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# Prior Inconsistent Statements and the Principled Approach: Can the Supreme Court of Canada Have U.(F.J.) Cake and Eat It Too?

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# PRIOR INCONSISTENT STATEMENTS AND THE PRINCIPLED APPROACH: CAN THE SUPREME COURT OF CANADA HAVE *U.(F.J.)* CAKE AND EAT IT TOO?

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## Abstract

*The principled approach to the admission of hearsay took a surprising turn in 2000 when the Supreme Court of Canada handed down R. v. Starr. The Starr decision severely restricted the type of evidence that could be examined at the threshold reliability stage, confining the analysis to the circumstances under which the statement was made and declaring that external evidence could no longer be considered in the analysis. Despite Starr's holding, courts have continued to consider external evidence when assessing threshold reliability. The Supreme Court's decision in U.(F.J.) may be responsible for this inconsistency. Although prior inconsistent statement hearsay was at issue in U.(F.J.), courts dealing with both prior inconsistent statement and declarant-unavailable hearsay have cited U.(F.J.)'s principles, which has led to great analytical confusion. However, R. v. Khelawon represents a step toward analytical consistency, as the Ontario Court of Appeal sheds some light on the issue and purports to make some sense out of the analytical confusion at the threshold reliability stage.*

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## Introduction

The "hearsay revolution," sparked by the court's adoption of the principled approach, has made great strides to ensure consistency in the admission of hearsay evidence, but has also created additional complexity. Although *R. v. Starr*[1] represents the Supreme Court of Canada's latest word on the application of the principled approach to declarant-unavailable hearsay,[2] courts have continued to deviate from its framework due to confusion and disagreement on how to adapt the older jurisprudence to the new approach. Indeed, this is evident with the struggle to adapt *R. v. U.(F.J.)* [3] into the principled analysis, particularly in light of *Starr*. It has been theorized that *U.(F.J.)* represents an exception to the ban on extrinsic evidence in the threshold reliability analysis.[4] This article will demonstrate that this theory is incorrect. Rather, as held by Justice Rosenberg in *R. v. Khelawon*, [5] *U.(F.J.)* falls within the declarant-available hearsay category, and is not an exception to the rules guiding the declarant-unavailable jurisprudence. However, rather than chalking *U.(F.J.)* up as an anomaly or confining it to the declarant-available category, courts have hinged on the "exception" that it created, stretching it beyond its limits into declarant-unavailable territory, and impeding logical jurisprudential development within the principled approach.

This article will illustrate that the confusion and inconsistency within the principled approach stems from a failure to acknowledge that two analytical models exist at the threshold reliability stage: one for declarant-unavailable hearsay dictated by the *R. v. Khan*,[6] *R. v. Smith*,[7] and *Starr* authorities, and the other for declarant-available hearsay emerging

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[1] [2000] 2 S.C.R. 144, 190 D.L.R. (4th) 591 [*Starr*].

[2] For referential consistency throughout the argument, "declarant-unavailable hearsay" will refer to situations in which the declarant is absent from court, while "declarant-available hearsay" will be analogous to "prior inconsistent statements", and is contingent upon an in-court declarant.

[3] [1995] 3 S.C.R. 764, S.C.J. No. 82 [*U.(F.J.)*].

[4] *Khelawon*, *infra* note 5 at para. 32, 36-38. See also Hamish Stewart, "A Rationale for the Rejection of Extrinsic Evidence in Assessing the Reliability of Hearsay" (2005) 30 C.R. (6th) 306 at 313 [Stewart].

[5] [2005] O.J. No.723, 195 O.A.C. 11, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 153 [*Khelawon*].

[6] [1990] 2 S.C.R. 531, S.C.J. No. 81 [*Khan*].

[7] [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590 [*Smith*].

from the *R. v. B.(K.G.)*[8] and *U.(F.J.)* lineage. The overall discussion will reveal that there are two factors contributing to the analytical confusion within the principled approach. First, the restriction placed by Iacobucci J. on threshold reliability has motivated courts to sidestep his analysis in *Starr* and drive them to *U.(F.J.)*'s "exception," which has been used to consider evidence beyond the circumstances in which a statement was made in assessing threshold reliability for declarant-unavailable hearsay.[9] Second, the courts' failure to recognize that *U.(F.J.)* is not an exception to *Starr*, but rather a peculiar piece within the prior inconsistent statement puzzle only affecting declarant-available hearsay, has led to an irrational blending between the declarant-available and declarant-unavailable analyses.

This analytical slue has created uncertain legal results, which threatens the fair treatment of victims, witnesses, and the accused. As Justice Rosenberg emphasized in *Khelawon*, the hearsay rule is multi-purposed, serving "both evidentiary and procedural goals" by "ensur[ing] that only trustworthy evidence is admitted" and recognizing that the accused's interest to due process and a fair trial must be protected.[10]

This paper is divided into four parts. Part I will briefly outline recent developments guiding the principled approach. Part II will highlight prior inconsistent statements' debut within the principled approach through *B.(K.G.)* and *U.(F.J.)*. In Part III, several lower court decisions will be summarized to demonstrate that while some courts have recognized the divide between the declarant-available and declarant-unavailable hearsay categories, others have obscured the boundary. Finally, the Ontario Court of Appeal's decision in *Khelawon* will be examined, as it highlights the discrepancies between *Starr* and *U.(F.J.)*, and represents a step toward analytical consistency.

## I. The Debut Of The Principled Approach

In the early 1990s, Chief Justice Lamer declared that *Khan* signalled a change in evidence law and that hearsay not fitting within the traditional categorical exceptions would now be admissible on a principled

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[8] [1993] 1 S.C.R. 740, S.C.J. No. 22 [*B.(K.G.)*].

[9] *Khelawon, supra* note 5 at para. 32.

[10] *Khelawon, supra* note 5 at para. 107.

basis – "the governing principles being the reliability of the evidence, and its necessity."[11] Courts and commentators accepted the *Khan* and *Smith* rulings as residual "catch-alls" for hearsay unfit for the traditional categories.[12] The jurisprudence was leaning towards an open hearsay analysis that broadened a trial judge's ability to admit reliable evidence. However, this trend shifted in 2000, when the Supreme Court of Canada rendered its ruling in *Starr*.

### 1. *R v. Starr*

Iacobucci J.'s decision in *Starr* wrought significant and unexpected changes to the traditional hearsay exceptions.[13] Iacobucci J. sparked controversy by stating that, when assessing threshold reliability,

> [T]he trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, *I would not consider the presence of corroborating or conflicting evidence*.[14]

Although Iacobucci J.'s analysis did not emerge as a logical progression from the preceding Supreme Court of Canada jurisprudence, he followed both the United States Supreme Court's approach in *Idaho v. Wright*[15] and the Ontario Court of Appeal's approach prior to *Starr*.[16] Despite this, the Court's ruling in *Starr* proved both "controversial and restrictive."[17]

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[11] *Smith*, note 7 at para. 32.

[12] Lee Stuesser "*R. v. Starr* and Reform of the Hearsay Exceptions" (2001), 7 Can. Crim. Law Rev. 55 at 56 [Stuesser].

[13] *Ibid.*

[14] *Starr*, *supra* note 1 at para. 217 [emphasis added].

[15] *Idaho v. Wright*, 497 U.S. 805 (1990).

[16] *R. v. Merz* (1999), 46 O.R. (3d) 161, [1999] O.J. No. 4309 at para. 51 ("[e]vidence from other witnesses which is consistent with the substance of an out-of-court statement is not a circumstance surrounding the making of that statement and cannot generally be seen as diminishing the risks associated with the admission of hearsay evidence") [*Merz*]; See especially *R. v. Conway* (1997), 121 C.C.C. (3d) 397, [1997] O.J. No. 5224 at para. 43-45.

[17] Don Stuart, "*Starr* and *Parrott*: Favouring Exclusion of Hearsay to Protect Rights

In narrowing threshold reliability to "whether or not the circumstances surrounding the statement provide circumstantial guarantees of trustworthiness," Iacobucci J. effectively prohibited corroborating evidence from entering the threshold reliability analysis.[18] This restriction proved puzzling. Pre-*Starr* commentators argued that while threshold reliability "may have traditionally focused on a narrow inquiry into the circumstances surrounding the making of the statement, a rigid adherence to this approach [could not] be countenanced in a new era of hearsay cases."[19] Iacobucci J.'s confined approach also contrasted sharply with Justice McLachlin's open analysis in *Khan*.[20] As evidenced in *Khan*, corroborating evidence "ha[d] long been an important tool used by trial judges in determining admissibility," which made Iacobucci J.'s holding perplexing.[21]

Although Iacobucci J. expressly stated that evidence going beyond the circumstances in which a statement was made should not be considered in assessing threshold reliability, extrinsic evidence has continued to creep into the threshold reliability analysis post-*Starr*.[22] This tendency typically relies on the prior inconsistent statement authorities and, in particular, the "U.F.J. exception."[23] As the following analysis will demonstrate, this reliance is faulty, as courts faced with declarant-unavailable hearsay should not be drawing on the declarant-available authorities.

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of Accused" (2001) 39 C.R. (5th) 284 at 286. See also David M. Tanovich, "Starr Gazing: Looking into the Future of Hearsay in Canada" (2003) 28 Queen's L.J. 371 at 401-02 [Tanovich].

18 *Starr, supra* note 1 at para. 215.

19 Laurie Lacelle, "The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes" (1999) 19 C.R. (5th) 376 at 392 [Lacelle].

20 *Khan, supra* note 6 at para. 30.

21 David M. Paciocco & Lee Stuesser, *The Law of Evidence* 3rd ed. (Toronto: Irwin Law, 2002) at 118 [Paciocco].

22 *Starr, supra* note 1 at para. 217.

23 *Khelawon, supra* note 5 at paras.32.

## II. Prior Inconsistent Statements

### 1. "I Said What?"

Prior inconsistent statements are a challenging form of hearsay because, although the hearsay declarant may be cross-examined, there is often difficulty manifest in deciding "whether [or not] to prefer an out-of-court statement to a witness's own evidence at trial."[24] With the 1993 decision of *B.(K.G.)*, prior inconsistent statements found new life as evidence that could be used to prove the truth of their contents by applying the principled approach to declarant-available hearsay. In making the move to regard prior inconsistent statements as potentially acceptable hearsay, Chief Justice Lamer addressed the hearsay dangers in the declarant-available context.[25] In speaking for the Court, he held that:

> [E]vidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*. However, it is clear that the factors identified in those cases – reliability and necessity – must be adapted and refined in this particular context, given the particular problems raised by the nature of such statements.[26]

Justice Cory agreed that Khan and Smith do "provide an alternative justification" for admitting prior inconsistent statements for substantive purposes, and held that "their unmodified application to prior inconsistent statements would [not] adequately protect the interests of the accused from the potential dangers that surround the introduction of statements made in court."[27] However, he differed on where he would place his analytical limitations, finding the Chief Justice's reliability indicators too restrictive.[28] Justice Cory's reasoning foreshadows the subsequent case law, as courts are tending to push the analysis towards his limits.

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24 Lacelle, *supra* note 19 at 386.

25 *B.(K.G.)*, *supra* note 8 at paras. 86-104.

26 *B.(K.G.)*, *supra* note 8 at para. 73.

27 *B.(K.G.)*, *supra* note 8 at para. 126.

28 *B.(K.G.)*, *supra* note 8 at para. 126.

Although the Chief Justice specified very strict reliability indicators, he also stipulated that substitute "circumstantial guarantees of reliability" could satisfy the reliability requirement, which would be assessed according to the individual judge's discretion.[29] A mere two years later, the Supreme Court of Canada revisited this proposition in *U.(F.J.)*, in which Chief Justice Lamer admitted a prior inconsistent statement in the absence of the *B.(K.G.)* requirements.[30]

The prior inconsistent statements in *U.(F.J.)* were of questionable reliability, as they were not given under oath or warning, and officer notes constituted their only record.[31] Despite these warnings signs, Chief Justice Lamer admitted the complainant's statement for its truth. In doing so, the Chief Justice expanded the circumstances in which a prior inconsistent statement could be used for substantive purposes by indicating that "a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a *striking similarity between two statements.*" [32] Chief Justice Lamer cautioned that striking similarities would only go to enhancing threshold reliability "when there is a basis for rejecting […] alternative explanations." [33] Determining this basis requires the trial judge to look beyond "circumstantial guarantees of reliability" and necessarily involves a consideration of *external evidence*.[34]

The Chief Justice's holding was substantial. However, his indication that "striking similarities" between two statements may suffice threshold reliability only if at least one statement is "clearly substantively admissible" is curious, because in *U.(F.J.)* neither statement was sufficiently reliable on its own.[35] Despite this discrepancy, *U.(F.J.)* has been accepted as good law, condoning an approach that "permits a form of corroborat[ing] evidence to function in the reliability analysis."[36] However, this "loophole" should not be extended to the threshold

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29 *B.(K.G.), supra* note 8 at para. 104.

30 *U.(F.J.), supra* note 3.

31 *U.(F.J.)*, *supra* note 3 at paras. 4-5.

32 *U.(F.J.)*, *supra* note 3 at para. 40 [emphasis added].

33 *U.(F.J.), supra* note 3 at para. 40.

34 *U.(F.J.), supra* note 3 at para. 39.

35 *U.(F.J.), supra* note 3 at para. 49.

36 Lacelle, *supra* note 19 at 383.

reliability analysis of declarant-unavailable hearsay, a caveat which has been overlooked and which will be explored in Part III.

### 2. Steer Away From *Starr*

The Supreme Court of Canada's decision to admit prior inconsistent statements for the truth of their contents does not mean that the threshold reliability analyses for declarant-available and declarant-unavailable hearsay must mirror one another. The ability to cross-examine the declarant and the need to have specific reliability indicators in the analysis, represent compelling reasons to have different analytical frameworks for each category. As Justice Blair stated in *Khelawon*, "different considerations may apply where the accused has had the opportunity to cross-examine the declarant as in R. v. B.(K.G.), [and] R. v. U.(F.J.)."[37] Similarly, in *R. v. Auger,*[38] the Northwest Territories Supreme Court recognized that specific assurances have been built into the threshold reliability analysis that are specific to declarant-available hearsay, and that any "exceptions to the various precautions which are to be put in place to try to assure reliability will be narrow."[39]

## III. *Starr*, meet *U.(F.J.)*

### 1. A Murky Affair

After *Starr*, the law regarding threshold reliability for declarant-unavailable hearsay should have been clear, as Iacobucci J. undoubtedly indicated that a trial judge may not resort to factors going beyond the circumstances under which a statement was made.[40] However, as discussed, the prevailing view seems to be that some exceptions can thwart the standard approach to threshold reliability for declarant-unavailable

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37 *Khelawon, supra* note 5 at para. 99.

38 [2001] N.W.T.J. No. 45, 2001 NWTSC 44.

39 *Ibid.* at para. 13.

40 *Starr, supra* note 1 at para. 217. See generally Paciocco, *supra* note 21 at 115.

hearsay.[41] The jurisprudential confusion can be traced in part to the acceptance of prior inconsistent statements as potentially admissible hearsay.

Lee Stuesser questions where *U.(F.J.)* fits into the principled approach. In "*R. v. Starr* and Reform of the Hearsay Exceptions," he argues that *U.(F.J.)* stands for another exception, condoning the consideration of corroborative evidence in the form of "strikingly similar statements" where there are "insufficient safeguards in place to meet the *K.G.B.* requirements."[42] Stuesser's argument is correct. *U.(F.J.)* must be taken either as an anomaly, rendered to get a particular result on specific facts or, alternatively, as an exception to *B.(K.G.)* that only applies in narrow circumstances within the declarant-available hearsay category. However, the courts have disagreed, resulting analytical discrepancies at the threshold reliability stage.

### 2. A (Semi) Clear Dividing Line

Some courts have recognized the boundary between declarant-available and declarant-unavailable hearsay, and have respected the 2 categories' analytical limits.

In *R. v. Czibulka*,[43] the trial judge followed *Starr* in assessing threshold reliability and did not look beyond the surrounding circumstances in determining reliability. On appeal, Justice Rosenberg correctly characterized the two threshold reliability models for declarant-unavailable and declarant-available hearsay.[44] He held that, "[s]ince the declarant was not available in this case, threshold reliability turned on the Smith, Khan, and Starr line of cases," and admissibility depended on the circumstances under which the evidence was produced.[45]

Similarly, in the case of *R. v. Sarrazin*[46] confusion was evident in the trial level judgment, which was clarified on appeal. In assessing threshold reliability, Justice Roy purported to rely on "consistencies

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41 *Merz, supra* note 16.

42 Stuesser, *supra* note 12 at 73; *U.(F.J.), supra* note 3 at para. 42.

43 *R. v. Czibulka* [2004] O.J. No. 3723, 189 C.C.C. (3d) 199 at para. 22.

44 *Ibid.* at para. 24.

45 *Ibid.* at para. 26.

46 *R. v. Sarrazin*, [2005] O.J. No. 1404, 75 O.R. (3d) 485 [*Sarrazin*].

and similarities between the various statements" made by the deceased declarant.[47] Justice Roy clearly relied on *U.(F.J.)* in holding that striking similarities between the unavailable declarant's statements could establish reliability.[48] On appeal, Justice Blair held that Justice Roy's approach was incorrect in these circumstances.[49] However, Justice Roy's approach would have been incorrect even under the right circumstances, as he did not properly apply *U.(F.J.)*. He failed to recognize that *U.(F.J.)* condones reliance on external evidence to establish "striking similarities" between *different* declarant's statements, not between the statements of a single declarant. In any case, Justice Roy should not have been drawing on *U.(F.J.)*'s principles, since this case concerned declarant-unavailable hearsay.[50]

## 3. A Blurry Boundary

Although this section will illustrates situations where the courts have demonstrated greater confusion at the threshold reliability stage, the cases that will be discussed are similar to those in the previous section, where differentiation between the analyses was vague or was clarified on appeal. For instance, *R. v. Chrisanthopoulos*[51] turned on an anonymous 911 caller's statement, which the Crown sought to introduce for the truth of its contents.[52] The Court of Appeal held that the trial judge properly admitted the hearsay, considering only "the circumstances surrounding the call" in assessing threshold reliability.[53] Although the court found that the reliability analysis was correctly executed, it agreed with the Crown that:

> [I]n light of the striking similarities between the event described by the caller and the events which occurred shortly thereafter, this was one of those rare instances, identified in R. v. U.(F.J.)[…], in which it would have been permissible for the trial judge to consider the surrounding

47 *Ibid.* at para. 74.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *R. v. Chrisanthopoulos*, [2003] O.J. No. 5252, 180 O.A.C. 124.

52 *Ibid.* at para. 4.

53 *Ibid.* at para. 9.

> evidence as a means of testing the reliability of the 911 call.[54]

This holding is curious since this case did not involve prior inconsistent statements, and the anonymous declarant was clearly not available for cross-examination. Further, it is difficult to ascertain why the Court of Appeal would compare an unavailable declarant's statement to events that occurred afterwards, since *U.(F.J.)* specified that the correct analysis concerns striking similarities between different people's *statements*. The Court of Appeal's erroneous comparison between statement and events indicates a misunderstanding of the particular circumstances that are required for *U.(F.J.)* to operate, and, like in *Sarrazin*, an inability to properly apply *U.(F.J.)*'s principles.

The pre-*Starr* case of *R. v. Dubois*[55] involved yet another incorrect analysis resulting from the fuzzy divide between declarant-available and unavailable hearsay. The hearsay declarants were young boys who had been sexually assaulted and were not able to testify at trial. This was therefore a declarant-unavailable situation, indicating that *Khan* and *Smith* should apply. However, the trial judge decided that the statements passed the threshold reliability stage, relying partially on similarities between the children's statements.[56] On appeal, Justice Brossard cited Chief Justice Lamer in *U.(F.J.)*, arguing that "the Supreme Court decided…that striking similarities between the versions of several persons could contribute to reaching the [reliability] threshold."[57] Like Justice Roy in *Sarrazin*, Justice Brossard did not execute the *U.(F.J.)* analysis correctly. Although this case pre-dates *Starr*, Justice Brossard should not have been applying *U.(F.J.)* in any event, as the facts did not involve prior inconsistent statements.

Analytical confusion is also evident in *R. v. Anderson*.[58] The declarant was too ill to testify and therefore unavailable at trial.[59] Justice Grannary slotted the statements into the prior inconsistent statement category, possibly because the declarant was still alive. *Starr* seemed to escape Grannary J's radar. He unnecessarily acknowledged that the state-

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[54] *Ibid*.

[55] *R. v. Dubois*, [1997] A.Q. no. 2667, 118 C.C.C. (3d) 544.

[56] *Ibid.* at 552.

[57] *Ibid.* at 557.

[58] *R. v. Anderson*, [2004] B.C.J. No. 1729, BCPC 293.

[59] *Ibid.* at para. 7-8.

ments "were not sworn or affirmed and were not videotaped."[60] Further, in conducting the reliability analysis, he went beyond the boundaries set out in *Starr* and considered "items of reliability," such as the "confirmation of [the complainant's] statements by extraneous objective evidence.[61]

This overview indicates that the line between declarant-available hearsay and declarant-unavailable hearsay is murky, and is leading to faulty analyses. Courts must begin to acknowledge that the two hearsay categories have different histories and authorities, and are augmented by concerns that are unique to either refuting a present witness's testimony or admitting evidence in the absence of cross-examination. For these reasons, threshold reliability must remain distinct for declarant-unavailable and declarant-available hearsay.

## 4. Khelawon Clears It Up?

In 2005, the Ontario Court of Appeal handed down *Khelawon*, contemplating the differences between the *U.(F.J.)* and *Starr* holdings and purporting to glean some sense of clarity from their conflicting principles.[62]

Videotaped statements concerning allegations against Khelawon were taken from two declarants, who were deceased by the time of trial, thus bringing declarant-unavailable hearsay into issue. In admitting the statements, Mr. Justice Grossi averted *Starr*'s analytical boundaries and incorrectly considered external evidence such as corroborating injuries and the "absence of an alternative suspect."[63] However, the Court of Appeal excluded the statements, and in doing so, engaged in a useful discussion.

Justice Blair, dissenting in part, discusses a minority of exceptions to the "no corroborative evidence" rule in *Starr*, and cited the "U.F.J. exception" as particularly important to this case.[64] He argues that "although Lamer C.J.C. created the U.(F.J.) exception in the context of

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60 *Ibid.* at para. 26.

61 *Ibid.* at para. 39.

62 *Khelawon, supra* note 5.

63 *Khelawon, supra* note 5 at para. 33.

64 *Khelawon, supra* note 5 at paras. 24-25.

the admissibility of a prior inconsistent statement where the witness was available for cross-examination", he does not "see a principled impediment to extending that exception" to declarant-unavailable situations.[65] Justice Blair recognizes that there are sound reasons for distinguishing "between situations where the declarant is available for cross-examination and those where the declarant is not available in considering the admissibility of hearsay."[66] Although he accurately separates the hearsay authorities, in doing so, he makes some questionable statements.

In justifying *U.(F.J.)*'s survival after *Starr*, he argues that "[t]he Supreme Court did not state that it was overruling itself in U.(F.J.), a clearly articulated and well-recognized prior authority."[67] As further justification, Justice Blair points out that Iacobucci J.'s reference to *U.(F.J.)* in *Starr* indicates that *U.(F.J.)* was not overruled by *Starr*.[68] One wonders why the same argument cannot be made for *Khan*, as Iacobucci J. also cited *Khan*.[69] While he did not state that he was overruling *Khan*, corroborative evidence can no longer be considered in the threshold reliability analysis, and therefore by implication, *Starr* has overruled *Khan*.[70] In considering this, Justice Blair states that while "it is not necessary as a matter of law, had the court intended to overrule itself on such a well-defined point as that made in *U.(F.J.),* [he] would have expected it to have said so, and to have conducted at least a minimal analysis of the guidelines."[71] Once again, Iacobucci J.'s treatment of *Khan* in *Starr* suggests that Justice Blair's reasoning for why *U.(F.J.)* was not overruled by *Starr* may be flawed, as *Khan* was taken as being overruled with absolutely no corresponding analysis.[72]

While attempting to reconcile *U.(F.J.)* and *Starr* by demonstrating how and when *U.(F.J.)* applies to declarant-unavailable hearsay, Justice Blair misses the point: *U.(F.J.)*'s analysis is not relevant to the

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65 *Khelawon, supra* note 5 at para. 46.

66 *Khelawon, supra* note 5 at para. 45.

67 *Khelawon, supra* note 5 at para. 39.

68 *Khelawon, supra* note 5 at para. 39.

69 *Starr, supra* note 1 at paras. 106, 153-55, 190.

70 *Starr, supra* note 1 at para. 217.

71 *Khelawon, supra* note 5 at para. 40.

72 *Starr, supra* note 1 at para. 217. See Suhail Akhtar, "Hearsay: The Denial of Confirmation" (2005) 26 C.R. (6th) 46 at 52. See also Tanovich, *supra* note 17 at 402.

declarant-unavailable context. Therefore, any discussion concerning why *U.(F.J.)* has survived *Starr* is moot, since *Starr* only affects authorities within the declarant-unavailable lineage. It is therefore impossible for *Starr* to have overruled *U.(F.J.)*.

Justice Rosenberg delivers reasons reflecting the correct position. He points to the declarant's availability in *U.(F.J.)* as the crucial defining feature between *U.(F.J.)* and *Starr*, which permits "a full and meaningful cross-examination."[73] He emphasizes that "[w]here the declarant is available the emphasis is not so much on the inherent reliability of the statement itself but the safeguards in place to detect unreliability."[74] Further, because the declarant's availability "provides a powerful safeguard for discovering whether the prior out of court statement is true," when a declarant is absent, it makes sense that *Starr* would hold "that the safeguards must be found in the circumstances surrounding the taking of the statement."[75]

Justice Rosenberg's reasons indicate that threshold reliability is to be approached differently for declarant-unavailable and declarant-available hearsay. In holding that *U.(F.J.)* does allow a court to move away from "the strictures of Starr where the *declarant is available*", he indicates that *U.(F.J.)*'s "exception" is not universal and only applies to declarant-available hearsay.[76]

## IV. Recommendations

If consistency is to be achieved, a few simple rules must be followed. As discussed, several cases since *Starr* have cited *U.(F.J.)* as authority for averting *Starr*'s strict threshold reliability analysis. It is therefore necessary to draw some boundaries around *U.(F.J.)*'s applicability to guide courts in the future.

First, *U.(F.J.)* applies to declarant-available hearsay, which necessarily involves prior inconsistent statements and a declarant with a present memory. Courts are cautioned that a declarant's presence does not automatically trigger the declarant-available authorities. A true declarant-available situation will only exist when the declarant remem-

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[73] *Khelawon, supra* note 5 at para. 111.

[74] *Khelawon, supra* note 5 at para. 111.

[75] *Khelawon, supra* note 5 at para. 113.

[76] *Khelawon, supra* note at para. 111 [emphasis added].

bers making the prior statement, so that meaningful cross-examination may be conducted. A present declarant who is claiming no memory will therefore necessitate the invocation of the declarant-unavailable authorities of *Khan*, *Smith*, and *Starr*.

Second, *U.(F.J.)* applies to very few situations within the declarant-available category. Specifically, *U.(F.J.)* condones resort to external evidence within strictly confined parameters and for one purpose only: to determine whether or not "striking similarities" exist between statements. In assessing "striking similarities," the court should focus on evidence that goes to whether or not declarants have colluded, gained access to each other's statement records, or rendered statements under the influence of interrogators or third parties.[77]

Third, the comparator statement invoked for determining the "striking similarity" must already be "substantively reliable" on its own.[78] Presumably, this reliability would have to be based on the *B.(K. G.)* indicators or the comparator declarant's presence in court coupled with his adopting the prior statement. When resort to external evidence for threshold reliability is limited by these three conditions, *U.(F.J.)*'s effect will be confined to cases within the declarant-available family, and then, will seldom apply. After all, Chief Justice Lamer himself anticipated that "statements so strikingly similar as to bolster their reliability will be rare," and therefore the "*U.F.J.* exception" will be exceptional.[79]

## Conclusion

Although *Starr* represents the Supreme Court of Canada's latest word on declarant-unavailable hearsay, the subsequent jurisprudence indicates otherwise. As courts and commentators have made clear, there are "valid reasons" for sustaining a distinction between declarant-available and declarant-unavailable threshold reliability analyses.[80] However, this distinction has faltered, presumably because courts dealing with declar-

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77 *U.(F.J.), supra* note 3 at para. 43.

78 *U.(F.J.), supra* note 3 at para. 44.

79 *U.(F.J.), supra* note 3 at para. 45.

80 *Khelawon, supra* note 5 at para. 45.

ant-unavailable hearsay cases are using *U.(F.J.)* to avoid *Starr*'s threshold reliability analysis.

Although the recent limits that *Starr* placed on threshold reliability have been highly criticized, this is where the jurisprudence stands right now, and *Starr*'s threshold reliability restrictions should be respected. As Stuesser argues, *Starr* is the current "statement of the law that is to guide us in our future re-examination of other hearsay exceptions."[81] Therefore, it should be followed until the Supreme Court of Canada decides that the analysis needs to be changed and gives formal word on the issue. Further, since *U.(F.J.)* seems to have been rendered so as to obtain a precise result on specific facts, and not to create a more flexible analysis, its framework should be resorted to with caution.

The threshold reliability analyses for declarant-unavailable and declarant-available authorities must remain distinct if fair and consistent legal results are to be achieved. Courts should not dabble in both worlds by taking what they like from the declarant-unavailable and declarant-available categories and then applying custom-made analyses to their particular facts. When applying the principled approach to hearsay evidence, the courts must not have their cake and eat it too.

[81] Stuesser, *supra* note 12 at 75.