Justice Wagner (as he then was) asserted that both the scope of cross-examination and inherent reliability of the statement were greater than the majority suggested: *ibid* at paras 118–52.

55 *Ibid* at para 71.

56 *Macdonald v HM Advocate*, [2020] HCJAC 244 at para 44; *Patrick O'Neill Appellant against HM Advocate Respondent*, [2016] HCJAC 86 at para 17; *Anderson v HM Advocate*, [2017] HCJAC 33 at para 19; *Walker v HM Advocate*, [2013] HCJAC 83 at para 13; *A v HM Advocate*, [2012] HCJAC 29 at paras 2–3. See also James Chalmers, *Law Essentials: Evidence*, 3rd ed (Dundee, UK: Dundee University Press, 2012) at 40, 79–80.

rule also remains unchanged in Ireland for civil proceedings,[57] and in South Australia[58] and Western Australia[59] for both civil and criminal cases.

Like Canada, however, many other jurisdictions have liberalized the rule, whether by statute or through the common law. There are two general approaches. The first presumes inadmissibility but gives courts the power to admit under limited circumstances. Under the second, prior inconsistent statements are generally admissible, subject to limited exceptions. We examine each in turn below.

A) Presumptive exclusion

United States (federal proceedings): Prior inconsistent statements are generally inadmissible for the truth of their contents under the *Federal Rules of Evidence*.[60] The main avenue for substantive admission is through Rule 801(d)(1)(A).[61] This exception states that a prior inconsistent statement[62] is not hearsay if the declarant testifies and is subject to cross-examination, the statement is inconsistent with their testimony, and the prior statement was "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."[63] Courts have generally declined to

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57 *O'Brien v Derwin & Anor*, [2009] IEHC 2 at para 22; Law Reform Commission, *Consolidation and Reform of Aspects of the Law of Evidence* (Dublin: Law Reform Commission, 2016) at 98.

58 See *R v Quist*, [2017] SASCFC 37 at paras 164–66.

59 See *O'Meara v State of Western Australia*, [2013] WASCA 228 at para 32.

60 David F Binder, *Hearsay Handbook*, 4th ed (St. Paul: Thomson Reuters, 2001) (loose-leaf updated 2020) at § 39:1.

61 *Federal Rules of Evidence*, 28 USC § 801(d)(1)(A) (2020).

62 According to most circuit courts, a declarant's claim to have forgotten the facts on which they based a prior statement does not amount to a prior inconsistent statement unless this claim is deceptive. See *United States v Russell*, 712 F (2d) 1256 at 1258 (8th Cir 1983). See also *United States v Dean*, 823 F (3d) 422 at 427 (8th Cir 2016); *United States v Cisneros-Gutierrez*, 517 F (3d) 751 at 757 (5th Cir 2008); *United States v Mornan*, 413 F (3d) 372 at 379 (3rd Cir 2005); *United States v Butterworth*, 511 F (3d) 71 at 75 (1st Cir 2007); *United States v Friedman*, 2018 WL 3456341 at 12 (ND Ill), aff'd 971 F (3d) 700 (7th Cir 2020); *United States v DiCaro*, 772 F (2d) 1314 at 1321–22 (7th Cir 1985); *United States v Palumbo*, 639 F (2d) 123 at 128, n 6 (3rd Cir 1981); *United States v Gerard*, 507 F Appx 218 at 222 (3rd Cir 2012); *United States v Cisneros-Gutierrez*, 517 F (3d) 751 at 757–58 (5th Cir 2008); *United States v Insana*, 423 F (2d) 1165 at 1170 (2nd Cir 1970); *United States v Knox*, 124 F (3d) 1360 at 1362 (10th Cir 1997). See also Madeline Smedley, "Hearsay in the Modern Age: Balancing Practicality and Reliability by Amending Federal Rule of Evidence 801(d)(1)(A)" (2019) 87:1 Geo Wash L Rev 207 at 214.

63 *Federal Rules of Evidence*, *supra* note 61. If these conditions are met, the statement will be admissible even if cross-examination at trial is impeded by the witness's claimed loss or memory or non-responsiveness to questioning. See *United States v Owens*, 484 US 554 at 554 (1988); *United States v Torrez-Ortega*, 184 F (3d) 1128 at 1134 (10th Cir

classify interviews by investigating officials,[64] such as sworn statements to police investigators,[65] as falling within the scope of "other proceedings." If a prior inconsistent statement is not found admissible under Rule 801(d)(1)(A), it may still be admissible using the residual exception to the hearsay rule (Rule 807).[66] This allows courts to admit hearsay if it is sufficiently necessary and reliable. However, most courts have held that this exception should be used only in exceptional circumstances.[67]

The Republic of Ireland: The Irish approach to prior inconsistent statements for criminal proceedings is set out in the *Criminal Justice Act 2006*.[68] Inspired in part by the Supreme Court of Canada's decision in *KGB*,[69] section 16 gives courts the discretion to admit when there is sufficient proof that the statement was made voluntarily, that it was reliable, and that the declarant understood the requirement to tell the truth.[70] As in Canada, reliability turns on whether the trier of fact can sufficiently assess the accuracy and truthfulness of the statement, not whether it is true.[71] Factors to be considered include the presence of an oath or affirmation, the existence of a video recording, and a witness' explanations for disavowing their prior statements.[72] The statement must

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1999). See also generally Michael H Graham, *Handbook of Federal Evidence*, 9th ed (St. Paul: Thomson Reuters, 2020) (loose-leaf updated 2020) at 561.

64 *US v Livingston*, 661 F (2d) 239 at 242–243 (DC Cir 1981).

65 *US v Ragghianti*, 560 F (2d) 1376 at 1380 (9th Cir 1977).

66 *Federal Rules of Evidence*, 28 USC § 807 (2020).

67 *United States v Bruguier*, 961 F (3d) 1031 at 1033 (8th Cir 2020); *United States v Wilson*, 281 F Appx 96 at 99 (3d Cir 2008); *United States v Jackson*, 334 F Appx 900 at 910 (10th Cir 2009); *Bratt v Genovese*, 782 F Appx 959 at 965 (11th Cir 2019); *United States v Wright*, 363 F (3d) 237 at 245 (3d Cir 2004).

68 *Criminal Justice Act 2006*, s 16.

69 See Niamh O'Sullivan, "The Admissibility of Previous Witness Statements" (2009) 12:1 Trinity College L Rev 63 at 67.

70 *Criminal Justice Act*, *supra* note 68 at s 16(2). Under s. 16(1), the witness who made the statement must be available for cross-examination, but refuse to give evidence, deny having made the statement, or give evidence "materially inconsistent" with the prior statement. A claimed loss of memory by the declarant amounts to such an inconsistency: see *DPP v Brian Rattigan*, [2013] IECCA 13 at para 10; *DPP v Collopy*, [2016] IECA 149 at paras 9, 15; *DPP v Cahoon*, [2017] IECA 307 [*Cahoon*] at paras 28–29. Each of these elements must be proven beyond a reasonable doubt: *DPP v McCarthy*, [2018] IECA 163 [*McCarthy*] at para 19.

71 See *DPP v Michael O'Brien*, [2010] IECCA 103 [*MOB*]; *DPP v Campion*, [2015] IECA 274 [*Campion*] at para 34; *Cahoon*, *supra* note 70 at paras 46–47; *McCarthy*, *supra* note 70 at paras 13, 18; *DPP v Conroy*, [2019] IECA 313 at para 12; *DPP v Gruchacz*, [2019] IESC 45 at para 20 [*Gruchacz*]; *DPP v Walsh*, [2020] IECA 358 [*Walsh*] at paras 100, 104–05.

72 *Criminal Justice Act 2006*, s 16(3). Courts have identified additional relevant factors, including the existence of any corroborating evidence (see *MOB*, *supra* note 71;

be excluded, however, if admission would be unfair, unnecessary, or otherwise fail to promote the interests of justice.[73]

South Africa: There are two mechanisms for admitting prior inconsistent statements for their truth in South Africa. The primary avenue is a statutory exception to the hearsay rule that permits admission "in the interests of justice."[74] Courts must consider several factors, including the nature of the proceedings and evidence, the purpose for which the evidence is tendered, its probative value, the reason why the evidence cannot be provided via direct testimony, and any prejudice to the opposing party.[75] Unlike in Canada, South African courts have placed little weight on the value of being able to cross-examine the recanting witness.[76] In addition to this statutory regime, some courts have adopted the Canadian principled approach as an alternative, common law basis for admission.[77] There is no consensus, however, on how this approach interacts with the statutory exception.[78]

B) Presumptive admission

The United Kingdom: With the exception of Scotland (discussed above), the Parliament of the United Kingdom has made prior inconsistent statements substantively admissible in criminal proceedings if they would be admissible as oral testimony, the declarant testifies at trial, and

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DPP v O'Brien & anor, [2015] IECA 312 at para 83; *DPP v McCarthy*, *supra* note 70 at para 18; *Walsh*, *supra* note 71 at paras 105, 107, 111); the solemnity of the occasion (see *Campion*, *supra* note 71 at para 3); and the availability of penalties for perjury (see *MOB*, *supra* note 71).

73 *Criminal Justice Act*, *supra* note 68 at s 16(4). Necessity is established when the prior statement is "essential in a material and substantive respect" to correctly deciding the case at hand as opposed to being merely supportive or desirable evidence: *DPP v Jason Murphy*, [2013] IECCA 1 at para 28; *DPP v Murphy*, [2017] IECA 6 at para 66; *Gruchacz*, *supra* note 71 at para 22.

74 *Law of Evidence Amendment Act 45 of 1988*, s 3(1). See also *Rathumbu v S*, [2012] ZASCA 51 [*Rathumbu*] at paras 9–11; *Ramatlotlo and Others v S*, [2019] ZAFSHC 11 [*Ramatlotlo*] at paras 9–10; *S v Sibanda and Others*, [2017] ZAECELLC 20 at para 386.

75 *Law of Evidence Amendment Act*, *supra* note 74 at 3(1)(c).

76 See *S v Ndhlovu and Others*, [2002] ZASCA 70 at para 51 (stating that the entitlement to cross-examine a recanting witness is "almost entirely illusory"). See also *Rathumbu*, *supra* note 74; *Montgomery v S*, [2006] ZAGPHC 52.

77 *Mathonsi v S*, [2011] ZAKZPHC 33 at paras 28–33.

78 See e.g., *Zulu v S*, [2016] ZAKZPHC 95 at para 48; *Ramatlotlo*, *supra* note 74 at paras 7, 10; *Mabaso v S*, [2021] ZASCA 98 at para 22; *Nigel v S*, [2015] ZAWCHC 40. See also Adrian Bellengere and Shelley Walker, "When the Truth Lies Elsewhere: A Comment on the Admissibility of Prior Inconsistent Statements in Light of *S v Mathonsi* 2012 (1) SACR 335 (KZP) and *S v Rathumbu* 2012 (2) SACR 219 (SCA)" (2013) 26:2 S Afr J Crim Just 175 at 183–85.

the declarant is notified of and given an opportunity to comment on the alleged inconsistent statement.[79] A hearsay statement may be excluded, however, if the case for excluding it, "taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence."[80] The United Kingdom has gone even further in the context of civil proceedings, making all hearsay admissible in each jurisdiction,[81] potentially subject to a general exclusionary discretion.[82]

Australia (Uniform Evidence Act jurisdictions): Prior inconsistent statements are also generally admissible under the Australian statutes based on the Uniform Evidence Act (the Commonwealth, New South Wales, Victoria, the Australian Capital Territory, the Northern Territory,

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79 *Criminal Justice Act 2003*, c 44, s 119(1). If hearsay evidence from individuals who do not testify at trial is admitted, any inconsistent hearsay statements are also admissible, provided they would be admissible as oral testimony: *ibid*, s 119(2). The same regime was made applicable to Northern Ireland by virtue of *The Criminal Justice (Evidence) (Northern Ireland) Order 2004*, art 23.

The courts in the UK have not settled the question of whether the prior inconsistent statement rule is triggered when a witness refuses to answer questions or claims an inability to remember a prior statement. See e.g., *Jake Muldoon v R*, [2021] EWCA Crim 381 at paras 37–42 (rule not triggered by claimed loss of memory); *R v Kieran Welsh and Others*, [2013] EWCA Crim 409 at paras 14–18 (rule triggered by claimed loss of memory from hostile witness); *R v B & Anor*, [2008] EWCA Crim 365 at para 14 ("because the appellant stated that he could not remember the events which he had talked about in interview, the contents of the interview also constituted previous inconsistent statements within the meaning of section 119 of the 2003 Act and were accordingly admissible"). See also generally Diane Birch and Michael Hirst, "Interpreting the New Concept of Hearsay" (2010) 69:1 Cambridge LJ 72 at 92.

80 See *Criminal Justice Act 2003*, *supra* note 79 at s 126; *The Criminal Justice (Evidence) (Northern Ireland) Order 2004*, *supra* note 79 at art 30 (same statutory exclusionary discretion as in England and Wales). As in Canada, courts in the UK also have a general discretion to exclude otherwise admissible evidence when its admission would compromise trial fairness. See *Police and Criminal Evidence Act 1984*, c 44, s 78 (evidence adduced by prosecution); *Police and Criminal Evidence (Northern Ireland) Order 1989*, (same); *R v Casey Morgan*, [2020] NICA 48 at para 43 (noting discretionary exclusionary power at common law).

81 See *Civil Evidence Act 1995*, c 38, ss 1(1), 5(1), 6(3), 6(5) (England and Wales); *Civil Evidence Act (Scotland) 1988*, c 32, s 2; *The Civil Evidence (Northern Ireland) Order 1997*, arts 3(1), 7(1), 7(4). See also generally Jonathan Doak, Claire McGourlay and Mark Thomas, *Evidence: Law and* Context, 5th ed (New York: Routledge, 2018) at 383–84.

82 See e.g., *L v L*, [2007] EWHC 140 at para 114 (QB); *Jones v University of Warwick*, [2003] EWCA Civ 151 at para 28. But see *JA (Afghanistan) v Secretary of State for the Home Department*, [2014] EWCA Civ 450 at para 24 (denying that civil courts can exclude relevant evidence because it is unfair).

and Tasmania).[83] Under section 60, statements admissible for a non-hearsay purpose may also be used to establish the truth of facts asserted in them,[84] even if the declarant lacked personal knowledge of those facts.[85] Prior inconsistent statements admitted to discredit a witness may therefore also be admitted for their truth.[86] The legislation also permits the admission of hearsay statements where the declarant is available to testify and had "personal knowledge of an asserted fact."[87] And as in the United Kingdom, hearsay evidence may still be excluded if its admission would cause undue prejudice or an unfair trial.[88]

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83 *Evidence Act 1995* (Cth), 1995/2; *Evidence Act 1995* (NSW), 1995/25; *Evidence Act 2008* (Vic), 2008/47; *Evidence Act 2011* (ACT), 2011/12; *Evidence (National Uniform Legislation) Act 2011* (NT), 2011/33; *Evidence Act 2001* (Tas), 2001/76. While there are some differences between these statutes, the provisions governing the admissibility of prior inconsistent statements are identical. See generally Roy Donnelly, "Gobbledegook, the Hearsay Rule and Reform of Section 60" (2006) 25:1 U Tasm L Rev 83 at 84; Andrew Ligertwood and Gary Edmond, *Australian Evidence: a Principled Approach to the Common Law and the Uniform Acts*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2010) at vii; JRS Forbes, *Evidence Law in Queensland*, 12th ed (Sydney: Thomson Reuters, 2018) at 654.

84 See e.g., *Evidence Act 1995*, *supra* note 83 at s 60(1) ("The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.").

85 See e.g., *Evidence Act 1995*, *supra* note 83 at s 60(2) ("This section applies whether or not the person who made the representation had personal knowledge of the asserted fact …"). The statutes exempt admissions in criminal proceedings from the scope of this rule: see e.g., *ibid*, s 60(3). As in other common law jurisdictions, however, admissions are generally admissible as a categorical exception to the hearsay rule. See e.g., *ibid*, s 81. See also generally *The Law of Evidence*, supra note 44 at 191–94.

86 Section 43 maintains the common law position that prior inconsistent statements are generally admissible to impeach credibility. See *R v Geoffrey Arthur Hall* (19 December 1996, 28 February 1997), BC9700339 (NSWCA); Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts*, 5th ed (Chatswood, NSW: LexisNexis Butterworths, 2010) at 858; JD Heydon, *Cross on Evidence*, 12th ed (Chatswood, NSW: LexisNexis Butterworths, 2020) at 1434. The Australian Law Reform Commission recommended this change partly in response to "criticism from judges and virtually unintelligible directions to juries" resulting from admitting statements for assessing credibility but not truth: MJ Beazley, "Hearsay and Related Evidence—A New Era?" (1995) 18:1 UNSWLJ 39 at 42.

87 See e.g., *Evidence Act 1995*, *supra* note 83 at ss 62, 64, 66. For criminal proceedings only, the statement must have been made when "the occurrence of the asserted fact was fresh in the memory" of the declarant: *ibid*, ss 66(2–2A). This does not require, however, that the statement be made during or immediately after the event. See Heydon, *supra* note 86 at 1446–47.

88 See e.g., *Evidence Act 1995* (Cth), ss 135–37. The High Court has warned, however, that these "confer no authority to emasculate provisions in the Act to make them conform with common law notions of relevance or admissibility": *Papakosmas v R*, [1999] HCA 37 at para 97.

Queensland: The Evidence Act in the Australian state of Queensland, in contrast, mirrors the United Kingdom approach, admitting prior inconsistent statements if they would have been admissible as oral evidence at trial.[89] It also gives judges a general discretionary power to exclude where admission appears "inexpedient in the interests of justice."[90]

New Zealand: The New Zealand Evidence Act stipulates that the out-of-court statements of "a person who gives evidence and is able to be cross-examined in a proceeding" are not hearsay.[91] But like other evidence, they may be excluded if their prejudicial effect outweighs their probative value.[92] The effectiveness of cross-examination in testing the prior statement is relevant to this calculus but not determinative.[93]

In summary, while comparable jurisdictions display a wide spectrum of approaches to prior inconsistent statements, many have gone much further than Canada in making them admissible for their truth. In the following section, we use statistical analyses of reported Canadian decisions to better gauge the extent to which decision outcomes cohere with the principles outlined in jurisprudence.

4. Statistics

A) Data & Methods

To assess the influence of various factors on the substantive admissibility of prior inconsistent statements, we created an original dataset of all reported trial and appellate decisions between February 26, 1993 (the day after the Supreme Court released *KGB*) and December 31, 2022.[94] This

89 *Evidence Act 1977*, 1977/47, s 101. See also Lee Stuesser, "A Comparison of the Law of Evidence" (2009) 8 JIALawTA 73 at 80; JRS Forbes, *Evidence Law in Queensland*, 12th ed (Sydney: Thomson Reuters, 2018) at 525–26; Heydon, *supra* note 86 at 1426.

90 *Evidence Act 1977,* 1977/47, s 98(1).

91 *Evidence Act 2006*, 2006/69, s 4. See also Richard Mahoney *et al*, *The Evidence Act 2006: Act & Analysis*, 2nd ed (Wellington: Brookers Ltd, 2010) at 24–25. The use of prior inconsistent statements in cross-examination is subject to the usual procedural limitations codified in section 96 of the statute, as well as other common law and statutory rules. See generally Richard Mahoney *et al*, *supra* at 399–400; *Morgan v R*, [2010] NZSC 23 [*Morgan*] at para 36.

92 *Evidence Act 2006, supra* note 91 at s 8.

93 See *Morgan, supra* note 91 at paras 37–42.

94 Trial decisions include those from both provincial courts and the superior trial courts. Appellate decisions include decisions from summary conviction appeal courts, provincial courts of appeal, and the Supreme Court of Canada. Coders assembled cases from the open access Canadian Legal Information Institute (CANLII) database, supplemented by the proprietary Lexis+ Canada and Thomson Reuters Westlaw Edge Canada databases. The dataset is available here. See also generally Mark A Hall and Ronald

yielded 386 trial and 115 appeal decisions. The admission rate at trial was 72.3%, i.e., the statement was admitted in 279/386 decisions.

In 93 of the 115 appeal cases, the prior inconsistent statement was admitted at trial (80.9%).[95] Among these cases, the decision to admit was upheld in 79 (84.9%) and overturned in 14 (15.1%). In the remaining 20 cases where the trial judge ordered exclusion, the appeal court upheld that decision in eleven (55.0%) and reversed in nine (45.0%). In addition, there were two cases where no admissibility determination was made at trial. On appeal, one resulted in exclusion and one in admission. This yields an overall appellate admission rate of 77.4% (89/115).

In the following two sections, we examine correlations between non-doctrinal and doctrinal variables and the decision to admit or exclude the prior inconsistent statement for its truth. The non-doctrinal variables are case type, court level, jurisdiction, jury vs judge-alone, and the party adducing the statement.[96] The doctrinal variables are the threshold reliability factors identified in the jurisprudence reviewed in Part 2.3 above.

B) Non-doctrinal variables

Case type: While we coded for four case types (civil, criminal, family, and regulatory), the overwhelming proportion of both trial (374/386) and appeal (110/115) decisions arose in criminal litigation. Accordingly, the admission rates for criminal cases (71.9% trial; 78.2% appeal) were very similar to the trial and appeal decisions generally. As shown in Tables 1 and 2 below, the sample sizes for non-criminal cases were too small to make any inferences.

F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96 Cal L Rev 63 at 100–16.

95 The greater trial admission rate for cases appealed (80.9%) compared to trials generally (72.3%%) very likely stems from the facts that: (*i*) most cases involve statements adduced by the Crown in criminal cases; and (*ii*) the defence has stronger incentives to appeal than the Crown. See Frank B Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford University Press, 2007) at 134–35; Steven Penney and Moin Yahya, "Section 24(2) in the Trial Courts: An Empirical Analysis of the Legal and Non-legal Determinants of Excluding Unconstitutionally Obtained Evidence in Canada" (2021) 58:3 Osgoode Hall LJ 509 at 535.

96 Further detail on the coding of variables may be found in the *Code Book*, available here.

Table 1: Admission by Case Type, Trial

	Admit	Exclude	Admission Rate
Civil	5	2	71.4%
Criminal	269	105	71.9%
Family	4	0	100%
Regulatory	1	0	100%

Table 2: Admission by Case Type, Appeal

	Admit	Exclude	Admission Rate
Civil	0	2	0%
Criminal	86	24	78.2%
Regulatory	3	0	100%

Court level: In the trial dataset, the admission rate in the superior courts (72.7%) differed little from that in provincial courts (71.6%). The difference was not statistically significant.[97] The vast proportion (103/115 = 89.6%) of appeal cases stemmed from provincial and territorial courts of appeal. The remaining twelve (10.4%) were equally split between summary conviction appeals and Supreme Court of Canada decisions. Not surprisingly, the differences in admission rates between these courts were not statistically significant.[98]

Party adducing: In 357/374 criminal decisions in the trial dataset, it was the prosecution that adduced the statement. While we cannot derive any conclusions about the influence of party status on admissibility from this data, it is notable that a high proportion of all prior inconsistent statement cases involved evidence adduced by the Crown in criminal cases, as in the original *KGB* decision. Isolating these cases reveals an admission rate of 72.5%, which is unsurprisingly extremely close to the overall admission rate.

In 105/115 appeal decisions, it was the prosecution that had adduced the statement at trial.[99] Of the remaining ten, the accused adduced the statement in a criminal case in seven and the defendant in a civil proceeding in three. There was a statistically significant difference in admission rates

97 Superior courts decided for 238 of the 386 trial decisions (61.7%); provincial courts the remaining 148 (38.3%). The p-value (Pearson's Chi-squared) for the difference in admission rates was 0.82. Further details on our statistical methodology may be found in the *Code Book ibid.*

98 The admission rate for court of appeal decisions was 78.6%; for summary conviction appeals 83.3%; and for Supreme Court of Canada 50.0%. The Fisher's Exact Test gave a p-value of 0.2809.

99 This includes three regulatory prosecutions.

as shown in Table 3 below.[100] This suggests that in criminal cases, appellate courts are more likely to admit statements adduced by the prosecution than by the defence.

Table 3: Admission by Party Adducing, Appeal

	Admit	Exclude	Admission Rate
Accused	1	6	14.3%
Crown	87	18	82.9%
Defendant	1	2	33.3%

Jury: While the jurisprudence does not suggest that prior inconsistent statements should be treated differently in judge-alone trials as compared to jury trials, judges might plausibly be more inclined to exclude to shield jurors from evidence that they might give inordinate weight.[101] Consistent with this hypothesis, trial judges in both datasets were more likely to admit in bench trials (75.9% trial; 81.0% appeal) than jury trials (68.9% trial; 72.5% appeal). Neither difference, however, was statistically significant.[102] A larger dataset might (or might not) support the intuition that admission is more likely in judge-alone trials.

Jurisdiction: As a matter of positive law, prior inconsistent statements should not be treated differently between jurisdictions (especially given that the vast proportion of decisions are made in criminal cases where the law is nationally uniform). But researchers have shown in a different context that judges in some provinces are more inclined to admit contested prosecution evidence than in others.[103] That said, while our data does reveal differential jurisdictional admission rates, the differences were not statistically significant at the 95% confidence level.[104]

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100 The p-value was 9.42×10^{-5} (Fisher's Exact Test). The p-value following a Monte Carlo simulation based on 2000 replicates was 0.0005.

101 Historically, many evidence scholars asserted that the hearsay rule (and other exclusionary rules) should not apply to proceedings without juries. See Kenneth Culp Davis, "Hearsay in Administrative Hearings" (1964) 32:4 Geo Wash L Rev 689 at 693. See also *R v Starr*, 2000 SCC 40 at para 31, L'Heureux-Dubé J, dissenting.

102 Of the 352 trial decisions where the distinction could be discerned, 249 (70.7%) were bench trials, and 103 (29.3%) were jury trials. The p-value (Pearson's Chi-squared) for the difference in admission rates was 0.18. Of 114 appeal decisions where distinction could be discerned, 63 (55.3%) were of bench trials, and 51 (44.7%) were of jury trials. The p-value was 0.29 for the difference in appeals admission rates (Pearson's Chi-Squared).

103 See Penney and Yahya, *supra* note 95 at 538–39, 545–47.

104 Among jurisdictions with at least 25 cases, the admission rates were as follows: Alberta (n=48): 70.8%; British Columbia (n=35): 65.7%; Ontario (n=179): (76.5%); Quebec (n=26): 84.6%. The p-value (Fisher's Exact Test with Simulated p-value (2000 replicates)) was 0.09, which is significant at the 90% confidence level.

In contrast to the trial dataset, the differing admission rates across appeal jurisdictions were statistically significant overall.[105] The small sample sizes, however, make it difficult to infer much from any one jurisdiction's numbers, except perhaps for British Columbia.[106] The results are shown in Table 4 below.

Table 4: Admission by Jurisdiction, Appeal

	Admit	Exclude	Admission Rate
AB	13	3	81.3%
BC	5	8	38.5%
MB	11	3	78.6%
NB	2	0	100%
NL	0	1	0%
NS	5	0	100%
NT	1	0	100%
ON	27	8	77.1%
QC	16	2	88.9%
SK	9	1	90.0%

C) Doctrinal variables

Oath: As seen in Tables 5 and 6 below, the admission rate in cases where a formal oath was administered before the statement was made was significantly higher than when it was not (for both trial[107] and appeal decisions[108]).

Table 5: Admission by Oath, Trial

	Admit	Exclude	Admission Rate
n/a	40	12	76.9%
No	160	79	66.9%
Yes	79	16	83.2%

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105 The p-value was 0.03748 (Fisher's Exact Test with simulated p-value). The Fisher's Exact Test without simulated p-value yielded a p-value of 0.042.

106 To get a better sense of the significance of this data, we conducted a Fisher post hoc analysis, which yielded significant preliminary differences between British Columbia and the following provinces: Alberta (p-value = 0.03), Nova Scotia (p-value = 0.04), Ontario (p-value = 0.02), Quebec (p-value = 0.006), and Saskatchewan (p-value = 0.03). However, when these results are calculated considering the Bonferroni correction, the results were no longer significant.

107 Pearson's Chi-squared test: $X^2 = 9.56$; df = 2; p-value = 0.008.

108 Pearson's Chi-squared test: $X^2 = 8.88$; df = 2; p-value = 0.01.

Table 6: Admission by Oath, Appeal

	Admit	Exclude	Admission Rate
n/a	25	6	80.6%
No	31	17	64.6%
Yes	33	3	91.7%

These differences remain significant even if it is assumed that no oath was administered in cases coded as "n/a", i.e., where the court did not mention whether the statement was made under oath. Here the trial admission rate for "no oath" is 68.7% as compared to 83.2% for statements made under oath.[109] The "no oath" and "oath" admission rates for appeals are 70.9% and 91.7%, respectively.[110]

Warning: As indicated in Tables 7 and 8 below, statements made after a warning of the penal consequences of lying were significantly more likely to be admitted than those made without such a warning in both trial[111] and appellate cases.[112]

Table 7: Admission by Warning, Trial

	Admit	Exclude	Admission Rate
n/a	141	40	77.9%
No	72	51	58.5%
Yes	66	16	80.5%

Table 8: Admission by Warning, Appeal

	Admit	Exclude	Admission Rate
n/a	47	11	81.0%
No	16	11	59.3%
Yes	26	4	86.7%

However, if it is assumed that the declarant was not warned when the court did not mention the factor, the trial admission rate for "no warning" rises to 70.1%, which is not significantly different (at the 95% confidence level) than the 80.5% "warning" rate.[113] For appeals, the admission rate

109 Pearson's Chi squared test: $X^2 = 6.74$; df = 1; p-value = 0.01.
110 Pearson's Chi squared test: $X^2 = 4.97$; df = 1; p-value = 0.03.
111 Pearson's Chi-squared test: $X^2 = 17.21$; df = 2; p-value = 0.0002.
112 Pearson's Chi-squared test: $X^2 = 6.99$; df = 2; p-value = 0.03.
113 Pearson's Chi-squared test: $X^2 = 3.0$; df = 1; p-value = 0.08.

for no warning rose to 74.1%, compared to a warning rate of 86.7%. This difference was not significant.[114]

We also combined the "oath" and "warning" variables to compare cases where there was no oath or warning with those involving at least one of these indicia of reliability. Assuming that there was no oath or warning in cases where these factors went unmentioned, we found a trial admission rate of 68.7% when there was no oath or warning (180/262) compared to 79.8% (99/124) when one or both indicia were present. The figures for appeals were 69.1% (47/68) *vs* 89.4% (42/47), respectively. Both findings were statistically significant.[115]

Recording: The coding for this variable is indicated in Tables 9–10 below.[116]

Table 9: Admission by Recording Method, Trial

	Admit	**Exclude**	**Admission Rate**
Audio	36	11	76.6%
Audiovisual	124	45	73.4%
No	46	36	56.1%
Written	70	15	82.4%

Table 10: Admission by Recording Method, Appeal

	Admit	**Exclude**	**Admission Rate**
Audio	8	4	66.7 %
Audiovisual	42	7	85.7 %
No	9	6	60.0 %
Written	23	6	79.3 %

While there was a significant difference between recorded and unrecorded statements in the trial database, contrary to what might be assumed from the jurisprudence, the type of recording does not appear to make a significant difference.[117] The appeal data did show the expected preference for audiovisual recording, but the differences in the data were

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[114] Pearson's Chi-squared test with Yate's continuity correction: $X^2 = 1.34$; df = 1; p-value = 0.247

[115] Trial (Pearson's Chi-Square Test: $X^2 = 5.21$; df = 1; p-value = 0.02); appeal (Fisher's Exact Test: p-value = 0.013).

[116] As the court failed to indicate whether the statement was recorded in only three of 386 cases, we excluded "n/a" results from this table.

[117] Pearson's Chi-squared test: $X^2 = 15.5$; df = 3; p-value = 0.00145.

not statistically significant at the 95% confidence level, likely due to the smaller sample size.[118]

Motive to fabricate: Courts referred to this factor in a minority of cases. But as shown in Table 11 below, the odds of admission in trial cases dropped precipitously where the declarant had a strong motive to fabricate.[119] Evidence of "some" motive to fabricate, however, does not seem to be as impactful. If it is assumed that there was no identified motive to fabricate when the factor was not mentioned, the trial admission rate for "no" motive dropped to 75.4%, but the differences remained significant.[120]

Table 11: Admission by Motive to Fabricate, Trial

	Admit	Exclude	Admitting Rate
n/a	155	64	70.8%
None	90	16	84.9%
Some	27	10	73.0%
Strong	7	17	29.2%

The appeals data, in contrast, did not reveal significant differences,[121] including when n/a values were included with "no" (see Table 12 below).[122] Under this assumption, the admission rate for "no motive to fabricate" decreased to 79.6%.[123]

Table 12: Admission by Motive to Fabricate, Appeal

	Admit	Exclude	Admitting Rate
n/a	61	18	77.2%
None	13	1	92.9 %
Some	12	3	80.0 %
Strong	3	4	42.9 %

Inducement: Courts were even more reluctant to admit evidence when there were indications that the statement may have been improperly induced. As shown in Table 13 below, even "some" evidence of

118 Fisher's Exact Test: p-value = 0.13.

119 Pearson's Chi-squared test: $X^2 = 31.0$; df = 3; p-value = 8.69×10^{-7}.

120 Pearson's Chi-Square test: X2= 23.8; df= 2; p-value = 6.7×10^{-6}. A Bonferroni corrected post hoc comparison yielded significant differences between "some" and "strong" (p-value = 0.006) and "none" (including "n/a") and "strong" (p-value = 0.00001).

121 Fisher's Exact Test: p-value = 0.10.

122 Fisher's Exact Test: p-value = 0.11.

123 The differences are significant (or very close to) significant at the 90% confidence level, however, suggesting that the appeal findings would have echoed those at trial given a larger dataset.

inducement significantly diminished the odds of admission at trial.[124] "Strong" evidence of inducement had an even more pronounced effect. The significance of this finding held even when we treated the failure to mention this factor as a finding of "no inducement."[125]

Table 13: Admission by Inducement, Trial

	Admit	Exclude	Admission Percentage
n/a	134	60	69.1%
None	137	27	83.5%
Some	6	12	33.3%
Strong	2	8	20.0%

The appeal dataset, shown in Table 14 below, showed the same pattern, but the differences fell just outside the significance threshold.[126] They became significant, however, when we treated the failure to mention the factor as equivalent to "no inducement" (as seems likely).[127]

Table 14: Admission by Inducement, Appeal

	Admit	Exclude	Admission Percentage
n/a	71	20	78.0 %
None	17	3	85.0 %
Some	1	2	33.3 %
Strong	0	1	0.00 %

Spontaneity: As shown in Table 15 below, trial courts admitted statements more frequently when they were made spontaneously as compared to non-spontaneous statements.[128] This finding holds even if we assume that the statement was not spontaneous in cases where the factor was not mentioned.[129]

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124 Fisher's Exact Test: p-value: $3.57\text{x}10^{-8}$.

125 Under this assumption, the trial admission rate for "no inducement" is 75.7% (Fisher's Exact Test: p-value $=1.14\text{x}10^{-6}$).

126 Fisher's Exact Test: p-value: 0.06.

127 Under this assumption, the admission rate for "no inducement" is 79.3% (Fisher's Exact Test: p-value = 0.04).

128 Pearson's Chi-squared test: $X^2 = 77.21$; df = 2; p-value = $1.71\text{x}10^{-17}$.

129 Under this assumption, the admission rate for non-spontaneous statements in the trial dataset drops to 60.2% (Pearson's Chi-squared with continuity correction: $X^2 = 40.6$; df = 1; p-value = $1.88\text{x}10^{-10}$).

Table 15: Admission by Spontaneity of Statement, Trial

	Admit	Exclude	Admission Percentage
n/a	126	56	69.2 %
No	13	36	26.5 %
Yes	140	15	90.3 %

As shown in Table 16 below, appeals showed the same pattern,[130] but the result was no longer significant when we combined the "n/a" cases with those finding that the statement was not spontaneous.[131]

Table 16: Admission by Spontaneity of Statement, Appeal

	Admit	Exclude	Admission Percentage
n/a	68	20	77.3 %
No	1	3	25.0 %
Yes	20	3	87.0 %

Close in time: As shown in Tables 17 and 18 below, whether a statement was made close in time to the event does not appear to play a significant role in admission decisions. The factor is mentioned in relatively few cases, and the differences in admission rates are not statistically significant.[132]

Table 17: Admission by Proximity of Statement to Event, Trial

	Admit	Exclude	Admission Percentage
n/a	200	77	72.2%
No	9	6	60.0%
Yes	70	24	74.5%

Table 18: Admission by Proximity of Statement to Event, Appeal

	Admit	Exclude	Admission Percentage
n/a	75	20	78.9 %
No	1	2	33.3 %
Yes	13	4	76.5 %

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130 Fisher's Exact Test = p-value of 0.04.

131 Under this assumption, the admission rate for non-spontaneous statements in the appeals dataset drops to 75.0% (Fisher's Exact Test: p-value = 0.275).

132 Trial (Fisher's Exact Test): p-value = 0.49; appeal (Fisher's Exact Test): p-value = 0.20.

Cognitive impairment: As indicated in Table 19 below, statements made by cognitively impaired declarants were significantly more likely to be excluded at trial.[133] This finding holds even if there was no impairment in cases where the factor was not mentioned.[134] The differences in the appeal dataset, in contrast, were not statistically significant, likely due to the small number of decisions referencing this variable.[135]

Table 19: Admission by Cognitive Impairment, Trial

	Admit	Exclude	Admission Percentage
n/a	188	71	72.6 %
High	1	12	7.7 %
None	63	6	91.3 %
Some	27	18	60.0 %

Against interest: As shown in Table 20 below, statements made against interest are significantly more likely to be admitted at trial than statements that do not have this characteristic,[136] even when assuming that the statement was not against the declarant's interest when the factor was not mentioned.[137] The results for the appeals dataset were not statistically significant under either assumption.[138]

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[133] Fisher's Exact Test: p-value: 2.61×10^{-9}.

[134] Under this assumption, the trial admission rate for "no impairment" (76.5%) remains significantly greater than for "some" or "high" impairment (48.3%). Between the combined categories of "some" or "high" *vs.* "no impairment," the Chi-square with continuity correction had a p-value of 1.94×10^{-5}. The respective figures for appeals are 79.6% for "no impairment" and 58.3% for "some" or "high" impairment. The Fisher Exact Test returned a p-value of 0.139.

[135] There was one case of "high" impairment (excluded), nine of "no" impairment (eight admitted), eleven of "some" impairment (seven admitted), and 94 cases where there was no mention of impairment (admission rate of 78.7%). The Fisher's Exact Test returned a p-value of 0.156.

[136] Fisher's Exact Test: p-value: 0.000307

[137] The admission rate for "not against interest" under this assumption is 69.7%, compared to 87.5% for "against interest." Fisher's Exact Test: p-value = 0.01.

[138] There were two cases where the appeal court noted that the statement was "not" against interest (one admitted) and eleven where it was (nine admitted). Additionally, there were 102 cases where the court did not discuss this factor. Assuming that the statement was *not* against interest when the factor was not mentioned, the admission rate for "not against interested" was 76.9% *vs.* 81.8% for "against interest." Fisher's Exact Test returned a p-value of 1.00 on a two-tailed test.

Table 20: Admission by Against Interest, Trial

	Admit	Exclude	Admission Percentage
n/a	224	90	71.3 %
No	6	10	37.5 %
Yes	49	7	87.5 %

Corroboration: The existence of at least some corroborating evidence also correlates with admission, as indicated in Tables 21 and 22 below.[139] This factor remained significant in both datasets, even if we assume that there was no corroborating evidence when the factor was not mentioned.[140]

Table 21: Admission by Existence of Corroborating Evidence, Trial

	Admit	Exclude	Admission Percentage
n/a	149	70	68.0 %
None	4	16	20.0 %
High	34	0	100 %
Some	92	21	81.4 %

Table 22: Admission by Existence of Corroborating Evidence, Appeal

	Admit	Exclude	Admission Percentage
n/a	46	16	74.2%
High	12	0	100 %
None	0	6	0 %
Some	31	4	88.6 %

Cross-examination: Opposing parties' ability to cross-examine witnesses on their prior statements correlated significantly with admission, as shown in Tables 23 and 24 below.[141]

[139] Trial (Pearson's Chi-squared test): $X^2 = 47.0$; df = 3; p-value = 3.48×10^{-10}; appeal (Fisher's Exact Test): p-value = 2.36×10^{-5}).

[140] In the trial dataset, the "no corroboration" admission rate is 64.0% *vs.* 85.7% for "some" corroboration (Pearson's Chi-squared test: $X^2 = 20.3$; df = 1; p-value = 6.56×10^{-6}). For appeals, the "no corroboration" admission rate is 67.6% vs. 91.5% for "some" corroboration (Fisher's Exact Test: p-value = 0.003).

[141] Trial (Pearson's Chi-squared test): $X^2 = 30.2$; df = 2; p-value = 2.8×10^{-7}; appeals (Fisher's Exact Test for Count Data): p-value = 0.004. As there were only 29 cases where this factor was not mentioned in each of the trial and appeal datasets, we omitted these from the analysis. The admission rate for these cases was 69.0% for trial cases and 75.9% for appeals.

Table 23: Admission by Ability to Cross-Examine, Trial

	Admit	Exclude	Admission Percentage
Full	124	22	84.9 %
Some	78	27	74.3 %
None	57	49	53.8 %

Table 24: Admission by Ability to Cross-Examine, Appeal

	Admit	Exclude	Admission Rate
Full	38	3	92.7 %
Some	9	6	60.0 %
None	20	10	66.7 %

Because the ability to cross-examine is the key element of procedural reliability, we conducted additional tests to assess its significance. First, we isolated the cases where the court found that there was a "full" opportunity to cross-examine and calculated the admission rate for each of the other variables when it was coded in the "exclusionary" direction. These results are shown in Tables 25 and 26 below.

Table 25: Admission by Full Ability to Cross & Exclusionary Coded Variables, Trial

	Count	Admit	Exclude	Admission Rate
Recording = "No"	14	9	5	64.3 %
Motive to Fabricate = "Some" or "Strong"	30	21	9	70.0 %
Inducement = "Some" or "Strong"	12	6	6	50.0 %
Spontaneity = "No"	12	5	7	41.7 %
Close in time = "No"	5	5	0	100.0 %
Mental Impairment = "Some" or "High"	8	5	3	62.5 %
Against Interest = "No"	10	4	6	40.0 %
Corroborating Evidence = "None"	5	2	3	40.0 %
Oath = "None"	87	71	16	81.6 %
Warning = "No"	53	38	15	71.7 %
Solemnity = "No"	13	11	2	84.6 %
All Variable Conditions	146	124	22	84.9 %

Table 26: Admission by Full Ability to Cross & Exclusionary Coded Variables, Appeal

	Count	Admit	Exclude	Admission Rate
Recording = "No"	3	2	1	67.7 %
Motive to Fabricate = "Some" or "Strong"	7	7	0	100.0 %
Inducement = "Some" or "Strong"	1	1	0	100.0 %
Spontaneity = "No"	0	0	0	0.00 %
Close in time = "No"	1	1	0	100.0 %
Mental Impairment = "Some" or "High"	5	3	2	60.0 %
Against Interest = "No"	1	0	0	100.0%
Corroborating Evidence = "None"	1	0	1	0.00 %
Oath = "None"	17	14	3	82.4 %
Warning = "No"	10	7	3	70.0 %
Solemnity = "No"	2	1	1	50.0 %
All Variable Conditions	41	38	3	92.7 %

These analyses confirm that while a full ability to cross-examine strongly favours admission, the presence of any of the exclusionary factors (except "proximity") may persuade trial judges to exclude. Appeal courts, in contrast, were less likely to exclude in these circumstances. And where full cross-examination was available, fewer exclusionary factors appear capable of tipping the balance toward exclusion in appeals compared to trials.

5. Discussion

As discussed earlier, the Supreme Court of Canada has indicated a strong preference for admitting prior inconsistent statements when there is a full opportunity to cross-examine the witness at trial, even if the statement may not be substantively reliable. However, our data suggest that courts still exclude such statements in a non-trivial proportion of cases. There

were 24 such decisions in the trial database[142] and three among appeals.[143] The courts expressed varying reasons for finding that threshold reliability was not met despite full cross-examination, including absences of oaths or warnings,[144] incomplete recordings,[145] improper inducements,[146] cognitive difficulties,[147] and motives to lie.[148] But none explained why cross-examination would not have exposed the frailties of the evidence in a manner that would have allowed the trier of fact to weigh it accurately. In other words, while the courts may have identified legitimate concerns about substantive reliability, they did not explain why admitting the evidence would have impeded the search for truth.

In addition, there were 27 trial and six appeal cases where the court ordered exclusion even though there was "some" ability to cross-examine the witness. But in many of these, the witness claiming memory loss explained the inconsistency and gave substantive answers to questions about the facts relayed in the statement.[149]

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[142] See *R v Rogerson*, 2015 BCPC 451 [*Rogerson*]; *R v LS*, 2008 CanLII 5981 (ONSC); *R v AHFF*, 1999 ABPC 56; *R v RN*, 1998 ABPC 88; *R v Gallant*, 1995 CanLII 10359 (NBQB); *R v Chrisanthopoulos (J)*, 2003 NLSCTD 75; *R c Hennie*, 2019 QCCS 5170 (statement of Fletcher); *R v Reis*, 2017 ONSC 287 (statement of Brown); *R v Boyce*, 2011 ONSC 966, [2011] OJ No 1983; *R v Woycheshen*, [1996] MJ No 570 at para 19 [*Woycheshen*], 31 WCB (2d) 346 (PC); *R v Denis*, 2014 ONSC 5987; *R v SH*, [1998] OJ N. 613, 14 CR (5th) 80 (CJ) [*SH*]; *R v Scotland*, 2007 CanLII 60382 (ONSC); *R v Palma*, 2016 QCCS 6655, aff'd 2019 QCCA 762, leave denied, 2019 CanLII 117832 (SCC); *R v Dell*, 2001 CarswellOnt 3640 (SCJ); *R v SWS*, 2005 CanLII 44181 (ONSC) [*SWS*]; *R v Harbin*, 2008 ONCJ 263 [*Harbin*] (911 statement); *R v Joseph Pennell*, 2001 NSPC 12 [*Pennell*]; *R v HJJ*, [1995] YJ No 83 (TC); *R v Norman*, 1993 CanLII 17023 [*Norman*] at para 12 (ONCJ); *R v Edwards*, 1997 CarswellOnt 873, 34 WCB (2d) 33 (CJ) (two statements); *R v A(HL)*, 1998 CarswellOnt 3135, 39 WCB (2d) 229 (CJ) (two statements).

[143] See *R v Tam*, 1995 CanLII 1805 (BCCA); *R v Unger*, 1993 CanLII 4409 at 44–48 (MBCA); *R v St Croix (RJ)*, 1999 CanLII 19721, 544 APR 159, 178 Nfld & PEIR 159 (NLSC).

[144] See e.g., *Rogerson*, *supra* note 142 at para 14.

[145] See e.g., *SH*, *supra* note 142 at para 37.

[146] See e.g., *R v Boyce*, 2011 ONSC 966, [2011] OJ No 1983; *SWS*, *supra* note 142 paras 30-31, 50, 68 WCB (2d) 55 (ONSC); *R v Edwards*, 1997 CarswellOnt 873, 34 WCB (2d) 33 at paras 25-29 (CJ).

[147] See e.g., *Woycheshen*, *supra* note 142 at para 19, 31 WCB (2d) 346 (PC); *Pennell*, *supra* note 142.

[148] See e.g., *R v Tam*, 1995 CanLII 1805 at para 33 (BCCA); *Harbin*, *supra* note 142 at para 16; *Pennell*, *supra* note 142; *R v HJJ*, [1995] YJ No 83 at para 23 (TC); *Norman*, *supra* note 142 1at para 12.

[149] See e.g., *R v Stubinski*, 2002 BCSC 612 at paras 15-16; *Taggart v Heuchert*, 2013 BCSC 1248 at paras 86-97; *R v Nolin*, 2003 CanLII 5923 at paras 134-40 (MBPC); *R v EF and TK*, 2006 ONCJ 120 [*EF*] at paras 2, 103-05; *R v Punia*, 2016 ONSC 2988 at para 81; *R v Mohammad*, 2007 CanLII 54965 [*Mohammad1*] at paras 17, 25 (ONSC); *R v Boulachanis*, 2016 QCCS 6876 at paras 7-19, aff'd 2020 QCCA 4, leave to appeal denied,

In our view, these statements should have been admitted, subject to a potential weighing of probative value against prejudice under the residual exclusionary discretion. In many instances, the courts did not appear to fully grasp the distinction between substantive and procedural reliability. While they typically noted that the availability of cross-examination counted in favour of admission, they often suggested that *some* evidence of substantive reliability was required.[150] As discussed earlier, this defies the Supreme Court's clear directive that threshold reliability can often be established by procedural reliability alone, especially through cross-examination at trial.

This suggests that the Supreme Court has not gone far enough in stating that a meaningful opportunity to cross-examine the witness goes a "substantial part of the way"[151] or is the "most important" factor[152] in establishing procedural liability and justifying the admission of prior inconsistent statements. We urge the Court to hold that prior inconsistent statements are admissible whenever there is a full opportunity to cross-

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2021 CanLII 129761 (SCC); *R c Pagé*, 2019 QCCS 162 at paras 9, 22; *R v Moneyas* (1995) 194 AR 1 [*Moneyas*] at para 65, [1995] CarswellAlta 917 (PC); *R v Babic*, 2021 ONCJ 656 at para 42; *R v Tucker*, 2007 NLTD 67 at paras 26, 34; *R v Mohammad*, [2007] OJ No 4901 [*Mohammad2*] at paras 14-17, 25, 75 WCB (2d) 690 (SCJ); *R v Crossley*, 2005 BCSC 988 at para 9 [*Crossley*]; *R v JWL*, 1994 CanLII 8734 at paras 45, 81 (ONCA).

150 See e.g., *R v Henderson*, 2008 SKPC 153 at para 30 ("as a result of the insufficient investigation I have little confidence in the reliability of the hearsay statement"); Moneyas, *supra* note 149 at para 67, [1995] CarswellAlta 917 (PC) ("[t]he common law exceptions to the hearsay rule noted here . . . are exemplars of inherently reliable out of court declarations. The availability of the declarant is immaterial"); *R v Tucker*, 2007 NLTD 67 at para 47 ("[w] hile I agree that the presence of Mr. Hinks for cross-examination on that earlier statement lessens the threshold somewhat, I am concerned about a number of other factors present"); *R v Reis*, 2017 ONSC 287 at para 15 ("[a]lthough I accept that Brown's statement was recorded and he was available for cross-examination at trial, I am unable to find that the circumstances surrounding the taking of his statement meet the threshold test for reliability"); *Pennell*, *supra* note 142 at para 5 ("the real test for reliability is the honesty and credibility of the witness and complainant . . . when she made her comments to the police and her testimony under oath"); *R c Pagé*, 2019 QCCS 162 at para 24 ("the comments noted in the questionnaire . . . present real concerns about their veracity and accuracy. The dangers associated with hearsay are not sufficiently ruled out"); *Mohammad2*, *supra* note 149 at para 26 WCB (2d) 690 (SCJ) (despite cross-examination, "a most important factor relates to the police assertion that it does not matter what the witness tells them about his brother, because his brother has already confessed"); *Crossley*, *supra* note 149 at para 13 (police interview tactics posed "a serious risk – to the reliability of the evidence obtained from a witness who is motivated to protect himself").

151 *UFJ*, *supra* note 13 at para 39.

152 *Khelawon*, *supra* note 40 at paras 66, 76. See also *Couture*, *supra* note 15 at paras 92, 95; *R v Bradshaw*, 2017 SCC 35 at para 126, Moldaver J dissenting. See also *cross-examination alone* provides significant indications of reliability."

examine the declarant, subject to the residual discretion to exclude evidence that is more prejudicial than probative.

A "full" opportunity to cross-examine, we propose, exists whenever the witness gives an explanation for the inconsistency and is responsive to questions about the matters detailed in the prior statement.[153] If these conditions are met, claimed memory loss or apparent reluctance to be fully forthcoming should not bar admission.[154] But if witnesses cannot provide *any* relevant testimony about their prior statements, the statements retain their hearsay character and should remain presumptively inadmissible.[155] This does not mean, of course, that the absence of a full opportunity to cross-examine should always result in exclusion. There will often be sufficient indicia of substantive or procedural reliability to justify admission under the principled exception.[156]

This approach would improve both adjudicative accuracy and trial efficiency. As we have seen, while Canadian courts are very likely to admit prior inconsistent statements when there is a full opportunity to cross-examine, they still sometimes exclude in these circumstances. In none of these cases, however, did the court justify exclusion based on an insufficient degree of procedural reliability. Instead, it focused on the absence of sufficient inherent reliability, which is manifestly not a prerequisite for admission under the principled approach. This error likely stems from the use of the word "reliable" to convey the standard for admission. Even when qualified by "procedural" or "testing," judges have too often appeared to give "reliable" its ordinary meaning.[157] They have interpreted "threshold reliability," in other words, as requiring some assurance that the prior inconsistent statement is true.

As discussed, however, the law of evidence does not countenance the exclusion of relevant evidence merely because it may be inaccurate.

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153 Sankoff, *supra* note 6 at §14.4(k).

154 See e.g., *R v Weldekidan*, 2019 MBCA 109 at paras 25, 46–63, leave application dismissed, 2020 CanLII 40626 (SCC) (witness's claimed lack of memory adequately tested in cross-examination); *R v Anaquod*, 2021 SKCA 111 at paras 70–71 (same).

155 See Christopher Sewrattan, "Lost in Translation? The Difference Between the Hearsay Rule's Historical Rationale and Practical Application" (2019) 42:4 Man LJ 87 at 107; Sankoff, *supra* note 6 at §14.4(k).

156 See *R v Biscette*, [1996] 3 SCR 599 at para 2 ("where defence counsel is unable to effect a complete cross-examination owing to a witness' failure of memory, this alone is not a reason to bar admission of the prior inconsistent statement for its substantive use"). See also *R v Sharif*, 2009 BCCA 390 at para 30, leave application dismissed, 2010 CanLII 21646 (SCC).

157 See *Merriam-Webster* Dictionary, online: https://tinyurl.com/mryc5tu4 [perma.cc/2KR2-N59Q] (defining "reliable" as "suitable or fit to be relied on: DEPENDABLE").

Dubiously reliable evidence is routinely admitted in criminal and civil proceedings.[158] Instead, the rationale for excluding potentially untrustworthy hearsay is to mitigate the risk that the trier of fact will give it undue weight.[159] This concern disappears when the weaknesses of the evidence are exposed through cross-examination.[160] This remains true even when other aspects of procedural reliability are missing, such as oaths, warnings, or video recordings. When witnesses explain the reason for the inconsistency in cross-examination, there will almost always be a sufficient basis to assess their credibility and the relative accuracy of the conflicting statements. The testimony will have been made under oath or affirmation in full view of the trier of fact, giving both parties the opportunity to assess the witness's perception, memory, narration, and sincerity in relation to both versions of their evidence.[161]

In the rare cases where the frailties of the evidence would be hidden from the trier of fact and admission would present too great of a risk of a miscarriage of justice, courts can use their residual discretion to exclude it. Several cases in our dataset involved the exclusion of statements produced by coercive police interrogation methods or in response to strong motives or incentives to disassemble.[162] To the extent that the admission of some of these statements, despite a meaningful opportunity to cross-examine, would have unduly compromised adjudicative accuracy (and perhaps contributed to a wrongful conviction[163]), the court could have used this discretion to exclude the evidence. Compared to the current law, this approach is less likely to deprive the trier of fact of the relevant evidence necessary for an accurate adjudication on the merits.

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[158] See *Khelawon*, *supra* note 40 at para 80 ("To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer … [a] lot of courtroom testimony proves to be totally unreliable.").

[159] See Wigmore, *supra* note 8 at §1364; John H Langbein, "The Criminal Trial Before the Lawyers" (1978) 45:2 U Chicago L Rev 263 at 306; Edmund M Morgan, "The Jury and the Exclusionary Rules of Evidence" (1936) 4 U Chicago L Rev 247 at 253–55.

[160] See generally Sewrattan, *supra* note 55 at 97. See also generally *R v Baldree*, 2013 SCC 35 at paras 30–33; *R v Osolin*, [1993] 4 SCR 595 at 663.

[161] See *R v Trieu*, 2005 CanLII 7884 at para 81, 195 CCC (3d) 373 (ONCA) (jurors assessing an unsworn prior statement "will have seen the declarant testifying under oath and subjected to vigorous cross-examination. By itself, that is likely to provide them with most, if not all of the information they need to make a reasoned decision.").

[162] See e.g., *R v Post*, 2007 BCCA 123 at paras 14–17, leave application denied, 2007 CanLII 37200 (SCC); *R v Chartrand*, 1997 CanLII 22813 at paras 49, 64–67, [1998] 4 WWR 657 (MBQB); *EF*, *supra* note 149 at paras 66–81, 94; *Mohammad1*, *supra* note 149 at para 26; *R v Phung*, 2006 CanLII 60985 at paras 53–62 (ONSC) [*Phung*].

[163] See e.g. *Phung*, *supra* note 162 at paras 55–60 (co-accused sought to adduce involuntary statement incriminating accused).

Our proposal is also likely to provide much-needed efficiency gains. The presumption of inadmissibility for all hearsay means that parties tending prior inconsistent statements must request a *voir dire* to test the admissibility of the evidence. Removing the presumption would greatly temper the need for such hearings. It would be up to the party *opposing* admission to show why a *voir dire* is necessary, either because a full opportunity to cross-examine was absent or because the statement's prejudicial effect exceeds its probative value.[164]

The importance of trial efficiency has grown in modern times. In civil cases, the need for more expeditious procedures has been recognized for more than a decade. As the Supreme Court noted in *Hyrniak v Maudlin*, trials have become "increasingly expensive and protracted" and are accordingly "not a realistic alternative for most litigants."[165] The civil justice system, it concluded, needs a "culture shift to create an environment that promotes timely and affordable access."[166]

The same is true of the criminal justice system. Criminal courts are also burdened by unnecessary delays, and the Supreme Court has expressed increasing support for efficiency considerations.[167] As Justice Martin put in *R v Haevischer*, the need for speedy criminal trials "is manifest." "Dismissing unmeritorious applications," she observed, "helps ensure that trials occur within a reasonable time," which is an "essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial."[168] And as the Court noted in *R v Jordan*, timely trials also benefit "other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.[169]

The law of evidence must play a critical role in ameliorating this situation. Courts have recognized that even the "probative value *vs* prejudicial effect" calculus that lies at the core of most evidentiary questions

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164 In the case of evidence adduced by the accused in a criminal case, the exclusionary discretion may only be exercised if its prejudicial effect "substantially outweighs" its probative value: *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 611.

165 2014 SCC 7 at paras 1, 4. See also *Moffitt v TD Canada Trust*, 2023 ONCA 349 at para 26.

166 *Ibid* at para 32.

167 See *R v Jordan*, 2016 SCC 27 [*Jordan*] at para 3 ("An efficient criminal justice system is … of utmost importance."); *R v Samaniego*, 2022 SCC 9 at para 23 ("managing the conduct of trials to ensure timely justice is particularly important").

168 2023 SCC 11 at para 49 [*Haevischer*] (internal citation omitted).

169 *Jordan*, *supra* note 167 at para 22. See also *Haevischer*, *supra* note 168 at para 49.

must consider the time and resources required to resolve the question.[170] As the British Columbia Court of Appeal remarked in *R v Podolski*, "in addition to ensuring trial fairness to the accused, the witnesses and to the triers of fact, the judge has an obligation to the accused to ensure that a trial concludes within a reasonable length of time."[171]

Creating a cleaner admissibility process that makes evidentiary hearings the exception—rather than the norm—has real benefits. Consider one of Canada's most successful recent evidentiary reforms: the 2005 amendments to the *Canada Evidence Act* relating to child witnesses. Before this change, every witness under 14 was prohibited from testifying under oath or affirmation. Their testimony was admissible only if the court decided, after holding a mandatory *voir dire*, that they had the capacity to testify truthfully.[172]

The process was time-consuming, cumbersome, and frequently subject to appeal. And then, suddenly, it was gone. Under the new regime, children under 14 are presumed competent.[173] This presumption can only be rebutted (and a *voir dire* held) if an opposing party establishes that "there is an issue as to the capacity of the proposed witness to understand and answer questions."[174] The change was both dramatic and remarkably efficient.[175] Disputes over the capacity of child witnesses, which were once common, have virtually disappeared.[176]

To be clear, we are not proposing that efficiency trump all.[177] Rather, the question is whether we should remove procedural barriers to admissibility that maintain or enhance adjudicative accuracy *and* improve trial efficiency. Our proposal recognizes that prior inconsistent statements are categorically distinct from other forms of hearsay. They do not warrant a presumption of exclusion and time-consuming *voir dires* involving debate and deliberation over multiple decision factors. Replacing this unruly regime with a relatively simple and certain rule would have real

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170 See e.g., *R v Mohan,* [1994] 2 SCR 9 at 21; *R v Candir*, 2009 ONCA 915 at para 61.

171 2018 BCCA 96 at para 386, leave application dismissed, 2019 CanLII 6030 (SCC).

172 For a review of how the provision operated, see *R v Caron* (1994), 94 CCC (3d) 366 (Ont CA).

173 *Canada Evidence Act*, *supra* note 5 at s 16.1(1).

174 *Ibid*, s 16.1(4).

175 *R v JZS*, 2008 BCCA 401 at paras 52-53, aff'd 2010 SCC 1 [Emphasis added].

176 Our search of the CanLII database revealed not a single case on the issue anywhere in Canada in the year 2022.

177 See generally Darryl K Brown, "The Perverse Effects of Efficiency in Criminal Process" (2014) 100 Virg L Rev 183.

benefits.[178] While it would obviously not solve the problem of excessive delay, it would unquestionably improve it.

6. Conclusion

It is past time for Canada to join the chorus of scholars, judges, law reform bodies, and comparable jurisdictions that have recognized that prior inconsistent statements should generally be admissible for their truth. With rare exceptions, cross-examining declarants at trial allows triers of fact to accurately assess the reliability of their prior statements in relation to their trial testimony. Our quantitative and qualitative examinations of Canadian cases show that the current "principled" approach to prior inconsistent statements has not fully assimilated this lesson. It should accordingly be replaced by a presumption of admissibility, rebuttable only where there was no opportunity for full cross-examination at trial (and subject to the general exclusionary discretion). In our view, this rule would enhance both the accuracy and efficiency of the trial process.

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178 See generally *R v MacKinnon*, 2022 ONCA at para 106, Paciocco JA, concurring (warning against delay caused by complicating and extending hearsay admissibility *voir dires*).