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2 SWJLTA 451
(Cite as: 2 Sw. J.L. & Trade Am. 451)

Southwestern Journal of Law and Trade in the Americas
Fall 1995

***451** PRIOR CONSISTENT STATEMENTS AS EVIDENCE IN THE UNITED STATES AND CANADA -- A SMALL PART OF THE STORY OF HOW SEX CRIMES CASES CONTINUE TO GENERATE LAW REFORM: HEREIN OF A COMPARISON OF TOME v. UNITED STATES [FN1] WITH R. v. KHAN [FN2]

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I. Introduction

Prior consistent statements by witnesses present problems both of relevance and hearsay. Assume that a person takes the witness stand in a trial and testifies about the matter involved in the case. Assume further that the examining attorney asks the witness to testify that on some other occasion before coming to court, she previously stated the same things as contained in the testimony just given. The witness's narration of her consistent statement made out of court on a prior occasion would surely bring forth a relevance objection. In the absence of any other purpose than merely to repeat the same story again, the objection should be sustained. Under United States law, the Federal Rules of Evidence (FREs) 401 [FN3] and 402 [FN4] dictate that the ***452** judge find that there is no fact of consequence for which the retelling through a prior consistent statement would be probative. Under Canadian law, the witness's retelling would violate the rule prohibiting self-serving statements. [FN5] In short, the evidence could serve no purpose other than to bolster the witness's testimony on the following theory: inasmuch as the witness has told the same story both on and off the stand and therefore has been consistent, she is probably correct and

truthful. In the absence of the opponent's attack on the witness based upon mistake or credibility, such an attempt to bolster the testimony of the witness is premature at best and irrelevant at worst.

Moreover, as the prior consistent statement was not made under oath, the witness/declarant was not subject to demeanor observation by the trier of fact at the time she made the original statement, and she was not subject to contemporaneous cross-examination either. Thus, the evidence of the prior consistent statement has all the earmarks of hearsay, even though the witness is on the witness stand and subject to cross-examination. The traditional view is that such statements are hearsay.

Because both relevance and hearsay concerns are involved in the use of prior consistent statements, it is not surprising that the treatment of such evidence, both in the United States and Canada, has intermingled the hearsay and relevance issues. In the United States, the FREs exempt three categories of witnesses' prior statements as non-hearsay. One of these categories is prior consistent statements. [FN6] However, not all prior consistent statements are declared non-hearsay -- only those offered to rebut an attack on the witness's credibility in the form of a charge of recent fabrication, improper influence, or motive. Case law in the United States, both pre- and post-FREs, was divided on the admissibility of such consistent statements, some courts held that only those statements made before the alleged motive to ***453** fabricate arose could qualify, either because the statement was otherwise not relevant or because that is how those courts interpreted the rule. Other courts have held that even post-motive statements are relevant, within the literal language of the rule, and thus admissible to rebut the claim of fabrication. Notably, this American rule resolves admissibility with respect to both the relevance and hearsay issues simultaneously under the same rule. If the statements are admissible under this rule, they are admissible as non-hearsay; that is, for the truth of the matter asserted (sometimes also referred to as admissible "substantively").

However, prior consistent statements which do not qualify for admissibility under the FRE 801(d)(1)(B) may still qualify for admissibility under the FREs' residual exceptions. Under the FREs in the United States, there is a category of hearsay exceptions, commonly known as the residual, or catch- all, exceptions, adopted to promote the development of the law of evidence and the expansion of hearsay exceptions -- namely FREs 803(24) and

804(b)(5). Essentially, these permit a trial court, within its discretion, to admit hearsay which does not fall within an enumerated exception to the hearsay rule, if the hearsay is more probative than other evidence, reliable, and necessary. However, in Idaho v. Wright, [FN7] the United States Supreme Court held that Idaho's residual exception, identical to FRE 803(24), could not be the basis for admitting a child's statement describing sexual abuse because it was not a firmly rooted exception to the hearsay rule and, thus, was barred by the Confrontation Clause of the Sixth Amendment to the United States Constitution. [FN8] Notwithstanding this decision, a statement which qualifies for one of these exceptions may still be able to pass Confrontation Clause muster, even though FRE 803(24) and FRE 804(b)(5) are not firmly rooted.

Similarly, under Canadian law, the rule prohibiting self-serving statements has a number of exceptions, some sounding as exceptions to the hearsay rule and others sounding as relevance justifications for admission. For example, one exception is a statement offered to rebut a recent charge of fabrication. [FN9] This exception would qualify the statement as an exemption from the hearsay rule in the United States under FRE 801(d)(1)(B). However, under Canadian law, unlike United States law, any out-of-court statement made by a witness available ***454** at trial is not hearsay per se in the first place. [FN10] Nonetheless, the exceptions to the rule prohibiting self-serving statements continue to include some that are hearsay related.

In R. v. Khan [FN11] the Supreme Court of Canada adopted an approach to hearsay, even in criminal cases, [FN12] which laid the foundation for the Court to repudiate the categorical exceptions to the hearsay rule in favor of determining whether the disputed hearsay evidence passes a test of reliability and necessity. Khan and its progeny, [FN13] consequently, have generated substantial reform of the law of evidence in Canada.

The law of evidence of the United States and Canada has evolved amid a plethora of sexual assault and abuse prosecutions which in recent years have inundated the courts and filled the case law reporters. Within the last four years, the United States Supreme Court has rendered two important decisions involving serious disputes over the admissibility of evidence in child molestation cases. In White v. Illinois, [FN14] decided in 1992, the Court found a young girl's statements admissible against the accused to prove molestation charges under the spontaneous utterance and statements for medical diagnosis exceptions to the hearsay rule. In 1995, the Court decided Tome v. United States [FN15] and

overturned a father's conviction for child molestation. In Tome, the Court held that a child's prior consistent statements had been erroneously admitted under a hearsay "exemption" on the ground that the statements were not shown to have been made prior to the time that the motive to fabricate came into existence. This decision sought to resolve the two conflicting lines of authority in the United States circuit courts regarding whether prior consistent statements, which are made subsequent to the time of alleged improper motive or fabrication, are still relevant to rebut such a charge.

***455** The Supreme Court of Canada, starting with R. v. Khan, [FN16] began the reform of Canada's hearsay rule either by rewriting the rule or by adopting a new exception to the rule. [FN17] In R. v. Khan, the Court allowed into evidence a very young child's statements describing a doctor's molesting her. The Court held that the hearsay rule with categorical exceptions is arcane and, henceforth, hearsay shall be deemed admissible if it passes the necessity and reliability tests. In two subsequent cases, both homicides neither involving sex crimes nor child witnesses, the Court has amplified the Khan rule and the test thereunder.

This article will detail the development of the United States and Canadian evidence rules regarding prior consistent statements, analyze the United States Supreme Court's latest proclamation related thereto in Tome v. United States [FN18] under both United States and Canadian law, and explore the relationship of the hearsay and relevance aspects of prior consistent statements under United States and Canadian law.

II. The American Perspective -- Federal Rules of Evidence 801(d)(1)(B)

In the United States, the Federal Rules of Evidence clearly provide that prior consistent statements are considered non-hearsay and are admissible if offered to rebut an express charge of recent fabrication or improper influence or motive under FRE 801(d)(1)(B). [FN19] However, in the application of FRE 801(d)(1)(B), there has been a substantial split of authority among the different circuits regarding the timing of a consistent statement in relation to the alleged motive to fabricate or improper influence. Six circuits have narrowly interpreted FRE 801(d)(1)(B) as limiting admissibility of prior consistent statements to those which antedate the point of alleged fabrication, influence, or motive - the so-called "pre-motive ***456** rule." [FN20] The other six circuits have rejected this pre

-motive rule and have called for a more flexible standard by holding that prior consistent statements made subsequent to the time of alleged fabrication, influence, or motive are admissible to rebut such charges. [FN21] The Advisory Committee Note to Rule 801(d)(1)(B) offers little assistance in answering the question of whether post-motive prior consistent statements are admissible; however, the Advisory Committee Note does clarify that prior consistent statements are admissible as substantive evidence, modifying the common law which limited admissibility to rehabilitative purposes only. [FN22]

Additionally, prior consistent statements may be admissible under the Federal Rules of Evidence even though they are not offered to rebut a charge of recent fabrication or improper influence or motive. Rule 801(d)(1)(B) does not, by its terms, address another possible use of such statements, namely, rehabilitative use. Rehabilitative use means the statement is introduced, not to prove its content, but only to bear on the credibility of the declarant. A prior consistent statement can rehabilitate a witness in several different ways: (a) providing the context for an inconsistent statement; (b) refuting the existence of an inconsistent statement; (c) refuting a charge of faulty memory; and (d) refuting a charge of recent fabrication or improper influence. [FN23] Logically, prior consistent statements which are deemed relevant for a rehabilitative purpose and, thus, are not offered for the truth of the matter asserted, should not be controlled by hearsay principles. However, there is certain language in the Tome majority opinion which suggests that FRE 801(d)(1)(B) is all-inclusive and, thus, ***457** that the latter category is the only relevant use under the FREs for which a prior consistent statement can be offered. [FN24]

A. A Split among the Circuits

Proponents of the pre-motive rule argue that prior consistent statements made subsequent to the motive to fabricate have no probative value, and, therefore, do not pass the relevancy threshold of admissibility. The Court of Appeals for the Seventh Circuit in United States v. Harris [FN25] explained the rationale for the pre-motive rule this way:

[E]vidence which merely shows that the declarant said the same thing at trial as he did on a prior occasion is of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same "for the simple reason that mere repetition does not imply veracity." [FN26] The Harris court also acknowledged that "although a prior

consistent statement may meet the literal requirements of Rule 801(d)(1)(B), it may nonetheless be inadmissible for failure to meet the relevancy requirement of Rule 402." [FN27] Other circuits also use this strict temporal requirement to evaluate the admissibility of prior consistent statements. For example, the Court of Appeals for the Second Circuit, in United States v. Quinto, [FN28] set out a three-part test for the admissibility of a prior consistent statement. First, the proponent "must show that the prior consistent statement is 'consistent with [the witness's in-court] testimony."' [FN29] Second, the proponent "must establish that the statement is being 'offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive."' [FN30] Finally, the proponent must demonstrate that the prior consistent statement was made prior to the time that the supposed motive to fabricate arose. [FN31]

According to evidence scholars Wigmore and McCormick, prior consistent statements have no relevance to rebut the charge of improper motive unless the statement was made prior to the existence of the improper motive. Wigmore reasons that "[a] consistent statement, ***458** at a time prior to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence." [FN32] McCormick concurs; where the opponent

has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated. [FN33]

A counter argument to the pre-motive rule is that there is nothing in the language of Rule 801(d)(1)(B) which expressly conditions the admissibility of a prior consistent statement upon a showing that the statement was made before the time that the charge of recent fabrication, improper influence, or motive arose. A literal reading of Rule 801(d)(1)(B) discloses only two prerequisites for admissibility: (1) the prior statement must be "consistent" with an in-court statement; and (2) it must be offered to "rebut" a charge of recent fabrication, improper influence, or motive. [FN34] Arguably, a statement offered after the time of fabrication would still contain some degree of probative value; therefore, it would then depend on the trier of

fact to evaluate the weight and credibility of the evidence. This argument is based on the assumption that a motive to fabricate does not always completely taint statements which are made subsequently. Theoretically, post-motive statements may still have some relevance. Thus, an interpretation of Rule 801(d)(1)(B) that precludes the admissibility of these prior consistent statements offends Rule 401. [FN35] The Court of Appeals for the Ninth Circuit has proposed that:

[T]rial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy -- albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." [FN36] ***459** A prior consistent statement made after an alleged motive to lie would be relevant if it had any tendency to prove that the declarant's in-court testimony was not a product of recent fabrication, improper influence, or motive. Under this theory, if a prior consistent statement is deemed relevant by the court, then it should be admissible regardless of its timing.

B. Previous Supreme Court Rulings Regarding Prior Consistent Statements

Before 1995, the United States Supreme Court addressed the admissibility of prior consistent statements on two occasions. However, both of these cases date back to the mid-1800s and predate the adoption of the Federal Rules of Evidence. In Ellicott v. Pearl, [FN37] a witness was impeached by the introduction of prior inconsistent statements. The Court held that it was proper to exclude from evidence prior consistent statements which were made subsequent to the prior inconsistent statements. Justice Story wrote:

Where witness proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that, in general, evidence is not admissible, in order to confirm his testimony, to prove that at other times he has given the same account as he had under oath; for it is but his mere declaration of the fact; and that is not evidence. [FN38] He further distinguished that a witness's in-court testimony "under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far

as his oath." [FN39] In dictum, however, Justice Story stated that "where the testimony is assailed as a fabrication of a recent date, or a complaint recently made . . . in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." [FN40] In Conrad v. Griffey, [FN41] several years later, the Court held inadmissible a prior consistent statement which was made subsequent to an inconsistent statement with which the witness had been impeached. The Court stated that "one proper test of the admissibility of such [prior consistent] statements is, that they must be made at ***460** least under circumstances when no moral influence existed to color or misrepresent them." [FN42]

C. Affirmation of Pre-Motive Requirement

In 1995, the United States Supreme Court interpreted Rule 801(d)(1)(B) in Tome v. United States. [FN43] Tome was convicted of aggravated sexual abuse of his four-year-old daughter while she was in his custody. Tome had primary physical custody of the child. The sexual abuse was discovered during a vacation that the child spent with her mother. At trial, the defense argued that the charges of sexual abuse were fabricated in order to prevent the child from being returned to her father. The prosecution produced six witnesses who testified to seven statements in all in which the child describes the sexual abuse by her father. The Court of Appeals for the Tenth Circuit held that the testimony regarding the child's out-of-court statements was admissible under Rule 801(d)(1)(B) even though the statements had been made after the child's alleged motive to fabricate arose. The Court of Appeals reasoned that "the pre-motive requirement is a function of the relevancy rules, not the hearsay rules." [FN44] The court advocated a balancing approach where "the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." [FN45]

The Supreme Court rejected the Tenth Circuit's balancing approach by holding that a prior consistent statement may not be used "to bolster the witness merely because she has been discredited." [FN46] Justice Kennedy, writing for the majority, [FN47] concluded that an out-of-court statement that predates the alleged improper motive is "capable ***461** of direct and forceful refutation," and thus is consistent with the rationale behind Rule 801(d)(1)(B). [FN48] He noted that some instances "may arise" when consistent statements that "postdate the alleged fabrication" have "some probative force" to rebut a charge of

recent fabrication, "but those statements refute the charged fabrication in a less direct and forceful way." [FN49] In a cryptic transition to this conclusion on the pre-motive requirement, Justice Kennedy observed: "Evidence that a witness made consistent statements after the alleged motive to fabricate arose may suggest in some degree that the in-court testimony is truthful, and thus suggest in some degree that testimony did not result from some improper influence . . . ." [FN50] While recognizing that there may be some minimal logical relevance of such post-motive consistent statements, this language leads to the principal conclusion that "if the drafters of Rule 801(d)(1)(B) intended to countenance rebuttal along that indirect inferential chain, the purpose of confining the types of impeachment that open the door to rebuttal by introducing consistent statements becomes unclear." [FN51]

Justice Breyer, with whom Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined in dissent, firmly disagreed that the "timing" of the prior consistent statement should be the ultimate determinative factor of admissibility. Justice Breyer advocated that all "[h]earsay law basically turns on an out-of-court declarant's reliability" and "does not normally turn on the probative force (if true) of the declarant's statement." [FN52] He then criticized the majority, and wrote that "[t]he 'timing' circumstance (the fact that a prior consistent statement was made after a motive to lie arose) may diminish probative force, but it does not diminish reliability. Thus, from a hearsay perspective, the timing of a prior consistent statement is basically beside the point." [FN53] Justice Breyer gave several examples in which post- motive prior consistent statements are relevant to rebut a charge of recent fabrication and therefore should be admissible:

***462** A post-motive statement is relevant to rebut, for example, a charge of recent fabrication based on improper motive, say, when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that only the truth will save his child's life. Or, suppose the post-motive statement was made spontaneously, or when the speaker's motive to lie was much weaker than it was at trial. [FN54] Thus, a post-motive statement may indeed be highly probative because the statement "may have been made not because of, but despite, the improper motivation." [FN55] One problem with Justice Breyer's examples is that such factual settings are difficult to imagine and even unlikely to occur. Perhaps this is the reason behind the majority's careful use of the term "in some degree" to concede minimal relevance of

post-motive consistent statements. [FN56]

Justice Breyer concluded his dissent by arguing for a more flexible application of FRE 801(d)(1)(B). He stated that trial court judges should have greater flexibility and should be able "to tie rulings on the admissibility of rehabilitative evidence more closely to the needs and circumstances of the particular case." [FN57] Greater flexibility would permit some post-motive prior consistent statements to be admissible on a case by case basis, subject to the application of the FRE 403 balancing test.

D. Other Rehabilitative Uses of Prior Consistent Statements -- An All Inclusive FRE 801(d)(1)(B)?

Rule 801(d)(1)(B), by its terms, addresses only a non-hearsay class of evidence. Statements qualifying under this rule may be admitted as affirmative, or substantive, [FN58] evidence; i.e., to prove the truth of the matter asserted. [FN59] This rule does not, by its terms, address another ***463** possible use of such statements, namely, the rehabilitative use. Rehabilitative use means the introduction of the statement, not to prove its content, but only to bear on the credibility of the declarant. [FN60] Before the adoption of the Federal Rules of Evidence, there was authority for the use of such statements for rehabilitative purposes. [FN61] Moreover, there is probative value in many situations for such use of a prior consistent statement, independent of its use to prove that what the declarant said on a prior occasion was the fact. [FN62]

Inasmuch as the rule does not address rehabilitative use, and because the Advisory Committee Notes accompanying the Federal Rules of Evidence do not shed any light on the matter, it may be argued that the pre-FRE rehabilitative use of prior consistent statements is not disturbed by the adoption of the requirements of FRE 801(d)(1)(B). [FN63] In other words, if a prior consistent statement is otherwise logically useful (i.e., affecting the credibility of the declarant/witness), it may be admissible under the FREs even though not offered to rebut a charge of recent fabrication or improper influence or motive. In such a circumstance the evidence would be restricted in its use by a limiting instruction to the jury, [FN64] but it would be admissible nonetheless.

A number of cases addressed this issue during the years immediately preceding and following the adoption of the Federal Rules of Evidence. The holdings of these decisions are

divergent. [FN65] No less eminent jurists than Justices A. N. Hand, [FN66] Learned Hand, [FN67] and Friendly, [FN68] all of the United States Court of Appeals for the Second Circuit, have opined on this question. In United States v. Sherman, [FN69] a case regarding stolen interstate goods, a member of the conspiracy, ***464** Oliva, testified at trial that the defendant Sherman was the truck driver in the theft. The defense then introduced Oliva's prior inconsistent statement to the FBI in which he never named Sherman as being involved in the theft but stating instead that the defendant Whelan was the truck driver. In order to break the force of the impeachment, the prosecution then sought to introduce a second written statement which confirmed the version of the story to which Oliva testified on the stand. According to Judge Learned Hand, "the fact that [the witness] changed his story so soon after making the contradictory statement, may have added to the persuasiveness of his testimony; and for that matter most persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness's testimony." [FN70] However, he excluded the statement "because it ha [d] not been made on oath rather than because it ha[d] no probative value . . . ." [FN71] In United States v. Corry, [FN72] Judge Augustus N. Hand affirmed a lower court's ruling regarding the admissibility of prior consistent statements which may have had questionable motivation and which were offered to rebut a prior inconsistent statement, finding that the statements were "merely cumulative and should not upset a verdict." [FN73] Finally, in United States v. Rubin, [FN74] Judge Friendly, in his concurring opinion, rejected the view that the limitation of FRE 801(d)(1)(B) applies to the use of prior consistent statements for rehabilitation as well as for direct evidence. Judge Friendly clearly believed that an interpretation of FRE 801(d)(1)(B) as a "universal rule" restricting the use of prior consistent statements for rehabilitation is "unjustified as a matter of language and history" and that the courts should practice "[l]iberality in allowing prior consistent statements for rehabilitation" when they deal with a record of what was said as opposed to a narrative of what occurred. [FN75]

The narrow question before the Court in Tome was whether the FREs adopted the pre-motive requirement in Rule 801(d)(1)(B). However, in the course of answering that question, in Part IIA of the majority opinion (joined by all five of the justices voting for the majority [FN76]), the Court made four statements indicating that no consistent statements other than those enumerated in Rule 801 are admissible ***465** for any purpose. Consequently, FRE 801(d)(1)(B) is all inclusive, and therefore,

prohibits all other rehabilitative uses of prior consistent statements not covered under the hearsay rule.

First, the Court noted that "the Rules do not accord this weighty, nonhearsay status to all prior consistent statements." [FN77] Rather, "admissibility under the Rules is confined to those statements offered to rebut a charge of 'recent fabrication . . . ."' [FN78] Moreover, in that same paragraph, the Court stated: "Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited . . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." [FN79]

Second, the Court observed that Rule 801(d)(1)(B)'s limitation, to rebut recent fabrication, improper influence, or motive, "is instructive" to demonstrate the temporal (pre-motive) requirement because impeachment by charge of recent fabrication or improper influence or motive is usually capable of "direct and forceful refutation" by introduction of pre-motive consistent statements. [FN80] Significantly, the Court went on, "[b]y contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved." [FN81] This statement is supported by citations and quotations from both McCormick [FN82] and Wigmore. [FN83] McCormick's quotation points out that a prior consistent statement offered to refute impeachment by character in the form of misconduct, convictions, or bad reputation, has "no color" to sustain it since the attempted refutation "does not meet the assault." [FN84] Wigmore's quotation avers that though a few courts admit consistent statement after impeachment of "any sort -- in particular ***466** after any impeachment by cross-examination. . . there is no reason for such a loose rule." [FN85]

Third, after noting that the indirect inferential chain necessary to explain the admissibility of post-motive consistent statements supports the conclusion that the drafters of Rule 801(d)(1)(B) intended to adopt the temporal requirement, [FN86] the Court asserted that "[i]f consistent statements are admissible without reference to the time frame we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well." [FN87] This assertion clearly implies that the majority of the Supreme Court of the United States believes that consistent statements to rebut "other forms of impeachment" (other than that specified in Rule 801(d)(1)) are not admissible.

Fourth, just before concluding this section of the opinion, the majority addressed the "underlying theory of the Government's position" that any consistent statement, whenever it was made, "tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence." [FN88] To this, the majority answered that Congress could have adopted such a rule easily, "providing for instance, that a 'witness's prior consistent statements are admissible whenever relevant to assess the witness' truthfulness, or accuracy."' [FN89] Further, the Court noted that the theory underlying such a rule "would be that, in a broad sense, any prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness's in-court testimony on the same subject." [FN90] However, the majority concluded that the "narrow Rule enacted by Congress, however, cannot be understood to incorporate the Government's theory." [FN91]

This last sentence, with its singular reference to Rule 801(d)(1)(B), coupled with the closing sentence in Part IIA of the majority opinion, which also uses the singular in reference to the Rule, suggests that the majority may not have intended to opine that Rule 801(d)(1)(B) is all-inclusive. That last sentence reads: "The language of the Rule, in its concentration on rebutting charges of recent ***467** fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule." [FN92] Hence, the majority opinion was either very loosely written, or the Justices must have concluded that no witnesses' consistent statements are admissible under the Federal Rules of Evidence except as specified in Rule 801(d).

E. Witnesses' Out-Of-Court Statements in General Under the Hearsay Rule

A witness's prior consistent statements, the subject of this article and of the Tome decision, are but one type of evidence which arguably should not be treated as hearsay at all. When the evidence presented is that of a declarant who is present in court, under oath, available for cross-examination, and subject to demeanor observation by the trier of fact, then arguably all of the hearsay risks are overcome and the witness's out-of-court statements should be admitted as non-hearsay. The United States Supreme Court, in Tome, acknowledged this fact in Part IIC of the

majority opinion. The majority noted that prior to the adoption of the Federal Rules of Evidence, "[g]eneral criticism was directed to the exclusion of a declarant's out-of-court statements where the declarant testified at trial." [FN93] Moreover, the Court observed that this criticism led to a suggested alternative "moving away from the categorical exclusion of hearsay and toward a case-by-case balancing of the probative value of particular statements against their likely prejudicial effect." [FN94] The Court cited Uniform Rule of Evidence 63(1), "which allows any out-of-court statement of a declarant who is present at trial and available for cross- examination," in contrast to the position taken in the Federal Rules of Evidence as adopted. [FN95]

This case-by-case balancing approach, which the Government sought in Tome and which the Court of Appeals for the Tenth Circuit applied, was rejected by the Supreme Court for the same reasons that the drafters of the Federal Rules of Evidence rejected such a formulation of the hearsay rule: the approach involved too much judicial discretion, ***468** thereby " 'minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial."' [FN96]

In reaching the decision to adopt the temporal requirement for Rule 801(d)(1)(B) and to reject the case-by-case balancing approach to prior consistent statements, the Tome Court acknowledged the "difficulties attendant upon the prosecution of alleged child abusers." [FN97] However, citing its opinion in United States v. Salerno, [FN98] the Court reiterated its powerlessness to alter the rules to suit litigants' preferences in a particular class of cases and pointed out that highly reliable, probative, and better evidence may be admitted through the residual exception, Rule 803(24). As the Court put it, "there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality." [FN99]

However, the Tome majority "intimate[d] no view . . . concerning the admissibility of any of . . . [the statements disputed therein] under" Rule 803(24), "or any other evidentiary principle." [FN100] That rule, and Rule 804(b)(5), constitute the so-called residual, or catch-all, exceptions to the hearsay rule, one of the major reforms wrought by the drafters of the FREs. The Court's reference in Tome seems to be an invitation to the government to seek admission of prior consistent statements via the residual exceptions. Yet, this interpretation would seem illogical since the Court, in Idaho v. Wright, [FN101] held that

a child's statements admitted under Idaho's residual exception (which is identical to the exception as it exists under the FREs) violated the Confrontation Clause. Consequently, this article now considers the United States Supreme Court's analysis of hearsay and confrontation in Wright.

The United States Supreme Court has historically and consistently adhered to the principle that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States is not "coextensive" [FN102] with the hearsay rule. [FN103] "Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to ***469** equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." [FN104] Nonetheless, in Ohio v. Roberts, [FN105] the Court "set forth a 'general approach' for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause." [FN106] Under the Roberts test, the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." [FN107] The result is a two-pronged test of necessity [FN108] and reliability. [FN109] In the "usual" case, this test's first prong requires a showing of unavailability of the witness. [FN110] The second prong of the test is satisfied either if the statement is falls within a "firmly rooted" exception to the hearsay rule or if the proponent shows that the statement has "particularized guarantees of trustworthiness." [FN111]

As to the first prong -- necessity -- there was no issue relating to unavailability in Wright, because the trial court found the child witness incapable of communicating; even the defense counsel agreed. Thus, "[f]or purposes of deciding this case," the Supreme Court assumed "without deciding that, to the extent . . . unavailability" was required in the case, the witness was unavailable within the meaning of the Confrontation Clause." [FN112]

As to the second prong -- reliability -- the argument in Wright was, in part, that the child's statements, which did not fit within any of the enumerated traditional exceptions to the hearsay rule, were admissible within Idaho's residual exception. As such, the evidence satisfied the Roberts test for admissibility over a confrontation clause objection. However, this argument failed, in the first instance, because "Idaho's residual exception . . . is not a firmly rooted exception for Confrontation Clause purposes." [FN113] The Court noted that

admitting ***470** the evidence under a firmly rooted hearsay exception would satisfy the constitutional requirement of "reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of . . . statements." [FN114] The Court contrasted such traditional exceptions with the residual exception, and noted that judicial decisions admitting such statements were based on the statements' "ad hoc" reliability. Thus, the Court concluded that "[h]earsay statements admitted under the residual exception, almost by definition, . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. [FN115]

Having failed the reliability prong under the firmly rooted exception rubric, the child's statements in Wright might still have been admissible upon a "showing of particularized guarantees of trustworthiness." [FN116] The Court explained that "the relevant circumstances [to be considered in deciding whether a statement has particularized guarantees of trustworthiness] include only those that surround the making of the statement and that render the declarant particularly worthy of belief." [FN117] Thus, the statement has sufficient trustworthiness if "cross-examination would be of marginal utility." [FN118]

The Court cited numerous examples of statements admitted under traditional hearsay exceptions because the circumstances surrounding the making of the statements guaranteed trustworthiness. They include excited utterances, dying declarations, and statements made for purposes of medical diagnosis or treatment. [FN119] According to ***471** the Court, inasmuch as such firmly rooted exceptions are worthy of belief under the totality of the circumstances and also are so trustworthy that adversarial testing would add little to their reliability, they provide the measure for Confrontation Clause admissibility for statements not within a firmly rooted exception. Thus, the Court concluded that "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." [FN120]

Finally, the Wright Court observed that a number of state and federal courts have, in deciding whether to admit child hearsay testimony in child sexual abuse cases, "identified a number of factors that . . . properly relate to" reliability. [FN121] The factors identified parenthetically by the Court in citing those

cases are: spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. [FN122]

Thus, post-Wright and pre-Tome, a child's (or anyone's) hearsay statement falling within the FRE's (or a state's counterpart rules) enumerated, categorical, firmly rooted exceptions, other than the residual exceptions to the hearsay rule, arguably would be admissible over a Confrontation Clause objection. [FN123] If the statement did not fall within one of the categorical exceptions to the hearsay rule, it might still be admitted under the standards enumerated in Wright; i.e., a particularized showing of trustworthiness by the circumstances surrounding the making of the statement. Those circumstances could be any factor, like those identified above, which also add up to the basis for a conclusion that cross-examination would be of marginal utility. Moreover, because Idaho's residual exception was declared not firmly rooted and the child's statements there were not found to have particularized***472** guarantees of trustworthiness, one would not expect the Court to assert that any statement falling within a residual exception could pass the Confrontation Clause test.

However, Tome's reference to Rule 803(24) opens the door to consideration of any statement's admissibility, for Confrontation Clause purposes, under the residual exception, if there exists adequate particularized guarantees of trustworthiness such as enumerated in Wright. Also, the reference in Wright to absence of motive to fabricate suggests that the Court would consider time qualified Rule 801(d)(1)(B) prior consistent statements to pass Confrontation Clause muster. [FN124] Finally, if a statement, like that in Tome, failed to qualify under Rule 801(d)(1)(B), the Court would still consider an argument that the statement should be admitted under the residual exception. That may be what the Tome Court meant when it declined to intimate any view on the admissibility of the statements under 803(24). [FN125]

III. The Canadian Perspective

The Canadian hearsay rule, unlike its American counterpart, [FN126] prohibits only "[e]vidence of a statement made to a witness by one not called as a witness . . . when that evidence is intended to establish the truth of the contents of the statement." [FN127] However, the witness's prior consistent statement would not be admissible if offered merely to bolster her in-court testimony. Such an offering would violate the rule against self-serving statements: "A previous statement which is

purportedly consistent with the witness's testimony is inadmissible to confirm such testimony." [FN128] There are several exceptions in which a prior consistent statement may be offered without offending the rule against self-serving evidence. These exceptions include those statements which are offered to rebut allegations of recent fabrication, those offered as part of the res gestae or made contemporaneously with the events in question, those offered as part of the narrative, statements of prior identifications, and parties' admissions. [FN129]

From the Canadian evidence law perspective, the facts of Tome v. United States lend themselves to a discussion regarding the admissibility of a child witness's prior consistent statements in a criminal sexual ***473** abuse case. At issue in Tome were a total of seven prior consistent statements made by the child witness, A.T. If the child herself had been asked to testify to her own prior consistent statements, this testimony would not violate the rule against hearsay because A.T., who was the declarant, was also a witness at trial. Under Canadian law, the prosecution's offer of six witnesses to testify to seven prior consistent statements made by A.T. would violate both the hearsay and self-serving statement rules. Under the common law, the hearsay rule provided that "a witness may not be called to prove another witness has previously made a statement asserting certain facts in order to prove the truth of those assertions." [FN130] The rule against self-serving evidence also prohibits the calling of a witness "to prove that another witness has made a prior statement consistent with the evidence which such other witness gives at trial." [FN131]

However, there has been considerable debate whether these hard and fast rules should be strictly applied in sexual abuse cases involving child complainants. In R. v. Khan, [FN132] the Supreme Court of Canada carved out an exception to the hearsay rule regarding children's out-of-court statements which meet special necessity and reliability requirements. Later, the Court expanded the Khan test, not just as an exception to the hearsay rule, but also as a new standard for determining the admissibility of all types of hearsay. In doing so, the Court rejected the categorical approach to hearsay exceptions. Furthermore, three judges on the Manitoba Court of Appeal have called for a new exception to the rule against self-serving statements to allow for the admissibility of the prior consistent statements which do not meet the requirements of the Khan test. [FN133] Adoption of this new exception may have allowed the admissibility of the controverted statements in Tome. This new exception, however, is not unanimously accepted. For instance,

the Ontario Court of Appeal, in R. v. M. (P.S.), [FN134] has advocated adherence to a strict pre-motive rule even in child sexual abuse cases which would ultimately make the testimony regarding the child's prior consistent statements in Tome inadmissible.

***474** A. Canada's New Hearsay Rule and Exception to the Rule against Self-
Serving Evidence -- The Khan Test

In R. v. Khan, [FN135] the Supreme Court of Canada specified a narrowly defined hearsay exception regarding the out-of-court statements of a child declarant. Khan, a physician, was charged with, but acquitted of, sexually assaulting a three-and-a-half year old child in his office before he conducted an examination of the child's mother. Approximately fifteen minutes after leaving Khan's office, the child's mother noticed a wet spot on the child's clothing and subsequently asked the child what the physician had talked to her about. It was at that point that the child explained that Khan sexually assaulted her.

Khan was charged with sexual assault. At the time of trial, the child was four-and-a-half years old, and the Crown sought to have her give unsworn testimony. However, the trial judge held that the child was not competent to give unsworn testimony. In addition, the trial judge held that the mother's testimony narrating the child's statements was inadmissible hearsay because it did not fall within any of the established exceptions to the hearsay rule. Khan was acquitted.

On appeal by the Crown, the Ontario Court of Appeal ordered a new trial, holding that the requirements for the spontaneous declarations exception to the hearsay rule should be relaxed as to child witnesses. Kahn appealed to the Supreme Court of Canada, which dismissed the appeal and directed a new trial. In an opinion authored by Chief Justice McLachlin, the Khan Court held:

that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. [FN136] In order to qualify for this new exception, the Court held that the statements must satisfy a two-prong test of necessity and reliability. The necessity prong, according to the Court, could be satisfied by the incompetency of the child witness, as occurred in Khan. Chief Justice McLachlin

also suggested that "sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve" to satisfy a finding of necessity. [FN137] With respect to the reliability prong, the Court asserted that "[m]any considerations such as timing, demeanor, the personality of ***475** the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability." [FN138] However, the Court declined to "draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (. . .) should be always regarded as reliable." [FN139] The reliability of the evidence should be left to the discretion of the trial judge. [FN140] The Khan test thus marks the end to the categorical approach to the admissibility of hearsay evidence and the beginning for the foundation of a new, more liberal admissibility standard.

B. Expansion of the Khan Test

In R. v. Smith, [FN141] the Supreme Court of Canada dramatically expanded the Khan test. The Court applied the Kahn test to the statements of a declarant who is unavailable at trial. The Court also broadened the circumstances in which the Kahn test can be used; the Kahn test is no longer confined to situations where a child's statements are involved, nor is it confined to sex crimes. In so doing, the Court announced its rejection of rigid categorical exceptions to the hearsay rule and allowed for a more flexible admissibility standard. [FN142] The issue in Smith related to several phone calls that the victim placed to her mother in the hours prior to the victim's death. The victim made four telephone calls to her mother during which she indicated that the defendant Smith had first abandoned her but later returned to drive her back home. Approximately an hour after the last phone call, the victim's body was found near a service station lying on a sheet with both arms cut off. At trial, the victim's mother was asked to testify to the contents of the victim's telephone calls. The prosecution argued that the content of the victim's statements should be admissible under the "present intentions" or "state of mind" exception to the hearsay rule. [FN143] The Court found that the third statement, "Larry [the defendant] has come back," did not qualify for the "present intention" exception to prove that the accused had in fact returned. [FN144] However, the Court held that the statement might still be admissible under the Khan test if it were found to be both necessary and reliable.

***476** In concluding that the Khan test applied, the Court

completely reformed the hearsay rule. The Court explained that "the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid." [FN145] According to the Smith Court, this reform had already taken place because the "court's decision in Khan, therefore, signaled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity." [FN146]

In Smith, the Crown appealed only the admissibility of the first three telephone conversations. As to the first two conversations, the Court found that the necessity prong was satisfied by the unavailability of the witness; the Court also found that the reliability prong was satisfied because there was no reason to doubt the veracity of the victim. However, as to the third conversation ("Larry has come back and I no longer need a ride"), the Court found that this evidence did not have the "circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination." [FN147] The Court explained that, inasmuch as it was possible that the victim made a mistake as to whether Smith returned for her or that she might have intentionally tried to deceive her mother, the evidence failed the reliability prong of the Khan test. [FN148] Accordingly, the Court granted the appeal and ordered a new trial.

In a subsequent case, R. v. B. (K.G.), [FN149] the Supreme Court of Canada applied the Khan test to a prior inconsistent statement made by a declarant who was an available witness at trial. In B. (K.G.), the defendant, along with three other youths, engaged in an altercation with two brothers. During the course of the fight, one member of the group pulled out a knife and stabbed one of the brothers to death. Two weeks later, the three companions were interviewed by the police and all three admitted that the defendant had made statements to them acknowledging that he stabbed the brother. At trial, however, all three companions refused to verify their earlier statements.

***477** Under the orthodox rule, "prior inconsistent statements are admissible only to impeach the credibility of a witness, and are not as evidence of the truth of their contents." [FN150] The Court rejected the strict application of the orthodox rule, citing both Khan and Smith. Applying the Khan test, the Court stated, "[T]he trend within evidence law [is toward] greater

admissibility and a correspondingly increased emphasis on the weight to be accorded admissible evidence." [FN151] Further, the Court observed that in the past the necessity prong had usually been satisfied merely by the witness's unavailability. However, in the case of an inconsistent statement, even though by definition the witness is available at trial, "it is his or her prior statement that is unavailable because of the recantation." [FN152] Thus, the unavailability of the witness is no longer a prerequisite to admissibility under the Khan test. The Court granted the appeal and ordered a new trial, finding that although the statements of the witnesses had been videotaped and counsel for the accused had an opportunity to cross-examine, the statements were not made under oath. The absence of an oath may be taken into consideration by the trial judge in determining whether a sufficient indicia of reliability exists for admissibility at the new trial.

C. Child Witness Exception to the Rule Against Self-Serving Statements

Recently, in an attempt to further expand the admissibility of statements of a child victim, the Manitoba Court of Appeal, in R. v. B. (D.C.), [FN153] called for an exception to the rule against self-serving evidence, allowing for the admissibility of a child complainant's prior consistent statements in cases involving sexual abuse, which falls short of qualifying for the Khan test. [FN154] In that case, the defendant's stepdaughter and twin daughters alleged that they had been continuously sexually assaulted for approximately five years. The Crown elicited testimony from the children's school counselor regarding her detailed, lengthy discussions with the children regarding their sexual abuse. On appeal, the defendant challenged the admissibility of the counselor's testimony. The Court dismissed the appeal and held the counselor's testimony admissible. In dictum, the Court added that the children's ***478** prior complaints should be "admissible because the judge-made rule against prior consistent statements should no longer apply to the evidence of a child's complaint of sexual abuse," and that the "evidence . . . should be admissible to show consistency with a child's court-room testimony. [FN155] The Court qualified its new exception by explaining that:

> [U]nless [the prior statement] falls under the Khan exception to the hearsay rule, the evidence, of course, would not be admissible for the purpose of establishing the truth of the matters stated. However, a child's out-of-court statements that fall short of the Khan tests of admissibility may still be

important evidence. They may tend to confirm the consistency of the testimony of a young victim who is required to recall and recount traumatic events in the intimidating hostile court-room environment. The new rule of admissibility will ensure that in appropriate cases, and for limited purposes, that kind of evidence will not be excluded from the court's truth-seeking process. [FN156] This exception would permit the admissibility of the child's previous accounts of sexual abuse which will assist the trier of fact in evaluating the child witness's in-court testimony.

The Court attributed the need for an exception to the rule against self- serving statements in child sexual abuse cases to the failure of the common law to evolve in response to the recent changes in society. Justice Philp extensively quoted Supreme Court Justice L'Heureux-Dube, who recognized that, statistically, the incidents of child sexual abuse had risen sharply and that the rules of evidence had not adjusted to accommodate the increased number of child complainants forced into the judicial system. [FN157] Currently, "[a] lthough the circumstances of a child's disclosure of alleged abuse may be helpful to a trier of fact deciding the issue of the child's credibility, those circumstances are not admissible in [the case in] chief." [FN158] Consequently, ***479** "[a] child witness's credibility, like that of an adult witness, has to be determined from the witness's evidence and demeanor in the court-room." [FN159] In the interests of justice and to acknowledge the "increasing prevalence of sexual assault cases involving young children," [FN160] the court took "up the challenge and conclude[d] that the out-of-court statements of the children were admissible because the judge-made rule against prior consistent statements should no longer apply to the evidence of a child's complaint of sexual abuse." [FN161]

E. Pre-Motive Rule in Child Sexual Assault Cases

Notwithstanding an adoption of a blanket exception for the statements of child victims in sexual assault cases, strict adherence to the pre-motive rule will make it impossible for a post-motive statement to be admissible even under the flexible Khan test. Returning to the facts in Tome, all seven of A.T.'s statements postdated the point that her alleged motive to fabricate arose. If the pre-motive rule is strictly applied, these statements will automatically fail the reliability prong of the Khan test and will be excluded. In R. v. M. (P.S.), [FN162] a case similar to Tome, a child accused her mother's common law husband of sexually abusing her. The defense contended that the

child fabricated her accusations in March 1986, after the mother told the child that she could not return to live with her and the defendant. The defense contended that the child intended to break up the relationship between her mother and the defendant, to regain her mother's attention. At trial, the child's aunt testified that the child had told her about the alleged abuse during a sleep-over which occurred before March 1986. On appeal, however, the defense introduced new evidence that the sleep-over in question may have instead occurred in the fall of 1986, hence making the statement post-motive to fabricate. The Ontario Court of Appeal held that the appeal should be allowed and ordered a new trial. In doing so, Justice Doherty stated that the "evidence concerning the timing of the complaint" to her aunt "was determinative of the admissibility of the complaint" and that if the aunt's "recollection that the conversation occurred before March, 1986, had not been accepted by the trial judge, the complaint would have had to be excluded." [FN163]

***480** IV. Conclusion

The Supreme Courts of the United States and Canada have both developed tests for determining the evidentiary admissibility of victims' statements, tests which have reformed the law of hearsay. This reform has occurred in the context of sexual offense crimes cases, some of which also have involved child witnesses. In the United States, the Confrontation Clause cases lead to the following alternatives: (1) the trial court determines if the witness, child or otherwise, is available to testify; (2) if the witness is unavailable, or available but the statements are within a firmly rooted hearsay exception which does not require a showing of unavailability, then the statements are admissible over a Confrontation Clause objection; and (3) if the statements are not within a firmly rooted exception, the trial court then determines the statements' reliability pursuant to standards relating to the circumstances surrounding the making of the statements. If the witness testifies, no separate Confrontation Clause analysis is required, but the statements must meet the criteria of the appropriate exception. [FN164] In any event, there is no unbridled discretion; presumably, the majority of cases will involve admissible evidence either under the enumerated exceptions, the residual exceptions, or the "particularized guarantees of trustworthiness" factors set forth by the Court.

In Canada, the result in any given case will probably be the same, but the process of reaching the conclusion is entirely different, perhaps even simpler. A Canadian trial judge

currently need not fit the statements into any particular hearsay exception. Rather, the judge need only find that there is requisite necessity for the evidence and reliability of that evidence. This Canadian rule is likely to give greater discretion to the trial judge because there are no initial rules or guidelines in the form of the exceptions to the hearsay rule.

Let us use the facts of Tome to compare the results of the American and Canadian approaches. A.T., the child victim in Tome, was called to testify, satisfying the Confrontation Clause. However, she became a reluctant or unsatisfactory witness as cross-examination progressed. Thus, the government found it necessary to try to present evidence of A.T.'s seven prior statements pertaining to the alleged sexual abuse. The statements were consistent with her direct testimony, but she was no longer on the witness stand. The government tried to fit the statements into the prior consistent statement category under FRE 801(d)(1)(B), but could not show that the statements were ***481** made at a time when there was no motive to fabricate, for clearly A.T. had the same motive with respect to Tome at all pertinent times. [FN165]

Given that A.T.'s statements could not qualify as prior consistent statements, the only other route to admissibility would be under Rule 803(24). First, as measured by the standards of the residual exception, the statements were "all highly probative on the material questions at trial," [FN166] thus meeting the first two requirements of Rule 803(24). [FN167] The remaining questions would be whether the statements had "equivalent circumstantial guarantees of trustworthiness" [FN168] and whether "the general purposes of . . . [the Federal Rules of Evidence] and the interests of justice will best be served." [FN169] Under the Tome Court's guidelines, the test for such indicia was whether the statements were "so trustworthy that adversarial testing would add little to their reliability." [FN170] The statements in Tome were related to A.T.'s babysitter, A.T.'s mother, a social worker, and three pediatricians. Some or all of these statements could be found to be reliable under these standards sufficient to satisfy the requirements of Rule 803(24). In fact, in Tome, the trial court had so found. [FN171]

In Tome, the child witness was available to testify, and thus the Confrontation Clause was satisfied. However, if the child had not testified and the statements were admitted pursuant to the catch-all exception, the court first would have had to decide the question of admissibility and then determine whether the circumstances surrounding the making of the statements satisfied

the reliability prong of Roberts. [FN172] For this the trial court would consider factors such as: (1) spontaneity; (2) consistent repetition; (3) mental state of the declarant; (4) use of terminology unexpected of a child of similar age; and ***482** (5) lack of motive to fabricate. [FN173] Only if the statements could be so found, would they be properly admitted.

By contrast, under the Canadian approach of Khan, the first determination would be of necessity. Here, where the child was a witness, but was having problems testifying, one would expect the requirement to be met. Next, to determine whether the statement met the second requirement of reliability, the court would look immediately to the factors bearing upon reliability such as: (1) timing; (2) demeanor; (3) the personality of the child; (4) the intelligence and understanding of the child; and (5) the absence of any reason to expect fabrication in the statement. [FN174] The issue of whether the prior consistent statement was made under the influence of an improper motive or recent fabrication would be only one of the factors the court considered in determining the reliability of the statement, in addition to the child's personality, demeanor, intelligence and understanding. As no one factor is determinative, a judge might admit evidence of a statement despite the fact that the statement was made after the motive to fabricate arose.

We have reached no conclusion with respect to the ultimate admissibility of the statements in Tome under either the United States or Canadian approach. Presumably, a trial court could decide either way on those questions. If the trial court applied the proper tests to the facts in the record and utilized appropriate reasoning, its exercise of discretion would likely be upheld by the appellate courts. What we conclude, however, is that the Canadian approach seems simpler and more direct than the United States', yet the results are likely to be the same; i.e., ultimately, admissibility is within the discretion of the trial judge within some minimal guidelines. Ultimately, far more hearsay evidence will be admitted in criminal cases of all kinds in both the United States and Canada, not just in those cases that involve sexual offenses or child victims.

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editorial comments.

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FN1. 115 S. Ct. 696 (1995).

FN2. 59 C.C.C. (3d) 92 (Can. 1990).

FN3. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In the text, the Federal Rules of Evidence are sometimes referred to as the FREs.

FN4. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402.

FN5. An early statement of the rule against self-serving evidence was made by Lawton, L.J. in R. v. Turner, 1 All E.R. 70 (C.A. 1974): "[I]n general evidence can be called to impugn the credibility of witnesses but not led in chief to bolster it up." Id. at 75. In R. v. Campbell, 38 C.C.C. (2d) 6 (Ont. C.A. 1977), Martin, J.A., stated that there are two separate rules: 1) the accused may not elicit previous self-serving statements of the accused from a witness and 2) a witness, whether a party or not, may not repeat out of court statements, nor elicit those statements from another witness. Id. at 18.

FN6. Fed. R. Evid. 801(d)(1)(B).

FN7. 497 U.S. 805 (1990).

FN8. U.S. Const., amend. VI.

FN9. See Campbell, 38 C.C.C. (2d) at 18.

FN10. Harold J. Cox, Criminal Evidence Handbook s 767, at 173 (1991).

FN11. 59 C.C.C. (3d) 92 (Can. 1990).

FN12. We say "even in criminal cases" because, traditionally, the accused in a criminal case presumably has greater rights to confront and cross-examine her accuser, even at common law, in the absence of a constitutional provision like the Sixth Amendment to the Constitution of the United States. Therefore, British and Canadian law reflect this tradition. Thus, when hearsay reform emerged in England, the rule was retained in criminal cases while eliminated in civil cases. See, e.g., Civil Evidence Act, 1968, ch. 64, s 2.

FN13. R. v. K.G.B., 79 C.C.C. (3d) 257 (Can. 1993) (indexed as R. v. B.(K.G.)); R. v. Smith, 75 C.C.C. (3d) 257 (Can. 1992).

FN14. 502 U.S. 346 (1992).

FN15. 115 S. Ct. 696 (1995).

FN16. 59 C.C.C. (3d) 92 (Can. 1990).

FN17. Although proclaimed an exception to the hearsay rule in Khan itself, the subsequent cases have proclaimed the Khan rule to be a rejection of the categorical approach to hearsay exceptions, and an adoption of the new test of reliability and necessity. See Smith, 75 C.C.C. (3d) at 270; B.(K.G.), 70 C.C.C. (3d) at 280-81.

FN18. 115 S. Ct. 696 (1995).

FN19. A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express charge against the declarant of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d).

FN20. See United States v. White, 11 F.3d 1446, 1450 (8th Cir. 1993); United States v. Lewis, 954 F.2d 1386, 1391 (7th Cir. 1992); United States v. Casoni, 950 F.2d 893, 904 (3d Cir. 1991); United States v. Vest, 842 F.2d 1319, 1329-30 (1st Cir. 1988), cert. denied, 488 U.S. 965 (1988); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1984), cert. denied, 465 U.S. 1009 (1984); United States v. Quinto, 582 F.2d 224, 233- 34 (2d Cir. 1978).

FN21. See United States v. Tome, 3 F.3d 342, 350 (10th Cir. 1993), rev'd, 115 S. Ct. 696 (1995); United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992); United States v. Miller, 874 F.2d 1255, 1271-75 (9th Cir. 1989), cert. denied, 114 S. Ct. 258 (1993); United States v. Lawson, 872 F.2d 179, 182-83 (6th Cir. 1989), cert. denied, 493 U.S. 834 (1989); United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981).

FN22. Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally. Fed. R. Evid. 801 advisory committee's note.

FN23. Tome, 115 S. Ct. at 707 (Breyer, J., dissenting).

FN24. See infra notes 76-92 and accompanying text.

FN25. 761 F.2d 394 (7th Cir. 1985).

FN26. Id. at 399 (citation omitted).

FN27. Id.

FN28. 582 F.2d 224 (2d Cir. 1978).

FN29. Id. at 234 (quoting Fed. R. Evid. 801(d)(1(B)).

FN30. Id.

FN31. Id.

FN32. 4 John H. Wigmore, Evidence In Trials At Common Law s 1128, at 268 (revised by James H. Chadbourn, 4th ed. 1972).

FN33. McCormick on Evidence s 47, at 65 (John W. Strong gen. ed., 4th ed. 1992).

FN34. Fed. R. Evid. 801(d)(1)(B).

FN35. " 'Relevant evidence' means evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401.

FN36. Miller, 874 F.2d at 1274 (quoting United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986)).

FN37. 35 U.S. 412 (1836).

FN38. Id. at 439.

FN39. Id.

FN40. Id.

FN41. 52 U.S. 480 (1850).

FN42. Id. at 491.

FN43. 115 S. Ct. 696 (1995).

FN44. Tome, 3 F.3d at 350.

FN45. Id.

FN46. 115 S. Ct. 696 (1995).

FN47. The majority consisted of Justices Stevens, Scalia, Kennedy, Souter, and Ginsberg. They all favored the result and agreed upon the statement of the case in Part I of the opinion; the conclusion in Part IIA that Rule 801(d)(1)(B), by "use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule," id. at 702; in Part IIC (which rejects a government argument to adopt a case-by-case balancing approach to admissibility of prior consistent statements); Part IID (which reinforces the conclusion of Part IIA); and Part III (which points out that the balancing test rejected in Part IID may be accomplished in an appropriate case by the residual exceptions, such as FRE 803(24)). Moreover, Justices Kennedy, Stevens, Souter, and Ginsberg agreed, in Part IIA, that the conclusion "is confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence" and that the Court has relied on those Notes. Id.
Justice Scalia did not join in Part IIB, disagreeing that

the Court should rely upon the Advisory Committee Notes, because they "bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution." Id.

FN48. Id. at 701.

FN49. Id.

FN50. Id. (emphases added).

FN51. Id. at 702.

FN52. Id. at 707 (Breyer, J., dissenting).

FN53. Id.

FN54. Id. at 708 (Breyer, J., dissenting).

FN55. Id.

FN56. See supra text accompanying notes 50-51.

FN57. Tome, 115 S. Ct. at 709 (Breyer, J., dissenting).

FN58. The term "affirmative" evidence is here used to denote a statement offered for the truth of the matter asserted, as was used by Judge Friendly in his concurrence in United States v. Rubin, 609 F.2d 51, 66 (2d Cir. 1979) (Friendly, J., concurring). The term "substantive" evidence, or use, often means the same thing. See, e.g., Fed. R. Evid. 801(d)(1)(B) advisory committee's note.

FN59. Affirmative evidence use, as contrasted with rehabilitative or impeachment use, is, by definition, offered for the truth of the matter asserted. See Fed. R. Evid. 801(c). In other words, a statement which would otherwise qualify as hearsay by definition is not hearsay if it is offered other than for the truth of the matter asserted in the statement. And, a statement offered for its content and for the truth thereof is evidence being used affirmatively. See, e.g., Rubin, 609 F.2d at 66-70 (Friendly, J., concurring).

FN60. See supra note 61, and concurrence of Judge Friendly

cited therein.

FN61. Rubin, 609 F.2d at 67 (Friendly, J., concurring).

FN62. Id.

FN63. Id. at 69. Contra Quinto, 582 F.2d at 233-34.

FN64. See Rubin, 609 F.2d at 61; United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

FN65. Before adoption of the Federal Rules of Evidence see, e.g., United States v. Corry, 183 F.2d 155 (2d Cir.1950); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948) cert. denied sub nom. Grenaldi v. United States, 337 U.S. 931 (1949). After adoption of the Federal Rules of Evidence see, e.g., Rubin, 609 F.2d 51; United States v. Check, 582 F.2d 668 (2d Cir. 1978); Quinto, 582 F.2d 224.

FN66. Corry, 183 F.2d at 156-57.

FN67. Sherman, 171 F.2d at 621-22.

FN68. Rubin, 609 F.2d at 66-70 (Friendly, J., concurring).

FN69. 171 F.2d 619 (2d Cir. 1948).

FN70. Id. at 622.

FN71. Id. (emphasis added).

FN72. 183 F.2d 155 (2d Cir. 1950).

FN73. Id. at 157.

FN74. 606 F.2d 51 (2d Cir. 1979).

FN75. Id. at 70 (Friendly, J., concurring).

FN76. See supra note 47.

FN77. Tome, 115 S. Ct. at 701. The status referred to in the quoted text is the status accorded to Rule 801(d) statements of witnesses which are designated non-hearsay. These include statements of witnesses and admissions by party opponents. Note the reference to "Rules" in the

plural.

FN78. Id.

FN79. Id.

FN80. Id.

FN81. Id.

FN82. " 'When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault."' Id. (quoting McCormick on Evidence s 49, at 105 (Edward W. Cleary gen. ed., 2d ed. 1972)).

FN83. " 'The broad rule obtains in a few courts that consistent statements may be admitted after impeachment of any sort -- in particular after any impeachment by cross-examination. But there is no reason for such a loose rule."' Id. (quoting John H. Wigmore, Evidence in Trials at Common Law s 1128, at 268 (revised by James H. Chadbourn, 4th ed. 1972)).

FN84. See supra note 82.

FN85. See supra note 83.

FN86. See supra text accompanying notes 49-51.

FN87. Tome, 115 S. Ct. at 702.

FN88. Id.

FN89. Id.

FN90. Id.

FN91. Id. Note here the singular "Rule".

FN92. Id.

FN93. Id. at 704.

FN94. Id.

FN95. Id. at 703.

FN96. Id. at 704 (quoting Fed. R. Evid. advisory committee's introduction to 28 U.S.C. app. art. VIII, at 771).

FN97. Id. at 705.

FN98. 112 S. Ct. 2503, 2507 (1992).

FN99. Tome, 115 S. Ct. at 705.

FN100. Id.

FN101. 497 U.S. 805 (1990).

FN102. California v. Green, 399 U.S. 149, 155-56 (1970).

FN103. See, e.g., Wright, 497 U.S. at 814; United States v. Inadi, 475 U.S. 387, 393 n.5 (1986); Dutton v. Evans, 400 U.S. 74, 86 (1970); Green, 399 U.S. at 155-56.

FN104. Wright, 497 U.S. at 814.

FN105. 448 U.S. 56 (1980).

FN106. Wright, 497 U.S. at 814 (citing Roberts, 448 U.S. at 65).

FN107. Id. at 814 (citing Roberts, 448 U.S. at 65.)

FN108. "First ... the Sixth Amendment establishes a rule of necessity. In the usual case ... the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Id. at 814 (quoting Roberts, 448 U.S. at 65).

FN109. "Second, once a witness is shown to be unavailable, 'his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."' Id. at 814-15 (quoting Roberts, 448 U.S. at 66).

FN110. See supra note 108.

FN111. See supra note 109.

FN112. Wright, 497 U.S. at 816.

FN113. Id. at 817.

FN114. Id.

FN115. Id.

FN116. Id. at 818 (citing Roberts, 448 U.S. at 66).

FN117. Id. at 819 (The state had argued that the showing could be based upon the totality of the circumstances, measured not just by the circumstances surrounding the making of the statements but also by the evidence at trial which corroborated the truth of the statement.).

FN118. "In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." Id. at 820.

FN119. In White v. Illinois, 502 U.S. 346 (1992), the Supreme Court approved the admission into evidence, over hearsay and Confrontation Clause challenge, a child's statements admitted at trial under the exited utterance (or spontaneous declaration) and medical diagnosis or treatment exceptions to the hearsay rule. Without discussion the Court found the statements to be within firmly rooted exceptions under the Roberts test, even though the "medical diagnosis" statements not only described the events but also identified the perpetrator. The state's definition of the exception to allow identification of the perpetrator was not clearly the majority rule even in Illinois, and to say that Rule 803(4) was "transformed in its entirety into a firmly rooted hearsay exception by the mere passage of some twenty years since the adoption of the Federal Rules and without any analysis of its more debatable attributes" is troublesome. Myrna S. Raeder, White's Effect on the Right to Confront One's Accuser: Are expanding interpretations of firmly rooted hearsay exceptions collapsing Confrontation Clause analysis?, 7 Crim. Just., Winter 1993, at 2, 55. Professor Raeder's analysis of the White decision also focuses on Wright.

FN120. Wright, 497 U.S. at 821.

FN121. Id.

FN122. Id. at 821-22.

FN123. The availability issue is not addressed herein. Although the Roberts test posits unavailability as the first prong -- necessity, where the firmly rooted exception does not require a showing of unavailability, the Court has demonstrated no resistance to ignoring that requirement for Confrontation Clause purposes. See United States v. Inadi, 475 U.S. 387 (1986). In Wright the child's unavailability was assumed. In White, the Court found that, like the situation in Inadi, the Court's finding that the statements were within firmly rooted hearsay exceptions that did not necessitate a showing of unavailability precluded the necessity for such a showing there. White, 502 U.S. at 354-57.

FN124. See supra note 122 and accompanying text.

FN125. See supra note 100 and accompanying text.

FN126. Fed. R. Evid. 801.

FN127. Cox, supra note 10 (emphasis added).

FN128. Id. s 639, at 141.

FN129. R. v. Jones, 44 C.C.C. (3d) 248, 255-56 (Ont. C.A. 1988).

FN130. Id. (Goodman, J.A.).

FN131. Id.

FN132. 59 C.C.C. (3d) 92 (Can. 1990).

FN133. See R. v. D.C.B. (Man. C.A. 1994) 91 C.C.C. (3d) 357, 372-73 (Philp, J., Twaddle, J., Kroft, J.) (indexed as R. v. B. (D.C.)).

FN134. R v. P.S.M., 77 C.C.C. (3d) 402 (Ont. C.A.) (indexed as R. v. M. (P.S.)).

FN135. 59 C.C.C. (3d) 92 (Can. 1990).

FN136. Id. at 105-06.

FN137. Id. at 104-05.

FN138. Id.

FN139. Id.

FN140. Id.

FN141. 75 C.C.C. (3d) 257 (Can. 1992).

FN142. Id. at 270 (Lamer, C.J.C.).

FN143. Id. at 266.

FN144. Id. at 267.

FN145. Id.

FN146. Id. at 270.

FN147. Id. at 272.

FN148. Id.

FN149. R. v. K.G.B. 79 C.C.C. (3d) 257 (Can. 1993) (indexed as R. v. B. (K.G.)).

FN150. Id. at 266 (Lamer, C.J.C.).

FN151. Id. at 280.

FN152. Id. at 295.

FN153. R v. B. (D.C.), 91 C.C.C. (3d) 357 (Man. C.A. 1994).

FN154. Id. at 372-73 (Philp, J.A.).

FN155. Id. at 383.

FN156. Id. at 372-73.

FN157. Further, difficulties faced by the young complainant as she tries to seek justice in the somewhat alien criminal justice system act to limit the attainment of the truth in the court process. Unfortunately, the barriers to justice

faced by child victims remain almost as steadfast today as they have for decades. In fact, despite the increase in child sexual assault complaints since the early 1980's, the ratio of charge to conviction rate remains unchanged. In 1986, only one in five of those charged with sexual assault were convicted, compared to a conviction rate of four out of five of those accused of other offences ... [sic] As "increasing numbers of sexual assault cases involving children come through the courts, it has become apparent that the traditional treatment of children and their evidence is unsatisfactory." Id. at 367 (quoting R. v. L. (D.O.), 85 C.C.C. (3d) 289, 302-5 (Can. 1993) (L'Heureux-Dube, J.)).

FN158. Id. at 379 (Twaddle, J.A.).

FN159. Id. at 379-80.

FN160. Id. at 372.

FN161. Id.

FN162. R. v. P.S.M. 77 C.C.C. (3d) 402 (Ont. C.A. 1992) (indexed as R. v. M. (P.S.)).

FN163. Id. at 419.

FN164. See United States v. Owens, 484 U.S. 554 (1988).

FN165. Remember, A.T. asserted, as part of her report of the sexual abuse, that she did not want to be with her father. Thus, the government, in an attempt to fit the statements within FRE 801(d)(1)(B), argued that the defense had launched an implicit charge that A.T.'s testimony was motivated by the child's desire to live with her mother. Tome, 115 S. Ct. at 700.

FN166. This is the language the Supreme Court used to note that the child's statements were arguably admissible under FRE 803(24). Id. at 705.

FN167. The first two requirements of FRE 803(24) are: "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed R. Evid. 801(24).

FN168. Fed. R. Evid. 803(24)(A).

FN169. Fed. R. Evid. 803(24)(C).

FN170. Wright, 497 U.S. at 821.

FN171. Tome, 115 S. Ct. at 700 (The trial court admitted the statement to the babysitter under 803(24) as well as under 801(d)(1)(B).).

FN172. Roberts, 448 U.S. at 66; see also supra text accompanying note 112.

FN173. Wright, 497 U.S. at 821-22.

FN174. Khan, 59 C.C.C. (3d) at 105.

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