

**THE CORNWALL
PUBLIC INQUIRY**



**L'ENQUÊTE PUBLIQUE
SUR CORNWALL**

Public Hearing

Audience publique

Commissioner

**The Honourable Justice /
L'honorable juge
G. Normand Glaude**

Commissaire

VOLUME 81

Held at :

Hearings Room
709 Cotton Mill Street
Cornwall, Ontario
K6H 7K7

Tuesday, December 19, 2006

Tenue à:

Salle des audiences
709, rue de la Fabrique
Cornwall, Ontario
K6H 7K7

Mardi, le 19 décembre 2006

Appearances/Comparutions

Mr. Peter Engelmann	Lead Commission Counsel
Ms. Christine Morris	Commission Counsel
Ms. Maya Hamou	
Ms. Louise Mongeon	Registrar
Mr. Peter Manderville	Cornwall Police Service Board
Ms. Reena Lalji	
Mr. Neil Kozloff	Ontario Provincial Police
Actg.Det.Supt.Colleen McQuade	
Mr. David Rose	Ontario Ministry of Community and Correctional Services and Adult Community Corrections
Mr. Stephen Scharbach	Attorney General for Ontario
Ms. Lisa Jacek	
Mr. Peter Chisholm	The Children's Aid Society of the United Counties
Mr. Allan Manson	Citizens for Community Renewal
Mr. Dallas Lee	Victims Group
Mr. David Bennett	The Men's Project
Ms. Jill Makepeace	Mr. Jacques Leduc
Mr. Mark Wallace	Ontario Provincial Police Association
Ms. Nadya Tymochenko	Upper Canada District School Board
Ms. Nicola Simmons	
Mr. Kim Ferreira	

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1 --- Upon commencing at 9:31 a.m./

2 L'audience débute à 9h31

3 **THE REGISTRAR:** Order; all rise. À l'ordre;
4 veuillez vous lever.

5 This hearing of the Cornwall Public Inquiry
6 is now in session. The Honourable Mr. Justice Normand
7 Glaude presiding.

8 Please be seated. Veuillez vous asseoir.

9 **THE COMMISSIONER:** Thank you. Good morning,
10 all.

11 **MS. MORRIS:** Good morning.

12 **MR. ENGELMANN:** Mr. Engelmann.

13 **MR. ENGELMANN:** Good morning.

14 I'm just going to adjust this for a minute.
15 I'm here for a brief cameo, Mr. Commissioner. I just
16 wanted to say good morning and good morning to Ms. Harvey,
17 who is here.

18 As you know, Ms. Morris will be leading the
19 evidence for Ms. Harvey.

20 I'm just here very briefly to speak to an
21 issue involving interim publication bans that were
22 requested last week.

23 **THE COMMISSIONER:** Yes.

24 **MR. ENGELMANN:** And just by way of reminder,
25 last Wednesday, December 13th, you will recall, sir, a

1 request or motion by Mr. Cipriano on behalf of Father
2 MacDonald for a publication ban with respect to Exhibit
3 205. That then led to further requests for Exhibit 206,
4 Exhibit 207, and if my transcript search is correct, also
5 Exhibit P-224. So there were four exhibits where there was
6 a request for a publication ban. The publication ban was
7 denied. A request was made for an interim ban, first,
8 pending confirmation that Father MacDonald would be seeking
9 a judicial review application, and next, I believe after
10 there was confirmation that Father MacDonald was in fact
11 seeking a judicial review application. You then asked for
12 confirmation of a date and I recall, at least from a
13 transcript search, that he was asked to report to you
14 December 14th at 9:30, then again in the afternoon. And he
15 did confirm instructions to file a judicial review
16 application.

17 But then at the end of the day on the 14th,
18 he was given until yesterday to speak to the issue, and I
19 am just looking at page 163 of that transcript where you
20 said:

21 "I'm saying to you I'm going to give
22 you, in fairness -- I'll give you until
23 Monday. I can tell you that if you do
24 not have a date by Monday, you will
25 have to give me very, very sound

1 argument as to why I should extend
2 this."

3 Mr. Cipriano did not make an application
4 yesterday for a continuation of the interim ban. We had
5 inquiries from some members of the press. I advised Mr.
6 Cipriano that we were getting these inquiries and that
7 because he had not made a request, his interim publication
8 ban had expired, and he informed me that he was aware of
9 that and he realized that.

10 So I just wanted to inform you, Mr.
11 Commissioner, members of the public, and we did have
12 questions from counsel, other counsel, and also from the
13 press.

14 **THE COMMISSIONER:** M'hm.

15 **MR. ENGELMANN:** So the interim publication
16 ban has expired.

17 **THE COMMISSIONER:** Yes.

18 **MR. ENGELMANN:** I don't know whether this
19 judicial review application will be pursued or not, but Mr.
20 Cipriano advised me that he did not have any dates from the
21 court.

22 I am advised that a Notice of Application
23 for Judicial Review has been filed.

24 In any event, as I said, the interim
25 publication ban expired. Mr. Cipriano is aware of that.

1 He has filed an application for judicial review and he
2 realizes the consequences.

3 **THE COMMISSIONER:** All right. Thank you.

4 So as far as I'm concerned, the interim ban
5 on publication on those Exhibits 205, 206 and P-224 are now
6 lifted.

7 **MR. ENGELMANN:** Yes, 205, 206, 207 ---

8 **THE COMMISSIONER:** Oh, 207 as well. Okay.

9 **MR. ENGELMANN:** --- and 224.

10 **THE COMMISSIONER:** And 224 as well.

11 **MR. ENGELMANN:** And just, if it wasn't
12 clarified for the record, with respect to the Diocese's
13 application that we spoke to last week, that matter -- a
14 leave application was filed by counsel for the Diocese.
15 The matter was spoken to before Justice McPherson. The
16 leave application will be considered by a three-member
17 panel of the Court of Appeal this Friday, December 22nd.

18 **THE COMMISSIONER:** M'hm.

19 **MR. ENGELMANN:** They will determine whether
20 or not to grant leave. If they don't grant leave, the
21 matter ends there. If they do grant leave, my
22 understanding is the case will be heard by a panel of the
23 Court of Appeal on Friday, January 5th in Toronto.

24 **THE COMMISSIONER:** All right. Thank you.

25 **MR. ENGELMANN:** Those are my very brief

1 comments, sir.

2 Now I'm going to turn things over to Ms.
3 Morris.

4 **THE COMMISSIONER:** Well, before we get to
5 Ms. Morris, what I would like to do is talk about our
6 counselling support and evaluation that we're about to do.
7 So if you would bear with me for a few moments?

8 I would like to take this opportunity to
9 talk about counselling support at the Cornwall Public
10 Inquiry.

11 As you may recall, on February 13th, 2006 I
12 indicated that I had decided that the Cornwall Public
13 Inquiry should have counselling support for any person
14 touched by the Inquiry. This would include those who had
15 experienced childhood sexual abuse, professionals in the
16 community who have a heavy burden of care and concern in
17 supporting those touched by sexual abuse, staff of the
18 Inquiry, others attending here who may find what they hear
19 stressful, those who feel falsely accused or unfairly
20 associated with abusers, or those alleged to be abusers and
21 those who are in need of treatment for their inappropriate
22 sexual attraction to children and youth.

23 In all cases, I extend eligibility to family
24 members who can certainly be affected by the stress of
25 someone close to them and need support in their own

1 difficult support role.

2 Now, I have repeated the criteria on who is
3 eligible in some detail with another reminder that anyone
4 seeking counselling, in my view, is a sign of personal
5 strength and integrity. So I urge people affected by the
6 Inquiry to consider the availability of counselling
7 support.

8 Now, about a month ago -- I'm sorry -- about
9 a month after I announced that we would have counselling
10 support, we were operational.

11 Now, the provision of a counselling support
12 mechanism is a first for Ontario inquiries and so there
13 were no available precedents. We did not know what the
14 demand for counselling would be or how certain mechanisms
15 we designed would work.

16 We did know that we had certain important
17 principles of operation that we could use to guide us. The
18 first one was personal choice. Individuals can choose
19 their counsellor. On request, we will help match people to
20 someone who meets their counselling needs, but individuals
21 can pick the person that is right for them.

22 Privacy: It is important to implement
23 assurances that a choice to have counselling support would
24 be kept private and not communicated to counsel or others.
25 This has been done. Records are kept segregated at the

1 Inquiry offices so there is no inadvertent knowledge
2 provided at the Inquiry.

3 Mechanisms are in place to protect personal
4 information of those getting counselling and we have
5 minimized personal information kept in our records to that
6 which is needed; for example, to make the payments.

7 We have a straightforward and helpful
8 administrative process. We wanted people to find getting
9 counselling support a relatively easy process, with little
10 red tape, so our approval processes usually take less than
11 an hour, not days, and we strive for respectful, minimally
12 intrusive interactions.

13 When we set up counselling support, it was
14 for one year, expiring March of 2007. At the same time, we
15 said that we would review counselling support in January
16 2007 to decide whether to extend, modify or end the
17 counselling support.

18 As promised, this review will occur. I want
19 to explain the review process. Firstly, we will write to
20 counsel for the parties and ask for their views. There
21 will be some specific questions we want counsel to address
22 with their clients and get back to us.

23 Second, we will have an independent, arms-
24 length process for asking for the views of both providers
25 of counselling services and those receiving it. The use of

1 independent researchers means that people can respond
2 without concern that comments or opinions of specific
3 people will get back to the Inquiry. We will only get
4 summarized, anonymous information and the summary
5 information will be made public, but anything that could
6 identify someone will in fact be taken out.

7 Providers of services will be asked to fill
8 out a written survey and return it to the independent
9 researchers. Those receiving counselling support will get
10 a telephone call and certain general questions will be
11 asked. People receiving counselling do not have to respond
12 if they do not wish to. However, it would be very helpful
13 to get their views and I hope they feel that they can help
14 us out by responding.

15 We didn't indicate to people when we started
16 up counselling support that those receiving counselling
17 might be asked for their views as part of the counselling
18 support review because they are why we have counselling
19 support and, in the end, their views matter.

20 Internally, staff of the Inquiry will assess
21 any issues they have seen arise administratively for my
22 review and Inquiry staff will meet with staff from the
23 Ministry of the Attorney General to discuss evaluation of
24 counselling support. In the end, gaining knowledge from
25 experienced program evaluators is helpful.

1 I hope to receive a staff report and the
2 independent research results by late February and make my
3 decision known no later than the first week of March.

4 Because many people do value counselling
5 support, I want to reassure people that I am inclined to
6 extend it in some way. However, I want to fix things that
7 may need fixing and think about the right periods of
8 extension.

9 I'm also aware that our unique initiative
10 has attracted some interest and attention as a potential
11 model for other similar situations or for victim services
12 generally. This being the case, this evaluation will be
13 useful for broader purposes and should be done in a sound
14 and professional manner.

15 I want to conclude by giving some
16 statistical information on counselling support as a
17 backdrop to the evaluation and in respect to our invitation
18 for party and public input.

19 As at December 1st, 2006, we had 155
20 counselling files open. Of those, 149 were approved. The
21 most common reason for people not being approved is that
22 they did not have an intake interview, which can be done in
23 person here at the Inquiry or over the phone. Sometimes
24 there's a delay in people contacting us and attending for
25 intake.

1 Of those approved for counselling, about 71
2 were men and 84 were women. Men predominantly identify as
3 survivors, as do women, but there are more individuals
4 identifying as family members among the group of women than
5 among the group of men.

6 Most have attended counselling since
7 approval. People sometimes delay attending or take breaks
8 and then return or may stop attending.

9 Twenty-one (21) counselling providers
10 currently provide or have provided counselling services.
11 Thirty-four (34) have been approved to provide services.

12 The Inquiry staff did 39 referrals to
13 providers. The rest had their own counselling in mind --
14 their own counsellor in mind.

15 As at December 1st, 2006, the Inquiry had
16 authorized about \$316,000 in counselling fees paid directly
17 to the counsellors.

18 As at December 1st, 2006, the sum of
19 approximately \$27,000 had been paid to individuals for
20 transportation to counselling session by car, bus or in
21 limited cases, by taxi.

22 Administrative costs of the Inquiry are
23 relatively low in that no individual has a full-time job in
24 counselling support. Several people pitch in to keep the
25 process going, to manage intake, to pay the bills and so

1 on. We have tried to keep our monies for direct
2 counselling services and transportation.

3 In conclusion, we have a constructive
4 process to get feedback on counselling support. At the
5 time, we promised at the inception of counselling support.
6 I urge everyone to cooperate with us and to feel
7 comfortable in making their views known. We set up
8 counselling support with the intention of doing the right
9 thing for those in need of counselling and need to continue
10 to do the right thing.

11 So please take the time to express your
12 views on counselling support.

13 So that paper will be on the website, along
14 with a fact sheet as to who is eligible and the details of
15 the facts that I have outlined.

16 Thank you.

17 **MS. MORRIS:** Good morning, Mr. Commissioner.

18 **THE COMMISSIONER:** Good morning.

19 **MS. MORRIS:** Ms. Wendy Van Tongeren Harvey
20 is seated at the witness box already. I wonder if she
21 could be affirmed, please?

22 **THE COMMISSIONER:** Good morning.

23 **WENDY HARVEY, Affirmed/Sous affirmation solennelle:**

24 **THE COMMISSIONER:** Thank you.

1 Good morning again.

2 **MS. HARVEY:** Good morning.

3 **MS. MORRIS:** I understand that you would
4 like to be addressed as Ms. Harvey during your testimony
5 before the Commission?

6 **MS. HARVEY:** Yes. I think everyone in the
7 room would prefer that too. It's much easier to say than
8 Van Tongeren.

9 **MS. MORRIS:** All right. Thank you.
10 Dealing firstly with Ms. Harvey's
11 qualifications ---

12 **THE COMMISSIONER:** Yes.

13 **MS. MORRIS:** --- Mr. Commissioner, by letter
14 dated January 27th, 2006 all counsel were advised of how
15 Commission counsel propose to qualify Ms. Harvey. There
16 have been no objections to this by the parties.

17 Commission counsel asks that Ms. Harvey be
18 qualified as a lawyer who is an expert in the prosecution
19 of child sexual abuse. Given that there have been no
20 objections to the proposed qualifications, I don't expect
21 much time needs to be spent on this issue. However, I
22 would like to briefly review Ms. Harvey's qualifications.

23 **THE COMMISSIONER:** Yes.

24 Thank you.

25 --- **EXAMINATION ON QUALIFICATION BY/INTERROGATOIRE SUR**

1 **QUALIFICATION PAR MS. MORRIS:**

2 **MS. MORRIS:** Ms. Harvey, could you please
3 turn to Tab 1 of your Book of Documents? Could you confirm
4 that this is your C.V. and that's it's accurate and up to
5 date? I understand that there's an entry at page 15 which
6 needs a slight modification?

7 **MS. HARVEY:** That's correct. I've had an
8 opportunity to review Tab 1 prior to coming here and I do
9 confirm that this is an accurate up-to-date curriculum
10 vitae and the point at page 15 is that the book "Trauma,
11 Trials and Transformation" was in press at the time that
12 this curriculum vitae was prepared and that has not been
13 published. It is a publication that I've written that is
14 available now.

15 **MS. MORRIS:** All right.

16 So on page 15 of the C.V., the seventh entry
17 down, if the notation "in press 2006" could be changed to
18 "published in 2006", please?

19 **THE COMMISSIONER:** M'hm.

20 **MS. MORRIS:** Thank you.

21 All Right. Could you please turn to Tab 2
22 of the Book of Documents? It contains your biography. Can
23 you please confirm that this is your biography and that
24 it's accurate and up to date?

25 **MS. HARVEY:** Yes, thank you, Ms. Morris. I

1 have had an opportunity to review this prior to testifying
2 and I do confirm that it is accurate and up to date.

3 **MS. MORRIS:** Thank you.

4 Your C.V. indicates that you received your
5 LLB from Queen's University in 1976. Is this correct?

6 **MS. HARVEY:** That's correct.

7 **MS. MORRIS:** All right.

8 And it also indicates that your completed
9 your Ontario Bar admission course in 1978 and your British
10 Columbia Bar admission course in 1979; correct?

11 **MS. HARVEY:** That's correct.

12 **MS. MORRIS:** I note on your C.V. that you
13 held various positions with the Ministry of the Attorney
14 General in British Columbia since 1980. Can you tell us
15 about those positions and briefly describe your role over
16 the years?

17 **MS. HARVEY:** Yes. Of course, when I started
18 as a woman wearing much younger women's clothing in 1980, I
19 started with general provincial court work in Burnaby and
20 my administrator at that time was Bob Lemiski who is now a
21 provincial court judge. And so having had the opportunity
22 to basically prosecute at that level and, you know, an
23 assortment of different types of alleged crimes, it was
24 actually a decision I made in 1981 to start to specialize
25 in crimes against children and sex crimes.

1 However, that didn't mean that my career
2 wasn't diverse in that subsequent to the Provincial Court
3 posting, I was doing Supreme Court work, first of all, in
4 New Westminster in 1983-84.

5 And then after that, I had the opportunity
6 in '84 to be an administrative Crown prosecutor in Port
7 Coquitlam, and so I held that post for a period of time.

8 And then, my administrator asked me to take
9 on a rather difficult project which was to try and clean up
10 the situation in Surrey around the Youth Court. There was
11 some administrative things that needed to be done to try
12 and improve the situation there, so I took that project on.

13 And then, by this time, I had still been
14 working on the specialization of crimes against children
15 and sex crimes. In 1988, this was acknowledged by my
16 administrators when they actually invited me to take on the
17 position as a headquarters lawyer. And that would mean
18 that I would be working in both Vancouver and Victoria but
19 my responsibilities would be province-wide, and it meant
20 that I had one-third of my time supporting the Attorney
21 General. So that would be writing briefs, that type of
22 thing, responding to letters.

23 One-third of my time was prosecuting the
24 most difficult sex crimes type prosecutions or crimes
25 against children in the Province of British Columbia

1 throughout the province.

2 And one-third of my time was called kind of
3 a public persona where I was available to speak to the
4 media, do training, respond to community groups who had
5 concerns in their communities and that type of thing.

6 **MS. MORRIS:** M'hm.

7 **MS. HARVEY:** And so I did that from 1988
8 until 1994.

9 In 1994, I went back to do the field work,
10 the prosecution in Abbotsford, British Columbia and then in
11 2000, I was transferred to B.C. Supreme Court work out of
12 the New Westminster's office and I continued that until
13 this year in May when I went on a two-year leave of absence
14 to pursue the work that I am currently doing.

15 **MS. MORRIS:** I understand that when you were
16 working in Abbotsford, you built up an administration
17 system for cases?

18 **MS. HARVEY:** Yes, because I had this sense
19 of responsibility about how we responded to crimes where
20 there was something kind of unusual, or there was a witness
21 who required particular needs.

22 So I had an experience where one of the
23 prosecutors came to me and they had not received notice
24 that they had a child witness on one of their cases, and so
25 they were meeting the child for the first time the day of

1 trial. And I just considered that absolutely unacceptable.

2 And so what I did was, although I wasn't an
3 administrator, so I was kind of putting my nose into other
4 people's business, but I went around the office and I
5 retrieved all the files that I felt should be categorized
6 as files that the prosecutor should be getting advance
7 notice. And so I created a database and I asked the
8 administrator then to assign those to prosecutors in
9 advance. Then I asked for permission to meet with the
10 trial coordinator once a week and actually go through all
11 the schedule for the week.

12 And so basically we had started a system
13 where the prosecutors would meet weekly and we would have a
14 notice three weeks in advance of all the trials that they
15 had and, in particular, the ones where advance notice was
16 required so they could meet vulnerable witnesses or
17 whatever is required in advance, and that system is still
18 used in that jurisdiction today.

19 **MS. MORRIS:** Thank you. I understand that
20 while working as a Crown prosecutor in British Columbia,
21 you've also lectured at universities, in particular, the
22 University College of Fraser Valley?

23 **MS. HARVEY:** Yes, that was kind of an
24 unusual thing. I was curious about whether or not I could
25 actually teach law without an LLM, and so I phoned the

1 college and asked them if they actually hired people with
2 just an LLB and not an LLM and they said "Yes, could you
3 start on Tuesday?"

4 And so I basically started teaching there
5 part time as a sessional instructor one night a week from
6 1997 and I taught basically first year Introduction to
7 Criminal Law.

8 And then, I think it was about 2002, after I
9 had finished the second edition of my book *Sexual Offences*
10 *against Children* and the criminal trial process, I
11 developed a course based on that book.

12 And so I taught not only students from the
13 University College Fraser Valley but also many others came
14 in, police officers and others, to get credit for that
15 course and people from even the local institutions who were
16 providing treatment to offenders and that type of thing.
17 So I did that for one semester.

18 **MS. MORRIS:** I also note from your C.V. that
19 you've sat on numerous committees and participated in
20 numerous projects related to sexual abuse cases throughout
21 your career.

22 Could you tell us about a few of these
23 associations and committees, please?

24 **MS. HARVEY:** Yes. A rather significant one
25 was the Society for Children and Youth which has really

1 done some tremendous work of advocacy for children in
2 British Columbia.

3 It was as a result of my being a part of the
4 -- and being on the board of the Society for Children and
5 Youth that I was actually invited to sit as an expert and
6 one of the parliamentary committees around the reform to
7 the *Criminal Code and Canada Evidence Act* in 1988.

8 That, just to give an idea to the type of
9 work that the Society for Children and Youth does, they
10 held a symposium in about -- let's see, when was that? I
11 can't remember the precise date -- in the '90s, in any
12 event, to try and encourage that we look at reforming how
13 we were dealing with children witnesses in British
14 Columbia.

15 And it was a time when amendments were being
16 made to the Code around using video taping to actually
17 receive transmissions where the offenders or accused
18 persons were actually still in the institutions and their
19 images were being transmitted into the courtroom rather
20 than having to transport them in.

21 So it was an opportunity to actually examine
22 the possibility again of using technology for children
23 witnesses. So the SCY created a symposium related to that.

24 They also have created documents to assist
25 with the monitoring of how Canada is doing in response to

1 our responsibilities as a signatory to the United Nations
2 Convention on the Rights of Children. So it takes what
3 may, at first blush, be a rather abstract responsibility
4 into something that is more real in terms of people
5 actually determining whether or not we were fulfilling our
6 obligations.

7 **MS. MORRIS:** I understand that the Society
8 for Children and Youth is also known as the Badgley Review
9 Committee?

10 **MS. HARVEY:** I'm sorry?

11 **MS. MORRIS:** It's also known as the Badgley
12 Review Committee, the Society for Children and Youth?

13 **MS. HARVEY:** No, I don't think so. There
14 probably was a part of the Society for Children and Youth,
15 a subcommittee that was actually a part of reviewing the
16 Badgley, but it wasn't directly connected to the Badgley.

17 **MS. MORRIS:** Okay. Could you tell us about
18 your work with the British Columbia Institute of Family
19 Violence, please?

20 **MS. HARVEY:** Yes. The B.C. Institute
21 Against Family Violence was an organization that was
22 affiliated with not only the Ministry of Health but also
23 the Simon Fraser University. It was an attempt to
24 encourage research around issues directly or indirectly
25 related to family violence.

1 And I held the position of Chair for some
2 time on that particular committee organization and it was
3 quite instrumental in actually developing very significant
4 pieces of research.

5 Some of you may have heard of Randy Kropp
6 and Derek Ives, a large part of their work in British
7 Columbia is actually developing instruments to assess risks
8 of offenders. And so a lot of work has been done in
9 British Columbia that is assisting us to actually determine
10 when people still present a risk around sex offending and
11 also around the violence against women.

12 **MS. MORRIS:** And your work with the Canim
13 Lake Treatment Program?

14 **MS. HARVEY:** Yes. That was quite a
15 privilege I had where the women of the Canim Lake Reserve
16 in Northern British Columbia invited me to come onto the
17 Reserve and help them with a tacky issue that they had.

18 The issue was that because they were trying
19 to develop a more effective way of dealing with sex crimes
20 and violence against women in the community, they
21 identified that if they used the criminal justice response
22 that that might well mean that many, if not most, of the
23 male members of their population would in fact find
24 themselves being incarcerated. And so they were trying to
25 find a different way of responding.

1 Again, this is an issue that has found its
2 way into the reserves of many of the provinces and
3 territories in Canada.

4 So what they devised is a treatment program
5 where rather than the complaints being made to the police
6 and gone through the criminal justice system, that the men
7 actually voluntarily go into treatment. And the treatment
8 modalities were based on the aboriginal interests. It
9 would include such things as healing circles and sweats and
10 that type of thing.

11 So now the concern with this, of course, is
12 that the women or the victims will be given a choice about
13 whether or not their offender would actually be dealt with
14 in the criminal justice system or through the treatment on
15 the reserve.

16 And there have been experiences in British
17 Columbia and probably in other parts of Canada as well that
18 the women feel coerced or pressured into opting for the
19 alternative measure rather than the criminal justice.

20 And, in fact, there has been some abuses in
21 some reserves where the elders have played a role in
22 ensuring that certain individuals, including themselves,
23 are not held accountable by pressuring the victims not to
24 tell.

25 So my job was to work with the women in the

1 Canim Lake Reserve to help them around the decision-making
2 of whether or not their individual offenders would be
3 reported to the police and go through that system or if
4 they would actually consent to their offenders going
5 through the treatment program on reserve.

6 And so we held a four-day engagement or
7 exercise but it actually -- the process took place over
8 several months.

9 And as I say, it was a very rare privilege
10 for me to be able to work with these women on reserve in
11 that way and I hope it helped that I did so.

12 **MS. MORRIS:** Thank you and the Jericho
13 Project.

14 **MS. HARVEY:** I understand that you have a
15 Jericho Project or situation in Ontario. This one is
16 different. This is the Jericho Hill School for the Blind
17 and the Deaf and there are allegations that sex crimes had
18 been committed by members of the staff on the children.

19 There had been two investigations in the
20 eighties relating to that but no charges came out of that
21 situation, but because I had a bit of a reputation in the
22 Province of British Columbia as a person who was concerned
23 about crimes against children, many people came to me and
24 they would say -- would basically informally tell me about
25 some of these goings on.

1 So when I was offered the position in 1988
2 to actually be responsible for this area in our province I
3 went to my administrator and suggested that we needed to do
4 something about the Jericho situation and have a look at
5 what was going on.

6 As a result of that, we actually worked with
7 the Vancouver City Police and many others and devised a
8 protocol for the investigation of sex crimes and
9 institutions and, in particular, we were hoping to use that
10 for re-looking at the situation of the Jericho Hill School
11 and then, ironically, as serendipity has it, one of the
12 victims went to the media and so there was a large story in
13 the province newspaper about these things that had been
14 going on in Jericho in the past and so we were ready. We
15 had a protocol. We had training about to be scheduled, and
16 so it was time to re-launch an investigation because there
17 were people who wanted that to happen, and so that occurred
18 and prosecutions took place as a result of that, not a lot.

19 There was a very extensive third
20 investigation, a very extensive charge approval process and
21 I believe there were one or two individuals who were
22 charged as a result.

23 **MS. MORRIS:** And lastly, your work with the
24 Policy Centre for Victim Issues for the U.N. Resolution on
25 Guidelines on Treatment of Children, Witnesses and Victims

1 2004?

2 MS. HARVEY: Yes, I was -- that was merely a
3 situation where I was invited to attend a meeting for a day
4 where -- there is an organization called the International
5 Bureau for Children's Rights that came up with guidelines
6 for the treatment of children victims and witnesses of
7 crime and, as a result of this and other workings in the
8 background, the U.N. resolution was passed to look at the
9 possibility of developing international guidelines that
10 would actually have a little bit more punch than a document
11 that was generated by an NGO.

12 And so Ottawa brought together some experts
13 and I was one of those persons to assist, give some ideas,
14 and as a result of that and other work, a document was
15 actually signed in Geneva in, I believe, March of 2005
16 which is very similar to these guidelines but basically is
17 an opportunity for the signatories to actually up their
18 standards if they need to and follow these guidelines to
19 give better treatment to children victims and witnesses.

20 MS. MORRIS: Thank you.

21 I see from your CV that you have lectured
22 extensively and given many training sessions. Their
23 description is in your CV, about nine pages of it actually.

24 Could you generally describe your lectures
25 and the training you have provided in the field of sexual

1 assault cases?

2 MS. HARVEY: Yes. What happened was in 1981
3 when I decided to specialize in this area, I basically
4 became identified as a person who was able and ready to be
5 called upon to provide training to others. And so it was
6 something that kind of started on its own.

7 And so since the early eighties right up
8 until the present, I have been invited from time to time to
9 teach and train, and that could be through the Justice
10 Institute, it could be through -- because I have gone
11 throughout Canada because of various agencies including the
12 police or Crown or others have asked me to come to their
13 provinces and to help them with others facilitate days of
14 training. So the audiences of my training have been Crown
15 prosecutors, defence lawyers. They have been
16 psychologists, psychiatrists, medical doctors, judges and
17 basically the people that are required to come together as
18 a multidiscipline team to respond to these types of cases
19 have been my audiences over the years.

20 And I have also been invited internationally
21 to train in 2003 -- oh, in 2001 I was asked to go to
22 Australia and teach prosecutors throughout the world on the
23 new developed IAP model Guidelines for Effective Crimes
24 Against Children Prosecutions. So that was just basically
25 a scenario where prosecutors from throughout the world came

1 to Sydney. It was part of the IAP Conference and I led
2 them through a day of prosecuting these.

3 **MS. MORRIS:** The International Association
4 of Prosecutors, IAP?

5 **MS. HARVEY:** That's right.

6 And also in -- sorry -- in 1992 I was asked
7 to represent Canada at a NATO conference on children
8 witnesses. Children witnesses is a matter of international
9 concern, and so there was two weeks of experts from
10 throughout the world, NATO countries, who came together and
11 we -- I made about three presentations at that particular
12 conference on how children witnesses were being dealt with
13 in Canada.

14 So those ---

15 **MS. MORRIS:** Thank you.

16 **MS. HARVEY:** Yes, good.

17 **MS. MORRIS:** Your CV also indicates that you
18 have written and had published numerous papers and several
19 books in the field of sexual assault cases over the years.
20 I understand that some of these materials are your first
21 books, "So You Have Got to Go to Court"
22 a book for young witnesses?

23 **MS. HARVEY:** Yes.

24 **MS. MORRIS:** Published in 1986, the first
25 edition?

1 **MS. HARVEY:** Yes, that book -- you see, what
2 happened was it was like a wave took over because people
3 were just so thirsty for information about the
4 investigation and prosecution of this type of crime, and I
5 was a candidate in their eyes to provide them with
6 information. And so it was a given that I would write
7 because people needed information and I'm definitely not --
8 I wouldn't consider myself a skilled writer by any means,
9 but just -- there was a need and so I filled the need.

10 The first little book, I actually wrote it
11 in 1983. So I had been specializing in these prosecutions
12 for two years and I actually attended a workshop at the
13 Justice Institute on communicating with children, and I had
14 this insight that -- when I think of it now it wasn't that
15 brilliant, but at the time it seemed pretty darn
16 significant -- and a psychologist named Schofield said to
17 the audience, "You know, as an adult, we are the ones who
18 have the responsibility to find the way to communicate with
19 children. It is not the responsibility of the children to
20 find a way to communicate with us."

21 So I thought, well, we need a book here and
22 it's -- so I came up with "So You Have to Go to Court!" and
23 I stopped off and met a girlfriend from high school who has
24 a Ph.D. in Special Ed, and so with my knowledge of the law
25 and hers of how to speak to children, we wrote "So You Have

1 to Go to Court!"

2 Now, we wrote it in 1983 and I'll tell you,
3 the first draft -- we didn't have computers in the same way
4 that we have now, so we sent it out to a typist and the
5 typist said to us, "I'll tell you, after having typed your
6 book, no way would I allow my child to testify." So Anne
7 and I looked at each other and realized that the product
8 that we had generated wasn't exactly what we intended.

9 Fortunately, it took three years before
10 anyone decided to actually agree to publish the book.
11 Fortunately because in those three years I was trying to
12 improve things in the courtroom for children and I could
13 put them in the book. So it was kind of an informal way of
14 law reform, actually.

15 So eventually I would put new things in the
16 book and enhance it and it was the -- it went to
17 Butterworth's at first and they wouldn't publish it at
18 first, and then it went back later and there were more
19 women on the publishing board by that time and it was the
20 women's vote that got it through and it actually became a
21 bestseller.

22 It actually, I think, epitomizes a principle
23 that is important which is if our criminal justice system
24 is to work now, the users need to know how it works so they
25 can ask and at times make demands of things that they need.

1 I heard of a story where a little boy having
2 read this book went into court and said, "The book says I
3 get a booster seat" and the court actually stood down and
4 found the little boy a seat rather than, you know, the
5 members of the court seeing just the top of his head they
6 could actually see the little boy and then his evidence
7 proceeded. From that perspective, it is exactly what Anne
8 and I intended when we wrote the book.

9 **MS. MORRIS:** All right.

10 And your second book, "Sexual Offences
11 Against Children in the Criminal Process", I understand it
12 was published in 1993?

13 **MS. HARVEY:** Yes. There was a -- Bill C-15
14 was passed in 1988 and there was a four-year review that
15 was attached to that particular piece of legislation and
16 that was a very significant reform to the *Criminal Code and*
17 *Canada Evidence Act* relating to crimes against children,
18 sex crimes.

19 So I with my colleagues, we had a project
20 whereby -- because remember back in those years, '88 to
21 '92, we didn't have the Internet availability of case law
22 the way that we have now, and so to actually monitor a
23 bill, it was quite expensive to try and find the cases and
24 see what the judges were saying, many of the cases not
25 being reported, of course.

1 So through my work with the Criminal Justice
2 Branch in British Columbia we had a research project to
3 help us with the review of C-15 and so we gathered many,
4 many cases to see what the judicial response was to the
5 bill and, as a result of that database of cases, there were
6 three documents that I wrote. One was the report for
7 Ottawa relating to the judicial response of Bill C-15; one
8 was the sexual offences book and one was a book for the
9 Province of British Columbia which was "Child Witness
10 Preparation" and so we could actually put authorities in
11 all of those pieces that basically showed how things were
12 working in British Columbia.

13 **MS. MORRIS:** Thank you.

14 And I understand your most recent
15 publication is a book titled "Trauma, Trials and
16 Transformation". It's published this year?

17 **MS. HARVEY:** Yes, that was a book -- I'm
18 very grateful to Irwin Law for hanging in while it took me
19 10 years to write this thing. I was asked to write it
20 about 1996 and basically I was asked to write a book for
21 victims of sex crimes, to write what their rights were. I
22 suggested to the publisher that I would like to take it a
23 little further than that and I would like to write it with
24 a psychologist and I would like to enter the investigation
25 of what a victim of a sex crime actually goes through and

1 what they need by way of information to help them through
2 the process.

3 So this book, actually, it's called "Trauma,
4 Trials and Transformation" because one of the points that
5 we are encouraging the reader to examine is the possibility
6 of if it is available to them and if we say the right thing
7 and if we provide the right information, that they can
8 actually examine the possibility of their ordeal, the
9 crisis and their ordeal, taking them on a path of self-
10 discovery and self-awareness and knowledge; personal growth
11 basically, as opposed to being stuck in a position of
12 victimization.

13 So the book talks about the criminal justice
14 system. It talks about what it is like to be a witness.
15 It talks about the possibility of civil suits. It talks
16 about the concept of choice, of forgiveness. It talks
17 about memory. It talks about the impact of sex crimes. It
18 talks about litigation stress and it acknowledges that we
19 are all unique individuals and our experience is very
20 unique depending on what we bring to that experience.

21 I'm very pleased that the product came out
22 in the way that it did and I really attribute that to my
23 co-authors, Judy and Dennis, who are both Ph.D.s in
24 psychology and have the discipline to stick to it and write
25 a book of that quality. That was truly up to them. The

1 high quality, really, I attribute to them.

2 **MS. MORRIS:** Thank you.

3 I understand that you're currently on a
4 leave of absence from the British Columbia Ministry of the
5 Attorney General and you are prosecuting war crimes in the
6 Special Court of Sierra Leone?

7 **MS. HARVEY:** That's right. I was invited to
8 put in an application, which I did in the early part of
9 this year, and I went to Africa, to Sierra Leone in Western
10 Africa which is, I think, the second poorest country in the
11 world, and I started prosecuting one of the cases there,
12 and after a short period of time I was transferred to the
13 Charles Taylor Prosecution Team. In fact, I'm the acting
14 senior trial attorney on that particular prosecution team.

15 Because of the potential risk and danger,
16 that case is being transferred to the Hague for
17 prosecution, and so in the spring I'll move to the Hague
18 for the prosecution of Charles Taylor.

19 **MS. MORRIS:** Thank you.

20 Mr. Commissioner, these are all my questions
21 for Ms. Harvey in respect of her qualifications.

22 Subject to any questions from the parties, I
23 ask that Ms. Harvey be qualified as a lawyer who is an
24 expert in the prosecution of child sexual abuse.

25 **THE COMMISSIONER:** Okay. Any questions from

1 anyone?

2 **MS. MORRIS:** Mr. Commissioner, I would also
3 ask that Ms. Harvey's Book of Documents, Volumes 1 through
4 6 be entered as an exhibit. I believe that we're now at
5 Exhibit Number 239.

6 **THE COMMISSIONER:** That's right. So Exhibit
7 239.

8 **--- EXHIBIT NO./PIÈCE NO. P-239:**

9 Book of Documents - Wendy Van Tongeren
10 Harvey - Volumes 1 to 6

11 **THE COMMISSIONER:** The witness is duly
12 qualified as an expert to give evidence.

13 **MS. MORRIS:** Thank you.

14 **THE COMMISSIONER:** Carry on.

15 **--- EXAMINATION IN-CHIEF BY/INTERROGATOIRE EN CHEF PAR MS.**
16 **MORRIS:**

17 **MS. MORRIS:** Ms. Harvey, just by way of
18 introduction, I understand that your testimony before the
19 Commission will deal with challenges in the prosecution of
20 child abuse and historical sexual offences. You will deal
21 with criminal law, policy and also practice.

22 I understand that you'll start by telling us
23 about challenges facing the prosecution. Then you'll
24 describe some high-profile cases to us and what came of
25 them in terms of changing the system.

1 You will be speaking to systemic changes in
2 the law and case law, also practical perspectives.

3 You will be speaking of international
4 perspectives, accountability of the Crown lawyer and,
5 lastly, the use of technology involving trials with
6 vulnerable witnesses.

7 All right. So starting off then, from your
8 experience, could you explain what an ideal child sexual
9 abuse prosecution involves?

10 **MS. HARVEY:** Yes. And in developing a
11 response for this, I'm very cognizant of my
12 responsibilities as a prosecutor and to ensure fairness to
13 the accused. So I see that a successful child abuse
14 prosecution entails getting before the trier of fact, the
15 person or persons who are required to make the ultimate
16 decision on the guilt or innocence of the accused, getting
17 before them all the relevant evidence and law so that they
18 can make that decision in a principled way.

19 Because we're dealing with child sexual
20 assault and because we have an adversarial system and
21 because that normally entails calling a child or a victim
22 of the abuse, clearly, part of our professional
23 responsibility is to ensure that we protect the needs of
24 that child so that they are not further traumatized by the
25 experience of attempting to hold their abuser accountable.

1 **MS. MORRIS:** So dealing with the first part
2 of your evidence, I understand you'll be addressing
3 systemic barriers in sexual abuse prosecutions which
4 existed in the past.

5 Could you please tell us about some of these
6 barriers, firstly, associated to the credibility of women
7 and children in sexual abuse prosecutions?

8 **MS. HARVEY:** It's actually been quite a
9 wonderful experience to have graduated from law school in
10 1976 and been a prosecutor until the current time, 30 years
11 later, and to see the evolution of the law and the
12 practices since my first days in court as a young woman
13 lawyer. I can tell you that the changes have been vast and
14 there were times in the initial days where it was a very
15 difficult experience to walk into a forum -- into a
16 courtroom where it felt like the interests that were being
17 protected were very different from what the general public
18 and what the consumers of our justice system were actually
19 in need of.

20 I think it says -- speaks a lot to the
21 Canadian justice system that this evolution has taken place
22 over the last 30 years, and clearly the reforms that have
23 taken place, the changes to our Criminal Code, have come
24 about as a result of our system of justice, our democracy,
25 the fact that our lawmakers are prepared to listen, and it

1 is one of the areas of law in our Criminal Code that has
2 actually experienced an absolute overhaul.

3 So when I take us back 30 years ago, and it
4 originated, of course, perhaps in our last century, if not
5 centuries and centuries ago, the -- I say that with an
6 attitude or in an environment where I can also say that I
7 am very, very pleased to say that things are significantly
8 different.

9 I also now have international experience
10 where I know that there are countries where things are not
11 significantly different. So I am quite pleased -- I am
12 quite proud to be Canadian and I'm quite pleased that I won
13 life's lottery which was being born in this country.

14 So I just wanted that little preamble to be
15 said before I embark upon what the challenges have been in
16 the prosecution of these crimes in this country.

17 The first one relates to how women and
18 children were seen in terms of their credibility. It seems
19 to have found its origins in basically perhaps a societal
20 framework which is basically the role of the male person to
21 be predominantly the breadwinner and the person who held
22 the positions, whether it be the judges or the lawmakers or
23 the police or whatever, and perhaps, as I've heard it
24 described by people such as Christine Boyle, that men found
25 themselves in a bit of a dichotomy because on one hand,

1 they wanted to protect their wives and their sisters and
2 their daughters from being sexually assaulted by other men
3 but, on the other hand, there was a real concern about
4 false allegations being made against them.

5 And so we saw examples in our Criminal Code
6 in the past where on one hand, the penalty for a rape would
7 be a whipping, a very harsh penalty indeed but, on the
8 other hand, it was virtually impossible to actually get to
9 the point of a conviction for rape because cooperation was
10 required and there was the rule of recent complaint and
11 that type of thing.

12 So basically, it was entrenched in our law
13 that women were not credible and children were not credible
14 and that cooperation was required in order that a
15 conviction actually be registered, and that is a thinking
16 that even when Parliament made efforts to repeal those
17 particular principles entrenched in our law, the remnants
18 continue to exist and it's taken a long time before you
19 actually see evidence that women are seen to have the same
20 status, in terms of credibility, as men and children the
21 same as adults.

22 Now, there are, of course, members of our
23 courts who have said this much more eloquently than I have,
24 and one of the cases where that has been articulated is the
25 case of *Regina v. Seaboyer* which was a case that found its

1 way to the Supreme Court of Canada in 1991, and that was a
2 case which dealt with a principle of criminal law which was
3 very pertinent to this particular issue, which is that
4 section 276 of the Criminal Code, which was enacted in the
5 '70s, which protected complainants of sexual assault from
6 being asked questions related to previous sexual activity,
7 and the concern was that it was actually understood at one
8 time in history that if a woman had sexual activity outside
9 of wedlock, for example, that she was less credible. In
10 other words, she had a nasty reputation and that would
11 affect her reputation and her credibility.

12 Similarly, it was understood that if a woman
13 had consented to sex at one time before, then one could
14 infer that she probably consented later.

15 So those are kind of related, but it's one
16 of the areas relating to the credibility of women where
17 Parliament has attempted to make changes.

18 So *Seaboyer* is an important case to look at
19 because section 276 was actually being constitutionally
20 challenged in 1991, and so it gave our Supreme Court of
21 Canada an opportunity to look at the history of the law
22 relating to the credibility of women and there are some
23 interesting things that are said. So that is at Tab 33 of
24 the materials.

25 In the end, the result of the *Seaboyer/Gayme*

1 case was that this section was held to be unconstitutional
2 and there was a parliamentary response after that in 1992
3 when Kim Campbell was the Minister of Justice, and that was
4 Bill C-49, which I will address a little later in my
5 testimony as well.

6 But -- let me just see if I can find -- I
7 apologize; I just need a moment here.

8 **THE COMMISSIONER:** M'hm.

9 **(SHORT PAUSE/COURTE PAUSE)**

10 **MS. HARVEY:** Well, I'll give an example of
11 the type of thing that interfered with the assessment or
12 credibility of the women, and it is described at page 113
13 of Tab 33, and it is the rule of recent complaint which was
14 abrogated, actually, in 1983 with Bill C-127.

15 Again, because I prosecuted in 1980, I
16 actually had the experience of being in court and operating
17 with this rule of recent complaint. On 113 it describes
18 basically how that rule operated. So it says:

19 "Evidence of a recent complaint in
20 sexual assault cases is an exception to
21 the general rule that self-serving
22 statements are inadmissible. Such
23 evidence is described in Cross on
24 Evidence, 7th Ed. 1990 at page 281, as
25 superfluous for the assertions of a

1 witness are to be regarded in general
2 as true until there is some particular
3 reason for impeaching them as false.
4 However, in the case of sexual
5 offences, either the absence of a
6 recent complaint or its inadmissibility
7 require the trier of fact to draw an
8 adverse inference regarding the
9 complainant's credibility. If evidence
10 of a recent complaint existed, the
11 complainant had to surmount onerous
12 requirements restricting its
13 admissibility. If admissible, such
14 evidence was tendered to show that the
15 complainant's testimony was consistent
16 but was not admitted to show the truth
17 of its contents. The importance of the
18 rule at common law lay not in its
19 ability to enhance the credibility of
20 the complainant but rather in its
21 ability to counter the presumption that
22 the complainant was lying."

23 So what this would look like, as a
24 prosecutor you would go into a voir dire. So the jury
25 would leave and you would ask the complainant to describe

1 the fact that she gave a complaint early on. And so it
2 could be a scenario where a woman was raped and perhaps she
3 ran out from behind the bush where she had been raped and
4 she was tempted to flag down the first car. However, it
5 looked like the car of her assailant, and so she passed
6 that by. And perhaps the first house that was available to
7 her was her ex-husband's, so she decided to pass that by,
8 and it turned out that the next person she spoke to wasn't
9 until five hours later and it might have been a girlfriend.

10 So you would go into a voir dire and the
11 woman would explain and describe that experience, and then
12 the judge would make a ruling as to whether or not that was
13 recent or not -- recent enough or not.

14 **MS. MORRIS:** M'hm.

15 **MS. HARVEY:** And in the event that there was
16 a ruling that it was not, then even though she had made a
17 recent complaint and even though she had the reasons, then
18 the jury would be warned that an adverse inference would be
19 drawn against her credibility because she didn't make a
20 recent complaint.

21 So it wasn't something that was -- and I
22 think this paragraph points out that it wasn't something
23 that was helpful to the complainants. In fact, it was
24 something that actually presented a hurdle for them to
25 surmount in order to actually gain an equality in their

1 credibility over other witnesses and other crimes.

2 So that's described.

3 **MS. MORRIS:** Sorry, go ahead.

4 **MS. HARVEY:** I'm just trying to find the
5 other -- on page 96 and 97, the Court articulates some of
6 the stereotypical thinking around women and sex crimes that
7 has had an impact on the assessment of their credibility
8 over the years. So at the bottom of page 96 they are
9 described to be -- and this is actually quoting from a
10 written piece by Check and Malamuth called "Sex Roles
11 Stereotyping in Reaction to Depictions of Stranger Versus
12 Acquaintance Rape" and talks about the Madonna/whore
13 complex when on one hand women are seen as pure and on the
14 other hand they are seen as whores.

15 General character: anything not 100 per
16 cent proper and respectable. So if one is on welfare,
17 drinking or a drug user it's used to discredit and they are
18 also used to imply that women consented to sex with a
19 defendant or that she contracted to have sex for money.

20 Emotionality of females: females are
21 assumed to be more emotional than males. The expectation
22 of that is a woman is raped will get hysterical during the
23 event and she will be visibly upset afterwards. If she is
24 able to retain her cool then people assume that nothing
25 happened.

1 Reporting rape: Two conflicting
2 expectations exist concerning the reporting. One is that
3 if a woman is raped she'll get too upset and ashamed to
4 report it and, hence, most of the time the crime goes
5 unreported. The other is that if a woman is raped she'll
6 be so upset she will report it and both expectations exist
7 simultaneously.

8 Women, they're fickle and full of spite.
9 Another stereotype is that feminine characters are
10 especially filled with malice; woman as seen as fickle and
11 as seeking revenge on past lovers.

12 Female under surveillance: is the victim
13 trying to escape punishment? It's assumed that the
14 female's sexual behaviour, depending on her age, is under
15 the surveillance of her parents or her husband and, also
16 more generally, of the community. Thus, the defence argues
17 if a woman said she is raped it must be because she
18 consented and that she was not supposed to have sex and she
19 got caught and now she wants to go back to the good graces
20 of whomever's surveillance she was under.

21 Disputing that sex occurred; that females
22 fantasize rape is another common stereotype. This was a
23 stereotype that many believe actually originated with the
24 works of Freud. Females are assumed to make up stories
25 that sex occurred when in fact nothing happened.

1 Similarly, women are thought to fabricate the sexual
2 activity not as part of a fantasy life but out of spite.

3 And stereotype of the rapist. One
4 stereotype of the rapist is that of a stranger who leaps
5 out of the bushes to attack his victim and later abruptly
6 leaves her. Stereotypes of a rapist can be used to blame
7 the victim if she tells what he did and because it often
8 does not match what jurors think rapists do, this behaviour
9 is held against her.

10 So there was one more quote that I was
11 trying to find.

12 **MS. MORRIS:** Is that at page ---

13 **MS. HARVEY:** The one of the multiple areas?
14 I know it's in the dissent.

15 **(SHORT PAUSE/COURTE PAUSE)**

16 **MS. HARVEY:** Oh, it's actually in the *D.O.L.*
17 case so I'd like to take us to another case ---

18 **MS. MORRIS:** All right.

19 **MS. HARVEY:** --- which is that of *D.O.L.*
20 which is Larami?

21 This case ---

22 **THE COMMISSIONER:** Just hold for a second.

23 **MS. MORRIS:** We will just find the tab.

24 It is Tab 40, the *Queen v. L.(D.O)*.

25 **THE COMMISSIONER:** And what page on that?

1 **MS. HARVEY:** This is page 30, three-zero.

2 **THE REGISTRAR:** Thank you.

3 **MS. HARVEY:** Now, the *D.O.L.* case, the
4 situation here was an amendment to the Criminal Code in
5 1988 whereby there was an exception to the hearsay rule
6 actually codified in the Criminal Code whereby if you had a
7 child who was a victim of a sexual assault under 14, that
8 you could actually introduce their videotaped version of
9 their complaint that they had provided to the police. The
10 child would still need to testify and they would adopt the
11 contents of that and it needed to be an accounting that was
12 made within a reasonable time after the offence.

13 And so not surprisingly, there was a Charter
14 challenge of that particular section and so the *D.O.L.* case
15 was a Supreme Court of Canada response to the Charter
16 challenge and that particular section was considered to be
17 held constitutionally sound.

18 Now, again, because they look to the
19 potential Charter violations as well as the justifiability
20 under section 1, the context is looked to.

21 And so in this particular case the context
22 is laid out on pages starting at page 27. And part of the
23 context that is described here, interestingly, is the
24 phenomena that statistically most of the victims of sex
25 crimes and child sexual assault are female and most of the

1 offenders are male.

2 So again, it relates to how women and
3 children are seen by the male decision makers in their
4 lives including, I believe, fathers, the police, the
5 lawyers and the judges. And it is in this particular
6 context that this quote is made.

7 John Wigmore, of course, was a man who held
8 a tremendous degree of influence in terms of the law of
9 evidence and he said this which from time to time has found
10 its way into cases and jurisprudence.

11 **MS. MORRIS:** Is it page 30?

12 **MS. HARVEY:** Page 30.

13 "Modern psychiatrists have amply
14 studied the behaviour of errant young
15 girls and women coming before the
16 courts in all sorts of cases. Their
17 psychic complexes are multifarious,
18 distorted partly by their inherent
19 defects, partly by diseased
20 derangements or abnormal instincts,
21 partly by bad social environment,
22 partly by temporary physiological or
23 emotional conditions. One form taken
24 by these complexes is that of
25 contriving false charges of sexual

1 offences by men."

2 So I recall actually reading that quote in a
3 case and I regret I don't recall the citation, but what I
4 do recall about that case is that the court was taking us
5 through the transition between a period of time when in our
6 courts of law, in our courtrooms, women and children were
7 seen to be considerably less credible, not only that but
8 seen to be almost dangerous or mentally ill or hysterical.

9 And taking us from that transition to where
10 we are what we are struggling with today, which is clearing
11 our way from a bigoted thinking into a thinking that is
12 principled and based on case-by-case analysis and based on
13 evidence and rationality so that individuals are actually
14 in -- if they are in a decision making position, whether it
15 be a police officer, a lawyer or a judge, they are self-
16 aware of some of those fundamental beliefs or prejudices
17 that they might have, are aware of them enough to know that
18 an exercise has to be embarked upon so that they are
19 intentionally finding a way to make a decision that is
20 based on something other than prejudice.

21 **MS. MORRIS:** Is it fair to say that the way
22 in which the credibility of women and children was assessed
23 and how corroboration was required and how their testimony
24 was considered to be inherently unreliable, is it fair to
25 say that these rules were particularly oppressive to

1 historic sexual assault victims because in those cases
2 generally there was no corroborative evidence?

3 **MS. HARVEY:** Yes. You see, the reality of -
4 - you know, there is a number of interests that basically
5 meet at the intersection when you are analyzing sex crimes
6 because sex crimes don't normally occur in front of other
7 people in an open way, although we do know that -- in fact,
8 there is sometimes expert evidence required for this type
9 of thing.

10 I recall years ago a research project that
11 said in this one particular group, about 80 per cent of the
12 crimes against children actually did take place in front of
13 another person or at least in the same home or building as
14 a person. So there is a kind of a belief that these things
15 happen totally in isolation, but I know I have seen many
16 cases where, for example, a perpetrator will have a child
17 on a couch with a blanket over them and there is other
18 family members watching reality TV or whatever and the
19 child is being sexually assaulted basically in front of
20 other family members.

21 But because people do not want to be held
22 accountable for sexually offending against kids, they find
23 ways to not be detected and that is either by having that
24 blanket over them on the couch or by going into a room or
25 giving excuses to other members as to why they would need

1 to be with the child or telling the child not to tell,
2 sometimes by instilling guilt so that the child thinks they
3 are actually participating in something wrong or telling
4 the child that there is nothing wrong or actually
5 threatening the child so that they're afraid to tell
6 because they're going to lose their father, their house or
7 their family or they're going to lose their pet or their
8 life.

9 So normally what that means is that there
10 isn't a lot of evidence outside of what the complainant
11 says about it and what the accused says about it and
12 sometimes there is kind of an unusual relationship between
13 the child and the perpetrator because the child knows that
14 the only person who knows the truth is the perpetrator.

15 So what that calls for is that you end up
16 with a scenario of one person coming and giving their
17 version and then the accused coming and giving their
18 version without outside corroboration.

19 Another reality too, if you're talking about
20 somebody who is very interested in having sex with children
21 is they want the children to come back and so they find
22 ways of having themselves sexually stimulated and aroused
23 and satisfied that doesn't actually physically hurt the
24 child.

25 And so that's where we ended up with another

1 problem in law because an assault is normally an
2 application of force, one to another, whereas with a sex
3 crime of a child, it's often more like a stroking or a
4 touching type environment. And so we have to deal with
5 that in law because an assault is normally considered to be
6 an application of force and what a person does to a child
7 to have that child come back for more or to not tell or
8 that there not be injuries or whatever, is that they
9 actually do something that is actually much more gentle
10 than that from a physical point of view.

11 All right. So we've got this problem that
12 these crimes are being committed in our country and there
13 is no cooperation and then added on that, you see, you've
14 got a double whammy if you've got children because we lived
15 historically with a bias against the credibility of women
16 and we lived historically with a bias against the
17 credibility of children. So if you had a female child, for
18 example, in a sex crime, we lived with a bias in our
19 criminal justice system that if a woman made a complaint of
20 a sex crime, that that was considered presumptively not to
21 have existed with all of these rules as barriers to her
22 credibility.

23 So you can see that if you get a combination
24 of a female child with a sex crime without cooperation then
25 it becomes a very, very difficult task. In fact, there was

1 clearly a time in Canadian history where it was virtually
2 impossible to prove a crime of sexual assault or of a
3 sexual nature against a child.

4 **MS. MORRIS:** And dealing with historical
5 sexual assaults, if you throw in that additional layer,
6 given what was or wasn't known about memory and recall
7 historically, could you comment on that, please?

8 **MS. HARVEY:** Yes. I just start as a
9 preamble that my practice as a lawyer changed phenomenally,
10 and if I could recommend anything to starting lawyers, it
11 would be study and understand how the human memory works
12 because everything that we do is about triggering human
13 memory or we're getting people to reconstruct a memory,
14 whether it be an interview we're conducting or them giving
15 their evidence in one form or another.

16 I recall that, again in my early years when
17 I did not have an understanding of memory, doing the very
18 things that get us all in trouble, where we're basically
19 taking a witness, a round peg, and trying to put them into
20 a square hole because we're expecting them to do something
21 different from what they're capable of doing.

22 So the classic example I can think of is
23 that I recall in my early days when I asked a witness to
24 describe ongoing, repeated sex crimes, that I would
25 actually ask them to tell me what happened chronologically.

1 "So what happened the first time." Now, that's okay to ask
2 what happened the first time, but after that, asking,
3 "Well, what happened the second time" or "What happened the
4 third time?" or "What happened the fourth time?" that is
5 asking the brain to do something that it is just basically
6 not programmed to do.

7 So it was in my -- fortunately, in the early
8 part of my career -- it was about 1983 or so that John
9 Yuille, who is an internationally-renowned expert in the
10 area of human memory and in child interviewing, and he and
11 I started working together. In fact, I sought his advice.

12 When I was interviewing children, I would
13 give him my videotapes and he would give me advice on how
14 to improve my interviewing. I started then doing training
15 with him throughout Canada, and I have continued to do
16 training with him. And so I benefit as a co-trainer
17 because I hear basically the scuttlebutt on what is the
18 ongoing evolution of the theory of human memory. It
19 enhances our ability tremendously.

20 But I can tell you, with that knowledge and
21 going into a court of law, at times it is extremely
22 frustrating because we have got practices that we use as
23 lawyers to test the credibility of witnesses that are
24 really -- that really fly in the face of human memory and
25 what a human being is capable of.

1 So examples are -- and I've seen this in
2 trials -- where if you have somebody who is sexually
3 assaulted on an ongoing basis, what happens is that they
4 develop that experience into script memory. And I'm sure
5 everyone in the room actually understands this, but I'll
6 just describe it in any event for those who may not.

7 **MS. MORRIS:** Yes, please.

8 **MS. HARVEY:** So the best way to understand
9 this is that if I ask you to describe to me, number one,
10 how many times have you ever driven to work? So if you
11 drive to work like 200 times a year or so, and I insisted
12 that you've got a pencil and paper in front of you and "I
13 want you to write down every time that you went to work."
14 So you've been going to work for 10 years. That's 2,000
15 times or so. So why isn't there 2,000 episodes of driving
16 to work on that piece of paper? It's because the memory
17 puts it into a script. And so what you're going to hear
18 and what, chances are, people will write is, "Well, I pick
19 up my briefcase and I would leave the door and I would go
20 to my car and open the garage door and drive my car out."
21 Basically, it's a script.

22 And what you're going to get any more
23 detailed than that is coming from the episodic memory which
24 is basically when something different happened, like "I ran
25 over the garbage cans when I left" or "That was the day I

1 had a car accident on the way to work" or whatever.

2 So the same principles apply. Of course
3 they apply when we're talking about a victim of a sex
4 crime. Many of these victims -- and it's the very nature
5 of some sex offenders, that these are repeated, ongoing
6 abuses and the result is that a victim will describe that
7 as a script.

8 So somebody who -- an investigator who has
9 had training on how to do this, the first thing they will
10 do is allow the complainant, the victim, to describe the
11 script and not have them deviate from that, not try to
12 correct them. Let them tell the script.

13 So as I said, in my early days I would
14 actually hear a complainant say something like, "Oh, we
15 would go into the bedroom and he would take my clothes off
16 and he would get on the bed." And I would say not "would".
17 Tell me what did happen. And then I realized that that use
18 of that language was actually the script, and so I have
19 since learned and have trained others that you must learn
20 the script first and then you go into the episode. "Was
21 there any time that was different?" for example.

22 Now, when this gets into a court of law, the
23 cross-examination happens and the cross-examination will be
24 of a nature of, well, "Witness, I've done the arithmetic
25 here and you said that this has happened for 10 years and

1 so many times a week, and so my arithmetic tells me that
2 this probably happened about 2,000 times. Is that
3 correct?" "Well, I haven't really done the math." "Two
4 thousand times, that is my arithmetic, and yet, witness, I
5 have counted how many times that you were actually able to
6 describe something that transpired and there's five.
7 There's five times, witness. How could this possibly be
8 that you have been sexually assaulted 2,000 times by this
9 man and you can only tell us five times?" You see.

10 And the trier of fact, the jury, is sitting
11 there and they're going "Yeah, witness" because they're not
12 thinking about the times of driving to work or the fact
13 that they can't recall the brushing of their teeth or what
14 they had for breakfast, because when we're in a court of
15 law, sometimes it takes on an artificiality, as if the
16 human brain is to operate differently from how it does day
17 to day, and it is convincing at times.

18 That is but one example. There are many
19 examples of where we are expecting something more from
20 witnesses, and particularly in sex crimes, than the human
21 memory is really capable of.

22 **MS. MORRIS:** I understand that at Tab 8 of
23 your Book of Documents there is an article, "Remembering
24 Historical Child Sexual Abuse" by Deborah Connolly and Don
25 Read that you wanted included, and it deals with issues

1 surrounding memories of historical child abuse.

2 **MS. HARVEY:** That's a delightful article.

3 This article, Dr. Read talks about there being two reasons
4 why there would be a delay in reporting or why we're not
5 seeing -- why is it we're seeing so many historic cases in
6 our courts as opposed to cases that have happened in the
7 recent times. So he actually talks about them being -- the
8 reasons being systemic and I think the other one was
9 intrinsic.

10 So systemic, basically, that's the type of
11 thing we're talking about is, you know, if you use the
12 analogy -- if there was a window on that door of the
13 courtroom and the female 12-year old complainant could look
14 through and say, "Do I want to be in there?" and they knew
15 about the way that credibility was assessed and they knew
16 about how cross-examination looked and they knew about the
17 fact that they were expected to remember things that
18 happened years ago and they knew that their private records
19 might well become public, et cetera. Then it doesn't look
20 very inviting to that 12-year old female and that might be
21 her reason why not to report.

22 However, Dr. Read makes the point that there
23 have been significant reforms, and that's true. So if that
24 is the case and that victim can look through the window and
25 see a guarantee that there's a ban of publication, a

1 guarantee that their records will stay private, a guarantee
2 that they can testify from a different room, et cetera,
3 then it may be more welcoming to make that report.

4 But Dr. King says, "Well, it's not quite
5 that simple because the other reality is that there is
6 something inherent in this type of crime that actually
7 prevents people from wanting to report." So he describes,
8 you know, some of the things that I've already alluded to,
9 which is there is this relationship.

10 And it's interesting; when you see -- and
11 I've seen this in my experience -- you might see someone
12 who is actually quite seriously injured physically and the
13 impact on them is less than somebody who, say, has been
14 abused by someone who is closer to them on an ongoing
15 basis, like a father, even though there was never any
16 physical hurt.

17 **MS. MORRIS:** M'hm.

18 **MS. HARVEY:** And I have cases of that in my
19 prosecutorial repertoire that I can think of.

20 And so it's not only the impact on them, but
21 also the likelihood of them reporting. Noone is much less
22 likely to report ongoing abuse by a caregiver than they are
23 that violent situation that arose on the way to 7-11 when
24 they were buying a package of cigarettes even though the
25 physical consequences were much more grave.

1 But as Sheri Ulrich said, she was raped and
2 she was actually knifed in the lungs, and she said that in
3 a perverse sort of way, she was glad that she was knifed
4 because she knew that people would believe her.

5 So there's the complexities of this
6 relationship and this type of offence and it has to do with
7 sexuality, which the world is so confused about in any
8 event. It means actually describing parts of one's
9 genitalia and not really knowing whether or not you've even
10 got those parts right and how it works.

11 And so the whole thing adds up to make it
12 the type of crime that people don't want to report.

13 So that's something that Dr. Read talks
14 about in his article. And then he goes on an examination
15 of some of the issues relating to the theory of memory that
16 I think he feels that we, as practitioners, in the forensic
17 arena should be aware of. And so he says some interesting
18 things.

19 He says, for example, just because somebody
20 is very competent in their recounting of an event, it
21 doesn't necessarily mean that they're accurate. It's
22 interesting because I could well imagine that the people in
23 this room, the barristers who have been in court and have
24 actually said, you know, "My client took the stand and he
25 was forthright. He was confident in what he said. He

1 didn't err. He wasn't evasive." And that basically is
2 giving him points as to why he should be believed.

3 And on the other hand, the opposite would be
4 said as well. "She hesitated" and it would be suggested
5 that they were not actually reliable.

6 But in fact, it may be that if somebody is
7 hesitating, that a trier of fact might actually look at
8 that and say, "Because we know what we know of memory, we
9 know that there is natural forgetting; we know that memory
10 is very much a reconstruction. We know that memory
11 operates with fragments that are coming together. It's not
12 surprising that there would be hesitation when somebody is
13 giving a recall." So that's one point that he makes.

14 Another point that he makes is on long-term
15 forgetting, I think he says there is, of course, normal
16 forgetting. That's very different from all of the debates
17 that go on around association and that type of thing or
18 psychological amnesia. And he says that, yes, there's this
19 process of normal forgetting and that you get to a certain
20 point, about 10 or 15 years, and it doesn't get any worse
21 after that. So you actually go through a progress of this
22 -- process of forgetting and it doesn't get worse after
23 that. Whereas some of us might have thought, you know, 30
24 years ago, my goodness, why do we even remember that? But
25 actually, they should have asked that like 10 or 15 years

1 ago because after that it doesn't make a lot of difference.

2 He talks about the effect of age on the
3 complainant. An important part of memory -- and by the
4 way, even though I'm saying this, I'm just sort of talking
5 about the article and I'm not an expert on memory.

6 **THE COMMISSIONER:** M'hm.

7 **MS. HARVEY:** But these are points that we
8 are practitioners ---

9 **MS. MORRIS:** Yes.

10 **MS. HARVEY:** --- are very helpful in terms
11 of how we practise law.

12 So a really important part of memory is that
13 -- and all of us are familiar with this -- if you are told
14 about a case, we have a much better likelihood of
15 remembering that than if we're told about a phenomena in
16 physics because we don't have -- assuming that you don't
17 have your undergrad degree in physics because we have the
18 reference hooks to put these things on and we've got ways
19 of reminding ourselves. And so this is one reason why
20 children's memory operates a little bit different, because
21 they don't have the knowledge in the first place. So if a
22 child is being sexually assaulted and they have never even
23 looked at their own genitalia and they don't even know how
24 anything anatomically works or anything about sexuality,
25 then they're going to not be able to reference that and

1 remember it in the same way as somebody who is more
2 experienced.

3 And similarly, when you retrieve it, the
4 same idea, and it's one of the reasons why some editing
5 happens where if an individual doesn't have knowledge when
6 they actually do the input and they've got subsequent
7 knowledge for the output, that it might actually make a
8 difference in terms of their ability to recall and even to
9 recount or describe.

10 Another one, he talks about the errors of
11 omission, when things are forgotten, and that actually is
12 quite common and quite natural because of the way that
13 memory -- memory doesn't unfold like a roll of toilet
14 paper. It's not like a computer. It is fragmented,
15 fragments that come and go, and we've all had the
16 experience that some days you remember things and other
17 days you don't remember them and there is something that
18 triggers it for you.

19 He talks about us as "welcome to the human
20 race". The reason why we have to have our Blackberrys and
21 our bookkeeping and all that is that we have a heck of a
22 time remembering times, not only the frequency of times but
23 when things happened, and so its quite natural for somebody
24 to be one or two years out in describing things. It's
25 quite natural for them to be mistaken in the number of

1 times, for example.

2 And so these are some things that he
3 describes that he suggests are particularly important when
4 we're dealing with historic crimes because time has passed.
5 There is no more forgetting, and the other reality which he
6 raises here is that there is no cooperation. So what's so
7 helpful to the police and to the trier of fact when
8 somebody makes a complaint of a sex crime immediately is
9 because you have got the date that it happened; you have
10 got the place that it happened. Hopefully, you've got an
11 ability to seize forensic evidence and find some
12 cooperation and, also, eye witnesses at least to show --
13 were able to show opportunity on a specific date and,
14 therefore, things become much more concrete and much more
15 clear than when somebody is coming many years after the
16 fact and recounting what transpired.

17 **THE COMMISSIONER:** Maybe we could take the
18 morning break now?

19 **MS. MORRIS:** Yes.

20 **THE COMMISSIONER:** Thank you.

21 **THE REGISTRAR:** Order; all rise. À l'ordre;
22 veuillez vous lever.

23 The hearing will resume at 11:20.

24 --- Upon recessing at 11:04 a.m. /

25 L'audience est suspendue à 11h04

1 --- Upon resuming at 11:27 a.m. /

2 L'audience est reprise à 11h27

3 **THE REGISTRAR:** Order; all rise. À l'ordre;
4 veuillez vous lever.

5 This hearing of the Cornwall Public Inquiry
6 is now in session. Please be seated. Veuillez vous
7 asseoir.

8 **WENDY HARVEY, Resumed/Sous affirmation solennelle:**

9 --- **EXAMINATION IN-CHIEF BY/INTERROGATOIRE EN-CHEF PAR MS.**
10 **MORRIS (cont'd/suite):**

11 **MS. MORRIS:** All right.

12 So continuing with past challenges and
13 sexual assault prosecutions, could you please talk to us
14 about what some of the problems were in the past for sexual
15 offence provisions?

16 **MS. HARVEY:** I brought with me a Criminal
17 Code from 1976 and, actually, if you just kind of look at
18 the thickness of the 2007 and the 1976, there is
19 considerably more codification that has taken place over
20 that time and particularly in the area of sex crimes.

21 So whenever you look at the reformers and
22 what they have done to try and improve the situation,
23 they've really looked at three areas and one is the sexual
24 offences and one is the evidence. And so -- you know,
25 abrogating recent complaint and dealing with how children's

1 evidence will be treated, that type of thing, and the other
2 one is procedure, and so accommodations are provided so
3 that -- you know, like in 1988 accommodations so that
4 children could testify outside the courtroom, that type of
5 thing.

6 But the offences not only in this area of
7 law but in others, you know, society evolves and so
8 basically we need to be flexible about developing new
9 crimes as new crimes can be committed. A classic example
10 of that is with the advent of the computer. So now we have
11 luring offences, related to luring children, whereas
12 obviously those weren't needed when we didn't have that
13 technology.

14 So there are two bills that were
15 particularly significant in reforming the sexual offences
16 and they were Bill C-15 in 1988 and, before that, Bill C-
17 127 in 1983. And in Canada there was the -- first of all,
18 the women's movement, so it was in the early -- sorry -- in
19 late '70s that the women's movement eventually created
20 enough of an impetus that there were significant law
21 reforms in 1983. They were the law reforms that took the
22 rape offences and we now have three-tier sexual assault
23 offences: sexual assault; sexual assault causing bodily
24 harm and aggravated sexual assault.

25 So what was the problem with the rape?

1 Well, number one, it was legal for a man to rape his wife
2 up until 1983. So basically, being married was a defence
3 to rape. And also, when you look at the offences in this
4 Criminal Code here, it's every male person who has sexual
5 intercourse with a female person. So many of the offences
6 were directed towards men as the offender and female as the
7 victim. It was possible for women to indecently assault a
8 female, but I know in the Jericho scenario when there was
9 an allegation that one of the offenders was a woman, we did
10 have difficulty finding, because there wasn't the offence
11 of a female indecently assaulting a male.

12 So the change in the law was in 1983. The
13 *Charter of Rights and Freedoms* started to play a
14 significant role in our law in Canada from 1982 and then
15 1985. So it made a significant amount of sense that the
16 old laws that were clearly discriminatory would be repealed
17 and the new sexual assault provisions would be enacted.

18 The emphasis as well and, again, because I
19 had prosecuted -- early on I had prosecuted many rape
20 cases. You know, we actually have to ask the women, "This
21 man is not your husband?" In other words, "You are not
22 married to him?" and we would ask them, "And you are a
23 female person?" and we would have to actually -- because
24 the emphasis of rape was the sexual penetration, we would
25 have to be quite precise about the positions of the

1 genitals whereas in sexual assault, that normally isn't
2 something that you have to go into quite so
3 microscopically.

4 If you don't have full penetration of the
5 penis in a rape it's an attempted rape, which makes a huge
6 difference in terms of the sentence.

7 Anyway, those are some examples of why we
8 needed to repeal those offences. The emphasis at that
9 particular time became more now on the act of violence as
10 opposed to the sexual activity, and so now you can have an
11 act of full vaginal penetration with a penis and it is
12 still a Level 1 sexual assault and you can have the
13 grabbing of a breast, but if there is a crowbar involved or
14 something it could well be an aggravated assault. So the
15 emphasis is on the violence rather than the sexual.

16 Okay. Now, in terms of the children, those
17 offences were changed dramatically in 1988, and so we had
18 the sexual intercourse with a female under 14. We had
19 gross indecency; sexual intercourse with a female 14 to 16.
20 These were all repealed and the new regime of the sexual
21 touching, invitation to touch, sexual exploitation were
22 passed and then some others that are used less frequently.

23 Now, the problem with the offences -- and
24 it's been interesting watching the law reform because there
25 are a number of parallel paths that contribute to law

1 reform and, clearly, there is what Parliament is doing but
2 also, of course, what the courts are doing. And it's been
3 my experience that often Parliament ends up kind of
4 endorsing what is just happening or about to happen in the
5 courts in any event. It's infrequent that you see radical
6 reforms.

7 In other words, we live in a country where
8 there are many, many courts sitting every day and there is
9 diversity throughout the country, but there are parts of
10 the country, I believe, that are more progressive than
11 others and that you will find in their courts movements
12 toward a certain type of thinking that the law is just
13 ready and Parliament is just ready to take on, and that's
14 what happens.

15 So the problems with the crimes that we saw
16 is, first of all, people were much more creative with
17 children and having sex with children than what our
18 Criminal Code was acknowledging that people actually do.
19 But I recall a case, just to give you an example, one
20 problem was what is an assault? And I recall a case,
21 reading it in the B.C. Digest, where an adult was in the
22 bathtub with a child and the child was being asked to hold
23 the erect penis of the adult and the literal interpretation
24 of that was that that was not a sexual assault because
25 technically the child's hand was assaulting the penis and

1 not vice versa.

2 So it was a very literal interpretation of
3 it and, hence, why some would say, "Well, we need to amend
4 our law so that we have an offence like invitation because
5 it is not unusual for an adult offender to invite a child
6 to touch the adult offender" and hence we have not only the
7 offence of touching directly or indirectly a child under 14
8 but also an invitation and, in fact, the offences made out
9 even by the fact that the words are spoken without any
10 touching needing to take place.

11 So when you look at sexual intercourse with
12 a female under 14, and 14 to 16 if she is a previous chaste
13 character, clearly inherent in that is that there is a
14 serious flaw if we are having to actually have as an
15 essential ingredient of the defence whether or not the
16 victim is of chaste character. That's a serious problem.
17 And clearly, the emphasis again is on the intercourse.

18 So now we're understanding that people do so
19 many things. In fact, I've been in training in the United
20 States where there have been descriptions of what people do
21 sexually with children that, you know, people actually get
22 off -- arouses them sexually, which really doesn't look
23 like sexual activity at all. I recall a scenario where a
24 fellow had the kids take their shirts off, go to a
25 microphone and hiccup or burp and that's basically what he

1 saw to be sexually stimulating for him.

2 So I think Parliament is starting to
3 understand that intercourse isn't the main thing that we
4 are trying to prohibit here with children. What we're
5 trying to do is prevent children from being used sexually
6 by adult persons and the sections now actually embrace a
7 wide range of possibilities of sexual activity.

8 **MS. MORRIS:** Thank you.

9 Dealing with investigations, what were some
10 of the problems surrounding investigation of sexual abuse
11 cases?

12 **MS. HARVEY:** Well, all of these are kind of
13 -- things are kind of interconnected. You know, I can
14 think of one of the main difficulties was, first of all,
15 you had to convince an investigator that this was a police
16 matter because historically crimes -- sex crimes against
17 children were so often seen as a family matter, for
18 example, and that it was something that shouldn't be
19 disturbed because it's a family matter, a little bit like
20 how violence against women was seen at one time.

21 So number one, you had to convince police
22 that this is a police matter and, in fact -- and I expect,
23 with the greatest respect to the police, that there are
24 still remnants of that today where, you know, "Give me
25 something real to investigate. Give me a homicide or give

1 me a robbery," because they still would see that this is
2 not a police matter.

3 So that's one thing, is sort of the attitude
4 that, yes, these are criminal offences that have taken
5 place and they need to be investigated.

6 The next thing historically is, of course,
7 the way that we interviewed and, again, you can sort of see
8 that if you juxtapose where we have been technically now --
9 an investigator can sit down with their digital recorder or
10 their digital video recorder or whatever, audiovisual; very
11 different experience from the '50s and the '60s where the
12 notebook would come out, and it was only more recently that
13 even statements were taken.

14 I recall when I first started practising law
15 and we would have all our written -- the statements would
16 be written. A few of them were even typed. Very, very few
17 were recorded. And so the result of that is how a
18 statement was taken, it was often actually a paraphrase
19 from the witness. Interestingly, that's how we are doing
20 it in Sierra Leone. So I sort of feel like I'm going back
21 in through the halls of history.

22 So this becomes interesting because when you
23 look at the purpose of a statement and the uses that it is
24 put to through the process; for example, even allowing a
25 witness to refresh their memory or prepare for court, what

1 a different experience for an eight-year old who basically
2 has available to them notes from an investigator which are
3 a paraphrase of what the child said, and the paraphrase may
4 well turn sticky stuff into semen or may well turn a pee-
5 pee into penis, as opposed to what is being encouraged now
6 through our legislation which is a videotape recording
7 where the child could actually sit and watch the videotape.

8 And I recall the dilemmas in the past when
9 we're trying to use the recording of an officer and his
10 notes to refresh their memory or to help prepare the child
11 or to use them in court or even for cross-examination
12 purposes in terms of an inconsistency. You can see the
13 likelihood of problems arising if it's a paraphrase as
14 opposed to the actual words, never mind the fact that
15 recently we have become more and more aware of the
16 suggestability of children and why it's important that
17 people who do these interviews are trained on those issues
18 and they do not have an agenda that they are taking in to
19 sort of convince the child to fulfil.

20 And so it's a darn good idea that there is a
21 recording not only of the responses but also the questions
22 that are being asked. So if you don't have a recording
23 like that, it makes -- it opens the door of the possibility
24 of defence suggesting that something untoward has happened
25 which may not, in fact, have happened but a suspicion is

1 aroused because of the way that the matter has been
2 documented.

3 So yes, the problems with the investigation
4 clearly were the interviewing, and I have done a tremendous
5 amount of work in training of police, in particular around
6 interviewing, and I recall in Victoria where we brought in
7 actors to allow the investigators to actually rehearse
8 interviews with actors and one of the actors said, "I'm
9 sure glad I'll be able to help you with this so that these
10 investigators don't have to practice on real people" and,
11 you know, unbeknownst to those actors, that's exactly what
12 happens and, in fact, the investigators were telling us how
13 relieved they felt because historically these interviews
14 would happen behind closed doors and investigators never
15 really had the opportunity to even develop their own skills
16 because basically they kind of hoped that not too many
17 questions would be asked about how the interview actually
18 transpired.

19 We are in a very different era now where
20 videotaping is being encouraged. Audio taping is being
21 encouraged and there are extensive training programs
22 available throughout Canada so that investigators are
23 trained in performing these interviews and trained
24 according to structures that have been developed by the
25 social scientists and others who are walking the walk of

1 both doing the research as well as understanding the
2 practical implications so that we can develop structures of
3 interviews and validity assessment and that type of thing.

4 **THE COMMISSIONER:** Are they any, in your
5 experience, models or techniques that are valid for
6 historical sexual abuse? So we have got an adult strolling
7 in here, in the body of an adult, who is going to tell you
8 what he or she remembers -- he, in our case in a lot of the
9 time -- about what happened when they were eight or nine
10 years old? Do you have any thoughts about that?

11 **MS. HARVEY:** Well, I know that John Yuille,
12 who is at the University of British Columbia, who has been
13 working in this area for about 40 years, and he has a
14 protocol both for children and he has a protocol for
15 adults.

16 **THE COMMISSIONER:** M'hm.

17 **MS. HARVEY:** And I haven't examined that
18 protocol from the point of view of historic, but that's
19 where I would look to answer that question. In fact, Dr.
20 Yuille is a person that is worth hearing from because not
21 only has he been working at UBC in his expertise around
22 human memory, but he also has travelled the world far and
23 wide and basically is an expert on the responses to sex
24 crimes in interviewing children throughout the world. So
25 he has the forensic as well as the psychological.

1 So he has an instrument for -- a protocol
2 with a structure and, as I say, both for children and for
3 adults.

4 **MS. MORRIS:** What about seeking out experts
5 at the investigative stage? Has a lot of progress been
6 made at that level?

7 **MS. HARVEY:** You know, we're galloping along
8 here and while the law is being reformed, we are getting a
9 much better understanding of so many things, some of which
10 I have spoken about. We can actually do research now and
11 have done on the credibility of children, for example, and
12 on human memory, how it works.

13 We also know a lot more about sex offenders
14 than we ever have. I can't remember the name of the
15 fellow. I remember when I first started and there was a
16 fellow who had done work for sex offenders and he granted
17 them -- he got the State of New York to grant offenders
18 amnesty so he could ask them questions about their sex
19 offending, and it was the first time that we discovered
20 that the average number of victims per offender was 100 or
21 so, and since then there has been subsequent research that
22 names the average number of victims to be like 167, like
23 many, many.

24 So I always say if everyone in this room was
25 a victim, we could all have the one offender and share it.

1 However, if we were all offenders, we would have between
2 100 and 150 victims, and so basically our influence would
3 be cast far and wide.

4 That's something that we know and, as a
5 result of that, there has been law reforms to address
6 sentencing needs. So we need expertise. We need to --
7 research is being done in the social sciences and in the
8 courts to continue to have validity in the context of our
9 society and it needs to hear from experts.

10 So the types of experts that are now
11 visiting our courts and being of assistance are available
12 in ways that they weren't in the past. In fact, I recall
13 reading when I was writing one of my books that one of the
14 problems is that because we are dealing with children and
15 because we are dealing with sex, people sort of assume, "I
16 was a child and I have children so I know about children"
17 and of course, "I have children so I know about sex" and so
18 "Who needs to hear from an expert?" And it actually took
19 some time to convince courts that we need to hear about
20 these things from experts and, in fact, the first case was
21 a civil case when an expert on children was called in
22 relation to toys because that was the subject matter of
23 that particular case.

24 Okay. So why do we need experts? We need
25 experts partly because of some of the things I have already

1 alluded to in my evidence that incorrect inferences were
2 being drawn about the way people were behaving, the fact
3 that a child goes back even though that child is being
4 abused, the fact that the child doesn't tell right away.
5 You need an expert sometimes to dispel the myths so the
6 trier of fact doesn't draw incorrect inferences about the
7 behaviours of a victim.

8 We need experts in terms of hearing about
9 the human memory. So when I think about cases that I have
10 had where I have called experts, I had a case where this
11 young woman was reunited with her father after about 12
12 years. So she was a teenager, and he basically fell in
13 love with her and it was like a honeymoon for him. He was
14 having sex with her repeatedly for about six months,
15 sometimes two or three times a day. But again, she could
16 only give a small proportion of the details of that. So I
17 actually called Dr. Yuille to describe how the human memory
18 works in relation to that, because what I was concerned
19 about is that the trier of fact is expecting to hear more
20 because the sex happened so frequently, and so the doctor
21 can describe that no, you know, this is the way the human
22 memory works.

23 Recently, I had a case; it was the last case
24 I prosecuted in British Columbia before I left for Africa -
25 --

1 **MS. MORRIS:** I believe this is at Tab 60 of
2 your material?

3 **MS. HARVEY:** Yes. It's *Regina v. Sims*.
4 This was an extremely complicated case and I regret to say
5 that this type of phenomena is happening far too frequently
6 in Canada. It is the phenomena of young people, 11, 12, 13
7 being seduced into relationships with people who traffic in
8 drugs or use drugs and basically introducing people to the
9 use of drugs and, of course, sexual activity as part and
10 parcel of that.

11 When I have done training in different parts
12 of British Columbia and Canada, this comes up as a very
13 serious problem in our communities of young people being
14 colluded into that type of milieu.

15 So in this scenario, the complainant was 13
16 when she first met the accused. So one of the issues was
17 whether she was 13 or 14 because she had trouble recalling
18 the exact details. Another issue was that she was
19 introduced to crystal meth and cocaine and I didn't know --
20 frankly, I didn't know what impact the introduction of
21 crystal meth and cocaine would have to her ability to
22 recall. So I was sitting there thinking, "Now, what
23 questions might the trier of fact have?" I have got
24 questions so I think I'll get some help from Dr. Lohrasbe.
25 So I called Dr. Lohrasbe in this case to help with the

1 issue of consent because she's 13, 14. If she was 14, then
2 consent is not vitiated if this Mr. Sims is not in a
3 position of trust or authority. So basically, I would need
4 to show a lack of consent. However, she's introduced to
5 cocaine and she expresses at times real fear of this fellow
6 but, on the other hand, she keeps going back and she is
7 enjoying the party and she becomes addicted to the drugs.

8 So I just saw all kinds of issues here and I
9 just wanted to make sure that I helped the judge sort them
10 all out, so I called Lohrasbe.

11 Do you remember what page that is?

12 **MS. MORRIS:** Yes, page 8, I think, number 4,
13 testimony of Dr. Lohrasbe?

14 **MS. HARVEY:** Yes, okay.

15 So frankly, this was, I thought, tremendous
16 information from Dr. Lohrasbe. Even I was surprised
17 because, look, he was qualified as an expert on the effect
18 of drugs and inappropriate sexual experiences upon
19 adolescent girls. Now, this is the part that surprised me.
20 He stated that:

21 "The brain of adolescents is not fully
22 developed, particularly with respect to
23 the executive functions of the frontal
24 lobe of the brain. The effect of
25 sexual experiences other than age-

1 appropriate experiences is to
2 traumatize normal psychosocial
3 development. The impact of drugs
4 including cocaine and crystal meth has
5 a greater impact on neurological
6 development which affects cognitive
7 abilities. The impact of both together
8 is to enhance the impact of one
9 another."

10 He was careful to point out that he could
11 not opine as to the path that J.M.'s life might have taken
12 as to the events at issue in this trial, but if her
13 statements about drugs and sex are accepted, he would
14 expect to see her life go sideways, independent of other
15 life experiences. He stated that:

16 "Young persons of the age of 13 or 14
17 do not have the experiential ability to
18 control the use of effects of cocaine
19 and crystal meth. One aspect of those
20 drugs which are highly addictive,
21 particularly when ingested by smoking,
22 is a compulsion to want more and a
23 willingness to do anything to get it."

24 So he continued and basically opined at the
25 end of the day that under those circumstances as we're in

1 this hypothetical that she really did not have the ability
2 to consent as we knew it.

3 And I guess the part that really surprised
4 me is that I recall him saying on the stand that the human
5 brain fully develops, you know, by the age of our early 20s
6 and that things occur to interrupt that and that's what
7 happened to this woman.

8 And it explained so much of her affect and
9 what she was able to tell us and how she saw it and the
10 fact that she could advocate for herself and, anyway, in
11 any event, I think the judge in the end found that most of
12 the crimes took place when she was 14 -- sorry 13. So it
13 turned out that this may not have had the impact that it
14 would have if it had occurred when she was 14.

15 **MS. MORRIS:** M'hm.

16 **MS. HARVEY:** But it was very very helpful
17 information for the court and Dr. Lohrasbe is evidently
18 well qualified and I think it helped us all make decisions
19 about what should transpire in this case. So there is that
20 type of expert.

21 The other one is, you know, helping us sort
22 out even how to communicate with certain people in the
23 court forum. Because we live with the adversarial and we
24 rely so much on the viva voce, so we've basically got one
25 kick at the can to get people to give their evidence

1 effectively.

2 So I recall a case I had called Bennett.
3 This is when I was prosecuting cases throughout British
4 Columbia. And the woman had Down Syndrome and she was
5 sexually assaulted by her mother's boyfriend. And she had
6 a very remarkable stutter to the point that it was painful
7 for the onlooker because we were all kind of waiting for
8 her to say the next word.

9 And so she had a mental disability. She was
10 under the care of the Association of Family Living and that
11 type of thing or community living, and she had this stutter
12 and I was trying to figure out how to allow her to
13 communicate her evidence in a judge and jury trial.

14 And I called for the assistance, because her
15 capacity was an issue. That was a time when we had to do
16 that, we went through the inquiry with her. And I called
17 Dr. Yuille and I called a psychometrist and the
18 psychometrist was actually able to measure how she was
19 operating and what she would be capable of doing and what
20 she wouldn't be capable of doing.

21 And Dr. Yuille, from a memory perspective,
22 told the court that she had a memory of the event but she
23 didn't have a memory of the words to describe the event.
24 So I said to him, "Well, could you please give us some
25 advice then on how we might be able to have her communicate

1 what she remembers of the event". And he suggested that we
2 use props so that we find non-verbal ways of trying to do
3 it, which is something that is -- requires a lot of
4 sensitivity because it's -- to, you know, act out sexual
5 activity is something that we always have to do with
6 dignity if we are trying to do it professionally and ensure
7 that there is not embarrassment.

8 In any event, we applied for a closed
9 circuit TV in that case. It wasn't allowed. That was in
10 the early years when the court was requiring actual fear of
11 the alleged offender.

12 So she needed to come into the courtroom
13 with the jury and we brought in some not very sophisticated
14 props, basically dolls and I think we used briefcases and
15 books and that type of thing as -- the witness kind of
16 chose them on her own for the bad and --- and she basically
17 demonstrated what transpired.

18 Now, that was a case where we had an
19 admission from the offender that, of course, was helpful
20 but we wouldn't have made the case necessarily on the
21 admission, the viva voce evidence of the witness.

22 I have often gone to experts to help me try
23 and find ways to have witnesses who are different from the
24 mainstream communicate their evidence in a court of law.

25 And, as you know, there are some people who

1 are so limited in their communication that they only really
2 communicate with one or two people in their lives, and
3 sometimes we need those very people to give us advice on
4 how to communicate with them.

5 So that's another area where an expert has
6 been used by myself and I've seen other authorities, of
7 course, where experts are used.

8 So I guess another area of expertise in
9 child sexual assault is in the physical or the medical
10 aspect and it's interesting. We've gone through an
11 evolution in that regard as well because we have a much
12 better understanding of what to anticipate in way of injury
13 or non injury of the genitalia of children.

14 And the most recent thing that I've seen --
15 because we went through a period where, you know, we'd be
16 surprised that there wasn't injury. We kind of expected
17 there would be. And then, there was the colposcope that
18 was discovered which is basically an instrument that
19 allowed physicians and pediatricians to get a better look
20 at the genitalia. It's just a magnifying glass with a
21 light basically.

22 And as a result of the colposcope, there was
23 a lot of research in the '80s that analyzed the different
24 injuries that one has seen and what they might actually be
25 originating from, the way that the entry to the hymenal

1 opening was made and that type of thing or to the anal
2 opening.

3 Now, one of the current piece of research
4 that I've seen -- there is actually a DVD available that
5 shows the healing of genital injuries and it shows that
6 this is a particular part of the body where the blood flow
7 is of a nature that injuries heal within hours and
8 certainly days. And so, at times, even though there may
9 have been a serious injury, that with a very short passage
10 of time, there is actually no indication of any injury.

11 So we've got a bit of an evolution and the
12 courts are very receptive, of course, to hear from medical
13 doctors and we often need to hear from the medical doctor
14 who conducted the examination, as well as an expert in the
15 area who can do an interpretation of the findings.

16 And those are the physical findings and then
17 what about the behavioural? We've gone through some -- an
18 evolution in that where there -- because a child, for
19 example, if they have undergone a sexual activity in a way
20 that is traumatic to them, then one would expect to see
21 behavioural indications that are consistent with trauma.

22 Occasionally, you see things that are
23 actually specific to sexual trauma which would be kind of
24 like a psychological acting out type thing, but most of
25 behavioural indicators that you see are just consistent

1 with trauma and that's as far as an individual can go.

2 But it's not -- you know, it is something
3 that investigators have to deal with where a parent will
4 say, "You know, ever since she went to karate, you know,
5 like she couldn't sleep at night and she had nightmares and
6 she was bed wetting", or whatever. And then the task is to
7 determine whether or not it really had something to do with
8 the sexual abuse that was being committed by the karate
9 coach or was it something else going on in the life of that
10 child.

11 And then there's a large body of
12 jurisprudence now relating to when experts can testify to
13 certain things and when they can't.

14 Now the huge big "no, no" in Canada in terms
15 of experts, which is in Canada and different from other
16 countries of the world, is that you cannot actually call an
17 expert who will speak whether or not a witness is -- their
18 credibility. In other words, you can't bolster their
19 credibility by calling an expert who says that they're
20 telling the truth.

21 However, experts have been allowed to
22 testify to the process in which children are interviewed
23 and the weaknesses or the frailties of the problems with
24 those interviews. And there are some circumstances if
25 there is evidence of a mental illness or something where

1 there have been some exceptions where experts have been
2 allowed to testify about the possibility of a witness not
3 telling the truth because of a mental illness or something
4 of that nature.

5 But one of the leading cases that I know of
6 related to that is a BC Court of Appeal decision called
7 *Jmieff*, which is I don't think in the materials, where Dr.
8 Yuille was actually testifying and he was asked in cross-
9 examination whether or not the statement was valid. And he
10 didn't want to respond to it knowing that that wasn't
11 within his mandate, but nevertheless, he did at the
12 invitation of the court respond and then the matter went to
13 the Court of Appeal and they clearly reiterated that the
14 law in Canada is that you cannot have an expert commenting
15 on the truth or the lack of truth from a statement of the
16 witness.

17 **MS. MORRIS:** Thank you.

18 Could you please spell the name of that
19 case?

20 **MS. HARVEY:** Yes, I'll give the citation as
21 well. I'm looking at a book that is very helpful. It's
22 called "Crimes against Children, Prosecution and Defence"
23 by Anna Maleszyk who is a Crown prosecutor in Toronto and
24 it's published by Canada Law Book. And *Regina v. Jmieff* is
25 J-M-I-E-F-F and the citation is (1994) 94 CCC, third

1 series, page 157.

2 **MS. MORRIS:** Thank you.

3 In terms of difficulties with the
4 investigation, what about witnesses about whom there was
5 abundant documentation in terms of their mental health
6 history?

7 **MS. HARVEY:** Yes, there is a segment of our
8 society that ends up being quite vulnerable in my view or
9 at least was historically. So you end up with kind of this
10 problem where an individual finds themselves for one reason
11 or another in institution after institution.

12 And all of us are very familiar with the
13 labeling concerns of basically a label of an individual
14 following them file after file, worker after worker, in
15 ways that may actually lack legitimacy.

16 So if you look to somebody who has a mental
17 handicap and they might be involved with the Association of
18 Community Living or they might actually be in a facility,
19 if you look to somebody who has been in trouble with the
20 law and they might be in a detention centre, if you look at
21 somebody who is at a boarding school and so that there is
22 more records about them then there would be if they were in
23 a normal school setting, you look to somebody who has
24 cerebral palsy or has a serious injury or whatever, mental
25 illness, the point is that they build up documentation that

1 most of us, you and I, do not have about our lives, because
2 they are being watched and people make comment and the
3 purpose of the documentation is usually to assist them in
4 their caregiving. And it certainly isn't designed for
5 forensic purposes.

6 However, what occurs or has occurred in the
7 past up until about 1997 or so, 1995 when our law changed,
8 is that the -- if this person ended up being a complainant
9 in a sex crime, a way of testing their credibility may well
10 be to gather these records and chances are you will see
11 scenarios where the police would actually gather these
12 records in some cases because they felt that there might be
13 something helpful in them.

14 And there might well be. There might be the
15 disclosures or there might be the behaviours or something
16 of that nature, or if they do sexually transpire in the
17 very institution where you get the records, clearly if it
18 was a caregiver, it would show opportunity and that type of
19 thing.

20 In fact, I prosecuted cases where I've
21 looked at the notes of the very caregiver who has said
22 things about the behaviour of the victim. But the
23 difficulty arises when the notes that don't specifically
24 recall -- don't specifically relate to the -- what
25 transpired between the caregiver or the child, or if the

1 alleged offender is not even affiliated whatsoever with the
2 institution, basically you've got a pile of documents about
3 this person's life that people go through willingly and
4 take out parts often out of context and use them to
5 demonstrate that this individual is not credible.

6 And it has created some difficulties clearly
7 and it is one of the reasons why somebody with that type of
8 life, that type of surveillance and documentation may well
9 feel quite hesitant about even making a complaint and
10 risking the possibility that their life could be exposed in
11 this fashion. And frankly, it's quite unfair if it's done
12 in certain ways, out of context.

13 So, yes, this has been a problem and the
14 Supreme Court of Canada dealt with it in *O'Connor* and the
15 parliament amended the *Criminal Code* after *O'Connor* so that
16 actually, now, there is a provision in the *Criminal Code*,
17 section 278.1 and .2 and further whereby if an individual
18 wants access to third-party records, they need to go
19 through a process and that process is actually designed in
20 a way to bring to the users some of the principles that
21 should be applied to ensure that the process is fair to not
22 only the alleged offender but also the victim.

23 **MS. MORRIS:** Dealing with court preparation,
24 what were some of the issues arising in the past?

25 **MS. HARVEY:** Well, I'm thinking back at law

1 school. I went to law school from 1973 to 1976. I don't
2 think -- I don't recall anyone ever talking to me about
3 preparing a witness for court.

4 There's not an awful lot -- wasn't an awful
5 lot written about it. There's a lot more written now.

6 So if you look to some of the issues that
7 I've already alluded to like our understanding or
8 misunderstanding of memory, our understanding or
9 misunderstanding of children, the way that we document
10 child interviews, the way that children are interviewed, so
11 you basically have a scenario -- and the whole point of
12 preparing a child for court is that it is an adult forum
13 that you're bringing the child into. You want to prepare
14 them emotionally for something that they're not used to.
15 Even adults have difficulty testifying in a criminal court
16 and particular difficulty with a very, very unusual
17 experience of being cross-examined and actually having to
18 sit in the same seat and endure it.

19 Most of us, when we are in difficult
20 conversations, we leave or shout back, and you're not
21 entitled to do that in a court of law. And so there is an
22 emotional preparation that is required.

23 There is a preparation required around
24 familiarizing them with the process so that they don't
25 bungle just because they're ignorant of the process. That

1 is the same principle as taking a woman to a maternity ward
2 before she gives birth so that she's familiar with the
3 process before she actually endures the experience.

4 Then, of course, the other part of preparing
5 a child for court is going over their evidence. We know
6 that there is a couple of phenomena that contribute to the
7 complexity of that, and one is the suggestibility of
8 children.

9 So the research is telling us and we know
10 that if the court preparation is a matter of either telling
11 the child what to say or repeatedly going over matters,
12 that all witnesses, wittingly or unwittingly, actually
13 start to adopt into their memory what the preparer is
14 saying about an event rather than their actual recall, and
15 even adult witnesses can't discern the difference.

16 An example that I've heard described is that
17 even if I said something as subtle to a witness as "Was it
18 a stop sign or a yield sign?" and they've heard that and it
19 may well be that two or three years down the road they're
20 calling it a yield sign where it was a stop sign because of
21 that question I asked, as opposed to what they actually
22 recall. So at least that's what the research is suggesting
23 to us, and we need to be mindful of that as practitioners.

24 So if you put all that together, back in the
25 -- certainly when I started prosecuting in the early '80s,

1 we didn't really have a sense of what should be involved in
2 preparing a child for court and we lived with the remnants
3 of the fact that it's a system of justice here based on the
4 common law system and it's only recently in Canada that we
5 have taken away the separation of the barrister and the
6 solicitor.

7 My colleagues in Africa tell me about the
8 system in Great Britain where the barrister really doesn't
9 speak to the witness at all before they go into court.
10 It's the solicitor who prepared them.

11 So I recall in my early days that there was
12 reluctance amongst prosecutors to meet with witnesses to
13 prepare them in advance, particularly children.

14 I know that it's been my experience as a
15 prosecutor over -- you know, since 1980, 26 years, that it
16 often has come up in court, what preparation I have put the
17 children through with a suggestion that perhaps something
18 untoward or inappropriate has happened.

19 And so I am a practitioner who believes very
20 strongly that children are entitled to be prepared for
21 court and that doesn't exclude the other -- people who come
22 to court should also be properly prepared.

23 So over the years we've actually kind of
24 evolved what the preparation might look like. In one of
25 the chapters that I wrote with Nick Bala, this is the 2nd

1 Edition, Child Welfare Law, I wrote a chapter on preparing
2 children for court and it basically articulates the
3 principles and describes the complexities.

4 An important part of that is describing to
5 practitioners what we must not do in the name of supporting
6 children. In other words, it's fine to support children,
7 but we need to do it within a context where we are not
8 affecting or inappropriately influencing their evidence or
9 in some way taking away from the integrity of the process.

10 So it's never appropriate to tell a child
11 what to say, for example. It is important that you limit
12 the number of times that they go over the particular
13 evidence, particularly in terms of what they -- I mean,
14 always it's important that the child do more talking than
15 the lawyer, but even with that, as much as possible, we
16 should try and not go over the evidence too much with the
17 witness so that there are other things that are actually
18 influencing their recall.

19 And because we now have accommodations
20 available, an important part of preparing a child is giving
21 them choices, giving them choices that they've never had in
22 the history of Canadian law, to testify outside the
23 courtroom, to testify with a support person. Now, we can
24 actually be quite creative.

25 I will give a child choices. There might be

1 some things that are difficult. "What do you want me to do
2 if you start to cry or if you find a part particularly
3 difficult? Do you want me to go back to it or do you want
4 me to keep on? Do you mind crying in the courtroom or do
5 you want to stand down? What should I tell the judge?"

6 So this type of thing is discussed with the
7 child so that they start to understand a little bit more
8 about the process as well as how they're going to be
9 supported by others in the courtroom.

10 **MS. MORRIS:** And in terms of accommodation
11 measures for adult complainants who make a complaint as a
12 result of being allegedly abused as a child ---

13 **MS. HARVEY:** As a result of Bill C-2 which
14 was passed in both 2005 and another part in 2006, the
15 accommodations that were once only available to children
16 are now available to adults, which is an example of
17 basically how the principles that led Parliament to these
18 changes in 1988, where it was a child under 14 who was a
19 victim of a sex crime was entitled to certain
20 accommodations. And if you look and take that to its
21 logical conclusion, you're basically saying, "Here's a
22 human being who is coming into this environment and telling
23 us about their victimization. What do we need to do to
24 assist them?"

25 And so it so happens that the light was on

1 children in 1988. Now the light is on all witnesses,
2 whether they be victims or witnesses, whether they be 97 or
3 7 and whether it be a sex crime or it be some other crime.
4 And so the accommodations that were once available for kids
5 with an argument or evidence or submissions having to be
6 made are now available to children willy-nilly just upon
7 the asking as a result of C-2 and all those accommodations
8 are available to adults if the demonstration is made by
9 either the witness or the prosecution -- the application
10 doesn't have to be made by the prosecutor -- that basically
11 it's required.

12 The Court looks to a number of variables
13 like the age and the relationship and the type of defence,
14 that type of thing, and determines whether or not it is
15 required in order to allow this person to give their
16 evidence or if there's something that suggests that it
17 would be contrary to the administration of justice for it
18 not to happen.

19 So for the adults, there's a bit more of an
20 inquiry. Some exceptions to that are like in criminal
21 harassment. An accused person is not entitled to cross-
22 examine the victim of -- the alleged victim of a criminal
23 harassment and the other exception is that if it's an adult
24 and they have a mental or physical disability, and
25 particularly if that disability affects their ability to

1 communicate, these accommodations are available as well.

2 So we're in a new era, post 2006, with the
3 new amendments to the Criminal Code and the provinces
4 throughout the country are doing their best, I'm sure, to
5 implement the bill.

6 **MS. MORRIS:** Thank you.

7 **THE COMMISSIONER:** One of the things I've
8 noticed, in any event, sometimes a Crown attorney will get
9 up and say, "Oh, we need the screen. We need the screen."
10 And oftentimes I don't know if it's expectations that
11 they've created for the child, because you put up the
12 screen and then all of a sudden you see the child looking
13 over and you say, "What are you doing?" "I want to see the
14 accused." He doesn't say "the accused", but says "I want
15 to see that person." You take the screen away and the
16 person is happy and away he goes.

17 So I don't know if we're institutionalizing
18 a lot of these things to the detriment of what the child
19 really needs and wants. Any comments about that?

20 **MS. HARVEY:** Well, I know I've had cases
21 where -- the approach would be to give the child a choice.

22 **THE COMMISSIONER:** M'hm.

23 **MS. HARVEY:** And the child, like all of us,
24 may be fickle about the choice.

25 **THE COMMISSIONER:** M'hm.

1 **MS. HARVEY:** So what the child said sort of
2 in the office of the prosecutor might be very different
3 when they've actually -- you know, because once a child is
4 sitting in that chair and sees a fellow like you and says,
5 "Hey, I like this guy and he's not going to hurt me," and
6 so ---

7 **THE COMMISSIONER:** I have that effect on
8 people.

9 **MS. HARVEY:** So it may well be that they're
10 achieving a level of comfort that the child didn't even
11 anticipate and actually feels protected.

12 So I think the point is the choice.

13 **THE COMMISSIONER:** Okay.

14 **MS. HARVEY:** Right.

15 And once the child has articulated that
16 choice, then the prosecutor would make that application or
17 the child could make it themselves.

18 But I certainly have had that situation.
19 It's one thing -- if a child hasn't been exposed, or anyone
20 for that matter, to a court of law and they're saying,
21 "Well, what do you think? Do you need a screen or
22 something so that you don't see your dad or whatever?" So
23 the child is kind of going through the rolodex of
24 experience to say, "Well, do I?" And they might start
25 thinking about the offence and think, you know, "I'm afraid

1 of that guy."

2 But this is one of the dilemmas that we face
3 is that usually there is a really tremendous and good part
4 of a relationship, and it's just the bad part that they
5 want to go away.

6 So similarly, in court they're going to be
7 talking about something that is difficult for them to say
8 but, on the other hand, they love the guy or they want to
9 be with the guy and they want to please the guy.

10 I prosecuted a case recently where a child
11 was present when her mother was actually murdered by her
12 father and it was the same idea. That child was -- they
13 were very -- she was very nervous and we did our best not
14 to even sort of talk about the realities of the death of
15 her mother, but she was running to the courtroom, looking
16 in the window and said, "I want to go in. Can I go see my
17 dad?" She was nine years old.

18 I mean, a part of what we are wrestling with
19 is do we have a responsibility to -- now, at that time
20 there was a no contact order, so that was easy, but if
21 there wasn't a no contact order, like what position is a
22 prosecutor in, in terms of, well, should that child be
23 seeing the father and would it be beneficial to the child?
24 Would it be beneficial to the accused? Would the accused
25 use it in a way to affect the evidence?

1 So the things that are contributing to the
2 complexity have to do with the relationship, the impact
3 that the abuse had on the child, the impact that the
4 accused's presence has on the child, and I think those
5 things are always kind of waxing and waning. Do you know
6 what I mean?

7 So it's not like there's a solid -- it's not
8 like a cardboard version of a child that we're bringing
9 forward and, in fact, I've seen this a lot because
10 sometimes the opposite can happen. The child doesn't want
11 the screen and then they come into the court.

12 And by the way, I don't really like the
13 screens even though I was the one who recommended it as an
14 expert in front of Parliament, because then I was convinced
15 that we wouldn't be using the closed circuit because we
16 just didn't have the equipment. So I said, "Put in a
17 screen," because that's what they do in the U.S. But the
18 screens have limitations, exactly what you say. They do
19 everything from fall.

20 **THE COMMISSIONER:** Yes.

21 **MS. HARVEY:** I don't know if you've had that
22 happen, or the children go down like this and they go
23 through, or somebody inadvertently takes it away and the
24 kids like scream in horror. So I like the close circuit TV
25 better frankly, but the reality is that, you know, we are

1 human beings and our emotions rise and fall and change and
2 shift.

3 So as practitioners, we could be in a
4 situation where, yes, there is a time that you could take
5 away the screen but the alternative might be so as well
6 there is a time to bring in the screen. And sometimes I've
7 had these cases where it's too late. We have caused the
8 injury. We cannot rehabilitate and I have lost a witness.

9 So as practitioners, I suppose a way of
10 calling it is institutionalising it but we would prefer to
11 prevent having the child spiral into that abyss and even
12 though we know that they may have been able to endure, but
13 it's just not an experiment that we want to conduct.

14 **THE COMMISSIONER:** Thank you.

15 **MS. MORRIS:** Terms of sentencing, could you
16 tell us about some of the difficulties in sentencing sexual
17 offences in the past?

18 **MS. HARVEY:** Well, again, these are related,
19 Ms. Morris, as you know, because we didn't have the
20 expertise even about what sex offenders were about. And I
21 can't remember the name of that fellow in New York because
22 one thing that he also described is that, like I recall,
23 when we would have the exposure, like the fellow who would
24 like to show himself, and we would look at him as if he was
25 kind of an innocent type of guy that wouldn't really hurt

1 anybody.

2 And yet, the evidence -- the research of
3 this fellow said that if you've got a sex offender, they
4 actually -- they sweep across a wide range of possibilities
5 and you can't necessarily assume that a fellow who just
6 exposes himself is going to stick to just exposing. You
7 can't assume that an incest offender is going to stick to
8 his own daughters. You can't assume that the frotteurist
9 is going to remain unknown to his victims.

10 So that's an important thing that became
11 important in sentencing because we were applying incorrect
12 principles in deciding what type of sentence was
13 appropriate. And not only that; our dear Criminal Code was
14 quite limited in what actually was available because unlike
15 other offences where, you know, you've -- what's that
16 expression, you know, you do your time and then that's kind
17 of the end of it.

18 But the reality is from some of the things
19 that I've already alluded with this expert and
20 Marshall, Bill Marshall from Kingston and Derek Ives and
21 others who have done research about the sex offenders -- in
22 fact, Dr. O'Shaughnessy, he says -- and I know this is very
23 difficult, but he says, "You can tell a sex offender is
24 lying because he's talking to you".

25 The reality is that if somebody is a fixated

1 pedophile, and by the way that's just a minority of sex
2 offenders, they are -- if they're so fixated and so keen on
3 getting access to children to have sex with, that it's like
4 any other addiction where it's something that controls them
5 and their mouth really doesn't have any connection anymore
6 with their actions.

7 In other words -- and I've seen this and Dr.
8 Lohrasbe testified in one of my dangerous offender hearings
9 on this point where the fellow stood up and said, "I'm not
10 going to commit; I'm not going to recommit offences; I'm
11 not", and he had been abusing. I had a chart of 30 years
12 of all the children that he had abused in his family and
13 extended family.

14 And Lohrasbe -- and we had the family
15 members there and Lohrasbe said to us, "Don't believe that
16 man. Like he doesn't have any say or control over whether
17 or not he's going to abuse a child. It's just so fixated
18 in his being."

19 Okay. So that's one guy, but on the other
20 end, you've got the situational scenario and let's say
21 hypothetically an example where a fellow is separated from
22 his wife perhaps and his 12-year-old daughter takes over
23 the chores and both of them were kind of picked on by the
24 wife and they kind of come together and commiserate and da
25 da da, and before you know it, their relationship turns

1 into a sexual one. Okay.

2 So an analysis may be done with the tools
3 that have been made available for sex offenders and it may
4 be determined that he's actually no a risk as long as
5 certain things aren't in place in his life. And so he
6 would be dealt with quite differently.

7 So in sentencing, the challenge is to -- you
8 know, in the best of worlds, we would be open-minded about
9 offenders having been identified as offenders, undergoing
10 assessments so we could see actually what category of
11 behaviour they fit in and what the risk is of them re-
12 offending and then tailoring a sentence to meet that.

13 Now, the Criminal Code does not contain a
14 provision here for an involuntary assessment of a sex
15 offender. There are some courts in British Columbia that
16 have interpreted the various sections to say that they can
17 order that, but generally you need the consent. And again,
18 if you're looking at the hard core -- and this becomes
19 really important because, you know, the trouble is that you
20 get so many people talking about pedophiles and, really, a
21 pedophile is an individual who has a preference for
22 children and they are the minority of the people who are
23 actually sex offending against children.

24 And in fact, in British Columbia, we have a
25 program right now where the worst case of repeat offenders

1 are being identified and followed because it's recognized.
2 There's a number of things that are recognized. One is
3 being recognized is just how much money it costs our system
4 that people are victimized by sex offenders in terms of the
5 impact it has on their life.

6 And so they're identifying those guys who
7 are likely to do the 167 victims in their lifetime and
8 ensuring that they're complying with their court orders and
9 that type of thing, and if they need to be designated as
10 long term or dangerous offenders that that is done. So
11 that is definitely a certain category of individual who
12 needs to be treated a certain way.

13 The others, the Criminal Code has now been
14 amended so that it -- I think what the Criminal Code does
15 now which it didn't do in former times is that it
16 acknowledges that I do the crime, I do the time.
17 Phenomenon doesn't apply to certain sex offenders because
18 there is a proclivity. The chances are that if you've got
19 someone who is well entrenched into that lifestyle they
20 knew it when they were just going into adolescence when
21 they were first sexually aware. They actually probably
22 designed their career path to give them access to children
23 and that they will continue to do it until the day that
24 they die, and the reality is in terms of a criminal justice
25 response. Then you have to understand that they need to be

1 under the supervision of one body or another for the
2 remainder of their lives in order to protect victims. So
3 the main issue becomes protection of the public rather than
4 anything else.

5 So we've got the dangerous offender. We've
6 got the long term offender. So we've got way more
7 flexibility. Like it used to be that, you know, I would
8 make submissions and I had two choices. I could say I want
9 two years less a day, plus three years probation. So that
10 would mean that you get your five years of supervision,
11 okay, which is what we wanted. We wanted supervision.

12 So other than that, you've got to ask for
13 five years penitentiary term, so often, because I didn't
14 think I'd get five years, I would ask for two years less a
15 day and ask for the three years just so I would get a
16 guaranteed longer period of time of supervision because I
17 felt that I was potentially protecting more victims from
18 this particular individual.

19 So now that's changed. You have the long-
20 term offender scenario where you can actually have somebody
21 designated and you can get as much as 10 years and then we
22 have the conditional sentences. There is just a lot more
23 flexibility in terms of sentencing, as well as section 161,
24 of course, where you can put somebody on a life order where
25 they are not to associate with children, not to go to

1 community centres and that type of thing or schools where
2 children actually might be found.

3 This is, I think, an endorsement and an
4 acknowledgement by Parliament from an understanding,
5 listening to people through our democratic process as
6 expert witnesses when these bills are crafted, to try and
7 embrace the complexity of, number one, being fair to an
8 accused once he's done his time, but on the other hand
9 acknowledging that the public at large is at risk if he is
10 not monitored.

11 **MS. MORRIS:** Thank you.

12 **THE COMMISSIONER:** We'll take a break for
13 lunch and then come after.

14 **MS. MORRIS:** Okay.

15 **THE REGISTRAR:** Order; all rise. À l'ordre;
16 veuillez vous lever.

17 The hearing will resume at 2:00 p.m.

18 --- Upon recessing at 12:34 p.m./

19 L'audience est suspendue à 12h34

20 --- Upon resuming at 2:03 p.m./

21 L'audience est reprise à 14h03

22 **THE REGISTRAR:** This hearing of the Cornwall
23 Public Inquiry is now in session. Please be seated.
24 Veuillez vous asseoir.

25 **THE COMMISSIONER:** Thank you. Good

1 afternoon.

2 **MS. MORRIS:** Good afternoon, Mr.
3 Commissioner.

4 **WENDY HARVEY, Resumed/Sous le même serment:**

5 --- EXAMINATION IN-CHIEF BY/INTERROGATOIRE EN-CHEF PAR MS.
6 **MORRIS, (cont'd/suite):**

7 **MS. MORRIS:** I understand that you've got
8 just a couple of comments surrounding past barriers for the
9 child witness in court, Ms. Harvey. Would you like to tell
10 us about those, please?

11 **MS. HARVEY:** Yes. I don't think I made it
12 clear this morning when I was testifying about some of the
13 preconditions that were required actually to have a child
14 testify. And again, because I had the opportunity to
15 prosecute before 1988, I saw these in real life form and
16 the impact that it had.

17 Basically, before 1988, the threshold test
18 that a child had to satisfy before even being allowed,
19 before even being qualified to testify was to demonstrate
20 sufficient intelligence. So the inquiry would take place
21 and the court would determine whether or not a child was
22 sufficiently intelligent to testify.

23 And then even if the child actually passed
24 that test, if they understood the nature of an oath, they
25 would swear to tell the truth. And the common law had

1 developed as a result of a case called *Regina v. Kendall*,
2 which interestingly was a case involving children who had
3 witnessed things relating to the murder of their mother but
4 were testifying to it as adults, but nevertheless, that
5 Supreme Court of Canada case was authority for the
6 proposition that the judge needed to warn the trier of fact
7 of the frailties of children's evidence. And the *Kendall*
8 case actually set out a quote about what those frailties
9 were and it was adapted from the work of Wigmore.

10 So what happened is that if you have a child
11 who is, you know, let's say 10 years old, in other words
12 under 14, and there was a child who understood what a bible
13 was and understood the nature of an oath, they would be
14 permitted to testify and, in fact, an accused person could
15 be convicted on their evidence that was not corroborated.
16 However, a trier -- the trier of law would warn the trier
17 of fact of the frailties of the children's evidence.

18 In the event that the child was not sworn,
19 then no accused person could be convicted on the
20 uncorroborated evidence of that child witness. So
21 basically what that meant for investigators and prosecutors
22 is that if you had a case where there was no corroboration
23 and it looked like the child was not likely to be sworn,
24 the matter wouldn't even go to court. There wouldn't even
25 be a charge approval.

1 And if you had a case knowing that there was
2 no corroboration and the child went on the stand, went
3 through the inquiry and they were not allowed to swear an
4 oath, then equally if you had no corroboration, then you
5 might as well just close your books and leave and that's
6 exactly what happened.

7 And I can tell you I recall a case I had --
8 because the law was developed in a way that the evidence of
9 an uncorroborated -- sorry, the evidence of an unsworn
10 child could not corroborate the evidence of another unsworn
11 child. So I recall a case where there were three children
12 in fact and they were corroborating each other and the
13 court was quite specific in saying that he could not
14 convict because the law had indicated that the evidence of
15 another child could not corroborate that of the victim.

16 So it was absolutely heart wrenching, you
17 know, to see this play out and to see what the families
18 were going through when it was so clear that the truth was
19 known but that our justice system couldn't do anything
20 about it in terms of hold people accountable.

21 So that changed in 1988 and the threshold
22 test became rather than sufficient intelligence, it was
23 ability to communicate the evidence.

24 And beside being able to swear on the Bible
25 or speak an oath before testifying, the children were also

1 entitled to promise and to affirm so that opened up the
2 possibilities and as the case-law developed. It was
3 determined that there was no difference in the weight to be
4 given to a child whether their evidence be sworn, un-sworn
5 or an affirmation or a promise or whatever.

6 But what was interesting, earlier I had
7 talked about kind of this double or triple whammy if you're
8 a child plus a woman plus a sex crime because what happened
9 through the evolution is that the requirements for
10 corroboration were lifted with the sex crimes and then
11 after '88 the corroboration requirements were lifted for
12 children who were not sworn. However, that common law
13 warning that had developed as a result of the Kendall case
14 still remained and, in fact, that was kind of a curiosity
15 we had after Bill C-15 as to whether that common law
16 warning would remain and it did remain until about 1999
17 when in fact there was a Criminal Code section enacted that
18 said any common law warning related to the frailties or
19 credibility of children is abrogated, and so that's in our
20 Criminal Code now. So basically, the evidence of children
21 would be, hopefully, treated as an adult.

22 Now, the other thing that happened was that
23 Bill C-2 became law in November 1st and then January 2nd,
24 2006. There were two parts to the amendments. What has
25 happened now is that the threshold test has basically been

1 abrogated. So if you've got a child who is under 14 now,
2 they are presumed to be competent unless a party actually
3 demonstrates that they are not. There is not the same
4 issue that there used to be. It's just basically a totally
5 different regime now.

6 The other important thing is that if the
7 confidence of the child is raised what transpires is that
8 there is an inquiry but the child is not to be asked
9 questions about the truth or the promise as part of that
10 inquiry, which is something that was -- Nick Bala probably
11 testified about this. I don't know. I didn't read his
12 testimony, but he was very instrumental in doing research
13 at Queen's University. He was -- some people did some
14 really creative, innovative work and basically were able to
15 demonstrate that this whole business about a ritual in
16 asking a child -- you know, it really doesn't make a lot of
17 difference because you could have a highly intelligent
18 child with little moral base who could give you one heck of
19 an explanation about what truth and all those things are.
20 Whereas you could have a child who didn't have that
21 knowledge base and -- so there was no correlation really
22 between what the kids were saying and how they eventually
23 performed.

24 **THE COMMISSIONER:** That would apply to
25 adults as well.

1 **MS. HARVEY:** Well, absolutely. This is
2 true, but for some reason some of these principles were
3 being applied to children as if they were a unique species
4 but they are just basically a younger version of us.

5 **MS. MORRIS:** Thank you.

6 **MS. HARVEY:** So those are some of the
7 obstacles and -- is that what you had in mind?

8 **MS. MORRIS:** Yes, thank you.

9 **MS. HARVEY:** And it's basically the
10 evolution of the law as it relates to children from a
11 statutory point of view and there was some interesting
12 things that happened in the common law, of course, that
13 moved us along in our understanding.

14 **MS. MORRIS:** Dealing with Part 2 of your
15 outline, "The Challenges Facing A Prosecution" I understand
16 that you have already covered a lot of this today. Maybe
17 we could have a look at what hasn't been covered then.

18 First of all, dealing with delay,
19 disclosures of abuse, do you have knowledge of the extent
20 to which sexual offences are reported or underreported? I
21 believe you have some case-law that you wanted to ---

22 **MS. HARVEY:** Yes, and there is actually a
23 quote in the case that I referred to this morning at Tab
24 33, the *Seaboyer/Gayme* case so we could go there.

25 When I write in this area I try very, very

1 hard, even though I'm not an academic, to make sure that
2 there is authority to the things that we are saying. So in
3 the "Trauma, Trials and Transformation" we talk about the
4 statistics of underreporting and there are a number of
5 sources from which those come.

6 Because we have the magic of the intervenors
7 in many of these appellate decisions, often the justices
8 are actually quoting from the works of social scientists
9 and others, and that is the case in the *Seaboyer* scenario
10 in the judgment of Madam Justice L'Heureux-Dubé and
11 Gonthier at page 13. Sorry, and this is a head note but,
12 nevertheless, it does come from the text later on and they
13 were dissenting and apart and said:

14 "Sexual assault is not like any other
15 crime..."

16 Further down, okay.

17 "It's for the most part unreported and
18 the conviction rates are among the
19 lowest for all violent crimes."

20 But I can tell you there is many other
21 pieces of research that substantiate this. And, in fact,
22 the fellow, a sergeant with the RCMP in Canada in British
23 Columbia, his name is Keith Davidson, and he has done
24 extensive research relating to sex crimes because he is a
25 behavioural scientist and works with the RCMP. He is the

1 fellow who is one of them responsible for that program I
2 talked about. I think it's called ISPOT where they are
3 identifying the main perpetrators in British Columbia to
4 focus on them.

5 He actually says a figure of something like
6 only 7 to 10 percent of sex crimes are reported. And we've
7 got some interesting -- did you want me to go into this or
8 is this what you're expecting?

9 **MS. MORRIS:** You know, that you have
10 specific knowledge with respect also to statistics on
11 conviction.

12 **MS. HARVEY:** Yes, yes.

13 In fact, the reason why I decided in October
14 of 1981 to even specialize in crimes against children as a
15 prosecutor is because statistics were brought to my
16 attention when I was a member of a taskforce for the United
17 Way. And there were statistics from Children's Hospital in
18 British Columbia that -- I don't remember them absolutely
19 specifically but it was like of 100 children that would go
20 to Emerg with complaints of having been abused. It was
21 something like 25 percent where charges were being laid and
22 about 7 percent ended up in convictions and about 3 percent
23 with offenders actually spending any time in jail.

24 So that was in 1981 that that was brought to
25 my attention in October and it just so happened I was

1 pregnant with my first child and had been a prosecutor for
2 a year and a half and I was shocked. I was told those
3 statistics because the people from the social scientists
4 and health and medicine and psychologists, they were quite
5 innocently asking me, "Why is that?" And so that day or
6 that week I went back to my administrator and I said, "You
7 know what, I'm curious about that too and I'd like to take
8 on the child abuse prosecutions from now on".

9 Now, I understand that recently the stats
10 aren't significantly different because if we talk about the
11 unreported offences, to keep things in evidence for
12 example, if it's 7 to 10 percent. And then there are
13 statistics that suggest that of those cases that are
14 reported, let's assume for a moment that they actually
15 result in an investigation. Clearly, there is research
16 that suggest that the charge approval rate in sex crimes is
17 lower than in other crimes. So it's more like a 60 percent
18 rather than the 80 or 90 percent. And then the conviction
19 rates are, again, about 55 percent.

20 So if you were -- you know, looking at in a
21 global or a holistic way, you would say "Okay, well, you
22 take your 10 percent and then you take 60 percent of that
23 and then you take your 55 percent of that". So it's hard
24 to -- and I don't want to be trite about this because I
25 know there are cases of wrongful convictions and I know

1 that is very serious and as a prosecutor it's clearly not
2 something that I want to be part of. But on the other
3 hand, it is really a very minor -- it is clearly a minority
4 of the cases that are finding their way to the criminal
5 courts and who knows exactly which ones are finding their
6 ways but we have sense of which ones are finding their way.
7 An example would be clearly cases where there are strangers
8 involved because there it seems to be less connection.

9 Clearly, we have a better sense of why
10 people aren't reporting and then why they eventually do
11 report. But if we consider, as many do, like Keith
12 Davidson who has done the math on what it costs our society
13 for people to be sexually assaulted, sexually abused. If
14 we are concerned about that, then we clearly do need to be
15 asking more questions about the manners in which we are
16 responding to these crimes and trying to encourage people
17 to have some faith in our justice system or whatever system
18 so that we can prevent further victimization.

19 So in terms of the delay of reporting, you
20 know, there is that 90 percent who aren't reporting, so why
21 is that? And I have looked at some research as to why they
22 don't report. One of the pieces was actually on the
23 Department of Justice webpage or some research that they
24 have done. And then Dr. Read in his article, he talks
25 about reasons why people don't report. And it's a

1 combination of, again, looking at our justice system and
2 looking at -- sometimes even looking at your local police
3 department and, really, do you even want to go in that door
4 and deal with that guy or looking at the image that our
5 local courthouse has.

6 And of course this becomes important if
7 you've got a child who has a history, perhaps a new
8 Canadian who is not trusting of persons of authority in
9 their own countries and feel that they have the same
10 mistrust for Canadian authorities or in circumstances where
11 a child has perhaps learned from their parents not to trust
12 authorities because the children have been apprehended or
13 Dad has gone to jail, or that type of thing.

14 So there is a number of factors that would
15 influence a person's image of our justice system. But some
16 of the things that -- some of the contributing factors may
17 be a child's perspective of what transpired. They may
18 think that actually what happened to them wasn't wrong and
19 then eventually by the time they do find out that it's
20 wrong they are already entrenched in their relationship
21 with the accused.

22 Another part of the formulas, as I'm sure
23 you've all heard over and over again, is that the accused
24 will say things to suggest even that it's the child who is
25 going to go to jail if they tell. So it basically imposes

1 some blame or contributory participation on the part of the
2 child for them to think that they in fact are as guilty as
3 the perpetrator.

4 The fears or threats, I talked about this
5 before, with the offender. The fears don't have to be that
6 "I'm going to kill you or your dog", although that happens,
7 but sometimes the fears are just things like "You won't be
8 believed". "You'll have to leave your school". You know,
9 like "You're going to break up the marriage. You won't
10 have a place to live". Things that are obviously important
11 to a child. And of course, the social stigma of being a
12 sexual assault victim is -- some people just don't want to
13 consider themselves victims and so whatever happened to the
14 other guy that's called victimization but not me. I don't
15 want to admit that it is me.

16 A big one does seem to be a fear of being
17 disbelieved, but I remember in that research that I read on
18 the webpage a large concern for women was the breach of
19 their privacy, like exposing their private lives and
20 expecting that that's exactly what you have to go through.
21 I don't think there's any of us who don't have at least one
22 or more chapters of our lives that we would prefer not be
23 exposed, and so if the impression is that that will all be
24 exposed, it would be enough not to want to tell.

25 And then an interesting thing happens in the

1 lives of many is that they pass by kind of this invisible
2 threshold where one day, all of a sudden, it seems the
3 right thing to do, to tell. And sometimes this is a year
4 later; sometimes it's 50 years later and sometimes the
5 person they tell is a therapist and sometimes it's a police
6 officer, a friend or whatever. Depending on who they tell,
7 it may or may not find its way into a police file and
8 there's all kinds of issues around that too.

9 As you know, some of the police agencies
10 have developed a third-party complaint type procedures
11 where people don't necessarily want to proceed with the
12 complaint through the system themselves, but they want the
13 police to know about it just in case there's a way of
14 preventing other children from being abused or other women
15 or whatever. And so there are ways that are worked out
16 where people can make a complaint, but it stays anonymous
17 and no action is taken.

18 Interestingly, in the taskforce that was put
19 together for the residential schools in British Columbia,
20 one rule that they had was that if a victim raised the name
21 of another potential victim, the police would not go to
22 that person who was named. In other words, they would only
23 answer the responses of the people who had come forth
24 willingly on their own.

25 I know one of the most challenging aspects

1 of investigation for investigators is going to that victim
2 who has been identified by another person and knocking on
3 their door or going to their place of work or wherever they
4 choose to see them and say, "I'm here to talk to you about
5 something that happened in 1960. Do you remember having
6 the teacher?" And I've seen the reactions of some of the
7 victims who have fallen prey to that type of necessary
8 investigative strategy when it involves -- and how
9 devastating it is when they basically have kept the cancer
10 of that secret for so many years and to have somebody bring
11 it to their attention without warning in a fashion that is
12 devastating to them.

13 So anyway, the phenomena develops where for
14 some reason, somebody changes their mind and they now want
15 to tell and, again, there's kind of been enough cases that
16 it's been documented about why that happens, and sometimes
17 it has to do with personal growth and people are just
18 realizing that it's something that is left incomplete that
19 has to be completed, has to be resolved in their lives for
20 them to reach their fullest potential, or it may have
21 something to do with something much more practical or even
22 dangerous like seeing the possibility of the offender going
23 after a grandchild or a sister, a younger sister or other
24 students or whatever. It just gets to the point where they
25 feel that they have to come forward in order to protect the

1 younger one.

2 So there are different reasons that people
3 come forward. Sometimes an individual, of course, is out
4 of the milieu so that they feel safe, so once they have
5 left home. And, of course, once one leaves home, their
6 terms of reference are different. So it may be that they
7 talked to a girlfriend or boyfriend and it's brought to
8 their attention for the first time. "What? No, dads don't
9 have sex with their daughters." And this was something
10 that was fed as being normal in a certain environment, but
11 in a new environment, it is brought to the attention of a
12 victim that no, this isn't normal and something should be
13 done about it. So that could encourage them.

14 There is a phenomena I know of where
15 individuals may want therapy, and so they would go to a --
16 if they don't have the money to pay for the therapy and
17 they want their offender to pay for their therapy, so they
18 might actually go to a civil lawyer. And I've heard it
19 said that civil lawyers would encourage a victim to go to
20 the police because an investigation would take place, and
21 that would be of assistance to the civil lawyer as well as
22 the police, obviously. So that's another reason why
23 somebody in fact might go to the police where they hadn't
24 thought of it before, where they're encouraged to do that
25 by a civil lawyer.

1 In some jurisdictions, in order to qualify
2 for criminal injuries compensation, one needs to make a
3 complaint to the police. Even if the matter does not end
4 up in a charge approval or in a trial, it's still necessary
5 to go to the police and for there to be a police report
6 number.

7 An unfortunate reality as well is that
8 victims often would love to hear their offender acknowledge
9 what transpired and also have them apologize, which is
10 extremely rare and is something that it's in our book. We
11 talk about that it's really not something that a victim
12 should expect, but it is one of the reasons why individuals
13 end up reporting. Perhaps they've sought an apology or
14 sought an acknowledgement and when it wasn't forthcoming,
15 that that was troubling to them and they felt they needed
16 to do something about it.

17 In interfamilial cases or where -- in fact,
18 there are many cases where victims still obviously love
19 their offenders and they want help for them, and so they
20 actually see that it is a positive move for the health of
21 their family and others that they report because it's the
22 only way that the offender, in fact, would get any help at
23 all.

24 Another reality is that if an individual
25 feels that there is an impact of the abuse on them and the

1 only explanation they have for the way they behave is their
2 abuse, and so for them to receive a better understanding
3 from those around them, they need to basically explain what
4 happened to them. I'm sure you've all heard of examples
5 where they say, "Well, I'm like this because I was raped.
6 So hands off; leave me alone." And so that's basically
7 where a report would start.

8 I have seen and have read of situations
9 where, you know, as parents we are trying to find a way
10 that instils in our children a sense of societal
11 responsibility, and that may be playing the Good Samaritan,
12 so if somebody's in trouble, that you actually assist in
13 rescuing them, but it may well be, in the case of somebody
14 who has been abused, actually in making a report because
15 clearly the health of the community is affected if we have
16 offenders who are affecting our children in this way. So
17 it would be a part of what is perceived to be a civic
18 responsibility and modelling that for a child to a parent
19 to sort of teach a child that the way to deal with these
20 problems is not to keep them in secrecy but to bring them
21 out in the open, and that includes reporting.

22 And then, of course, probably the most
23 obvious one in the report -- and again, I hear this over
24 and over again where you have someone known to the victim;
25 they love them and, in fact, it's like there's a Dr. Jekyll

1 and Mr. Hyde scenario where you've got this loving
2 relationship, whether it be the priest or the teacher or
3 the father or the doctor, whoever it is, who provides so
4 much to that child and actually in many ways helps them
5 with their development in a really positive way, but then
6 there's this. There's the fact that the sexual abuse is
7 going on and if only they could have that relationship
8 without this, and they find that the only way that this can
9 be stopped is by telling someone about it or reporting.
10 There are other ways like running away from school or
11 attempted suicide. There's other ways, but the hope is
12 that by telling, that some other large adult who has the
13 same power as their perpetrator, that those actions can
14 actually be stopped.

15 So there's more, but those are some examples
16 in the research and what I've heard of, of why people take
17 that pivotal step between keeping the secret and letting
18 the secret be known by others.

19 **MS. MORRIS:** And what are some of the
20 factors that contribute to a person feeling confident to
21 report?

22 **MS. HARVEY:** The factors that contribute?

23 **MS. MORRIS:** Yes.

24 **MS. HARVEY:** Well, clearly, if we look to
25 what the justice system is trying to do -- so again, there

1 could be confidence around the individual or there could be
2 confidence in terms of how that individual sees the
3 criminal justice response that they would anticipate, and
4 so this is why it's not uncommon to have a victim kind of
5 hanging out at a woman's centre and then talking to victim
6 services, and they're kind of testing the waters to see
7 what type of response that they would get. And then once
8 they have gained some confidence that certain things will
9 unfold a certain way then they are willing to take the
10 step.

11 But I want to talk of a case that I
12 prosecuted which -- you know, these cases -- and as a
13 prosecutor I have done a lot of them, but they all feel
14 like gifts to me in terms of my understanding of these
15 issues and of my fellow human beings, and I recall a case
16 where this fellow had actually been abusing the members of
17 his family for many, many years, and it started with him
18 coming together with a woman who is about his age and she
19 had two children, and within a week he was engaging sexual
20 activity with these two little girls who were about eight
21 and ten at the time. Both of them became pregnant
22 eventually, and then the mother actually consented for him
23 to marry one of them, and so she ended up having children
24 from him. Meanwhile, he was also having sex with the
25 original woman and a child was born from that relationship.

1 So he had a daughter from that woman as well.

2 So as you can well imagine, this is going on
3 for years and years and eventually he raped his daughter
4 that was born to the original woman and she was so badly
5 injured that it actually took three episodes of surgery to
6 correct the problem. In fact, the incident was identified
7 because the little girl was bleeding to death. So she
8 eventually got help.

9 That occurred in 1972, and when the child
10 was at the hospital, the surgeon was engaging in repairing
11 her, and when she had been brought in, she was told -- the
12 medical folks were told by way of history that she had
13 fallen off a bike. The surgeon who was engaged in
14 repairing the damage said to his team of surgeons, "This
15 doesn't look like falling off a bike to me. I mean, this
16 is ridiculous. This reminds me of..." And then it dawned
17 on him, of a rape that had happened in Boston when he was a
18 surgeon there and he said, "This reminds me of a rape."
19 And they actually reported it.

20 Now, in 1972, with protocols being missing
21 and people not having the understanding that they have
22 today, what transpired is that the dad, the perpetrator,
23 would go to the hospital and he was whispering into his
24 daughter's ear one thing or another -- we don't really know
25 what -- but whenever the police went to talk to her, she

1 would say, "Daddy is going to take me to the PNE".

2 So it was identified that the perpetrator
3 just couldn't be named by the child and it was decided that
4 no charges could be laid at that time.

5 So again, 1972, you need corroboration, all
6 those things that I've described.

7 Now, what happened is that the family was
8 told by the police that there was insufficient evidence to
9 proceed with this, and so the family at that particular
10 point -- and this is something that I've seen over and over
11 again in terms of that image that people have of the
12 justice system and of investigators and what we do -- so no
13 matter what happened in that household after that event,
14 the family was convinced that there was insufficient
15 evidence. So whether it be him raping or chasing people
16 around with firearms or whatever, whatever, they just felt
17 that they were powerless and that there would be no help
18 from the police, not that they had any resentment or bad
19 feelings towards the police, but their understanding was
20 that, well, my goodness, if that is insufficient evidence
21 when our daughter, our little sister almost died, then what
22 the heck does it take to take these cases before the court?

23 And so more children were born, more
24 children were abused and eventually it was when the woman
25 just got to a stage in her life with her own personal

1 development and with a tremendous sense of guilt,
2 eventually reported to the police.

3 It was, again, ironic in that case, a little
4 bit like the Shari Ulrich quote, of all those women, the
5 one who was actually least injured of all was the one who
6 almost died because no one ever touched her again. No one
7 ever doubted her word and the rest, on the other hand,
8 didn't have the benefit of that "corroborating evidence."

9 So those are the things that have
10 contributed to people not telling. In that particular
11 family it contributed for years and years that they didn't
12 tell because they felt that the police would never have
13 enough evidence and there are other examples where I recall
14 a negotiation took place where pleas were taken relating to
15 a little boy having been abused and the charges were
16 dropped with the girls and the family left with the
17 impression that it was okay to abuse girls but not boys,
18 just because of the lack of communication between the
19 police and the prosecution and the members of the public
20 who were coming in and, in those days, had a very different
21 status and role in these matters than they do today.

22 **MS. MORRIS:** In terms of other challenges
23 facing the prosecution ---

24 **MR. MANSON:** Excuse me, Mr. Commissioner,
25 perhaps for the transcript Ms. Harvey could explain what

1 the PNE is?

2 THE COMMISSIONER: Right.

3 MR. MANSON: You have made a reference to
4 the ---

5 MS. HARVEY: Yes, it's the Pacific National
6 Exhibition. It's like a playground.

7 MS. MORRIS: Thank you.

8 MR. MANSON: I apologize.

9 THE COMMISSIONER: No, that's all right.

10 MS. MORRIS: In terms of challenges, other
11 challenges facing a prosecution, I understand that you are
12 very familiar with charge assessment and screening, being a
13 B.C. Crown. Can you tell us in what Canadian jurisdictions
14 charge assessments are conducted and what are some of the
15 challenges associated to it and benefits as well?

16 MS. HARVEY: Yes. Charge assessment clearly
17 is done by all provinces, but what is different about
18 British Columbia is the Crown agency that does the charge
19 assessment, and that is the same in New Brunswick and
20 Quebec. So basically, the way that this works is that the
21 police would conduct the investigation and it's when the --
22 with very, very rare exceptions -- it's when the
23 investigation is complete that the file is brought to us
24 and then the Crown makes a decision on the charge
25 assessment.

1 We have policies, of course, as all
2 provinces I'm sure do, that guide us so that we make a
3 principled decision on the charge approval. We decide not
4 only whether or not there are charges but also we decide
5 what charges should be laid.

6 Now, in some circumstances it's clear that
7 there is a substantial likelihood of conviction. However,
8 there are things missing and bits of evidence that the
9 prosecutor would prefer to see. So we will -- like I'm
10 sure the experiences in other provinces, we will ask the
11 police and recommend to the police that they follow up on
12 certain things.

13 So this becomes important and one of the
14 challenges in sex crimes because, you see, the police --
15 just for an example, the police will conduct an interview
16 and we know the elements of the offences and we know what
17 questions need to be asked and answered so that we can just
18 see whether or not we can approve a particular crime.

19 So I've seen an issue that comes up relating
20 to historic abuse cases where, you know, we have had these
21 numerous amendments to the Criminal Code and here is a book
22 I'm bringing to your attention which I think is excellent
23 to describe. It's a David Watts "Prosecution and Defence
24 of Historic Defences Relevant Statutory Provisions" and it
25 basically tells you what the different offences were

1 through time.

2 So we have got amendments in the Code in
3 1983 and 1988 and so it's not unusual for a new
4 investigator to come on and think that things have always
5 been as wonderful as they are now, and that they will
6 actually investigate something that happened in 1982 and
7 charge a sexual exploitation or an invitation to touch or
8 something just because they don't know. And it gets even
9 more complicated than that because Parliament has
10 recognized -- the lawmakers and the legislative drafters
11 have recognized the complexity relating to sexual assault
12 and consent, the issue of consent.

13 And so there are actually three significant
14 sections in the Code that deal with consent and these have
15 all been enacted at different times. So the first one was
16 enacted in 1983 with Bill C-127 and that's section 265(3),
17 and that basically talks about scenarios where consent is
18 not present under certain circumstances.

19 And then there is section 150.1 which was
20 enacted in 1988 with Bill C-15 and that deals with the age
21 differences so that consent is vitiated if the complainant
22 is under 14, for example, if the perpetrator is older.

23 And then the other section came about with
24 Bill C-49, the Kim Campbell bill after *Seaboyer*, and that
25 is section 273.1 and that is kind of an interesting section

1 which I -- oh, you don't have the Criminal Code, do you?

2 **MS. MORRIS:** Tab 15 is Bill C-41.

3 **MS. HARVEY:** Okay.

4 **(SHORT PAUSE/COURTE PAUSE)**

5 **MS. HARVEY:** So it's section 273.1 and Tab
6 15. So this became law in 1992.

7 Now, many of these things in 273.1 -- the
8 common law was consistent with this in any event and it was
9 a codification, but one of the concerns, I believe, has
10 been that often an offender is actually calling something a
11 mistake of fact when in fact it's a mistake of law and, as
12 you all know, an offender can be exonerated on a mistake of
13 fact but not on a mistake of law.

14 So there has been some efforts, I believe,
15 to codify some of these things. So offenders, it's really
16 clear to them that the consent you get has to come from the
17 complainant and not the father of the complainant or not
18 the husband of the complainant, that type of thing. You
19 can't rely on a mistake of fact if you say, "Oh, I thought
20 in Canada it was okay to have sex with a woman who was
21 unconscious" and there is other examples in this particular
22 section.

23 But what becomes important for an
24 investigator is that they need to be aware of section
25 265(3) and that it became law in 1983. So if you look to

1 260 -- well, you don't have the Code in front of you, but -
2 - oh, you do have ---

3 **MS. MORRIS:** Bill C-127 is at Tab ---

4 **MS. HARVEY:** You do have 127.

5 **MS. MORRIS:** Tab 17.

6 **MS. HARVEY:** So you see, what happened in
7 1983 is that when rape was repealed, what was developed was
8 basically there was an assault and an assault is defined in
9 section 265 and the charging section is 266, and then if
10 the assault takes place in the context of sexuality, then
11 it's a sexual assault. So there is a definition of assault
12 in 265.

13 Let's see if I can direct you there.
14 What tab is 127?

15 **MS. MORRIS:** Tab 17.

16 **(SHORT PAUSE/COURTE PAUSE)**

17 **MS. HARVEY:** You know why? They are
18 different section numbers at that time.

19 **MS. MORRIS:** That's right.

20 **MS. HARVEY:** So 234.

21 **MS. MORRIS:** It was previous to 1985.

22 **MS. HARVEY:** Yes, so it's renumbered. It's
23 actually on page 45 and 46. So the one that I am referring
24 to is on page 7 and it's the top left. Okay. So this
25 section applies to all forms:

1 "So for the purposes of this section,
2 no consent is obtained where the
3 complainant submits or does not resist
4 by reason of the application of force."

5 Okay. So what becomes really important here
6 is that, look, see there is no consent:

7 "...where the complainant submits or
8 does not resist by reason of the
9 exercise of authority."

10 And so what happens often is that, like
11 let's say you get an institutional abuse where you have got
12 maybe a 14-year old and you're talking about a teacher or
13 principal or something like that, so the police would tend
14 to want to look at this section and assume that because
15 there is a teacher, that there is an exercise of authority
16 and so they won't even ask the victim about consent.
17 They'll just ask them what happened and they won't say
18 anything like, well, you know, what did you think about
19 that or did you say anything or whatever question they are
20 going to ask about consent.

21 So the case comes to us, and I have had
22 that, and it's a very unfortunate thing because what
23 happens is that you look at it and you know that you need
24 to ask the witness about consent because this particular
25 section was not in place before 1983, and so it puts the

1 officer in a position where they are going back to a
2 complainant and having to hone in on the issue of consent
3 which is a difficult situation for the complainant and the
4 investigator clearly knows that.

5 So I guess the moral of the story is that in
6 our efforts to be involving and answering to what society
7 needs, it makes it a very, very complex situation for
8 police and for prosecutors because these sections apply or
9 they don't apply and the investigators -- it's why it's so
10 good to have somebody who is a specialist, actually, and
11 who knows the law or consults with a Crown who knows the
12 law so that they get some advice in advance about the types
13 of things that need to be asked of a complainant so they
14 don't have the unfortunate circumstance of having to go
15 back and ask more questions, which is always disconcerting.

16 So that's one of the challenges of the
17 historic abuses and the investigation involved in them.

18 And back to the charge approval then,
19 another issue of charge approval for a prosecutor is
20 whether or not he should actually be meeting with a
21 complainant before charges are laid. There is in our
22 policy, and it's acknowledged in B.C., that there are some
23 circumstances where that is called for. You see, it
24 becomes a bit of a complex situation because we are working
25 under the understanding that the investigation is complete

1 and what possibly could a prosecutor do in meeting with a
2 complainant in deciding whether or not charges should be
3 laid.

4 And there are some prosecutors who would
5 prefer to see on their own their own assessment of the
6 credibility. I personally don't agree with that, but
7 that's just a matter of personal choice. I much prefer the
8 idea that you have a skilled interviewer. You have a
9 skilled investigator and you videotape or you document the
10 statement in a way that a prosecutor looking at it could
11 actually make those decisions.

12 There are other things, of course, a
13 prosecutor can do during that meeting if it's a
14 particularly sensitive matter, they can actually provide
15 the victim some confidence in continuing with their report
16 and tell them about some of the accommodations and things
17 that are available to them to make their experience less of
18 an ordeal.

19 But anyway, that's an issue, whether or not
20 the prosecutor would actually meet the person in advance,
21 and then, of course, probably the most significant one is
22 the one that the trier of fact is going to have to raise as
23 well, is how do you assess the credibility of a complainant
24 and what factors should you take into consideration?

25 You know, there have been a number of

1 developments in the law that I think help us with that, but
2 there are still people who would make a decision like "I'm
3 not going to approve this case because the victim in this
4 case is also a sex offender, has a record for sex
5 offending. So I'm not going to approve it."

6 Now, again, I don't -- I've heard of that
7 type of scenario arising and, frankly, I don't agree with
8 it and I don't understand how there's a logical connection.

9 So sometimes some biases or beliefs come
10 into why charges shouldn't be laid that are perhaps
11 questionable and maybe the opposite is true as well. It's
12 why in devising documents to assist individuals exercise
13 their discretion, it's a good idea to give some guidance.

14 And we've seen it over and over again in the
15 Criminal Code in section 278, 276, where people are given
16 guidance to exercise their discretion and, similarly,
17 protocol and policy instruments need to perform the same
18 tasks when it comes to charge approval and other similar
19 issues that prosecutors need to resolve.

20 **MS. MORRIS:** To allow for principle or fact-
21 based screening?

22 **MS. HARVEY:** Yes.

23 And what about the complainants, say, for
24 example, where -- you see, another huge issue is this
25 business about unfounded complaints. The police are

1 calling a complaint that doesn't result in charges, is not
2 followed through, unfounded, and that is different from the
3 offence not having taken place.

4 However, you know, it may look the same. So
5 if you end up -- say you have a complainant who has got two
6 previous unfounded complaints and someone might look at
7 that and say, "Oh, we've got a history here, so this is
8 some reason why perhaps charges shouldn't be laid because
9 it's suspect." But actually it's very likely or it's
10 definitely as likely that all that's happened here is that,
11 yes, here's a person who has been victimized by three
12 different people.

13 There's absolutely no reason why at all the
14 charges shouldn't proceed, particularly because we have
15 evolving case law that is starting to understand the human
16 creature more and understand that sometimes actually people
17 may even -- and I prosecuted a case where a complainant
18 actually did make a false complaint. We dealt with it and
19 it was partly dealt with in terms of the trial. The Court
20 felt that there should be limited access to that police
21 report. It was explained and the matter proceeded and
22 there was still a conviction.

23 We do not live in a society that says,
24 "Look, if somebody lies at one time, they are never again
25 afforded the protection of the police or the criminal

1 justice system" and as human beings we have to work this
2 out on a case-by-case basis with certain objectives in
3 mind.

4 **MS. MORRIS:** In terms of challenges in the
5 trial, are there particular challenges related to delayed
6 trial dates, adjournments, those kinds of delays?

7 **MS. HARVEY:** Yes.

8 **MS. MORRIS:** Cases being split into parts?

9 **MS. HARVEY:** Yes. I think it's one of the
10 most difficult things that I've experienced in my career is
11 trying to get these trials on quickly, and there is --
12 generally speaking, most of the argument is on the side of
13 trying to get them tried as soon as possible once the
14 complaints have been made because people's lives are in a
15 bit of turmoil and delays appear to be inevitable.

16 Partly, the delays come about because of the
17 docket, the overcrowding, the number of files that there
18 are to move through a particular jurisdiction. Sometimes
19 the delays are created because a lawyer is fired or, for
20 some reason, is not available on a particular date or that
21 type of thing.

22 It is a horrendous experience for a
23 complainant to be prepared to go to court and then a week
24 before, on the day of court, being told that the case is
25 going to be adjourned, and not only adjourned but adjourned

1 three months down the road or six months down the road or
2 even a year down the road.

3 I had such a case where the child was 11
4 eventually when she testified and it was a very well known
5 and experienced defence lawyer who did not have a new trial
6 date for a year down the road. The judge, this lawyer and
7 myself worked really hard to try and figure out how to deal
8 with this so that we would not end up having this trial
9 with an 11-year old having to wait for another year. And
10 so we tried something which was we adjourned the trial to
11 the next possible date and we just called her evidence and
12 then the rest of the trial was scheduled for that date
13 several months down the road where the rest of the evidence
14 was called.

15 From a prosecutor's point of view, it's not
16 the ideal way of strategically introducing the evidence,
17 but on the other hand, it was a way of trying to
18 accommodate a little girl whose life was in turmoil so that
19 she could basically carry on, at least with her evidence
20 done, and then the matter would proceed.

21 Now, this was before C-2, and so I had
22 applied that she testify outside the courtroom and that
23 application took three days. So we had scheduled -- I
24 can't remember how long we scheduled -- maybe two weeks,
25 and three days of that was with the application as to

1 whether or not she would actually testify outside the
2 courtroom. So it gives you an idea of how strenuously
3 these things are argued at times.

4 As it turned out, the accused -- the judge
5 preferred that the accused actually leave the room rather
6 than the child, and so he sat in the jury room, because
7 this was a judge-alone trial. So the child testified.

8 At the end of the day, it was an acquittal
9 after the year had passed and the entire trial had been
10 heard, but the child had wanted not to be in the room with
11 the fellow and that happened. So from that perspective, it
12 was successful.

13 **MS. MORRIS:** What are some of the other
14 challenges facing victims in the courtroom?

15 **MS. HARVEY:** Well, the law has changed now
16 so that we don't have to go through this demonstrating to
17 the Court the -- giving a full and candid account in order
18 to use the out-of-court testimony, but there are -- you
19 know, you hear over and over again that people are very
20 concerned about being in the courtroom with the accused
21 person.

22 And so that is a challenge, and it's a
23 challenge partly because the victims will carry their own
24 memories and their own inhibitions and fears about that,
25 but it's also a challenge because we do see things happen

1 in the courtroom where the accused do gesture. There's
2 been many a courtroom I have been in where half the
3 courtroom is the supporters of the accused and half the
4 courtroom is the supporters of the victims, and there's
5 hems, hahs, toots, all kinds of notices coming from them as
6 the evidence unfolds, which is again a very difficult thing
7 for anyone who is testifying.

8 In some cases the accused may not have
9 counsel. And so historically there have been cases where
10 the accused himself has actually cross-examined the victim
11 and, again, a very, very difficult thing.

12 I've heard of scenarios where you see an
13 accused and a victim, they know things that others might
14 not know. So they might actually have a code. So the code
15 for "It's time to have sex" might be something like a
16 scratch on the head or something benign like "Let's watch
17 Survivor". And that code actually comes up in court
18 because it's only the victim and the perpetrator who know
19 this, and if the perpetrator or the accused is actually
20 entitled to cross-examine the victim, then it's an
21 opportunity to use the code. So I've heard of those
22 things.

23 Fortunately, the Criminal Code has been
24 amended now so that hopefully no accused person will be
25 cross-examining children under the age of 18, no matter

1 what the offence, and similarly in cases where there's a
2 person with a mental or physical disability or someone who
3 is a victim of criminal harassment.

4 So that has been a challenge and Parliament
5 has seen fit to respond to that, and we will see how the
6 rest of the world interprets it.

7 The spaces where people wait to go to court
8 aren't ideal in this country, and so there are places at
9 different ends of the spectrum where on one hand you could
10 go to what I consider a magnificent space in Edmonton which
11 is part of the Zebra Centre and the movement there whereby
12 in that particular courtroom -- and for those of you who
13 are interested ever in going, there are pictures available
14 of this so you don't have to go to Edmonton to see how it
15 operates.

16 But it's a courtroom whereby the child can
17 come in, and if this were the courtroom, what would happen
18 is that the screen -- or there would be a device around
19 here so that my evidence would actually transmitted. It
20 would be on the monitors. So if I came in, the only person
21 who I would see is this very friendly judge that the kids
22 all like. So basically the child is screened from the
23 rest. So that's kind of nice because it's like the judge
24 in that case I told you about, he wanted to see the child,
25 and so there is still that opportunity to do it, but the

1 child is screened from the others.

2 But also in that particular physical plant
3 in Edmonton, they have the other room where the child
4 waits. Now, if you were making a list of what your child
5 needs to go on vacation or wherever you're going to be with
6 a child, you just have to go to a children's hospital or a
7 paediatrician or a dentist who specializes in children
8 where this stuff is clearly a no-brainer. So what do you
9 need? Well, you probably need some snacks. Kids tend to
10 need to eat a little bit more. You might need a place for
11 them to have a bit of a nap if there's a long wait. You
12 need a place for them to take a pee, obviously, and you
13 probably need some distractions.

14 And what are distractions for kids these
15 days? Well, you might need a computer with some games or a
16 TV or something where they can watch a movie.

17 In any event, at the Edmonton courthouse,
18 it's all there. It's all there. So what that means is
19 that the child can come in and they wait.

20 So if you look at the contrast of a child in
21 Edmonton and a child in another jurisdiction in Canada, a
22 child in Edmonton will go into that room and it may be that
23 they go into the courtroom or it may be that they actually
24 give their evidence from that very waiting room where they
25 had all these amenities, whereas another child in another

1 part of Canada will go into a courthouse and they will be
2 sitting a distance away from their accused, six or seven
3 feet away and the accused' supporters.

4 Even with the presumption of innocence in
5 place, it's still an awkward, awkward situation and it
6 creates a very difficult feeling before individuals,
7 whether it be an accused or the witnesses go into court.

8 Similarly, just as the accommodations are
9 available, there are still courthouses and courtrooms in
10 Canada where there is virtually no provision of the
11 videotaping or screens or anything of that nature and, in
12 fact, little room for even support persons to sit.

13 So those are the challenges. Those are the
14 challenges for the victim. Those are the challenges for
15 this country.

16 When we look at the international documents
17 that are suggesting that we should treat victims and
18 witnesses and children a certain way, you know, we tend to
19 perhaps look at the Edmontons and the Montreals and the
20 London and Kitchener, those spots in Canada where people
21 have specialized and have developed some of these things
22 available and say Canada is doing okay.

23 But you know what? Canada is not doing okay
24 because there are many, many areas in Canada and role
25 settings in others where these courthouses are still

1 allowing both the accused and the victim the significant
2 discomfort and distress of not having the physical plant in
3 place so they can engage in this arduous ordeal without
4 some dignity basically. So that clearly is one of the
5 challenges.

6 **MS. MORRIS:** Thank you.

7 Are there particular challenges associated
8 to multi-victim cases?

9 **MS. HARVEY:** Absolutely. The issues around
10 multi-victim cases are so complex and regrettably what
11 happens often is that you have a first responder who goes
12 to the initial complaint not quite appreciating what they
13 have and embarking upon an investigation not quite
14 appreciating the complexity. And we see this over and over
15 again.

16 Frankly, it's not difficult to understand
17 what a multi-victim case might look like at the first
18 response. Like as soon as a child is saying something like
19 "I was abused by my karate teacher" or "I was abused by my
20 teacher at school" or, you know, somebody who has access to
21 a lot of children, chances are you are walking into the
22 quicksand of a multi-victim case. And as soon as something
23 like that happens, the authority should recognize that
24 perhaps it's not the one or two-year junior constable who
25 should be going out on a complaint like that.

1 But anyway, that is what has happened in the
2 past and what is very difficult is that the constable or
3 the junior people who are the first responders will go out
4 and they'll start to take the complaint, not quite
5 appreciating that what they are gathering there is going to
6 basically be the ghost of the past that carry through the
7 entire investigation and the prosecution.

8 And all of the issues relating to
9 suggestibility, separating witnesses from each other, how
10 to interview a child, documentation, et cetera, et cetera,
11 et cetera, they are all very pertinent at that initial
12 stage.

13 So what happens classically in a multi-
14 victim case is that you've got your initial police response
15 and you've got the community response happening. And
16 often, the community response is quicker than the police
17 response. So the phones start ringing; people start
18 comparing stories; people start panicking, getting very
19 upset that perhaps their child was one of children who was
20 abused at the school or by this dancing teacher or
21 whatever, and people get talking and that clearly has an
22 impact on the ability of these investigators to be able to
23 get peer statements and peer versions from these people
24 about access, behaviour from the children, what the
25 children said, whatever.

1 And then, on top of that, what happens is
2 the media sometimes becomes involved and so the result is
3 that you get a community that ends up being divided,
4 seriously harmed, not only by the abuse itself but by the
5 revelation of the abuse and the trauma of finding out that
6 your child has been abused and comparing the stories with
7 the others and living under a circumstance where it appears
8 that the response from the authorities is inadequate.

9 So if you have a protocol in place in
10 advance, that clearly is the best. And if you have funding
11 in place in advance, contingency funding so that police
12 agencies can actually seek the assistance of other parts of
13 their agency or even other agencies to try and move the
14 investigation promptly and to document it properly, and
15 have people who are actually skilled in these areas to
16 conduct the investigation, conduct those interviews that
17 are so important, that is clearly a better model.

18 Equally, it has to be a component of a
19 multi-victim case that the victims, their families and the
20 public are kept informed. And again, that is a very
21 delicate balance, but it has to happen because people need
22 and deserve information about what is transpiring and it
23 also helps them to maintain kind of a level of calm so that
24 things don't grow into something far worse.

25 Similarly, because of the trauma related to

1 this, you need quick counselling response. And Mr.
2 Commissioner talked earlier, at the beginning of the day,
3 about the importance of the counselling and similarly you
4 need a response in a multi-victim type case.

5 Now, what's interesting is it starts to, you
6 know, rear the head of that monster which is the therapy
7 pending trial-type scenario which many prosecutors and
8 police even are concerned about and that is because a
9 suggestion is being made. But if a person is in therapy
10 pending trial, then actually, that would have an impact on
11 their evidence and it's better, some think, to actually not
12 provide therapy and wait until after the litigation.

13 In fact, there are some counselling centres
14 who will not provide counselling until after litigation,
15 but I personally don't agree with that point of view. But
16 the point is, all of us will know that a protocol must
17 address counselling and it must address counselling in a
18 way that not only deals with the needs of the victims and
19 their families but also it deals with the needs of
20 litigation so that the counselling is provided by people
21 who are savvy in the litigation interest and so that they
22 know that they need to design a therapeutic intervention
23 that does not go over the facts, for example, that deals
24 with other issues and does not bring the people together.

25 Like you can't -- you shouldn't even have

1 two clients waiting in the same waiting room or, you know,
2 you need to have things in place to ensure that you are not
3 actually bringing people together to encourage them to talk
4 and commiserate about what is transpiring.

5 So these are the types of things that need
6 to be addressed and there are many, many helpful documents
7 now that have been developed including a -- there's a
8 fellow named Wayne Fullerton who is with the Ministry of
9 Health in British Columbia and he did research on the
10 multi-victim cases in British Columbia.

11 And again, if you go on the Department of
12 Justice webpage, like there are examples for people who
13 have developed protocols for multi-victim investigations
14 and prosecutions and I've just touched on the complexity.

15 But they are very, very difficult cases and
16 Canada has definitely had its share of them and we can
17 benefit from the knowledge, the lessons learned from our
18 predecessors in dealing with these very, very complex
19 situations.

20 **MS. MORRIS:** What about challenges in multi-
21 agency joint investigations?

22 **MS. HARVEY:** I am sorry?

23 **MS. MORRIS:** What about particular
24 challenges in multi-agency joint investigations?

25 **MS. HARVEY:** Yes. And multi-agency

1 challenges arise in any event because the mandates are
2 different.

3 So on one hand, you've got the mandate say
4 of Social Services or protection workers who are concerned
5 about the protection and might be dealing with a legal
6 system that permits hearsay for example, whereas an
7 investigator -- a police investigator will know that the
8 rigours are different.

9 And similarly, different mandates, like a
10 protection worker will likely have an obligation to be
11 communicating with the parent even if that parent is an
12 alleged abuser, whereas the police, their dealings with the
13 alleged abuser being the parent would be very different.
14 They would tend to want to arrest and try to see whether or
15 not they could seek a warrant statement.

16 So that's just one small example where the
17 mandates may well collide and individuals end up, if they
18 can't resolve those differences, end up distrusting each
19 other and not wanting to work together and, in fact,
20 communication would atrophy rather than be enhanced and
21 which it has to be in this type of thing.

22 So whether you are talking about police or
23 their protection workers, the same types of complexities
24 arise when you're dealing with, perhaps, a therapist who's
25 also providing assistance to somebody and their mandate is

1 the well-being. And so if you've got a victim who is
2 saying something like, "You know, I'm having trouble
3 remembering; could you help me remember what happened?" Or
4 if they say something like, "I really think it was my fault
5 because the blouses I was wearing were too opened and I was
6 exposing myself".

7 And so their mandate clearly would be the
8 best interest of the client and they would pursue their
9 course with that in mind, which would be a very different
10 mandate from if a prosecutor was aware of what was going on
11 in that therapeutic session or a defence lawyer for
12 example.

13 So, yes, clearly it's an example that calls
14 for protocols to be developed in communities. And I have
15 an example actually of a community and I understand that
16 Cornwall has a protocol already, but our communities really
17 need to be developing protocols so that when the crisis
18 hits, those relationships are already worked out.

19 And we kind of have to realize this as human
20 beings that to be professional, we need to work with
21 individuals even though our mandates are different. And we
22 might not even like the guy, but you still have to be able
23 to sit down and work this stuff out and work
24 professionally.

25 So the Williams Lake protocol, as an

1 example, was developed in 2006. And this was developed
2 around the amendments to the *Criminal Code* that are calling
3 for better supports for children witnesses.

4 And clearly, as long as you are providing an
5 enhanced service, it means that you've got to do
6 preparations in advance and preparations in advance means
7 identifying those cases early on and making sure that you
8 meet with people in advance so that you can do what needs
9 to be done to provide the service.

10 So whether it be a multi-victim case or
11 providing service to a child witness or whatever, we need
12 to have these protocols and have dress rehearsals so like
13 that actress said, so that we not practicing on the real
14 people.

15 **THE COMMISSIONER:** Time for the afternoon
16 break. Thank you.

17 **THE REGISTRAR:** Order; all rise. À l'ordre;
18 veuillez vous lever.

19 The hearing will resume at 3:35 p.m.

20 --- Upon recessing at 3:18 p.m./

21 L'audience est suspendue à 15h18

22 --- Upon resuming at 3:40 p.m./

23 L'audience est reprise à 15h40

24 **THE REGISTRAR:** Order; all rise. À l'ordre;
25 veuillez vous lever.

1 This hearing of the Cornwall Public Inquiry
2 is now in session. Please be seated. Veuillez vous
3 asseoir.

4 **WENDY HARVEY, Resumed/Sous affirmation solennelle:**

5 **THE COMMISSIONER:** Go ahead, Ms. Morris.

6 **MS. MORRIS:** Thank you.

7 Ms. Harvey, another area I understand you're
8 going to be speaking to us about is cooperation between the
9 police and Crown counsel.

10 So how can cooperation between police and
11 the Crown be improved?

12 **MS. HARVEY:** How can it be improved? Well,
13 the areas where I've seen police and Crown work pretty well
14 together is basically when structures are in place that
15 enable them to actually meet, get to know each other, know
16 what each other's mandates are, and discuss things so that
17 fewer problems are arising because of misunderstanding or
18 miscommunication.

19 So you know, and I appreciate, of course,
20 being a Crown prosecutor that there is some concerns about
21 the Crown thing and investigative role or about the
22 phenomena of self-fulfilling prophecy in the event that the
23 investigator is so involved in the prosecution that we
24 never engage in an opportunity of alternative hypothesis
25 analysis.

1 I am certainly aware of those concerns. I
2 am aware of the FPT report that was published in 2004-2005
3 on the prevention of wrongful convictions in Canada and the
4 concerns of tunnel vision. Some of the recommendations
5 that have been made around ensuring that we don't have
6 wrongful convictions of the nature of Milgaard, Morin,
7 Sophonow and others that we've had in Canada.

8 But still, hopefully, those recommendations
9 won't take away from the value of police and Crown working
10 together and police seeking advice from Crown at the
11 investigative stage and Crown engaging the services of the
12 police at the trial preparation and trial stage.

13 And clearly, you know, the way I think to
14 describe this is that if our trial is basically the end
15 result and is a place to display the workings of the
16 investigator, surely the investigator should be aware of
17 what takes place in a trial and what the law is and what
18 the procedures are and what the expectations are so that it
19 can enhance their investigation practices.

20 And similarly, because the prosecutor is
21 displaying those wares, surely they should be conscious of
22 some of the intricacies and challenges of the investigator.

23 And there are mechanisms in place for this
24 to happen, including some that are contained in the
25 *Criminal Code* where there's requirements that prosecutors

1 actually work with the police around ITOWs and that type of
2 thing.

3 MS. MORRIS: Information to obtain search
4 warrants?

5 MS. HARVEY: To obtain -- yes, or
6 authorizations. So -- I'm sorry?

7 MS. MORRIS: Yes.

8 MS. HARVEY: So I should say that, you know,
9 that the Zebra Centre that I mentioned is an example of a
10 model where police and Crown come together in child abuse
11 cases and I talked about the courtroom and I talked about
12 the room adjacent to the courtroom where children wait.
13 But there is also a building in Edmonton that is basically
14 dedicated to child abuse investigations and there are
15 police seconded to work there and there are Crown and there
16 are medical people and victim support and counsellors.

17 So they have attempted to make a one-stop
18 shopping effort and I was invited there to train and, yes,
19 I did my two days training but I'll tell you I learned a
20 tremendous amount from those people in what they have done
21 in bringing because there aren't too many jurisdictions in
22 Canada that I know of where this has worked to the
23 satisfaction that the Zebra Centre is working.

24 And the Zebra actually is a -- it's a bit of
25 a metaphor because apparently the Zebra, the adults

1 encircle the younger zebras and the stripes become
2 confusing. So the predator cannot see the child in order
3 to harm them. So that's why it's called the Zebra Centre
4 because it's consistent with the theme of child protection
5 and adults playing a role in the protection of children.

6 So that is an environment where people still
7 have their various mandates but there's a common goal in
8 mind, which is basically transcending our differences and
9 fulfilling our mandates and still making sure that we're
10 responsible and accountable. But all in the name of, you
11 know, professionally investigating these allegations
12 involving children and doing what we can, doing what they
13 can to ensure that they are pursued where they should be
14 and the children are to the least extent possible further
15 traumatized.

16 **MS. MORRIS:** What about the participation of
17 Crown counsel in terms of advice to police for statement
18 taking? Do you see ---

19 **MS. HARVEY:** Well, the example that I gave
20 about -- you know, with the definition of consent, you see
21 -- if the police don't know what's happening in our courts,
22 they end up asking questions that the lawmakers have tried
23 so hard to prevent being made. So like if you don't -- if
24 you don't have a police officer who is properly trained,
25 they're going to ask questions about whether or not someone

1 had an orgasm, whether or not they've had sex before with
2 other people, and not to say that there are circumstances
3 where clearly those questions need to be asked.

4 An example might be if there is an injury
5 and a complainant might be asked whether or not there is
6 another explanation for the injury, for example. But
7 regrettably you see some officers pursuing investigations
8 and asking questions that are insensitive and in fact are
9 the types of questions that our Supreme Court of Canada and
10 our parliament have tried to prevent complainants being
11 asked.

12 So the investigators need to know what is
13 relevant, what is helpful, what is appropriate, what would
14 help identify for the prosecutor the essential elements of
15 the offence. It goes far enough but does not go too far.

16 **MS. MORRIS:** I understand that there is a
17 correction to be made to your outline in this respect; so
18 at Tab 5 on page 10 in the second bullet dealing with Crown
19 counsel playing a role in the investigative stage and the
20 change is in the third line from the bottom, "Spouse may be
21 charged *Criminal Code* section 278". This should actually
22 read "Production of record to accused *Criminal Code* section
23 278.2".

24 **MS. HARVEY:** Yes. Sorry, what tab is that?

25 **MS. MORRIS:** This is your outline, Tab 5.

1 It's page 10 in the second bullet.

2 **MS. HARVEY:** Yes, okay. Yes, and I
3 apologize. I'm sure that was my error. I had probably
4 said section 278 but it's section 278.1 or .2, and 278
5 talks about spouse may be charged and 278.1, .2 talks about
6 private records.

7 So this is the dilemma and why police need
8 some assistance from a Crown prosecutor.

9 Let's say for example an investigator is
10 sitting with a complainant and she says, "I've got a
11 diary". Okay. So investigator A might say, "Great; I'll
12 take your diary" and he takes the diary and he's being
13 conscientious and he photocopies every page and he provides
14 it to the Crown prosecutor. And it may be that in the
15 diary we see things like this where there might be a code,
16 like a star is on the day that intercourse took place or,
17 you know, something like that, or it may be that there is a
18 description of meetings or whatever.

19 Or like in the *Shearing* case that went to
20 the Supreme Court of Canada, there was no reference and the
21 defence was concerned about the fact there was no reference
22 to anything in the diary, but in any event --

23 So now, the diary is a record pursuant to
24 section 278.1. So the Crown actually has an obligation not
25 to hand over that diary in a sexual assault type scenario.

1 Many police officers don't know that and in fact what might
2 happen in sort of the disclosure conveyor belt of things is
3 that the diary could be reproduced, put in as kind of one
4 of the tabs or even pages of it as one of the tabs. It
5 goes to the disclosure folks. They don't appreciate that
6 that in fact is a diary and it's a record pursuant to
7 section 278, and it's disclosed and it's not supposed to be
8 disclosed that way.

9 The way that it should be disclosed is that
10 if it's identified as a record, then the Crown would inform
11 the defence that they actually have this document and then
12 the defence would actually make application before the
13 court to get access to it if they feel that that is
14 something that is relevant to their case or their defence.

15 So that's just yet another example of some
16 of the complexities that arise. And if you speak to a
17 Crown prosecutor, they probably wouldn't say to you, to an
18 investigator, "Yes, seize that diary, photocopy all the
19 pages and put it in with the police report". They likely
20 would have some other advice on how to deal with something
21 like that, particularly if there's one or two pages in the
22 diary that are at all relevant to the investigation.

23 So it's yet one more example of the
24 complexities and why it's so important that the police are,
25 at the very least, understanding that they should be

1 informing themselves on these issues and that one of the
2 persons or the agency that they can go to for assistance is
3 the Crown prosecutor or the Crown attorney.

4 **MS. MORRIS:** So the next area we'll be
5 dealing with is Part 3, "Outline of Systemic Change". I
6 understand that this portion of your testimony will address
7 criminal legislation and cases that have impacted child
8 abuse and historic abuse prosecutions.

9 Firstly, in terms of the legislation, I know
10 that, from your testimony today, that you've already told
11 us about several amendments that have changed the map. So
12 perhaps we could go through the remainder of legislation
13 that you think is particularly relevant to having changed
14 things in sexual abuse prosecutions.

15 **MS. HARVEY:** Okay. So this does -- it
16 clearly has a story to it and the story does begin with
17 Bill C-127, which is Tab 17, and I've already described
18 that basically but the part to 127 not only -- oops, sorry,
19 it's me making all that racket.

20 Not only did it change the offences, in fact
21 like I said whenever there is a legislative reform, the
22 Parliament tends to look at the offences. It tends to look
23 at the rules of evidence and procedure. So the rules of
24 evidence that were important here, of course, were
25 abrogating the rule of recent complaint and doing away with

1 any corroboration requirements, and also, the offences --
2 repealing the offences of rape and sexual -- sorry,
3 indecent assault on a male, indecent assault on a female,
4 and replace it with the sexual assault.

5 And I've already addressed the sections
6 relating to consent and the section was at 244 or 265(3)
7 that was -- became law in 1983.

8 **MS. MORRIS:** M'hm.

9 **MS. HARVEY:** So as you all know, what that
10 means is that from that day forward, those crimes would be
11 charged according to those new sections, as opposed -- if
12 they were committed after that date, they would be charged
13 according to the new sections. However, if they happened
14 before that date, they would still be charged under the old
15 laws. And that again creates tremendous concern not only
16 for investigators but also for complainants sometimes who
17 see an indictment loaded with offences from pre '88, pre
18 '83, and they're wondering why we're kicking on this fellow
19 and actually like why you're making such a big deal and
20 actually, well no, we have to do it this way because the
21 Code changes. And so we charge according to what it is at
22 a particular time.

23 So there are -- I've heard of complainants
24 who are concerned about there being so many charges on the
25 indictment. So that's C-127.

1 And then you see this was in 1983 and now
2 meanwhile the Badgley scenario was happening. So the
3 Badgley Report was published in 1984, which was a year
4 after that. And it wasn't until 1988 that there were
5 significant changes again. And I recall actually it was
6 Hnatyshyn who introduced this Bill into the House in 1986.
7 And I recall him saying that one of the purposes here was
8 to use our criminal courts to protect children because
9 historically they weren't being used for that purpose to
10 the fullest possibility and that there were reforms
11 therefore in the area of the offences and the evidence and
12 the procedure.

13 So that was in '88 and meanwhile one of the
14 recommendations of the Badgley Report is that a Special
15 Advisor be appointed and that was Rix Rogers. So Rix
16 Rogers' report was published in about 1990 I think and you
17 probably have that as one of your exhibits from other
18 witnesses.

19 **THE COMMISSIONER:** M'hm.

20 **MS. HARVEY:** But clearly when you're trying
21 to look at a situation of how to improve the plight of
22 children victims in Canada, these documents are very
23 helpful because there are many, many reports and
24 recommendations that have been made by bodies throughout
25 Canada that are basically sitting on the shelf. And

1 sometimes the recommendations are follow-up and sometimes
2 either the will or the finances or both are not present to
3 actually bring some of these recommendations into fruition.

4 So the 1988 provisions I have talked about
5 in terms of the offences and the efforts around the
6 evidence and the procedure are -- I've talked about the
7 child witness now, the threshold test became ability to
8 communicate the evidence, and it did away with requirements
9 for corroboration. However, it did not do away with the
10 warning, the common law warning and then there were
11 provisions for the support person testifying outside the
12 courtroom, not being cross-examined by the accused. And
13 the other one is a previous -- it was a hearsay exception
14 that was enacted in the Code with the videotaping.

15 So if the child testified and adopted the
16 contents of the videotape, then that videotape could be
17 used for the truth of its content. So it clearly was a
18 hearsay exception and that would include whatever the
19 interviewer said as well. So that was in 1988.

20 Now, I alluded to this before. Like again,
21 what Parliament was thinking is, okay, we're dealing with
22 sexual offences against children. There were some others
23 too, like spouses of offenders being competent to testify
24 and that type of thing.

25 So that was the main focus. So when you

1 look at Bill C-15 you see that the people they are trying
2 to protect are complainants or victims and they're 14 or
3 under and they are sex crimes, and so those accommodations
4 are available to those.

5 MS. MORRIS: And this is at the time of
6 trial?

7 MS. HARVEY: And at time of trial, yes.

8 MS. MORRIS: Fourteen (14) at the time of
9 trial?

10 MS. HARVEY: Yes, although I think the
11 videotaping is at the time of videotaping.

12 MS. MORRIS: Okay.

13 MS. HARVEY: Right. It's a bit before.

14 So what has happened, you can sort of see a
15 principled thinking evolving because there have been
16 amendments where -- and this makes a lot of sense, frankly.

17 So you end up with a scenario where let's
18 say a child is sexually assaulted by a mother. Does it
19 make any difference that that child was threatened by the
20 mother or physically assaulted by the mother? Like is it
21 any easier for that child to testify against that mother?

22 And so we did have scenarios actually after
23 Bill C-15 where Crown were saying, "Look, the bill says
24 this" or "The new amendments say this, but I've got a
25 scenario where the child doesn't want to testify in front

1 of her mother. Can we still have these accommodations,
2 like a screen?" And the courts actually did exercise their
3 discretion, relying on cases like *Regina v. Smellie*, the
4 1919 case, where the court exercised its jurisdiction to
5 move the accused to the back of the courtroom to say that
6 the Court has inherent jurisdiction over the proceedings of
7 what transpires in that courtroom so, yes, even though it's
8 not covered by the new amendments, we will still allow that
9 to happen.

10 All right. So then we have amendments to
11 the Code that actually kind of follow suit with that, so
12 that it was expanded to not only complainants but witnesses
13 and not only crimes of sex but also crimes of violence.
14 And so we have the situation where this was allowed.

15 But, again, it's so interesting because, you
16 know, that case I told you about with the little girl who
17 was in a house when her mum was murdered by the father, do
18 you realize that the out-of-court testimony was not
19 available for her because homicide was not one of the
20 sections that was covered by out-of-court testimony? We
21 managed to do it because the Court applied section -- I
22 think it was 714, the videotaping or out of court -- or the
23 video-conferencing testimony out of province and then there
24 was consent of parties, and so we did this kind of
25 convoluted couple of back somersaults and managed to

1 actually have this little girl because everyone agreed --
2 you know, the judge agreed and both counsel agreed -- to
3 have her testify outside the courtroom. But, again, it
4 kind of shows the limitations to the legislation as it was
5 framed.

6 So these amendments that you see, like in
7 1999 with Bill C-79, that is a bill that expands the
8 principles of what was originated in C-15 to other
9 witnesses.

10 Okay. So that's just kind of carrying the
11 theme over but, again, to take it even further in the year
12 2006, there were further amendments on January 2nd where
13 these accommodations have been expanded not only to
14 children but to adults and they have to satisfy the same
15 threshold test that the children used to have to, but the
16 children, according to the law, they just have to ask for
17 it if they're under 18. They just have to ask for
18 testifying outside the courtroom or behind a screen and
19 it's made available to them as long as it's not contrary to
20 the interests of justice.

21 So that clearly is an extension and it's
22 basically saying and endorsing the things that have been
23 said by some of the justices for years, that our criminal
24 justice system has been failing the children. It is an
25 adult forum where we expect children to come and perform a

1 certain way, and the research is saying that these
2 accommodations are helpful. So they're helpful. So if a
3 child asks for it, then the child will receive it, unless
4 there is a reason shown that they shouldn't and, for that
5 matter, they are available to adults as well.

6 So those amendments came about '88, 1999 and
7 now in 2006 and the country is still in the throes of
8 implementing the new Bill C-2 which was -- actually took
9 various forms and it was before the House for actually
10 about three years actually before it was passed.

11 Okay. So now some of the other amendments -
12 --

13 **MS. MORRIS:** I understand that your outline
14 should specify at two places that the "Amendments noted are
15 as a result of C-2 as well."

16 **MS. HARVEY:** I'm sorry? I didn't hear you,
17 Ms. Morris.

18 **MS. MORRIS:** I understand that your outline
19 should specify at two places that "Amendments that are
20 noted there are a result of C-2 as well".

21 **MS. HARVEY:** Oh, yes.

22 **MS. MORRIS:** And that's not apparent in the
23 text.

24 **MS. HARVEY:** Yes.

25 **MS. MORRIS:** At page 12.

1 **MS. HARVEY:** On page 12 where it says:
2 "Further significant amendments include" and so the first
3 bullet, and then the Criminal Code expanded accommodations,
4 that is actually C-2 which is -- so it's in the wrong
5 place, really. It should be under C-2 rather than that --
6 rather than where it is.

7 **MS. MORRIS:** And two bullets down from that
8 "Amendments to the sentencing provisions"?

9 **MS. HARVEY:** Yes, C-2 had a number of parts
10 to it. It actually created some new offences and it
11 amended the sentencing provisions, and so that third bullet
12 down also is part of C-2.

13 **MS. MORRIS:** So where it says:
14 "Articulated the principles of
15 sentencing including that abuse of
16 one's child amended to any child in
17 2005 in abuse of authority are
18 aggravating factors."

19 That's the one?

20 **MS. HARVEY:** Well, I'm trying to remember.
21 I think it was about 1995. I don't think I have it listed
22 here.

23 Our Criminal Code was amended so that the
24 principles of sentence are actually articulated in sections
25 718 and beyond, whereas before we were relying on the

1 common law for the principles of sentencing, but now they
2 are clearly articulated, including what are aggravating
3 circumstances.

4 So it's been considered an aggravating
5 circumstance if it is a child who is a victim, if it is the
6 child of the perpetrator. Now, it's been expanded as a
7 result of C-2 to include all children. It doesn't have to
8 be the child of the perpetrator. It can be any child. So
9 that was a C-2 reform.

10 The other amendments were not part of C-2,
11 like the long term and dangerous offenders. That was a
12 separate piece of legislation, as was the conditional
13 sentences. But one thing that C-2 did do is that for many
14 of these crimes against children now, there are actually
15 minimum penalties which is interesting because what a
16 minimum penalty means, and sometimes it is a 14- day and in
17 some days it is a maximum of -- or a minimum of one year
18 for -- I think that's living off the avails or it might be
19 prostitution with a child under 18. I'm not sure.

20 But the point of that is that conditional
21 sentences are not available if there is a minimum sentence,
22 whereas a conditional sentence might have been available
23 previously for a sex offender before if they are charged
24 with interference or invitation to touch or sexual
25 exploitation. Now, those three offences as well as others

1 but not including sexual assault bring with them minimum
2 penalties. So that was part of C-2.

3 The other thing -- I was just wondering if
4 there was anything else with C-2 that I haven't -- oh, yes,
5 there is the new offence of voyeurism in C-2 and it also
6 addressed the pornography response to the *Sharp* case and it
7 made breach of court order, section 127, a hybrid offence
8 and, probably more important to our purposes here, it also
9 expanded the applicability of the sexual exploitation
10 section, and that's section 153 of the Criminal Code.

11 What the law used to be is that if you had a
12 victim who was 14, 15, 16 or 17 and there was a position of
13 trust, dependency or authority, then the consent was
14 vitiated where either a sexual touching or an invitation to
15 touch took place, so basically a sexual relationship. So
16 that clearly dealt with the situations, whereas if you had
17 a teacher who was engaged in sexual -- even sexual touching
18 or anything with a student 14, 15, 16 or 17, consent was
19 vitiated and you didn't even have to demonstrate a use or
20 abuse of authority. In other words, like for the 265(3)
21 section where it says "use of authority" you'd have to have
22 some evidence like "Have sex with me and I'll make sure
23 that you make the nationals" or "Have sex with me and I'll
24 make sure you get an A on your essay." So that's a use of
25 authority.

1 But for the sexual exploitation it's enough
2 that that relationship exists.

3 Now, there is a whole area of case law
4 defining what is a person in authority, what is
5 dependency, what is a relationship of trust, and so we have
6 had situations like the father of the child who is being
7 babysat is not in a position of authority. The
8 schoolteacher, even though it is a summer holiday, is in a
9 position of authority.

10 So obviously we have been wrestling with who
11 would fit into that category.

12 But what the new legislation has done with
13 C-2 is it has expanded it so that it goes beyond
14 relationship of dependency, and I'm just trying to look
15 here to see if I can actually find it.

16 Did you say that was 17 at Tab 12?

17 **MS. MORRIS:** This is at Tab 12.

18 **MS. HARVEY:** Tab 12?

19 **(SHORT PAUSE/COURTE PAUSE)**

20 **MS. HARVEY:** So if you turn to -- for
21 whoever is in control of the monitor, it's page 4 and it's
22 on the left-hand column and it's (1.2) and you can see
23 there, by the way, as we scroll down, the minimum penalty
24 for that sentence, for that section.

25 So it says:

1 "A judge may infer that a person is in
2 a relationship with a young person that
3 is exploitive of the young person from
4 the nature and circumstances of the
5 relationship including the age of the
6 young person, the age difference
7 between the person and the young
8 person, the evolution of the
9 relationship and the degree of control
10 or influence by the person over the
11 young person."

12 So it opens the door a little bit to embrace
13 other relationships besides the trust/dependency/authority
14 one that the courts have been tackling with over the years.

15 You know, I mentioned earlier that I hear
16 over and over again when I do my training about the problem
17 of young people being recruited by older people for drugs
18 and other purposes and it may be that that is the type of
19 relationship that might be captured in this new amendment.
20 I'm not sure. I haven't seen how it's been enforced so
21 far.

22 So that's C-2, which brought about these
23 various changes. And I'll just go back to my outline.

24 (SHORT PAUSE/COURTE PAUSE)

25 MS. HARVEY: Okay. And I did talk about C-

1 49 which became law post *Seaboyer*, and it was a response to
2 *Seaboyer* because 276 was held to be unconstitutional. So a
3 procedure was developed to determine when the complainant
4 could be asked questions related to other sexual activity.

5 And by the way, even though this is the law,
6 I can tell you I feel like a terrier at a pant leg trying
7 to keep these questions out of court because I find that
8 many people haven't read section 276 or they say they
9 haven't read it and they don't know the procedure and, at
10 times, I have cases where I see that there is previous
11 sexual activity that chances are there will be questions
12 about it and you need to almost let other counsel know and
13 invite them to give you notice because -- rather than have
14 no notice and get an adjournment and all those things.

15 So this is an example to me where -- I'm
16 going to say this in the most -- giving everyone a total
17 benefit of the doubt.

18 Practitioners are very busy. They don't
19 always have the opportunity to know the Criminal Code
20 inside and out. They don't always have the opportunity to
21 know what is required of them, if they're going to ask
22 questions of previous sexual activity, and I find it's one
23 -- this one section and also the 278, that Crown
24 prosecutors end up playing a role of informing Defence of
25 these procedures that are in place because they're not

1 always informed about what's required.

2 And I've been in situations where I've
3 actually had to be in court and read it out loud so that we
4 are all informed about what procedure should be followed.

5 You know, maybe it's counter-intuitive. I
6 don't know why, but I think it demonstrates some of our
7 challenges in implementing legislation.

8 **MS. MORRIS:** Do you have any further
9 comments about challenges in implementing legislation?

10 **MS. HARVEY:** Yes. I've had two
11 opportunities to assist with the implementation of bills.
12 I recall in 1988 I was in Great Britain and I met people
13 from Bangladesh, and I had this fellow describing to me the
14 very progressive legislation they have in Bangladesh, but
15 that none of it is enforceable because it hasn't been
16 implemented because there's not the money to do so. And
17 I've always kind of remembered that story and I never
18 checked it out, so I have no idea if that's true.

19 But I certainly have seen in the Canadian
20 experience the challenges of having the federalism where,
21 on one hand the federal government amends our Code, and it
22 is an area of law that is administered provincially, and so
23 what happens is that -- C-2 is an example where it becomes
24 law in January, but our fiscal period actually starts in
25 April. So the budgets haven't actually taken into

1 consideration these things.

2 If you're talking about renovating
3 courthouses and that type of thing, nothing can really
4 happen until the next fiscal policy. So I mean, that's
5 kind of the most basic of challenge when you're talking
6 about legislation that is coming from a federal sphere.

7 Never mind the challenge of if you are truly
8 integrating new legislation into a system, you have to
9 examine what policies are affected. You have to examine
10 what legislation provincially is affected. So, for
11 example, we have in British Columbia, responded to Bill C-
12 15 by also amending the *British Columbia Evidence Act* so
13 that children are dealt with with the same accommodations
14 in civil proceedings as they would be otherwise.

15 You need to not only ensure that the
16 training takes place, and often a common mistake we've made
17 is that our mandate with the Attorney General is training -
18 - the first thought is Crown prosecutors, but then we start
19 to realize that it's also the court staff; it's also the
20 Victim Services people. Well, that's not within our
21 Ministry. That's Sol. Gen., but it's also our clerical
22 staff, like our secretaries, because they're all affected
23 because the forms need to be developed -- designed and
24 developed and implemented.

25 We have JUSTIN in British Columbia, which is

1 a computerized system where every court case is basically
2 put on computer, qualified computer. So amendments have to
3 be made to JUSTIN, and so it is no easy task, never mind
4 when you're dealing with a scenario where, number one, like
5 Nick Bala has said in his articles, that some people like
6 Crown prosecutors are resistant to some of these changes.

7 We know that human beings don't particularly
8 like change, some human beings, and don't particularly like
9 the idea of children being able to testify without a
10 competency hearing or children not having to come into the
11 courtroom or whatever. So you end up with a scenario where
12 people are saying -- and I've seen this since 1988 where
13 they're saying, "What do we do first?" This is a chicken
14 or egg riddle. "What do we do first? Do we build the
15 \$60,000 courtroom with the videoconferencing and all that
16 sort of thing, or do we just basically MacGyver something
17 together and then when it gains some momentum, then put the
18 money into the \$60,000." And the argument will be, "Well,
19 look, if you have the courtroom, people will use it."

20 But I have seen experiences -- in fact, I
21 went to Montreal in 1990 and I was shown by a very lovely
22 young woman this wonderful courtroom that they had built,
23 and I said to her, "This is fabulous. I wish we had this
24 in British Columbia." And I said, "How does it work?" And
25 she said, "Well, actually, we have not used it yet." And I

1 was thinking how could you not use this courtroom? This is
2 fabulous.

3 But there's many other things that go into
4 using this fabulous physical plant besides just having the
5 physical plant. Welcome to the human race and welcome to
6 implementation of federal legislation.

7 **THE COMMISSIONER:** And \$60,000 would buy you
8 the plans maybe.

9 **MS. HARVEY:** Well, I think we paid \$60,000.
10 What we've done in British Columbia is brought portable
11 units, and I think they were -- we were able to actually
12 buy a number of those. And so they devised a way, for just
13 a matter of under \$10,000, equipping courtrooms throughout
14 the province.

15 But I know the Montreal courtroom, I'm sure,
16 cost a heck of a lot more than \$60,000.

17 **MS. MORRIS:** Without going through it today,
18 I understand that Tab 10 of your materials is an article
19 that you've written, "The Use of Technology with a
20 Vulnerable Witness - Some Legal and Practice Issues for the
21 Prosecution". I understand that at pages 8 and 27 of that
22 article you talk about the reluctance of prosecutors to
23 actually use the new technology available?

24 **MS. HARVEY:** I wrote this paper. It was --
25 you know, these always have a context and the context is

1 that there were amendments to the Criminal Code to allow
2 videoconferencing so that witnesses from out of province
3 can testify using videoconferencing and also, court
4 appearances can be made by accused.

5 So it was an effort to again revisit the
6 possibility of using technology with children. So there
7 wasn't actually a change in the legislation or anything.
8 It's just that there was this equipment coming available.

9 The other thing that was going on is that
10 Nick Bala wrote this paper in 2001 as a result of research
11 that he had conducted and there is a number of pieces of
12 research. Here's another one, "I'm doing my job in court;
13 are you?" because that comes from, you know, that book for
14 children, "What's my Job in Court?" So "I know I'm doing
15 my job in Court; how about you?" And so the idea is well,
16 what are the Justice personnel people doing to enhance the
17 experience of the children since we're inviting them to
18 come into our world?

19 So basically it was some research that was
20 available. We've got the Criminal Code. We've got the
21 toolkit. Are we using the toolkit? And so the research is
22 saying that no, there -- and this didn't come out of the
23 province in which I work, but the research from Nick Bala
24 was that the prosecutors in Ontario were reluctant to use
25 some of these accommodations that were available.

1 So I took the opportunity to describe,
2 because I was asked, basically, to write about vulnerable
3 witnesses and technology, and I took the opportunity to
4 insert some of the pieces from Nick's article.

5 I obviously have tremendous respect for my
6 colleagues in British Columbia, but I have to say that
7 although I gave that little caveat that this is Ontario
8 research, I feel fairly confident in saying that there are
9 some examples of prosecutors in British Columbia who as
10 well are reluctant to use some of the accommodations that
11 are available.

12 The reasons that we often hear are things
13 like the trier of fact needs to see the child and so it's
14 better that the child be in the courtroom rather than on
15 the TV screen and that type of thing.

16 So this is a paper that does exactly that.
17 It takes excerpts from Nick's paper and it juxtaposes them
18 with some of the other research from Louise Sas and others
19 about what the benefits are of using some of these
20 accommodations, what the research is telling us about how
21 often they are used, the fact that the Supreme Court of
22 Canada is saying that this is all constitutionally sound.
23 So okay, folks, we're all dressed; now it's just time to go
24 to the party. And for some reason, we're not all doing
25 that.

1 **MS. MORRIS:** I understand that the next
2 portion of your testimony will deal with cases that have
3 changed the map?

4 **THE COMMISSIONER:** Maybe we should start
5 that tomorrow? I understand that Mr. Manson would like to
6 have the floor for a few minutes.

7 **MR. MANSON:** I simply wanted to advise Ms.
8 Harvey and some of the counsel of the areas that I was
9 going to pursue tomorrow.

10 **THE COMMISSIONER:** Mr. Manson is the lawyer
11 for the Coalition for Community Renewal ---

12 **MR. MANSON:** Citizens for Community Renewal.

13 **THE COMMISSIONER:** Citizens for Community
14 Renewal, sorry.

15 **MS. HARVEY:** For community?

16 **MR. MANSON:** Renewal.

17 And I have just a few areas that I wanted to
18 go -- and I thought if I told you now you would have a
19 chance to -- I don't mean to be presumptuous and be like
20 assigning homework or anything, but just so that you could
21 think about them.

22 **THE COMMISSIONER:** Mr. Manson is a
23 professor, so he's ---

24 **MS. HARVEY:** I'll do my homework, Professor
25 Manson.

1 **MR. MANSON:** I want to ask you some
2 questions about similar fact evidence and especially the
3 period between the Supreme Court of Canada decisions in
4 *B.C.R. v. Handy*. I'm going to ask you some questions about
5 *Joinder* and I'm going to look at some parts of the Ontario
6 Crown Policy Manual, especially the sections dealing with
7 charge screening, the police relationship with Crown
8 counsel, sexual offences, witnesses and Attorney General
9 consent. I may not get into all of that, but I'm going to
10 review some of that tonight.

11 There's some other areas I wanted to look
12 at, but I thought I would give you a little bit of a heads
13 up.

14 Thank you, Mr. Commissioner.

15 **THE COMMISSIONER:** All right. Thank you.

16 So before we adjourn, what I would like to
17 do is -- I believe tomorrow is our last day with Ms. Harvey
18 in any event. So you might want to speak with Ms. Morris
19 so we can canvass the number of people who will cross-
20 examine and the time they will require so we can either
21 organize the day by lengthening it tomorrow night.

22 All right? Thank you. Let's close her up.

23 **MS. MORRIS:** Thank you.

24 **THE REGISTRAR:** Order; all rise. À l'ordre;
25 veuillez vous lever.

1 The hearing is now adjourned. L'audience
2 est ajournée.

3 --- Upon adjourning at 4:26 p.m./

4 L'audience est ajournée à 16h26

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C E R T I F I C A T I O N

I, Sean Prouse a certified court reporter in the Province of Ontario, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Sean Prouse, un sténographe officiel dans la province de l'Ontario, certifie que les pages ci-hauts sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



Sean Prouse, CVR-CM