**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 82

**Held at :**

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

Wednesday, December 20, 2006

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Cornwall, Ontario
K6H 7K7

Mercredi, le 20 décembre 2006

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| Mr. David Rose | Ontario Ministry of Community and Correctional Services and Adult Community Corrections |
| Mr. Stephen Scharbach<br>Ms. Lisa Jacek | Attorney General for Ontario |
| Mr. Peter Chisholm | The Children’s Aid Society of the United Counties |
| Mr. Allan Manson | Citizens for Community Renewal |
| Mr. Dallas Lee | Victims Group |
| Ms. Jill Makepeace | Mr. Jacques Leduc |
| Mr. Mark Wallace | Ontario Provincial Police Association |
| Ms. Nadya Tymochenko<br>Ms. Nicola Simmons<br>Mr. Kim Ferreira | Upper Canada District School Board |

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--- Upon commencing at 9:34 a.m./

L'audience débute à 9h34

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

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

Please be seated. Veuillez vous asseoir.

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

Not too many cobwebs this morning?

Good morning, Ms. Harvey.

**MS. HARVEY:** Good morning.

**THE COMMISSIONER:** How are you today?

**MS. HARVEY:** Very well. Thank you.

**THE COMMISSIONER:** I understand you're on your way home tonight?

**MS. HARVEY:** Today, yes.

**THE COMMISSIONER:** Good for you.

**MS. HARVEY:** Not Africa though.

**THE COMMISSIONER:** Ms. Morris.

**MS. MORRIS:** Thank you. Good morning, Mr. Commissioner.

**THE COMMISSIONER:** Pardon?

**MS. HARVEY:** Not Africa.

**THE COMMISSIONER:** No, no, I said home, big "H".

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Good morning, Ms. Morris.

**MS. MORRIS:** Morning.

**THE COMMISSIONER:** You were going to review case law now?

**MS. MORRIS:** Yes.

**WENDY VAN TONGEREN HARVEY, Resumed/Sous le meme serment:**

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

**MS. MORRIS:** Ms. Harvey, I understand you prepared, for the benefit of the Commission, a chronological summary of cases that changed the map in the field of prosecuting sexual offences?

**MS. HARVEY:** Yes.

**MS. MORRIS:** So perhaps you could take us through the principles enunciated by these cases?

**MS. HARVEY:** Okay.

**MS. MORRIS:** The cases are all contained in tabs in the Books of Documents.

**THE COMMISSIONER:** M'hm.

**MS. MORRIS:** If you would like to take us through the principles, you don't necessarily need to refer to the cases. You could do it that way.

**MS. HARVEY:** Yes. Thank you.

Ms. Morris, as you know, when you asked me in preparation to describe some of the things that basically changed the practice relating to sex crimes against children and also historic sexual abuse, I put together this list of cases, but I just wanted to say as kind of a caveat, I suppose, that this is not meant to be a comprehensive list of significant cases in this area, but I combined a combination of my expertise in the law, as well as actual memory that I had when these cases either came about or had some impact in my practice as a prosecutor. So many of these were basically off the top of my head. I kind of remembered that they had an impact.

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

**MS. HARVEY:** It's a difficult struggle for society and for the justice community to work out some of these very difficult issues, and I can actually say that at times we feel some sense of relief, for example, when the Supreme Court of Canada has actually sorted out one of the issues for us, and no matter what one thinks about a particular judgment, at least it provides some guidelines and certainty in our practice.

As you well know, often cases are held in abeyance, sometimes for years, while we're waiting for the Supreme Court of Canada to actually make a ruling on a

particular issue, and so cases are often adjourned or dates aren't set until matters are actually resolved.

So that's what these cases are meant to represent. So I don't want anyone to interpret them as being comprehensive treaties of all of the significant cases but the ones that basically came to mind off the top of my head and ones that clearly affected our practice in this area.

**MS. MORRIS:** Thank you.

**MS. HARVEY:** Like in many experiences in life, when we discussed these in 2006, sometimes it's easy to forget the significance it had in the particular year that the judgment came about because it was a totally different context.

So *Regina v. Pottle* is the first example, 1978. So already we know that that is before Bill C-127. So that was still the days where we were dealing with the old rape and indecent assault on a female, et cetera.

But not only is there that context, but there's another context that is significant. It was also before we had photocopiers and computers and Internet and Oprah, stories that have made the media, like the Sheldon Kennedy scenario. So even public awareness was at a different place than it is today.

So *Pottle* was an interesting case for the

examination of similar fact evidence, and I bring it to attention because I recall that it was one of the very, very few cases that actually dealt with, number one, the issue of when there were two children coming forward and to what extent the evidence could actually be used, one to support the other, and also the scenario of the unsworn child and an older child actually supporting or corroborating the evidence of the younger one.

This particular issue was later dealt with in 1990 by the Supreme Court of Canada in the case of *C.R.B.* That is the case of the similar fact, and then subsequently in the case of *Regina v. Handy*, and both of those cases are also in the materials.

*Regina v. Burden*, I had indicated yesterday that one of our challenges was sorting out what was an assault, and it was a helpful case in 1981, which again was before C-127, where Mr. Burden was on a bus and put his hand on the thigh of a passenger beside him, and the question became “Is that actually an assault?” because assault is normally considered to be the application of force. And so this was helpful in terms of the type of touching that would happen in a sexual assault, that it would not necessarily require like a grab or application of force in the normal sense. So it was helpful from that point of view.

*Kostuck* was an important case because the Manitoba Court of Appeal had to deal with the issue of expert testimony, and in this particular case the expert testified about children and children giving evidence and actually said that children do not normally lie about sexual assault. In the matter going to appeal, the Court of Appeal, an acquittal was actually entered in part because of that evidence that came from that expert. So this was one of those cases where we were -- looked at it and were a little bit in dismay about that outcome, but clearly obviously recognizing that there had to be guidelines drawn in terms of what experts could say, particularly in light of the established law in Canada around bolstering the credibility of a witness.

*Regina v. Case*, again, 1987. So this was post 127 but it was pre Bill C-15, and it was a helpful case in terms of describing what “sexual” meant in a sexual assault and that it didn’t necessarily have to -- although the parts of the body that were touched were relevant, it wasn’t necessarily the end of the question and there would be a context that would be looked at in determining whether something was in fact sexual, so that the accused’ intent and purpose wasn’t important.

However, it has been established that sexual gratification is not a prerequisite or a necessary element

of a sexual assault, and that is demonstrated in a later case in the materials, Tab 38, which is *Regina v. V.(K.B.)*. In that particular case, an adult grabbed the genitals of a little boy and that was held to be a sexual assault where clearly the motive was not sexual gratification but rather it was a disciplinary action on the part of the offender. So sexual gratification is not necessarily an essential element of the offence.

The next one, *Regina v. L.E.D.*, this is a case out of British Columbia that found its way to the Supreme Court of Canada, again addressing the issue of similar fact. During the course of the trial in that case, the similar fact was introduced by the Crown, but there was an unusual circumstance where during the cross-examination of the mother, it became part of the trial in front of a jury that the accused had actually been convicted of incest. And so incest is clearly more aggravated in terms of the facts because it necessarily involves sexual penetration, whereas the accused was on trial for basically a fondling of the breast scenario.

So the Court at the trial level found themselves in the difficult situation of the fact that the jury had now heard that the accused had been convicted of incest.

In any event, the matter went to the Supreme

Court of Canada and the principle that emanated from this particular decision is that the similar fact evidence cannot be of a more aggravated nature than what the accused is actually on trial for and clearly the prejudicial value would outweigh the probative value.

Now, that case -- I didn't prosecute that case at the beginning, but I actually had the multi boxes of the file come to my office for the *Askov* application because it took six years for it to go through trial, then the Supreme Court of Canada and the ruling. So an *Askov* argument was raised and it was successful, so that matter never did go back to trial.

**MS. MORRIS:** Just for the purposes of the public, *Askov* meaning the delay.

**MS. HARVEY:** Yes. It was determined that there was an unreasonable delay in that case, and so although the Supreme Court of Canada had ordered a new trial, the B.C. Supreme Court judge ruled that the six-year delay was unreasonable and so the matter did not go back to trial.

*Regina v. Brooks*, basically it is helpful in deciphering what type of sexual activity would fit into the different categories so that if you had a sexual intercourse with a female under 14, it was implicit in the *Regina v. Brooks* case that that also could be charged as a

sexual assault, and that's basically what that was helpful for.

Again, I just remind you that this is 1989. So these are some questions that were not answered at that time. So any guidance that was coming from an appellate court was helpful to us.

Similarly, *Regina v. Cadden*, you recall that yesterday I talked about a couple of things. One is that there was authority for the proposition that if the accused was inviting a child to do the touching, that that in fact was not a sexual assault, and it's why Parliament saw fit to amend the Code so that there was the invitation of touch.

However, I also have noticed and brought to the attention of the Commissioner yesterday that there seems to be a parallel movement where the courts are evolving and rendering decisions that kind of parallel what is happening in Parliament as well, and this is an example of that because in the *Cadden* case there was a determination that where a schoolteacher had been inviting students -- and this was basically in the classroom under his desk -- to commit fellatio, that a charge of sexual assault in fact was made out even though it was like an invitation.

*F.E.G.* was again in 1989, so a fairly new

case or a fairly -- relatively speaking, it was one of the first cases that dealt with the admissibility of expert evidence about the disclosure of a child sexual abuse.

So I have in the summary which you all have here that an expert opinion about general behavioural and psychological characteristics of child victims of sexual abuse is admissible for certain purposes and that it assists the trier of fact in deciding whether in that particular case a recantation by a child of her allegations of sexual abuse should lead to a doubt about the witness' credibility.

You've probably heard from other experts, and it certainly is something that is discussed repeatedly in the cases, is that it's not unusual for a child perhaps or even an adult, when they are first approached, to deny that anything happened or if they actually suggest that something happened, that when they become aware of the consequences of their disclosure, that they, in order to try and get themselves out of the corner, might recant.

And so we do have cases in our jurisprudence that deal with that because sooner or later it has to be dealt with in the court as to why on one day a complainant is saying something happened and then at a subsequent time is saying that it didn't.

Clearly, there's many complainants who have

no idea what the consequences will be to them telling and they have no idea about how the police will respond or what the process might be in taking a statement, the delays involved in charge assessment the repeated interviews that might take place, never mind the consequences in their families and in their homes, family members who reject them, being ostracized, that type of thing.

It is something that is not predictable and there are complainants who, experiencing the consequences, decide that this is not something that they want any part of.

*Nelles v. Ontario*, that is added basically relating to the accountability of Crown lawyers and *Nelles*, of course, is a decision that adds to the list of possible consequences to a Crown who chose negligence in their decision making in the exercise of their discretion or otherwise.

Now, there are many other ways that the Crown prosecutors are held accountable, including the fact that they are members of the Bar of their particular province, and so there are circumstances and, in fact, in the Province of British Columbia there are specific rules relating to the conduct of Crown counsel. So if a Crown prosecutor is answerable to the local Bar and to the administrator or the management so that they can be

disciplined, and they are accountable civilly. Although the Crown prosecutors are not held accountable by other bodies, they certainly are guided by principles of being accountable to the people whose lives are affected by the decisions that they make. Sometimes that is demonstrated by requirements in policies that the Crown actually fully explain to the police why they've made the decisions that they have or to the victims and there are many ways that Crown's decisions are scrutinized and, in some cases, are in a very formal way examined with the Crown being held accountable.

We have some significant cases where Crowns have actually been sued and there have been significant judgments against them, even personal judgments.

In *Regina v. Khan*, that's a case from 1990 and that is again post-1988. So we already have a hearsay exception in the Criminal Code by this time relating to the admission of an interview that has been previously videotaped as part of the investigation. Although I should say that in the Criminal Code section, it doesn't actually say that it has to be a videotape created by the police during an investigation. I have never seen a case where a parent or someone else has actually made a videotape, but it doesn't say specifically in the Code that the police are the ones who need to have made that.

In *Regina v. Khan*, the Supreme Court of Canada looked at the law of hearsay in Canada and decided that a flexible approach was the better approach, and this was a child sexual assault case and *Khan* is quite specific in terms of looking at the principles relating to child sexual assault cases. However, the principles in *Khan* have been applied to other cases that are not child sexual assault cases. This was a case that is quite well known by now. It was a case of a three-and-a half year old who was at the doctor's office with her mother and while her mother was changing, the doctor sexually assaulted the child and within a matter of 15-20 minutes after leaving the office, the mother asked the child how -- I think she asked her about the conversation or how was it, the little visit with Dr. Khan, and it turned out that the child's response suggested that she had actually been sexually assaulted, but because she was only three and a half, it was very much in the language of a three-and-a-half year old, and she talked about "pee-pee", "birdy" and that type of thing rather than the terms that an adult would use. The mother immediately took the child to the police, and it was determined that there was actually ejaculate on the sleeve of the child and the matter went to trial. At the trial level, the trial judge ruled that the child was not competent to testify, and so the Crown decided to try to

introduce the evidence of the statement through the mother and it was not allowed at trial.

It went to the Ontario Court of Appeal and the Ontario Court of Appeal felt that it was a hearsay exception. The matter was appealed further to the Supreme Court of Canada, and although the Supreme Court of Canada found that the evidence of the mother should have been admitted for different reasons, they basically agreed with the result of the Ontario Court of Appeal and the Supreme Court of Canada expanded the rules relating to hearsay.

That same case is -- or at least that same situation resulted in another case that is in your materials as Tab 36, which is *Khan v. The College of Physicians and Surgeons of Ontario*. The ruling of the Supreme Court of Canada in the case of which I just spoke said that the hearsay would be admitted if it is demonstrated that there is necessity and trustworthiness. And the necessity arose in the original case because the child was deemed to be not competent to testify pursuant to section 16 of the *Canada Evidence Act*.

And the trustworthiness came as a result of the circumstances under which the statement arose and also the features of the statement, which I have described where it was very much in the child's language. She was not prodded in any way by her mother. In fact, her mother

discouraged her, suggested to her that maybe she was mistaken and so everything about it suggested that it was trustworthy.

In the subsequent case, the child was older and being called upon to testify and she had no recall, through normal forgetting, of the events. And so, again, the hearsay was admitted this time because the child basically could not remember what had transpired.

Moving along now to 1990. This is the case of *C.R.B.* These cases are very, very challenging on the similar fact end of things and it's not without significance that Madam Justice McLaughlin, in this particular case, considers it significant that this is a scenario where there are children involved. And there is one particular paragraph in that case, on page 25, and it's about the fourth paragraph down, "As noted earlier…" You will see and counsel is no doubt aware of the challenges in dealing with similar fact evidence and the principle of law in Canada that the Crown cannot be introducing propensity evidence against the accused in order to prove the charges that he is facing on the indictment, the subject indictment.

But in this particular case, the important factor was that the similar fact was being admitted and sanctioned by the Supreme Court of Canada for the purposes

of supporting the credibility of the child. This paragraph here, "As noted earlier…", and I'm quoting:

> "As noted earlier, the probative value of similar fact evidence must be assessed in the context of other evidence in the case. In cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility."

So that is a principle that I clearly had not heard or seen before around similar fact evidence and frankly haven't seen since, but it is a reality, of course, that -- and as was described yesterday, when you have the vulnerabilities of certain witnesses and they are giving their version of events often without corroboration and so one can well see why in this particular case, the learned justice determined that this was important to admit this evidence to assist the credibility of this child.

In 1990 again, the Tab 30 is the Supreme Court of Canada case of *G.B.*, and this was a case relating to again the evidence of children and that it should be assessed differently from that of adults. This was a case

where the child was quite young and she was about a year out in giving her evidence about her experiences of abuse. I think this was a bullying situation, if I remember correctly. There was an expert and there was a mother who actually gave evidence that suggested that the real date of what happened and then the Crown sought to amend the information. So the issue that was important was the weight to which the expert's evidence would be considered by the court.

In this particular case, on page 6 of the case, it's Dr. Richard Wallach, who is a clinical psychologist who spoke. He talked about behavioural characteristics that were experienced by young victims of sexual offences, including the bedwetting, nightmares, anxiety, et cetera. This matter went to the Supreme Court of Canada, and the case that you have in your materials is at that level, but the Court relied considerably on the judgment of the Court of Appeal and, in particular, Mr. Justice Wakeling -- and he is quoted at page 10 and 11. I won't read it for the record, but on pages 10 and 11 of that judgment, it's quite helpful in terms of the purposes to which this expert evidence and also considerations relating to children are considered by the Court.

If you turn to pages 26 and 27, page 27 is the final disposition, but pages 26 and 27 are an

articulation of the disposition and the finding of the Court. So it says this:

> "Dealing first with Wakeling J.A.'s comments regarding the credibility of child witnesses it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be

able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children."

Then, on page 27, in terms of the expert testimony:

"Wakeling, J.A. felt that the trial judge may not have given adequate credence to the evidence of the expert witness because of his concern that expert testimony not supplant his role

as the trier of fact. However, all Wakeling J.A. did, it seems to me, was review the settled law regarding the admissibility of expert evidence. I need only say in dealing with this ground of appeal that I agree with Wakeling J.A.'s conclusion that the expert evidence in this case was well within the bounds of acceptable and admissible testimony and that in cases of sexual assault against children the opinion of an expert often proves invaluable."

Again, I read those because this is in the context of 1990 and so it's one of the first cases where this type of approach is being taken and it is subsequently relied upon by the Supreme Court of Canada in dealing with this type of case. So it provided tremendous guidance to us in the field prosecuting these cases.

*Kilabuk* is in your materials as Tab 31. In 1988, as I've indicated, there was this hearsay exception via the videotape, but that was enacted in the Criminal Code. Now, there weren't guidelines under that section as to when a tape would or would not be admitted if all of the precursors were fulfilled, i.e. that it was -- I said them

yesterday -- the tape was made within a reasonable time from the offence; the child testified, adopted the contents, et cetera. So *Kilabuk* is an example where the tape was not admitted.

Now, in reading the judgment that is actually in your tab, it doesn't set out precisely why the tape was not admitted. And since Bill C-2, that section was amended somewhat so that it does place a discretion on the part of the court to either admit or not admit the tape, looking to concerns of the administration of justice.

Now, the judgment doesn't say why and I can't recall where I read this, but my recollection is that the reason why it wasn't admitted is because it contained -- it was an interview that had extensive leading. And we hear this from experts that we are advised as prosecutors and police, that if you have an interview of a young person, knowing that the younger the child the more suggestible they are, that consists of repeated leading questions, that after that point, even if you engage in an interview process that does not have leading questions, that there is still some concern that the child is influenced by the original interview of leading questions.

So there's that issue, and if you apply that concern and logic to a videotape where a child has been interviewed with leading questions, it doesn't make a lot

of sense that a jury or a trier of fact should rely on that for the truth of the contents, where clearly if the child were testifying they would not be subjected to the same leading question type exercise, so a determination that it just wouldn't be helpful to a trier of fact to consider a videotape of that nature.

That's not to say that occasionally you might see a leading question in an interview, but normally the experts in this area train the police and others that if you have to ask a leading question, just don't stay in the leading question zone, go back to the free narrative or the open-ended questions. Occasionally it might be necessary to ask a leading question, but just don't be tempted to stay in that particular modality or method of interviewing.

So *Kilabuk* was important from that point of view.

*Stinchcombe,* of course, was important to us all. The Charter had already been in place for nine years, but this was an important case that dealt with the principles to be applied in providing full disclosure to an accused person. And the *Stinchcombe* case, interestingly, however, was a case involving a commercial crime, a paper case basically involving a professional, and it didn't have the intricacies and the complexities that a sexual assault

or a child abuse case would have in terms of third-party records or private records. So that matter of the third-party records was dealt with in a subsequent case which is in the materials, which is the case of *Regina v. O'Connor*.

So *Stinchcombe* was in 1991. *O'Connor* went to the Supreme Court of Canada in 1995. And as a result of the *O'Connor* case, the Criminal Code was amended and the sections that were integrated into the Code were the section 278.1 that dealt with a procedure so that -- that's why I gave that example yesterday of the diary. If a defence counsel actually wanted access to the diary, number one, the Crown would need to tell them that they either had or were aware of the diary, and then the defence would go through the process. And incumbent in the process is actually subpoenaing or informing the complainants if they are -- well, informing not only the person who is affected by the contents of the diary, so in that case it would be the creator of the diary or the complainant, but also the custodian.

So if we were talking about psychological records, notice would also go to the psychologist or to the sexual assault centre or whoever had those records. And there's actually a fairly formal procedure that takes place where those parties come to the court and they are individually represented. And in fact, in British Columbia

we have a policy whereby Legal Services pays for counsel for the complainant to have counsel in an O'Connor Application, and the court goes through a two-tier process to determine whether or not these private records are disclosed to the defence, and even if they are disclosed there could be conditions for the disclosure. So it could be edited; it could be sealed; it could be conditions that it not be photocopied, be returned and that type of thing.

So that is very, very different from the procedures that took place before 1995 and before this matter was tested in the manner that it was in the *O'Connor* case.

The other area of law that has developed is that now at preliminary hearings, although an O'Connor application will not be made at a preliminary hearing, questions can't be asked of the complainant about counseling or other matters that are relevant to a subsequent O'Connor application, with some limitations. And there is growing case law in that area.

*Regina v. Seaboyer,* we talked about at length yesterday, but again, another case that resulted in a response by Parliament.

*Regina v. V.K.*, this is a B.C. case that talked about, again, the weight to be given to children's evidence and that there are no assumptions of

unreliability. So this is 1991 after C-15 but before the amendment to the Code relating to the warning to the trier of fact.

And in 1992, the important case of *Regina v. R.W.*, another case that is certainly worthy of a read relating to how children's evidence should be seen, again, a Supreme Court of Canada case.

I find that as a practitioner, if I have a child sexual assault case or a sexual assault case I have a case book ready in our final submissions, and it's something that I'm sure all of the prosecutors who deal with these cases have in front of them because we have to constantly be reminding ourselves from where we have come and where we are and the wisdom of the Supreme Court of Canada and the judiciary, of course, benefits from being reminded of what the Supreme Court of Canada is saying on these important issues.

*K.G.B.*, again, was a Supreme Court of Canada case from 1993. This case was more important and affected police practices relating to domestic violence scenarios. Basically, it allowed for a procedure whereby if a witness is interviewed and is under oath and videotaped, that in the event that there is a recantation, that they can actually show the videotape and it can be introduced for the truth of the contents. And so some police practices

were affected by that particular case.

*Levogiannis* is a very important case. It's, as you see, post-1988 and it was a case where the section relating to the use of screen and out-of-court testimony -- in other words, if it was shown that in order to receive a full and candid account a child required to testify behind a screen or out of court using the closed circuit TV, then that would be permitted. And the section was challenged --

**THE COMMISSIONER:** I'm sorry, what case are you looking at?

**MS. HARVEY:** *Levogiannis*, Tab 39.

**THE COMMISSIONER:** *Levogiannis*. Okay.

**MS. HARVEY:** *Levogiannis*.

**THE COMMISSIONER:** Thank you.

**MS. HARVEY:** And so in conducting the analysis of the constitutionality of that section and the needs of children, there's a very helpful summary of the balancing act that needs to take place and what the courts and the social sciences have said about the needs of children and, in particular, children witnesses.

And it was in this case that there is a suggestion that the criminal trial process has in fact failed children in the past.

**THE COMMISSIONER:** So ---

**MS. HARVEY:** And this is -- I'm sorry.

**THE COMMISSIONER:** Can I stop you there for a minute?

**MS. HARVEY:** M'hm.

**THE COMMISSIONER:** Maybe open a parenthesis a little bit.

The judicial system has failed children in the past ---

**MS. HARVEY:** Yes.

**THE COMMISSIONER:** --- is an interesting concept and it's a tragic one.

And one of the concerns I have is that, you know, we're going to look at the historical sexual abuse of children and a lot of the institutions are saying "Look, we're making great strides to put all of our protocols up to snuff and everything" and then we're all going to pack up our bags and go home. And one of the concerns I have is -- do you have any thoughts, having worked with children and dealing with sexual abuse, is there a way that -- or any suggestions that maybe we can be a little more proactive either philosophically with respect to the protection of children so that institutions don't react as much or have to react as much but are more open to protect children? It's a philosophical question, I suppose, more than anything else. But from your experience, is there

something that institutions could do?

**MS. HARVEY:** By institutions ---

**THE COMMISSIONER:** Crown attorneys, the judicial system.

**MS. HARVEY:** Well, there's -- when I took this conversation on in the early '80s ---

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** --- I -- the first thing that comes to mind is that we need to be intentional about what we do. So we need to be informed and intentional. And our intentionality needs to be guided by certain attitudes, and that's why it's helpful for a centre, for example, like the Zebra Centre, and they use the metaphor of protecting children, an that's their mutuality, and within that mutuality the different bodies have their mandates, but they're able to fulfill those mandates but in a way where there's some transcendence into a common -- a mutual goal around protecting children.

So what would it take for people in these institutions to have as a priority in fulfilling their mandates to the protection of children? Well, one important aspect of that is, first of all, the country has to be convinced that that is a priority and our law makers and our treasury boards and our -- you know, the justice system is reflective of what is happening in a larger

society.

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** So an important piece of this is an understanding that, you know, the children don't vote and the children aren't the ones with the funds and they don't have a lot of power in society generally, and so a part of staying awake and intentional about what we do as Crown prosecutors and police is a part of also engaging in public education and public awareness of programs that let our society know as a whole how important it is and the cost to our communities when our children are hurt.

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** Now, this isn't -- this has been said many times and it's the reason why, for example, when Bill C-15 was passed the lead ministry that dealt with it was Health and Welfare Canada and they're the ones who had the funding and it wasn't a criminal justice focus.

**THE COMMISSIONER:** Right.

**MS. HARVEY:** And I think another part of this, of course, is that most of us are hoping that we can prevent child abuse and that more funds and more effort should go into preventing child abuse so that Crown prosecutors are out of work basically in terms of having to deal with this particular problem. So that's one point.

And another point is, again, in this

intentionality, it is comparable to a game of -- you know, a game like a game of chess, where a number of pieces need to be advanced. And so yesterday I was given a policy, for example, to look at, and I have been a part of assisting my ministry in the development of policy.

But we're very aware that policy is only one very small part. There is the legislative reform. There is the case law. There is the training. There is the public education. There is the policy.

Often what happens in our institutions is these things are advanced in isolation and, in order to achieve what you're talking about, we need to be intentional about advancing all of them to engage in a shift that would be comparable to our shift in attitudes around drunk driving or around wearing seatbelt, or it's a shift that requires basically a reframing on how we see these -- how we see children, how we see women, how we see victims, how we see the relationship between the judges and the Crown prosecutors and lawyers and the public, the access that the public has to our justice system, that the justice system is here to serve the public and not vice versa, and that we basically put things in place to ensure that people feel that the justice system is accountable when things go wrong and that we are open to ongoing development.

So there is that shift that is required and it will only take place, as I say, where a number of things have to be advanced.

I often hear people criticize the criminal justice system or they don't want part of it, as if it's kind of a separate building on the planet earth, but for me, the justice system is merely -- it's an institution that has developed out of our society. It's one of the reasons why, in my view, the Canadian criminal justice system, our justice system, is one that is laudable and is held in such high regard in the world. Many people look to Canada for ideas on how to do things justly and fairly.

But also, our flaws in our criminal justice system are a result of the flaws that we see in our societies and our communities; and so it is a large project that we have ahead of us, but we all, I think, hold the idea that when we're given the privilege to live a life, that a part of our responsibility is our own personal development, the development of our families, of our communities and, ultimately, our justice system because the justice system is a part of that.

So there's a large picture and a smaller picture, and I think the smaller picture has to do with individual awareness and intentionality and considering our children to be important, considering our fellow citizens

to be important, that women are given credence and equality. So it takes attitudinal shifts and it takes practice shifts until eventually the critical mass takes hold.

**THE COMMISSIONER:** Thank you.

**MS. MORRIS:** Were you going to point out a passage at page 11, I think, of ---

**MS. HARVEY:** Yes, page 11 of Tab 39.

You know, the -- I'm sure words of this nature have been said before, but I can't help but to add the courage that it would have for the justices to actually articulate some of these things that haven't been articulated in law before.

You know, as a woman who has been practising law in Canada since 1976 -- that's when I graduated, but it was actually '78 and '79 -- there were times when it seemed like a different reality when you were in a courtroom, and it wasn't always easy to say things that seemed so obvious. It wasn't always easy to identify the big fat elephant in the middle of the room. I think everyone knows what I'm talking about. It's like being in a family perhaps where there's alcoholism or incest or something. The family members -- nobody actually wants to identify it for what it is.

And so in the early days of my experience as

a woman lawyer in the criminal justice system, sometimes it -- you felt quite a bit of reticence about identifying, actually, some of the problems in the system. It would have been like identifying a problem in your family and the response that you would get would not be friendly.

So an important part of our evolution here has been the courage of these judges and, in this particular case, the Supreme Court, who have actually listened with an open mind to the intervenors and to the folks who have been specialists in this area and actually are prepared to say what this particular judge said in this judgment, which I will bring to the attention of Mr. Commissioner.

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** You actually -- what page did you ---

**MS. MORRIS:** Page 11.

**MS. HARVEY:** Page 11.

So it starts at the bottom of page 11:

> "The examination of whether an accused' rights are infringed encompasses multifaceted considerations such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth.

"The goal of the court process is truth seeking."

Even that is a rather important statement to make.

"And to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. In ascertaining the constitutionality of section 46(2.1) of the Criminal Code, one cannot ignore the fact that, in many instances the court process is failing children, especially those who have been victims of abuse who are then subjected to further trauma as participants in the judicial process. In fact, as I commented in *L.(D.O.)*, despite the increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction rate remains unchanged."

And she's citing A. MacGilvray, Abused Children in the Courts - Adjusting the Scales after Bill C-15, 1990, 19 Manitoba Law Journal, page 549.

"In addition, young complainants often

suffer tremendous stress when required to testify before those whom they accuse. Social science research as reflected in the brief for *amicus curiae* of the American Psychological Association in *Maryland v. Craig*, 110 Supreme Court 3157, 1990 at page 3 indicates that testifying in confrontation with the alleged abuser may, in many cases, cause child victim witnesses to refuse to testify or to testify less completely than they are capable. In this regard, the London Family Court Clinic in Ontario has done a three-year study of over 221 child witnesses. In their report entitled "Reducing the System-Induced Trauma for Child Sexual Abuse Victims Through Court Preparation Assessment Follow-Up", January 1991 at page 107, the authors remark:

"The children who did have the benefit of the screen were assisted greatly in giving their evidence in court. All screen recipients were fearful of the

accused and felt unable to tell their story in court because of their anxieties and fears of their personal safety as well as due to their great uncomfortableness facing the accused. Younger children seem to experience the screen as providing a physical barrier between themselves and the accused which made them feel safe. Older children describe not having to worry about making eye contact and being drawn to look at the accused out of fear. The plight of children who testify and the role of courts must play in ascertaining the truth must not be overlooked in the context of the constitutional analysis in the case at hand. As this Court has said, children may require different treatment than adults in the courtroom setting, *Regina v. B.K.G.* 1993, 1 S.C.R. 740 and *Regina v. B.(C.)* 1992 S.C.R. 30 at page 54, and *Regina v. W.(R.)* 1992, 2 S.C.R. 122 at page 133. For a more comprehensive analysis, I refer to my reasons in

*L.(D.O.)* supra. It is with this context in mind that the constitutionality of section 486(2.1) must be examined."

So that's clearly a very important case and it's still very pertinent today because now Parliament has amended the Criminal Code once again, and this time under circumstances where if children ask for the screen or closed-circuit TV, that according to the Code, they are entitled to have it.

The justice referred to the subsequent case that is referred to, *Regina v. D.O.L.* and that dealt with the constitutionality of section 715.1 which equally is an important case in dealing with children and how they respond to the court process.

Now, the *Regina v. Osolin* case, that was a case where it ended up that the complainant was to be cross-examined and, frankly, it's the dissent in *Osolin* that I think was particularly pertinent and it articulated principles were re-articulated later in the *O'Connor* case around the use or abuse of private records.

So in other words, if at one time we had an assumption, that pile of records I referred to yesterday that certain individuals have about their life can be used to destroy their credibility in court, then maybe that

needs to be re-examined. Maybe we can do what we need to do in cross-examination and we can do what we need to do in ensuring a fair trial without basically destroying the individual beyond just demonstrating problems with their credibility.

This is the notion that is discussed in the dissent in *Regina v. Osolin* as well as the case of *Regina v. O'Connor* when the access to private records was being examined.

*Regina v. François,* again a Supreme Court of Canada case that discusses the flexibility and guidelines in examining credibility assessments. In particular, the case provides some help around circumstances where, in fact, there are witnesses who have not told the truth before, and if they are given the opportunity to explain why to the trier of fact, and the trier of fact accepts the reasons -- so it could be a recantation; it could even be a false allegation -- it doesn't mean that an individual has acted a certain way. All of us know that sometimes people feel in a corner and they respond in a way to survive that seems the only way accessible to them and often regret it, but hopefully we do not have a system of justice where they have to regret it to the extent that they are never afforded protection again by a court of law when they are victimized.

*Regina v. A.*, now in 1983, you will recall that the rule against recent -- the rule of recent complaint was abrogated, and so we still lifted the question about well, what do you do with the reality of the delayed disclosure and what impact would that have on a person's credibility. So *Regina v. A.* is authority for the proposition that in fact you can introduce evidence about the delay and why it came about and, in fact, as part of a narrative, a complainant is entitled to tell not of -- not the details of a previous complaint that they've made but the fact that they did make a complaint.

If they were entitled to give the content, then that would be like giving a previous consistent statement or it would be like the recent complaint rule. So that's why this becomes important.

*Regina v. Audet*, 1996, Supreme Court of Canada case, I addressed this yesterday. It was a case where the Supreme Court of Canada was examining the issue relating to trust authority and, in particular, whether or not a schoolteacher still held a position of trust and authority over a student even though it was the summer holiday.

The learning piece that came out of this for the police was that -- particularly the police, although it affects us all -- if you have a person who has a label or a

relationship that one can label like a stepfather or a father or a teacher or whatever, that in law we can't assume that that's a position or a person who holds a position of authority or trust or dependency and it's incumbent on the police to actually investigate further what's behind that relationship because you may well have a situation where you have a stepfather who plays no role of authority vis-à-vis a child or you may have the opposite, where somebody is a friend but nevertheless has a position of authority or trust or there is dependency. So that's an important piece for investigators.

*Esau*, Supreme Court of Canada, 1997, raised issues relating to a mistaken belief in consent, and this was -- we always are perplexed by issues relating to the use of intoxicants and how it affects an accused who has consumed a great deal to the extent that he or she says that it affects their ability to appreciate what has transpired in committing an offence and, similarly, the complex issues when it is the complainant who also has consumed drugs or alcohol, and this is not a situation that I'm speaking of where it has been the accused who has intentionally fed drugs or alcohol to a complainant in order to stupefy them to have sex, which is a different section of the Code entirely.

But the challenge is that sometimes you do

have scenarios where an individual consumes alcohol or drugs and wakes up or becomes conscious or, after the fact, determines that they have been sexually assaulted and then they attempt to describe what transpired and they are encumbered by the fact that they have no memory of the actual event. Clearly, if somebody is intoxicated to that extent, there is not the same input process that one would normally have in being able to input the memories for later retrieval.

And then the issue arises of -- well, if the complainant cannot recall, then can the accused basically just fill the gaps and suggest a fact scenario that demonstrates that there was consent.

So it’s one of those very complex issues that the police and Crown deal with when there is the involvement of drugs and alcohol in a sex crime.

I should add that in relation to that, I had a prosecution once where a woman was fed benzodiazepine in order to stupefy her, and one thing that was interesting that came out of that case is that we actually changed our policies in British Columbia, because in the sex crimes kits, they often took blood samples but they didn’t take urine samples, and actually, if you have urine samples, they can detect whether there’s a drug or alcohol at a time subsequent to the blood sample because the urine is being

stored, basically. So there are things that we can do to try and help us forensically to sort out these complex issues, but it is always a very, very challenging case that an investigator is confronted with when there is the use of alcohol or drugs, and it clearly affects the complainant's ability to recall.

*Carosella* was a case, 1997, where a centre had records pertaining to a particular complainant, and those turned out to be destroyed and the result in the Supreme Court of Canada was a stay of proceedings.

So this gave people concern. I know that in our Ministry there were -- there was a circulation of material to help us to distinguish this from certain cases and that type of thing, so that we wouldn't be developing a trend where whenever something was destroyed, that there would be a stay of proceedings. So *Carosella* has determined to be distinguishable on many fronts from other cases.

However, it is a realistic scenario that if important evidence is lost or destroyed, that it may well be that the appropriate recourse is a stay of proceedings and there are other cases that give that example.

*Ewanchuk* is an extremely important case from jurisprudence or a legal point of view, but it was also kind of an interesting and important case that showed some

of the dynamics and the difficulty in finding some mutuality in developing our law because of some of the occurrences that took place between the members of the judiciary in relation to that case. Basically, there was a conflict between the Court of Appeal judge and the Supreme Court judge subsequent to that case that most of you, I'm sure, are aware of.

This particular case was one where the law of consent was examined, and it was again clearly articulated and very helpful to us that in Canada there's no such thing as implied consent and that if a complainant says no, and the accused is relying on a mistake of fact, the fact that "no" was said is enough to suggest that, number one, there was no consent and, number two, that the accused knew there was no consent. It would be quite different if the complainant had said "Yes, I will have sex" and then changed their mind.

Similarly, *Ewanchuk* was a case that articulated the principle that it's not enough that there is a benign response, that in fact there is a duty on the part of all of us to ensure that we do not violate the sexual integrity of others, that we hear an affirmative response as to whether or not an individual is interested in participating in sex.

There was a large public response to the

*Ewanchuk* case, but again, it's a very important case in Canadian jurisprudence relating to the law of consent.

*Regina v. Gabriel*, 1999, this was an important case, which articulates the principles behind the use of Victim Impact Statements. I think, Mr. Commissioner, this is an example of kind of the attitude that emanates from the Bench that is respectful of victims and the role that they play in our criminal court, and it certainly has been a shift.

I know that in the '80s we used to, from time to time, ask complainants to write out a letter before it became formalized through a Victim Impact Statement, but it is not -- it certainly was not commonplace that the views of victims would be sought.

Interestingly, in the statute of Rome and the ICC, victims of crimes are actually entitled to have lawyers and they are actually entitled to ask to be part of the questioning of a particular witness. That is not something that is done in the Canadian jurisprudence, but there certainly are models in the world where victims have played that type of active role in a trial.

**THE COMMISSIONER:** Is that in the trial proper or after the finding of guilt?

**MS. HARVEY:** In the trial proper.

**THE COMMISSIONER:** Interesting.

**MS. HARVEY:** Now, interestingly, there's another component to that as well, which is I'm aware that there was a ruling that the prosecution would not prepare the witness. So it would be the Witness Victim Assistance people who actually prepare the witness before testifying rather than the prosecution.

Now, as you are well aware, in the development of the ICC and the statute of Rome, there was an examination of both the civil and the common law systems and many people feel that the result is an integration of the two with perhaps more emphasis on the common law or the adversarial system.

But you can never start, in my view, looking at other systems and bringing little parts and pieces because all of this is within context and there is other aspects that play a role.

In the civil systems, hearsay evidence is admissible. So one of the reasons why we look to experts like Undeutsch from Germany in the evaluation of the credibility of children is because they have the hearsay exception and, actually, for years and years, since the '40s and '50s, they have been interviewing children, assessing their credibility and actually testifying as to the statement taking process as well as the validity of the statements. So they have developed an expertise that we

didn't have in North America because we have an adversarial system and those hearsay exceptions were not available and experts just aren't used that way.

So different systems of the world have brought different results and different modalities in dealing with these complex issues.

**MS. MORRIS:** Just for the purposes of the record, the ICC being the International Criminal Court?

**MS. HARVEY:** Yes.

And *Regina v. Bremner* as well is a case that examines the role of the Victim Impact Statement, and, in this particular case, the B.C. Court of Appeal was critical of a particular Victim Impact Statement, which leads to another issue, which I don't know if people are aware of, and it's hard to know what to do about it.

We're in an environment now where the Internet -- and perhaps this particular proceeding is an example where members of the public have access to what is going on in proceedings. In this case, it's an inquiry, but in other cases the public has access to cases on the Internet.

And so if you have a scenario with a victim who has participated in a process and they are waiting for the outcome, we have some examples where victims have been significantly angered and traumatized by what they read in

the judgments.

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** And so sometimes the judgments, you know, they would even maybe not name the victim, but their identity is obvious and they would be critical of them. They would perhaps talk about their background, talk about them being abusers of drug or alcohol, talk about things that the trier of fact or the judges consider important in the assessment of credibility. They might even go so far to say that they were lying, that type of thing, or that they are not credible. That's the way that it would normally be framed.

But I have seen examples and heard of examples where victims of crime have been just devastated by what judges have said. There are some classic examples. One example we had in British Columbia that created a huge outcry was a judge who called a three-and-a-half-year old sexually promiscuous. I don't know if you remember that.

**THE COMMISSIONER:** M'hm.

**MS. HARVEY:** I was a Headquarters lawyer at that time and I was actually assigned to draft the responses and there were hundreds of concerned citizens who wrote about that, and in all fairness to the judge, there was a perfectly logical reason why he was describing the situation the way that he did, but out of context it

brought a lot of criticism.

So it's a dilemma we have because I can tell you our victims today, if they go to the Internet and they start to look to cases that are available on the Internet through CanLII and other -- even if you Google cases and you find them. And you see on the case "ban of publication" and then you'll start to read and you'll read that it's a sexual assault or a child sexual assault. There will be initials used at times, but at times as well you see things like "ban of publication", sexual assault of a 15-year old and she went to this school and so and so was her principal, and it doesn't take a rocket scientist to sort out the identity. Complainants and victims know this.

In fact, I had one case where this is exactly what happened. She did her search. She found all these ban of publication cases. She found that -- she realized that at the end of this, we may well be in a situation where her case with her details were going to be on the Internet. She came to me, absolutely devastated at the possibility. So we put together some affidavits showing the judge that. We did an inquiry about whether or not the court reporters actually do any vetting and does anyone do any vetting when you have a ban of publication and nothing should be published which tends to identify the complainant.

It turns out that there wasn't any vetting. The only vetting that I've ever seen done is actually Lexis-Nexis. You see "Edited by Lexis-Nexis" and they do some vetting to ensure that there's nothing that tends to identify.

So I found myself in the rather bizarre situation of very respectfully asking the Court that when you frame the judgment, here's some things that we're asking you not put in the judgment because they would tend to identify, and the judge also felt that he was in a very bizarre situation where counsel would be suggesting how the judgment be framed. But nevertheless, he found a way to frame the judgment so that it fulfilled the purposes but, on the other hand, ensured that the identity of the complainant would not be made.

Again, we benefit tremendously by the Internet and the communication that it can bring about and lawyers are able to give their submissions on a dime now because we can find cases and even today's example of the technology that is being used here is very impressive.

The downside, pedophiles have better access to children. Pedophiles have a better cumulative or they have better collections of material and communicate with others to ensure that their strategies are more effective in getting access to children.

Downside, members of the public who want to use our justice system are concerned that some of the cases in which they testify and where they've been brought forward are on the Internet and will be read by individuals who have perhaps sinister motives at the very least embarrassing the complainants and at the very worst actually doing them harm.

So it's again one of the complexities that we deal with in our work.

*Regina v. DD* is a very important case. It also relates to the rule of the abrogation of recent complaint. Interestingly in that case, there was an effort being made to call an expert who would talk about the dynamics of delayed disclosure and the ultimate result in *DD* was that the court has said that an expert was not required because that rule was abrogated in 1983 and, actually, Mr. Justice Major makes a recommendation of the charge that could be made to a jury or a trier of fact about how a court should actually -- or how a trier of fact should be dealing with the issue of delayed disclosure by a complainant.

So that's 2000. *Darrach* 2000, as well, the Supreme Court of Canada, the 276 rules were challenged constitutionally and survived that challenge.

*Regina v. Handy*, the Supreme Court of Canada

placed restrictions on the use of similar fact evidence, and it's certainly the interpretation of some academics that *Handy* has limited the use of similar fact. In other words, it's more restrictive than it would have been prior to the *Handy* case and that it places responsibility on investigators, for example, to not only find the similarities between the actions but also the differences and that the Crown prosecutors be prepared to make submissions as to what the specific issue is that they are considering and feel that it's necessary to call similar facts on beyond propensity.

So this particular case is a bit unique in its circumstances because there was apparently collusion between the complainant in this case and the witness of the similar fact, but in any event, it allowed the Supreme Court of Canada to visit this issue again, and we have this guidance from them.

*Regina v. Regan* is an important case from the various levels of court actually. The important piece here, it talks about a number of things in terms of the conduct of Crown prosecutors, but the part that we, in British Columbia, felt was particularly important was the role of Crown prosecutors in interviewing complainants particularly before charge approval, and the discussion of the roles between the investigator and the Crown prosecutor

and when the Crown is playing an investigative role and guidance in that way.

Now, interestingly in this case, at the Court of Appeal level, the Court seems to be still critical of the idea that a Crown prosecutor would actually interview complainants pre-charge, but at the Supreme Court of Canada level, after having heard witnesses from various jurisdictions throughout Canada who represented Crown agencies and describe the benefits of interviewing pre-charge, the Supreme Court of Canada actually describes why it is important in many cases that the Crown prosecutors actually interview complainants beforehand.

I think this can be appreciated at a number of levels. First of all, at the face of what is being said in terms of the Supreme Court of Canada acknowledging that this is an important role of Crown counsel. But I think it also is important that the Supreme Court of Canada or that people are heard from about what is actually happening in the offices of Crown prosecutors.

And the reality that here we are talking about child sexual assault and sexual assault; we are talking about statistics that suggest that only seven per cent of people are prepared to report, only seven per cent are prepared to engage in the process of using our criminal justice system.

And so on one hand to say that and on the other hand to say it is improper for Crown counsel to meet with a complainant, to describe to them what the system is about and how they could be protected and that type of thing, that just doesn't jive -- you know, for people to be comforted at the idea that this service can be provided to them, they need to hear from the person who is at the gate, and they need to hear from the Crown prosecutor what accommodations can be made available, what efforts can be made to protect their privacy, et cetera, because there are not people lining up at the door to be protected by our police and by our criminal justice system in the area of sexual assaults.

So they need to hear from us about what we can offer and that is a respectful perspective.

*Regina v. Leduc* again is a case that shows the complexity of these cases. And what is important here, in my view, is that a part of the accountability of Crown prosecutors is that often you are in court and you are challenged for actions that are performed by the Crown counsel office and so it puts the Crown prosecutor in a difficult position where on one hand, they are advocating on behalf of the criminal justice branch or the Ministry of the Attorney General, the Attorney General and society at whole but, on the other hand, their personal conduct of a

file is being challenged. And so they find themselves in a conflict.

So this is interesting because it's 2003 case where it is suggested that, in fact, it shouldn't unfold in that fashion and in fact a Crown prosecutor in that position should step aside and another Crown should take place, and they should deal with that issue.

I had heard this arising from cases in the United States before where that's exactly what happens; it's that the prosecuting attorney was set aside and then they would have kind of a trial within a trial to deal with that particular issue. It just makes a lot more sense because when a Crown prosecutor is being accused of doing something untoward, the consequences to them are grave indeed and, in fact, they could end up with law society consequences if not disbarment as well as matters relating to their reputation and their employment. So I=it makes sense that they would be entitled to have a bit of a time-out to be able to review what they are being criticized for and also, if needed, to seek legal counsel. So *Leduc* I thought was an interesting case that addressed those issues.

Last but clearly not least, I have included the case of *Regina v. C.N.H.* from a B.C. Provincial Court judge. That was the first case we had in British Columbia

where the provisions in C-2 relating to the close-link and the screen were constitutionally challenged and the judge in that case found that those particular sections were constitutionally sound.

All right, that's what I put together and I hope it's helpful.

**THE COMMISSIONER:** Yes.

**MS. MORRIS:** Thank you very much, yes.

**MS. HARVEY:** I think that if one practices in this area they put that in their bookcase and they're set for a while.

**MS. MORRIS:** Ms. Harvey, I understand that Part 6 of your Outline "Experience as it relates to the use of technology in a trial involving a vulnerable witness" is an outline of your experience and of the use of technology. So you've cited for us here your participation in presentations, your testimony as an expert witness before the Parliamentary Committee, which you have spoken to us about already. You have also set out the facts and circumstances of several cases that you prosecuted in this respect.

Is there anything in particular that you would like to point out to us?

**MS. HARVEY:** Well, it does show the evolution, and I don't know if I need to say anything more

about that because it's clearly a theme of what I've been talking about in the last day or so. But when we talk about the evolution, I think an important piece of that is not to forget the consequences to the people who are involved.

So in this case in 1988, you know, I had to work -- 1988, it was the first time that I had any opportunity because there was legislation available for out-of-court testimony. And I had this six year old who was very vulnerable, in my view, and I wanted to apply to have her testify outside the courtroom, and it was my analysis that she was just extremely vulnerable; that she couldn't and wouldn't articulate a fear of the accused, but she was afraid of just about everything else, like the court process and being called upon to do this. And because the case law had not evolved to the point that it is today, the result was that the application was not allowed because there was no demonstration of fear of the accused.

So I recall that day and we had all kinds of victim assistants and counsellors and I recall it just so happened the timing that when I was bringing her up to the courtroom, and she was about the third step from the top, and the accused happened to be in the same hallway and this little girl froze and I couldn't -- it would take me sort

of picking her up like you know a piece of lumber and carrying her into the courtroom, like she froze and she would not come into the courtroom.

So now, of course, I had evidence that she was afraid of the accused, and I went into the courtroom and made a submission related to that, but it didn't change the matter, and it certainly changed my perspective of whether or not she should be called as a witness because I felt that she was just hurt and that we shouldn't be doing anything more with her that day.

But I can tell you as a prosecutor in '88 when that happened, it had a personal impact on me too. I felt horribly guilty that I had exposed this little girl to this and, in fact, one thing that I did was I called my friend, Mary Wells, who was the author of this book, Canada's Law in Child Sexual Abuse, and I said, "Mary, what do I do? I think that what transpired today has resulted in this little girl being quite traumatized and I am concerned about it." She said, "This is what you do;" she said, "Go get some crayons and get some construction paper and go to her and make her a courage badge." I wasn't sure if she was talking about therapy for the child or for me, but it worked because I gathered my kit and I went to the child's parent and she agreed that I could meet with the child and we made a courage badge.

I tell that story from the point of view of we go through these cases and we go to the Tab, and we go to page 33, and we read, but for every decision that is being made, it is a human life that is affected or human lives that are affected, and there are many tears, and there are many consequences to our decisions. And we are trying our best to be objective and to assist with the evolution of our law, so that it is fair to the accused and fair to the victims, but there's always a cost that sometimes we ignore as lawyers, and that is the human cost of bringing the people into the system and expecting of them things that they normally do not have to do in their lives.

So in that particular case, it turned out that the little girl did eventually testify at a subsequent trial for the co-accused because there was severance in that case, and she did testify using the closed circuit, and that was the next year in Vancouver. In any event, that was part of the evolution.

**MS. MORRIS:** On the theme of protection of child witnesses and victims, I think you wanted to briefly talk to us about one remaining document in the Book of Authorities, the U.N. Report dealing with child ---

**MS. HARVEY:** Yes, and I did allude to that yesterday.

And what tab is that?

**MS. MORRIS:** Tab 7.

**MS. HARVEY:** Tab 7.

Now, Canada is a signatory to this and other documents. It used to be that when we were signatory to U.N. documents that it's hard to take the abstract into the concrete, but as I mentioned yesterday, there are documents that have been drafted to assist institutions in deciding whether or not they are in compliance with U.N. documents. And also, I know that Brent Parfit, who is a former children's ombudsperson from British Columbia is actually -- goes to Geneva from time to time and he is part of the audit of countries to ensure that they are in compliance with the U.N. Convention on the rights of a child.

Interestingly, in Bill C-2, in the preamble you will see reference to the United Nations Convention on the rights of a child.

So this is another U.N. document. However, it's not the status of the U.N. Convention on the rights of the child, but nevertheless, Canada is a signatory. And it started with these guidelines from the International Bureau for Children's Rights and now is articulated in these guidelines on justice and matters involving child victims and witnesses, and it articulates objectives, special considerations and principles. And the principles include

the right to be treated with dignity and compassion, the right to be protected from discrimination, the right to be informed, the right to be heard and to express views and concerns, the right to effective assistance, the right to privacy, the right to be protected from hardship during the justice process, the right to safety, the right to reparation, the right to special preventative measures.

Again, if we are talking about development of legislation, for example, Parliament has seen fit to address or to mention the United Nations Convention on the rights of the child in the preamble of C-2, but also when we are now drafting our policies, one would, in my view, be tempted to look at documents like this and ensure that there are embodied in our policies some of these principles, so that when we're drafting policies for Crown prosecutors, for example, that we're not only thinking in terms of what a prosecutor needs but in order to fulfill their role and their mandate according to *Regina v. Boucher*, for example, but also what does that prosecutor need to carry with them in terms of the lens that they look through when they see a victim and the role of that victim in participating in the criminal justice process.

So it may be well -- it may take us to a place we want to be if we start articulating in our policies the importance of community coordination, the

importance of ensuring that victims are informed, informed, for example, of their rights pursuant to C-2 so that victims know, witnesses know, that when they go to court, that they can actually ask for out-of-court testimony, because clearly that right of that witness will not find the light of day unless they're informed.

And whose obligation is it to inform them? I would suggest it's the police and the prosecutor. And it may well be that we can start to shift the tenor or the climate of our policies towards some of these international documents and the principles that are integral in them.

**MS. MORRIS:** Ms. Harvey, do you have any further recommendations to improve the system?

**MS. HARVEY:** I sort of feel on the spot. The recommendations don't kind of come off the top of my head, if you know what I mean. I just know that there are many, many people who have examined over the years what could improve the system for children and for victims of sex crimes. But one thing that's really clear is that this is a part of a bigger picture, which is ensuring that overall we have a justice system that we keep on track, and there are many examples of us doing that so that we've got everything from the FPT report on the prevention of wrongful convictions, the Arthur Martin Report of 1993 in Ontario.

So it is -- no matter what we do, we mustn't be examining it in isolation because we're not alone. We're affected by what happens in the world and the world is affected by what we do.

That's it. Thank you.

**THE COMMISSIONER:** Thank you.

**MS. MORRIS:** Thank you.

**THE COMMISSIONER:** We should take the morning break at this point, and we'll begin cross-examination after that.

Thank you.

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

The hearing will resume at 11:25 a.m.

--- Upon recessing at 11:10 a.m./

L'audience est suspendue à 11h10

--- Upon resuming at 11:32 a.m./

L'audience est reprise à 11h32

**THE REGISTRAR:** This hearing of the Cornwall Public Inquiry is now in session.

Please be seated. Veuillez vous asseoir.

**THE COMMISSIONER:** Professor.

**WENDY VAN TONGEREN HARVEY, Resumed/Sous le même serment:**

**---CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR. MANSON:**

**MR. MANSON:** Good morning, Ms. Harvey. My name is Alan Manson. I'm one of the lawyers for the Citizens for Community Renewal.

Before I put some questions to you I want to tell you that I thought you were a wonderful resource and that's why I'm putting some questions to you. I want to use you as a resource. I'm not trying to get you to second guess decisions that other people have made. I'm not really interested in your opinions on the decisions that other people have made. What I'm mostly interested in is talking about the factors that prosecutors ought to have taken into account when they made decisions.

And while a lot of your material about children as witnesses and technology was interesting and quite relevant, I'm mostly interested in historical cases, and I'll be restricting my questions to that. And I'm referring to situations where allegations are brought forward by adults, brought to the attention of the police, the attention of prosecutorial authorities, years and decades after alleged events.

As I indicated yesterday, the first thing I wanted to explore with you was the question of Joinder. And I want to suggest to you that as a general rule all related charges should be tried together. In other words, there's a presumption against multiplicity of proceedings;

correct?

**MS. HARVEY:** Yes.

**MR. MANSON:** And so if we assumed a situation where three complainants of sexual offences made allegations against X it would be appropriate that those three be tried together?

**MS. HARVEY:** Yes.

**MR. MANSON:** And I want you to assume that particular situation and assume an election of judge and jury so we have a preliminary inquiry in three cases. Okay?

**MS. HARVEY:** You have a preliminary inquiry and there's those ---

**MR. MANSON:** Three complainants.

**MS. HARVEY:** Three complainants.

**MR. MANSON:** Three complainants, one accused.

**MS. HARVEY:** Yes.

**MR. MANSON:** Okay. Now, I want you to assume that after the preliminary is commenced that there's new complainants who come forward and the question is how should the prosecution deal with the question of Joinder at this stage?

I want to start by suggesting that the three options are direct indictment or commence new charges, go

through the preliminary and then use a joint indictment. The third option would be to proceed in two stages. By that I mean ---

**THE COMMISSIONER:** Two different trials?

**MR. MANSON:** Yes. Pursue the one that you've already started up the ladder and then start the new one and proceed separately.

So what I would like you to talk about for a minute are the factors that you think are relevant to this kind of Joinder decision.

**MS. HARVEY:** All right. First of all, Mr. Manson, good morning to you as well, and I appreciate your introductory comments, and I think this is a very relevant question to prosecutors who are involved in historic type cases because this type of scenario does arise quite frequently.

So the type of factors, first of all, if there are new complaints that arise, the first consideration is that the complainants could be used as either complainants on charges specific to them or they could actually be used in the trial of similar fact if in the event that the events were actually quite similar.

The other consideration is that the Crown now becoming aware that there are new complainants, I would take the approach that whether or not we would join those

complainants into a new indictment or whatever, I would still feel an obligation to disclose that new information to the defence, which becomes important because -- and I've had this situation arise and I would tend to want to proceed with the three and take it to the end rather than joining the new ones. Okay. But one of the considerations would be if you joined the new ones it might contribute to some delay. However, if the police have identified new complainants and if the Crown feels an obligation to disclose that information, then that also might contribute to delay, whether or not you add those complainants to the new indictment, for example.

But it may be that the Crown -- and I have been in this situation before, where we basically have to make a decision that we're not going to add new evidence because it's better to continue with the trial and not create a delay. So you actually say to the defence, "Look, we have this new information but we are not changing our trial strategy." So what you're trying to do is maintain the first trial on course so that it doesn't contribute to a delay of that particular trial, and then you see what the consequences would be of that particular trial and then decide what to do with the new complainants after that.

And there are many cases where you would still continue with a trial, depending on what the outcome

was to the offender and what his sentence was and that type of thing.

So the ---

**MR. MANSON:** Can I break that down for you for a moment?

**MS. HARVEY:** Sure.

**MR. MANSON:** What you've said is first you want to assess the question of whether the new complaints can be used as similar fact evidence to support the case that you've already got going with the first three complainants; correct?

**MS. HARVEY:** Right.

**MR. MANSON:** That's one assessment that has to be made because, of course, if you're going to use it as similar fact evidence you might as well have the charges on the table.

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

**MR. MANSON:** Next you started talking about the delay concerns, and the first thing you said was with respect to disclosure. Were you suggesting that you would disclose these new allegations to defence counsel in the first group, regardless of whether they're joined?

**MS. HARVEY:** Yes, in the event that the investigation was complete. If it were an ongoing investigation, that would be different.

**MR. MANSON:** Now, I want to suggest to you though that the extent of disclosure would be different depending on whether you join or not.

**MS. HARVEY:** That's likely. You know, it's hard to judge in isolation, but I just would see that it would be appropriate and fair if the investigation were complete that the accused be aware that there were other complainants. And I might even see whether or not there was a possibility to engage in plea negotiation or some negotiation around joinder or something to encourage the accused to deal with all of the matters that had now been revealed in one proceeding.

**MR. MANSON:** But my point with respect to disclosure is that if all the cases are joined, the question of relevance is going to be much, much broader then if you're simply advising Defence counsel in the first group, in group 1, that there's another investigation.

**MS. HARVEY:** Well, I guess the way that I would describe that is in the case where you're aware of those and there's no joinder, then I would say, out of an abundance of caution and as a courtesy, it would be appropriate to communicate the evidence to the Defence. In the case where you're joining them, you have an absolute legal obligation to give full disclosure.

**MR. MANSON:** And you have to be rigorous

about that and it's an obligation that will continue over time as new matters may come to light.

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

**MR. MANSON:** Can we look at other delay factors, for example? I wanted to ask you about -- one commonly sees in 11(b) delay cases the question of the complexity of the case. Would you agree that the number of alleged victims adds to complexity?

**MS. HARVEY:** Absolutely.

**MR. MANSON:** A situation where, let's say, one of the complainants can give in-chief all of their evidence about all their allegations in half an hour doesn't suggest an extremely complex factual situation?

**MS. HARVEY:** Well, that's not how I would measure it, but I know what you're saying. If, hypothetically, it's because there wasn't a lot to tell, then that's one issue, but if you are dealing with the complexities of human memory or recanting, or some of these other things that we've been discussing about, it may well be that all the complainant is able to give is in half an hour, but actually the story is sort of the tip of iceberg, if you know what I mean.

So you can't always measure it by the time, depending on what that particular complainant brings, not only in terms of the story but also his or her capacity to

tell it.

**MR. MANSON:** As we think about 11(b), unreasonable delay issues and as we move into years, not months, I want to suggest that the question of how complex the case is becomes more important.

**MS. HARVEY:** Yes.

**MR. MANSON:** Can we now shift to similar fact evidence for a minute?

**MS. HARVEY:** Certainly.

**MR. MANSON:** You talked about the two cases that I wanted to raise with you, *B.C.R.* or *C.R.B.* which I think is at Tab 29 of your list of cases, and *Handy* which is at Tab 54. That gives us a period from about 1990 with *C.R.B.* to *Handy* coming about 10 years later, and it's that decade, the '90s, that I want to talk to you about particularly.

Can I just read to you a paragraph from the Paciocco and Stuesser Law of Evidence, 4th Edition? You're familiar with this?

**MS. HARVEY:** It's not a text that I use, but I am familiar with it.

**MR. MANSON:** And it's a respected Canadian evidence text quoted by the Supreme Court of Canada?

**MS. HARVEY:** Absolutely.

**MR. MANSON:** Let me just read you this

paragraph about the evolution over this decade, and I want to ask you what you think of it.

"The similar fact evidence rule was..."

This is at page 52, by the way.

"The similar fact evidence rule was gradually reformulated in an effort to improve the quality of analysis. Courts, most notably in *Director of Public Prosecutions v. Boardman...*"

And that would be the 1975 House of Lords decision.

"...and in *C.R.B....*"

That's the 1990 Supreme Court Decision that you referred to.

"...began to require the balancing of probative value against prejudice in determining the admissibility. Courts using this approach also began to speak about the permissible use of propensity reasoning, while at other times, affirming the existence of a prohibited inference. This caused confusion for those who misunderstood the prohibited inference as preventing propensity reasoning *ab initio*. The contribution that *Handy* makes to the jurisprudence

is that it clarifies the distinction between general propensity reasoning and specific propensity reasoning. In doing so, it reconciles the two branches of authority, while articulating the standard of proof for admissibility and explain in clear terms the approach that should be taken to determine the admissibility of similar fact evidence."

**MS. MORRIS:** The witness would benefit from being shown the text as well.

What's your question going to be?

**MR. MANSON:** The point I'm trying to make is that if you start with *C.R.B.*, you've still got this confusion around propensity evidence and is it admissible or why isn't it the prohibited inference that Boardman talks about and this confusion, Professor Paciocco and Professor Stuesser are suggesting, is what ultimately is clarified in 2000 by *Handy*.

**MS. HARVEY:** M'hm.

**MR. MANSON:** Would you agree that that decade has shown that degree of evolution of our understanding of similar fact evidence?

**MS. HARVEY:** I guess I don't know if it's

confusion or just evolution, if you know what I mean. The confusion suggests that perhaps we're wrong about something and mistaken, whereas evolution suggests that we just become more sophisticated in our thinking as more examples are brought to our attention.

**MR. MANSON:** Well, the point I want to make is that even at the time of *C.R.B.*, the Supreme Court of Canada was not being especially helpful and it was hard to predict similar fact evidence results because of this confusion that the authors are speaking about, and the confusion really comes from the fact that there's a sentence in *Boardman* that says "We're prohibited from using propensity reasoning", which is obviously wrong and *Handy* makes it clear that that's wrong. The whole topic is about some kind of propensity reasoning. And so all the authors are suggesting is that there is a 10-year evolution that's clarified by *Handy*.

**MS. HARVEY:** And, I have no dispute with what you're articulating here and suggesting.

**MR. MANSON:** And can we look at Handy for a minute? This is a decision that you're familiar with and you referred to it earlier. I want to suggest to you that ---

**THE COMMISSIONER:** Sorry, number 54, Madam Clerk?

**MR. MANSON:** Yes, it's Tab 54.

**THE COMMISSIONER:** Thank you.

**MS. HARVEY:** Go ahead.

**MR. MANSON:** I want to suggest to you that aside from this question of resolving confusion, what's particularly important about *Handy* is that it makes it clear, number one, similar fact evidence is presumptively inadmissible.

Number two ---

**MS. HARVEY:** I think that was articulated even in *C.R.B.*, was it not?

**MR. MANSON:** Well, we could go back and look, but I don't think it was made with the kind of force that you see in *Handy*.

Number one, it's presumptively inadmissible.

Number two, can be admissible when the probative value outweighs the prejudice, and again, this isn't especially new, but what really is new is the framework that Mr. Justice Binnie provides, especially the use of ideas like strength of the evidence, cogency of the evidence, connectedness and dividing prejudice into the two categories of moral and reasoning prejudice.

**MS. HARVEY:** Right.

Was it this year or last year, I had a case where I tried to introduce similar fact evidence and we, of

course, looked at the *Handy* decision and clearly, it took us to new areas of dialogue that we would not have considered previously, including the fact that an accused virtually is facing two trials, like the moral prejudice that you speak of.

**MR. MANSON:** M'hm.

**MS. HARVEY:** And so the *Handy* case clearly is very helpful to practitioners in helping us through the complex dialogue and dealing with similar fact evidence.

**MR. MANSON:** It has a very neat analytical framework that includes some new concepts that help us understand this commonly used phrase, but probative value versus prejudice.

**MS. HARVEY:** Yes.

**MR. MANSON:** You'd agree with that?

**MS. HARVEY:** Yes, I do.

**MR. MANSON:** And can we look at paragraphs 27 and 34 of *Handy*, please? It must be on the earlier page. It might be 26 or -- there it is.

You see the list of references in that paragraph that says "See also Watson".

**MS. HARVEY:** M'hm.

**MR. MANSON:** And the next case is *B.L.* and I know that you're from British Columbia and that you have an excellent Court of Appeal and this is the Ontario Court of

Appeal, and I'm not suggesting that you should be familiar with all of these cases.

**MS. HARVEY:** I am though because that was in Stuesser's book, *B.L.*, I think.

**MR. MANSON:** Yes. And what's important about *B.L.*, I would suggest, is Madam Justice Charron, who is now on the Supreme Court, but at the time on the Ontario Court of Appeal, first she starts to use the name of past discreditable conduct for similar fact evidence, which my guess is will become the more popular name because it's more accurate, but also, she started using the analysis of strength and cogency to assess probative value in that case; correct?

**MS. HARVEY:** I'm not familiar with the case to the extent to know that, but ---

**MR. MANSON:** Okay.

**MS. HARVEY:** But that's interesting to know.

**MR. MANSON:** And I'm just going to point out that the Supreme Court refers to it again at paragraph 34. The point I want to make here, Ms. Harvey, is that by 1997 the Ontario Court of Appeal is becoming much more sophisticated about similar fact evidence and, in fact, plays a big role in influencing what the Supreme Court does in *Handy* in 2000. Would you agree with that?

**MS. HARVEY:** I'm not familiar enough with

*L.B.* to agree with that, but I'm certainly not disputing it.

**MR. MANSON:** Okay. Can I move to another area?

**MS. HARVEY:** You're the boss.

**MR. MANSON:** That's all I wanted to ask you about joinder and similar fact evidence, but I'm very interested in your views on experts. You spoke about that yesterday, particularly a psychologist and other social scientists or psychologists and social scientists who may have things to tell us about memory.

**MS. HARVEY:** M'hm.

**MR. MANSON:** Am I correct in that it's your view that evidence about how people remember or how people forget ought to be adduced in front of juries?

**MS. HARVEY:** Yes, and particularly if there's a possibility of an incorrect inference being drawn because of the common sense of how people operate, as opposed to what we know as -- what people know as experts about the theory of human memory.

**MR. MANSON:** So you're suggesting that since expert evidence is only admissible when it's necessary, there are some cases of historical sexual assault where, in your view, it would be necessary to ensure that juries draw proper inferences?

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

**MR. MANSON:** So we're not talking about bolstering credibility. We're talking about educating juries about memory?

**MS. HARVEY:** Yes.

**MR. MANSON:** And in your view, that is and ought to be admissible in an appropriate case?

**MS. HARVEY:** Yes.

**MR. MANSON:** That kind of expertise, and I'll come in a minute to the Connolly and Read article that is an example of some of that expertise, but I want to suggest to you that that would also be very helpful to policing authorities who are involved in investigating historical sexual assaults.

**MS. HARVEY:** Mr. Manson, I'm telling you that my practice of law changed when I became informed of the theory of memory principles, and you realize that, as a lawyer, that it's essential that we understand that it's kind of a fundamental knowledge base that is required because so much of what we do is asking people to retrieve memories based on something that has been deposited at some point in their life. And we can only do that well and professionally and effectively if we understand how human memory works.

**MR. MANSON:** And so you would agree that if

we were looking for the best investigator, in an ideal world we would want someone who was trained in interviewing techniques based on a sound understanding of how memory works?

**MS. HARVEY:** I agree with that proposition.

**MR. MANSON:** Especially if we're talking about investigating 10, 20, 30-year old cases?

**MS. HARVEY:** Absolutely. In fact, that's where the issues are most -- the most poignancy is apparent because we're talking about -- well, you're talking a combination of the trauma, the passage of time, normal forgetting and retrieval in circumstances of trauma and passage of time.

**MR. MANSON:** If instead of being a prosecutor you were in fact an investigator, and you got a phone call that someone wants to come see you to talk about an old case, with your understanding of the legal framework and memory, is there any advice you would give that person in preparing for their first meeting with you?

**MS. HARVEY:** Okay. Are you talking about -- in your hypothetical is this officer an experienced officer?

**MR. MANSON:** This is you.

**MS. HARVEY:** Oh, it's me?

**MR. MANSON:** Yes. And you know the legal

framework, but you've just changed jobs. You know the legal framework and you understand a lot. You might not qualify yourself as an expert, but you understand.

What advice would you give this person who wants to come in and see you?

**MS. HARVEY:** Well, I would tell them to buy my book.

**(LAUGHTER/RIRES)**

**MR. MANSON:** They would say "That's cheeky. That's not why I called you."

**MS. HARVEY:** Because we deal with this expansively in the book. Well, the chapter on human factors, the law and human factors. We talk about memory. We talk about the tricks that memory can play on people, that sometimes they might, in fact, be convinced of something that occurred when in fact it didn't. We give them some guidelines about the necessity of organizing their memory so that when they come to ---

**MR. MANSON:** Is this the kind of advice you would give the person who was going to come in and see you tomorrow?

**MS. HARVEY:** The person -- well, it's written in the book because we consider it important information for people to know.

**MR. MANSON:** So you ---

**MS. HARVEY:** If someone were -- if I were an investigator and someone was going to come in, I think if they were going to come in and see me tomorrow, I probably would say, “Well, I want you to know that tomorrow I don’t know what your expectations are, but I would like it to be an introductory session.”

**MR. MANSON:** Okay. So that would be your first bit of advice?

**MS. HARVEY:** Yes. “And so I’m going to talk to you about the process and what will be expected of you and develop a plan with you about how you can best recount your version of the events from this historic event.”

And I would talk to them about, as an investigator, the importance that anything that they say to us at the first, that it be as accurate as possible because there’s not a lot of room for correcting. And so there may be some things that are necessary to collect in the first instance to assist them to ensure that in mapping out the events, that it’s done accurately.

**MR. MANSON:** You’re suggesting you’re going to tell them if they have any documents, things of ---

**MS. HARVEY:** Photographs, documents.

**MR. MANSON:** You’re going to want those things?

**MS. HARVEY:** Yes, that type of thing and

also perhaps doing a timeline so that they start to sort out -- in fact, this is one thing that I do with complainants myself. We start from the date of birth and the dates of the incidents, and you show the ages and you show where they were living at a particular time. So they put it in context, because so often the interviews are started with, “Okay. Well, tell me what happened.” They say, “Well, you know, I was seven and living in the white house and my teacher…” And then by the time we do the math, it wasn’t the white house; it was the blue, blah, blah, blah, and then ends up kind of taking over the trial and is particularly unfair to the accused because it sets them up for the possibility of mistaken alibi type scenario. So these dates are important.

So yes, part of it would be trying to have them appreciate -- have the witness appreciate, the complainant appreciate that if -- they will have certain expectations of the police and of the prosecutor and of a trial, and their first responsibility is to reconstruct what transpired in as accurate a way possible, and because the human memory cannot do that on its own, they will require some assistance with structured documents around issues of dates and that type of thing.

**MR. MANSON:** So just to sum up, you do think it’s important to give advice to the person before you

actually meet them on how they -- what they should expect, that it's going to be introductory, that they should start preparing for your meeting by collecting documents or photographs and they should start thinking about a timeline?

**MS. HARVEY:** Yes, at the least. And I would probably want to work out whether or not I helped them as an investigator with the collection of some of those documents or the extent to which I left them to do that.

One thing that I think that investigators do that I don't particular like as a prosecutor is that they would ask the complainant to go home and write it all out and then bring it back, and they write that from the perspective of layperson who doesn't appreciate what is relevant in a court and, of course, it's discloseable and it ends up being something that's not very helpful.

**MR. MANSON:** And once you've got it, you're stuck with it.

**MS. HARVEY:** Absolutely.

**MR. MANSON:** Would you give them any advice about who they should talk to or not talk to?

**MS. HARVEY:** Yes, I would give them advice not to talk to family members or other witnesses who are involved in the case, and I would give them advice that it might be prudent for them to talk to a lawyer.

**MR. MANSON:** Now, someone might say to you, "Truly, that's obvious; you don't have to give that kind of specific advice." But you're saying to me that you do, that you -- and you should be careful and accurate about that advice because it can have repercussions down the road?

**MS. HARVEY:** Well, you see, I'm not convinced that all police officers even know to give that advice because I've seen circumstances where police have actually -- with the best of intentions have actually facilitated members of the family coming together because they are focusing on the reconciliatory part of it and the trauma which is laudable, clearly, but I suggest there is a way of dealing with those issues without facilitating witnesses coming together and potentially sharing their evidence.

**MR. MANSON:** What I meant was you would want, as an investigator, to be very clear about this advice. You wouldn't want to leave any confusion that might let somebody think, "Boy, I had better go talk to my buddies about this because they will be helpful." You would want to be clear that they should not be talking to other potential witnesses, other potential victims?

**MS. HARVEY:** I would do my best to be clear. We all know that individuals, if they are nervous, anxious,

upset, traumatized, they might not hear the advice of the police that is actually being given, just like we don't always hear the diagnosis from the doctor that we don't want to hear. But I would say certainly I would be trying my best to articulate this clearly.

**MR. MANSON:** Can I just put a few ideas to you that come either from the Crown Policy Manual in Ontario, 2005 version, which I believe is the up-to-date version, and also I'm going to -- some of that material is an exhibit in Exhibit 48. One piece that I wanted to put to you has not been made an exhibit yet, but I have found the identical material in another document that is an exhibit. I just want to put these to you as concepts. I'm not asking you whether the policy is complete or exhaustive, but I just want to hear your views on some of these matters.

So the first one is the Crown Policy Manual. It's Exhibit 48, Tab 40.

**THE REGISTRAR:** It's Exhibit 46, Tab 40.

**MR. MANSON:** Yes, Exhibit 46, Tab 40?

**THE COMMISSIONER:** We're looking at charge screening?

**MR. MANSON:** Yes.

And I simply want to ask you to explain your understanding of reasonable prospect of conviction.

**MS. HARVEY:** Well, one thing that is curious is that in British Columbia our policy calls for a substantial likelihood of conviction which, on the other hand, our policy suggests that in some cases where public interest is paramount or protection of the public is paramount, we actually might approve charges with a lesser threshold and the lesser threshold is a reasonable prospect of conviction. So at least with that analysis it suggests that reasonable prospect is something less than substantial likelihood.

**MR. MANSON:** Yes.

**MS. HARVEY:** So I -- normally, the challenge for the prosecutor is that you examine what evidence is likely going to be admissible. You don't consider the -- you don't consider or speculate on potential defences necessarily or what defence evidence might be called, but on the basis of the strength of the case that you have, whether or not a jury properly instructed to would reasonably convict.

**MR. MANSON:** Thinking again about historical sexual assault cases, what role does the, in your mind, vulnerability of a witness, especially in terms of credibility, a victim witness -- what role does that play in reaching this decision about reasonable prospect of conviction?

**MS. HARVEY:** Well, clearly, if you have a scenario where you have a complainant, say, who demonstrates their vulnerability by changing their story every time they are asked, then that would be a situation where there would not be a reasonable prospect of conviction because you would anticipate that the same thing would happen in court, both in examination in-chief and in cross-examination, and that would not be reliable evidence upon which a jury could convict.

**MR. MANSON:** What if the vulnerability is an example of fragility and you're worried how is this witness going to stand up?

**MS. HARVEY:** That's, I would say, a public interest issue, not a -- is not the first branch issue.

**MR. MANSON:** This would be the next level?

**MS. HARVEY:** The next level, yes.

**MR. MANSON:** And can you explain that?

**MS. HARVEY:** Yes. There are some circumstances where if -- and I've certainly had cases like this where I've received letters from a psychiatrist or a psychologist saying that "My client cannot withstand the ordeal of the criminal trial process and so we're asking that you not proceed." And so even though if they did testify, there would be a substantial likelihood of conviction, they're asking that we not proceed because of

the fragility. And so on the basis of the public interest, we would not proceed.

**MR. MANSON:** And I take it that the particular witness' views would be very important on that to you as a prosecutor?

**MS. HARVEY:** Well, if the -- now, there might be exceptions, but generally speaking and it's been my practice, and I have examples that I don't need to share but where the fragility of the witness and the views of the witness are of a nature where a decision has been made that in the public interest, the case would not be proceeded with.

**MR. MANSON:** Can I ask you to have a look at another part of -- I guess it's Exhibit 46 too. This would probably be Tab 30, "Police Relationship with Crown Counsel".

Have you got that document, Ms. Harvey?

**MS. HARVEY:** Yes, I do.

**MR. MANSON:** Just to paraphrase -- I'll wait until it comes up on the screen.

**MS. HARVEY:** Which tab is it in the book? Is it -- okay, got it. Thank you.

**MR. MANSON:** I would suggest that it basically describes a partnership.

**MS. HARVEY:** Yes.

**MR. MANSON:** Including using the phrase "Each agency has a role to play independent of the other and neither agency is subordinate". Correct?

**MS. HARVEY:** Yes.

**MR. MANSON:** Which seems to imply partnership.

**MS. HARVEY:** Or equality.

**MR. MANSON:** Equality, thank you, that's a better word. Police may seek advice from Crown counsel concerning legal issues arising in the investigation of offences. Crown counsel may ask the assistance of police in conducting further investigations. So this is an example of the partnership, but the charging decision remains with the police; correct?

**MS. HARVEY:** According to this policy, yes.

**THE COMMISSIONER:** Yes; because we talked yesterday that in B.C., it's up to the Crown?

**MS. HARVEY:** Yes.

**THE COMMISSIONER:** Much as it was in Quebec ---

**MR. MANSON:** Oh, yes.

**THE COMMISSIONER:** --- and in Ontario, it's the police.

**MS. HARVEY:** Right.

**MR. MANSON:** I apologize for that. The

question I want to put to you is the first paragraph talks about the working relationship between police and Crown counsel should reflect mutual respect and professionalism. I am sure you agree with that.

**MS. HARVEY:** Yes.

**MR. MANSON:** If we're talking about a half-day trial, we would still argue that the relationship should be one of mutual respect and professionalism. But if we are talking about a long investigation and a long multi-victim trial, these matters become even more important because the two partners, the investigators and the Crown are working closely together over a long period of time. Correct?

**MS. HARVEY:** Okay.

**MR. MANSON:** And, I mean, do you agree that mutual respect and professionalism become more important in those situations?

**MS. HARVEY:** It's always important.

**MR. MANSON:** That's fine.

**MS. HARVEY:** And well, let's put it this way. Perhaps there are some circumstances in our working life where we're put to the test. And in the latter scenario that you're describing, our ability to maintain that mutual respect and professionalism is probably more put to the test when something is more arduous and that is

likely to be the scenario in a lengthy trial with complex issues.

**MR. MANSON:** And effective communication between those partners continues to be essential especially as a proceeding gets longer and more complicated. Correct?

**MS. HARVEY:** Yes. You know, the ideal situation is that once the trial day starts that the police and the prosecutor are working together because clearly there are issues that come up throughout the trial that require further investigation.

Although, you know, here it talks about each agency is independent, et cetera, and no one is subordinate. However, it very much looks like, during a trial, when it is the Crown prosecutor who's sort of the surgeon of the operation that they need the assistance of the police that it looks like a subordinate role for them to go and do things. And sometimes, what looks to be like a gopher role, but nevertheless it has to be done by somebody, and it should be done by an investigator. So, yes, that is essential for the smooth running of a trial.

**MR. MANSON:** And they need to be able to communicate these functions and the distribution of these functions to each other.

**MS. HARVEY:** Yes, that's implicit in what you're saying in terms of making it work.

**MR. MANSON:** And if there are obstacles to communication, they ought to be addressed and ought to be cleaned up or cleared up rather.

**MS. HARVEY:** Well, hopefully people are observing and realizing if there are obstacles in communication and can address them.

**MR. MANSON:** So, if we were talking about a long proceeding and you were the prosecutor, and you were having great difficulty communicating with the senior investigative officers, you'd want to deal with that. Correct?

**MS. HARVEY:** Yes, you have to deal with it. You have to -- it's interesting because, you know, you've identified the issues which is -- you've got this busyness happening because you've got a project and then you've got these parallel issues that are potentially time-consuming to deal with. And if you look to professionals who deal with, say, dynamics of team building or communication or whatever, and they take people into caucus or into workshops or into some sort of facilitation to help them get rid of their baggage or their attitude or their false impressions or whatever it is that is encumbering them and getting in the way of effective communication, it's time-consuming.

How one takes a time-out for that type of

development in a trial is a challenge. But clearly, if it is not dealt with, it will have an impact. But I know the realities to speak in terms of the project that needs to be fulfilled and dealing with these other issues of communication which, as I say, you could have a process, an exercise, the length of the very trial to try and sort those out. And so it is a challenge to be able to do it midstream.

**MR. MANSON:** But it's not something that one would want to ignore. One would want to ensure that there are clear avenues of communication and if there's an obstacle, it should be cleared up.

**MS. HARVEY:** I am convinced of that. I am convinced that in our various institutions that we need conflict management streams, so that when these conflicts arise that we have protocols in place so that people can be taken aside perhaps with a mediator; that some of these communications can be facilitated with the help of others who are professionals in knowing how to do that without people becoming upset or withdrawing. And I think it's something that we will see more and more of.

There are some organizations that already have these things in place. I know that they had something like that in Legal Services in British Columbia when disputes arise, and we started to see it, the Criminal

Justice Branch in British Columbia as well.

**MR. MANSON:** To go back to your phrase about the relationship equality, just as a communication obstacle can be apparent to you in your relations with investigators, investigators may have a communication problem with you. It's a two-way street.

**MS. HARVEY:** Not only that, it's happened. Like, I know exactly of what you speak and it is a reality in our work.

**MR. MANSON:** And from either perspective or from both perspectives, however you want to look at it, communications avenues have to be kept clear and if there are obstacles, they should be addressed and rectified, if possible.

**MS. HARVEY:** Yes, if possible, and there are realities that make that a challenge.

**MR. MANSON:** I want to refer you to -- yesterday, I gave you a copy of a Crown Policy Manual document on sexual offences.

**MS. HARVEY:** M'hm.

**MR. MANSON:** And that's not an exhibit, but Practice Memorandum number 9 of 206 dealing with sexual assault and other sexual offences is an exhibit. And the three little excerpts I want to refer you to are identical.

So, Mr. Commissioner, this is Exhibit 46

again, or is it 48?

**THE REGISTRAR:** Exhibit 48.

**MR. MANSON:** This one is 48, and it is Tab -- or is it by itself, it's just -- for the record, Mr. Commissioner, I am going to be referring to a few short passages from Exhibit 48.

I will read them to you, Ms. Harvey, so you'll see they are identical to the ones that I gave you.

**MS. HARVEY:** Okay.

**MR. MANSON:** Do you have Exhibit 48?

**MS. HARVEY:** Yes, and what is the Tab number?

**MR. MANSON:** I am sorry?

**MS. HARVEY:** The Tab number?

**MR. MANSON:** I think it's not a tab, it's just ---

**MS. HARVEY:** Oh, sorry. No, I don't have that one.

**MR. MANSON:** Again, and if there are differences in British Columbia, please point those out. If this seems to be a good matter of practice, you can tell us that as well. I am at page 8, "Assignment and Scheduling of Cases".

**MS. HARVEY:** Okay. My page 8 doesn't have that. So I must be ---

**MR. MANSON:** It's number 4, "Assignment and Scheduling of Cases". Ah, there it is.

**THE COMMISSIONER:** It's on the screen.

**MS. HARVEY:** Page 7?

**MR. MANSON:** Yes. My apologies.

> "Prosecution of serious sexual offences can require extensive preparation, Crown counsel should be assigned to these cases at an early stage".

Do you agree with that?

**MS. HARVEY:** Yes.

**MR. MANSON:** "This will allow for early meetings with the victim and may assist in expediting the prosecution. Consistency of Crown counsel may reduce in stress the stress and trauma that a victim of sexual offence may associate with the criminal justice system".

Do you agree with that?

**MS. HARVEY:** Well ---

**MR. MANSON:** Other than the poor grammar and syntax?

**MS. HARVEY:** Well, in principle, I absolutely agree. However, I know there are circumstances where some victims don't relate to the prosecutor. And so

it ends up making it a more difficult situation for them. But, in principle, I agree with this statement.

**MR. MANSON:** I'm sure that there are some situations in which the same counsel can't stick with the case from beginning to end. There is problems of health, et cetera. But it would be a good idea not to change counsel midstream.

**MS. HARVEY:** Yes.

**MR. MANSON:** The next ---

**MS. HARVEY:** There is another thing though too, it's that depending on how the administration works, like, there is some counsel who would be qualified to do a preliminary hearing but not necessarily a Supreme Court judge and jury trial.

**MR. MANSON:** Oh, yes.

**MS. HARVEY:** So they might end up junioring.

**MR. MANSON:** Yes.

**MS. HARVEY:** Perhaps ---

**MR. MANSON:** Questions of qualifications, yes.

**MS. HARVEY:** Yes.

**MR. MANSON:** Can we move down to "Scheduling of Cases", number B.

> "Crown counsel in each jurisdiction should make best efforts to expedite

trials involving serious sexual offences. Wherever possible, sensitivity should be shown to the victim by avoiding dates important to him or her in prior commitments if known".

I think you spoke about that yesterday and gave examples of how counsel can accommodate victims.

**MS. HARVEY:** Yes.

**MR. MANSON:** But in terms of scheduling, with all due respect to any judges or judicial administrators in the room, the Crown doesn't control the dates; correct?

**MS. HARVEY:** No, that's true.

**MR. MANSON:** One would hope that both judges and judicial administrators followed a similar priority for a sexual assault case. Would you agree with that?

**MS. HARVEY:** Well, Mr. Manson, it's why it's so important when these policies are developed actually that they are inter-ministry policies.

**MR. MANSON:** I'm sorry, I ---

**MS. HARVEY:** Inter-ministry.

**MR. MANSON:** Oh, yes, yes.

**MS. HARVEY:** That there are other people involved to sign off on these principles. Who basically

have, you know, the helm of the boat, the ones who are in control of these specific things and court services is one of those persons.

**MR. MANSON:** Yes.

**MS. HARVEY:** So you're absolutely correct.

**MR. MANSON:** That's all I wanted to ask you about that document, Ms. Harvey. And the last thing I wanted to refer you to was the Connolly and Read article that you mentioned yesterday, which is at Tab 8 of your book.

We lost you, oh, there you go.

I took it that you were saying that a lot of the material in this article is the kind of material in an appropriate case that you might consider bringing and expert, a qualifying expert, to tell a jury.

**MS. HARVEY:** If I felt that an inaccurate inference would be drawn. Sometimes it appears quite obvious. And by the way, there is controversy over these areas ---

**MR. MANSON:** Yes.

**MS. HARVEY:** --- and so it just so happens that we have Don Read's article here. If I had an article from somebody else, they might have a different point of view. Even in terms of what he says about the fragments and that there might be omissions, but it does not explain

inconsistencies. You know, in our book, and it was John Yuille and Judith Daylen who wrote the part on memory, they have an explanation for inconsistency. So these are areas that are not without controversy and there are some folks who believe as well that many of the -- much of the research that is done empirically is not transferable to the court setting either. So with that sort of precursor caveat in mind, yes, these are the types of areas where the trier of fact could, in many cases, benefit from some assistance by somebody who is aware of these issues.

**MR. MANSON:** I am looking at page 448, subsection 2 “Reliability”. If I could just read that paragraph:

> “Often the only inculpatory evidence in HCSA ...“

Which I take it is Historical ---

**MS. HARVEY:** Yes, Historical ---

**THE COMMISSIONER:** Historical Sexual Assault.

**MS. HARVEY:** --- Child Sexual Assault.

**MR. MANSON:** “…is the memory report of the complainant, and of course the only exculpatory evidence is the denial of the accused. In a sense then, memory is on trial. In the following section

> we argue that some report characteristics that are used to evaluate the reliability of memory of single occurring recent events may not be as useful in terms of assessing the reliability of reports of an instance of a repeated event that occurred in the distant past when the complainant was a child."

In other words, what we might use to assess credibility if someone was talking about what happened yesterday would not be an appropriate tool to assess a repeated event from 30 years ago.

**MS. HARVEY:** M'hm.

**MR. MANSON:** That's what they seem to be saying; correct?

**MS. HARVEY:** Yes.

**MR. MANSON:** And then they give some specific examples of seven issues that they talk about later in the article, and I'm not going to go to them. But "Specifically we discussed seven…" -- well, in other words:

> "The context of HCSA must be considered when deciding how to evaluate the reliability of related memory reports. Specifically we discussed seven issues,

the affect of a long delay on memory, the young age of the complainant when the offence occurred,…"

And you spoke about this yesterday how childishness affects the storing of data in one's memory.

"…memory, for instance, of repeated events, omission errors, memory for time, memory for frequency and non-continuous memory."

What I want to suggest to you is some of the common targets for cross-examination and challenges to credibility are the very issues that these authors are suggesting are wrong, for example, inability to recall or difficulty to recall the timing of events.

**MS. HARVEY:** Well, if I understand you, what one does see is that a cross-examination and even submissions -- and I don't just want to point the finger at defence because clearly all of us are guilty of contributing ignorance to the ultimate fact-finding process. But yes, one sees cross-examination and submissions that run counter to what we're reading from experts on memory. And so there are cross-examinations, as I said yesterday, that suggest to a complainant "You should be remembering more" and "There is something wrong about your complaint because you don't". And that ultimately

goes to the trier of fact as if an inference can be drawn that there at the least not reliable and at the most not credible.

So I have sat as witness in many, many trials where I see this happening and I find it disturbing, just as I find it disturbing what witnesses undergo offering in cross-examination with highly leading pressured questions when particularly with young children it's being suggested to us that that's exactly how children should not be interviewed. So that is an exercise that doesn't necessarily help us, as Madam Justice L'heureux-Dubé describes in eliciting the truth.

**MR. MANSON:** So what you're really advocating is that in some historical sexual assault cases, questions about credibility that really arise from memory, in those cases juries would, of necessity, be helped by hearing from an expert explaining how memory works, why omissions aren't as important as they might appear, why failure to remember dates is not as important as it might appear.

In other words, a lot of what we think about memory is counter-intuitive to what experts tell you about memory?

**MS. HARVEY:** And it's not with the view that the memory expert would be the ultimate decision-maker, but

it is information that would guide the trier of fact in their -- it's one of the variables for consideration in their decision-making.

**MR. MANSON:** Because credibility is ultimately up to the trier of fact?

**MS. HARVEY:** Absolutely.

**MR. MANSON:** Thank you, Ms. Harvey. Those are all my questions.

**THE COMMISSIONER:** Thank you.

I think what I want to do now is head off a conflict, a management stream, by looking at time management stream. And so your plane, Ms. Harvey, is at 6:00?

**MS. HARVEY:** I have to be at the airport at 6:00 in Ottawa.

**THE COMMISSIONER:** In Ottawa?

**MS. HARVEY:** M'hm.

**THE COMMISSIONER:** All right.

Are you driving there?

**MS. HARVEY:** Yes.

**THE COMMISSIONER:** All right.

So we're going to have to figure out what the balance of the cross-examination will be, and I want to make sure that everybody has some time.

So Ms. Morris, can you re-canvass everyone.

And should we start a little earlier? I don't know. How much -- so let's assume, if we start at 2:00, maybe finish at 3:30, 4:00. That should give you -- is the plane at 6:00 or that's your safety ---

**MS. HARVEY:** The plane is at 8:00 so we're just measuring ---

**THE COMMISSIONER:** You've got ample time. Okay.

**MS. HARVEY:** I've got ample time, yes.

**THE COMMISSIONER:** So in theory we could go to 4:00. It will take you less than two hours to get to the airport?

**MS. HARVEY:** It's my driving, Mr. Commissioner.

**THE COMMISSIONER:** Oh, you're driving, an hour and a half.

**(LAUGHTER/RIRES)**

**THE COMMISSIONER:** All right.

In any event, what I want you to do is portion the time.

**MS. HARVEY:** Yes.

**THE COMMISSIONER:** And make sure that everybody has time to cross-examine.

**MR. MANSON:** My submission, Mr. Commissioner, is that there may not be a lot of cross-

examination.

**THE COMMISSIONER:** Because of your brilliant ---

**MR. MANSON:** No.

**(LAUGHTER/RIRES)**

**MR. MANSON:** No, because I've been eavesdropping.

**THE COMMISSIONER:** All right.

Okay. Well, let's come back at 2:00 then and we'll see where we go.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Thank you.

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

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

--- Upon recessing at 12:33 p.m./

L'audience est suspendue à 12h33

--- Upon resuming at 2:09 p.m./

L'audience est reprise à 14h09

**THE REGISTRAR:** This hearing of the Cornwall Public Inquiry is now in session.

Please be seated. Veuillez vous asseoir.

**THE COMMISSIONER:** Good afternoon all.

Mr. Lee, good afternoon.

**MR. LEE:** Good afternoon, sir. How are you?

**THE COMMISSIONER:** Good. Yourself?

**MR. LEE:** I'm well. Thank you.

**---CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR. LEE:**

**MR. LEE:** Ms. Harvey, my name is Dallas Lee. I'm counsel for the Victim's Group, a party at the Inquiry.

I won't be very long with you. I'm interested in discussing with you the prosecution of historical child sex abuse cases, and to be clear, to let you know exactly what I'm talking about, the example is a 40-year old man complains of abuse that occurred when he was 10 years old. That's the kind of situation I'm talking about here.

Mr. Manson asked you to discuss earlier this morning how you would advise a complainant if you were an investigator who was contacted by the complainant for the first time. I'd like to talk to you a little bit about the Crown's dealings with complainants.

You explained yesterday during your evidence-in-chief in relation to preparing children to testify, children who are still children, that it's important to familiarize the witness with the process so they don't bungle just because they're ignorant of the process. Do you recall saying that?

**MS. HARVEY:** M'hm.

**MR. LEE:** Would the same apply to adult

witnesses?

**MS. HARVEY:** Yes, I believe so.

**MR. LEE:** So you don't have concern with adult witnesses going into a court process to make sure that they're familiarized with it?

**MS. HARVEY:** Exactly, because for example, the process of having a transcript or a statement being put to a witness beforehand, or being put to the witness by the defence in cross-examination, and for them to appreciate what the process is and what's being asked of them to do. It's just helpful if they understand that that's something that's likely to happen, and when it happens they understand what is going on and they're not confused by it.

**MR. LEE:** Would the same apply to things such as the layout of a courtroom?

**MS. HARVEY:** Yes.

**MR. LEE:** The roles of court reporters, and a clerk, and the judge, and things along those lines?

**MS. HARVEY:** Yes, that's pretty basic stuff.

**MR. LEE:** Are those things that typically as a Crown you would expect would be explained to the witness before they take the stand?

**MS. HARVEY:** Yes. Often in many jurisdictions that's done through the victim services people or through pamphlets or documents that are given

out, or it's a good practice to actually take the witness into the courtroom in advance and to show them the layout of the courtroom.

**MR. LEE:** And typically whose role would you think that would be to physically bring them into the courtroom and show them in advance?

**MS. HARVEY:** I think in a jurisdiction where there is Victim Witness Services, that's likely their role to do that.

**MR. LEE:** So it's done beforehand and it's part of the coordinated effort of different agencies and different places that you talked about. Is that correct?

**MS. HARVEY:** Yes.

**MR. LEE:** And it's an important one, I take it?

**MS. HARVEY:** M'hm. Yes, it is.

**MR. LEE:** You explained yesterday that, again, in relation to child witnesses, it was part of the same discussion, that the other part of preparing a witness is going over their evidence.

**MS. HARVEY:** M'hm.

**MR. LEE:** And would you agree that that applies to adults as well?

**MS. HARVEY:** Oh, absolutely.

**MR. LEE:** And adults in -- well, would you

agree that it pertains to adults dealing with historic child sexual abuse?

**MS. HARVEY:** Yes, very much so. Because there is so much to tell that it's important, in my view, to ensure that there's a structure in place that helps the witness organize their thoughts so that when they communicate what they have to communicate, it's easier for people to listen and understand what they're talking about.

**MR. LEE:** And you discussed earlier today that the initial contact that the complainant has with the police is where a lot of that foundation is laid in telling the story and deciding -- laying out what's happened, and by the time it typically gets to the Crown that's been done?

**MS. HARVEY:** Well, I don't think you can assume that, because it's my experience, for example, that what happens with the witness when they meet with me is quite different from their experience in meeting with the investigator. And that's part because our mandates are different, but also because often witnesses just don't remember all or don't tell all at the early stages of the investigation. And as a result of certain questions being asked different parts, different fragments of memory are enlightened or a different -- in other words, they remember some things that they may not have remembered when they

were interviewed by the police.

So there are times I find in my prosecutions that near the eve of trial I'm finding out things and I have to make a decision about whether or not -- obviously things will be disclosed to the defence, but whether or not I'm actually going to go there in the examination-in-chief because it would just be too upsetting to the trial actually to change course a little bit. So although I might disclose it, I wouldn't necessarily take the witness there as part of the examination-in-chief, however, it would be open to the defence if they felt that was necessary.

So I wouldn't assume that when a Crown prosecutor meets with a victim of historic abuse that things are a fait accompli, that there are new things that arise and new strategies that need to be developed.

So for example, a model that I try to use is when I am interviewing a witness as part of trial preparation I try to use the same style that I will use in court. So I'd say to them "Okay, now I'm going to go over, ask you some questions about your evidence, and I'm going to do that in the same way that I do in court so that you learn my style, you learn how I am going to frame my questions, and you will learn, for example, that I'm not allowed to prod, I'm not allowed to ask leading questions.

So this is how I would like to structure your evidence." And I've actually given witnesses the structure of those, the introduction, background, and so then they are not surprised.

We wouldn't necessarily and we don't -- I wouldn't tell them what to say but I tell them the structure in which I would prefer that they give their evidence so that it's easier to be received by the trier of fact.

**MR. LEE:** That's interesting. Thank you for that. And it goes to part of what I'm trying to get out of you and part of what I want you to help me understand and help the Commissioner understand, is as a Crown, in your preparation with the witness, with the victim, what your process is before you get into the courtroom; how you go about preparing them; exactly what you do; how often you meet with them; things along those lines. Could you explained to us typically what you would think you would do or what you would recommend be done in an historic case to prepare that person.

**MS. HARVEY:** Okay. And it might depend on what I would consider to be -- let's see, it might depend on the investigation that has taken place up to then. Because there are clearly situations where I don't think things have been done as part of the investigative course

that should have been done. And so there may be circumstances where I start preparing the witness for court but meanwhile I'm asking the investigators to go and do some things that hadn't been done at an earlier stage. So that happens.

But number one, I need to say that I believe it's very important that we -- that a prosecutor, in preparing a witness, they have certain objectives in mind and that you design a preparation with those objectives in mind. And I think historically lawyers sit down and start to prepare witnesses without really thinking about what their objectives are, and the objectives are clearly mutual.

On one hand you're preparing the witness for the experience of going into a very foreign environment to them and they should be familiarized with some of the things that will happen and what to expect. But equally, you're preparing the lawyer who is going to be leading that evidence to come to know how best this witness communicates and what their needs are, et cetera.

So it is very much a mutual preparation, and I believe that it's important for us as prosecutors to have an attitude that these witnesses are helping us out as much as we are doing any service to them, and that is an attitude of respect.

And so keeping in mind the objective, if the objective is something like to prepare this witness so that they can do their best job possible in communicating their evidence, that is an example of the objective. Then you look to the strategies to ensure that that can be done.

**MR. LEE:** Just to interrupt, I take it that's always an objective, to ensure that the witness can tell his or her story as best they can?

**MS. HARVEY:** Yes, and then the strategies within that like, for example, working out whether or not they should be testifying outside the courtroom and going over their previous statements and that type of thing.

**MR. LEE:** M'hm.

**MS. HARVEY:** So then the first meeting with the witness in a historic abuse case would likely be just a discussion of how to design the best preparation for that particular person. So I would actually communicate to them some of the fundamentals about the justice system, our expectations, the role of Crown counsel, et cetera, that I'm not their lawyer, and that we're embarking upon a project together to prepare them for court and to introduce their evidence in court. And I would work with them to design what that looks like because there are some people whose daily routines are of a nature that they have some difficulty coming into my office for any preparation. So

we would sort out how often do they -- what do they need? How often do we need to meet to make those needs met -- have those needs met? And then we basically map it on a calendar.

So if the first interview is preparing the preparation that this witness is going to undergo with myself, then we would look at the first part and say, "Okay, do you want to start that today or do you want to start it another day?" And we actually would, you know, determine whether or not -- "Would you rather meet with me for an eight-hour session on one day or would you like to break this up over several days?"

And again, fundamentally, I work under the assumption that I want to give this witness as many choices as I possibly can about how we do this so that I'm not creating a huge interference in their life.

So the first part of the preparation might well be talking about the background, so some introductory questions about their background and finding out how old they are, where they're from, where they work and working out some of the logistics about making sure they have appropriate support through the process. It might be working out who they want helping them through the process, whether they want people sitting in on the interview with them and that type of thing.

By the way, if you have a multi-victim case, which I have had -- I've had cases, one with 21 children; another one with 17 men in a residential abuse case -- and so you have to design structures to try and ensure, on one hand, consistency of service with each person but also that you still embrace the uniqueness of each individual. But it's a good idea to have the forms and the structure and everything in place so that there is consistency of service for each person.

So we may say then an example would be -- and I have to explain to them, to the witnesses or the victims, "There's three areas where I want to prepare you for court and one is the evidence and one is the emotional and one is the procedure." So we would build in a visit to the courtroom. We would build in a day when I'm talking about the procedure, that type of thing. By day, I mean an appointment.

**MR. LEE:** Right.

**MS. HARVEY:** I might give them some resource material. In fact, in one of the multiple victim cases I had there was a newsletter that we circulated from time to time and there is much larger models of this wherein the Air India case, for example, there was a webpage that was developed for victims.

So clearly something needs to be in place to

do the mutual communication and let people know about the procedures.

So then the next part would be going through the statements and the evidence that has been given before. So there would be a session of reading the statements over, and it's my practice that I don't give -- although I may give a witness a statement to read on their own, at some point I will read a statement with the witness. So we basically will read it over, and if there was a tape recording available, we would actually play the tape and listen to it.

The police don't always have the opportunity to do that and to actually see that the tape is conforming with the transcript, and so I find it's always a good practice to do that, to make sure the transcript is truly reflective of what was in the tape.

By going through the transcript of the statement -- and one thing I try to do is we kind of map out, "Look, you gave four statements before and this was this date and this was this date and this was this date," just so that they can sort of see the different times that they've given the statements. And we would read them one by one and the instructions to them would be, "Okay, the reason why we're reading this is to refresh your memory about what you said before and if there are any errors that

you want to correct, here's an opportunity to correct them, and if there's any omissions it's an opportunity to fill in any omissions." And so we go through the statement.

I often sit at my computer. I ask the witness if they don't mind if I do that, and as we go through, I will make notes of the errors or omissions that are made and those it's understood will be disclosed to the defence.

So at the end of that session, number one, we have hopefully refreshed their memory, have identified errors or omissions and I've also created a document to be disclosed to the defence. And we do that with previous statements and with the transcript from the preliminary hearing if there is one.

The next part would be -- and again, it would be part of the design -- that "I want to go over your evidence." And so I will have designed, as I say, a structure. And so I can think of a structure in one of the cases. Again, it was introductory questions, background, and then, you see, I have ideas about how I'm going to lead the evidence and I've adapted some of what I know around memory into the leading of the evidence.

So, for example, just as an aside, when I lead evidence of historic abuse and there's the script memory scenario, I will actually ask the question -- tell

the Court or ask the direction -- “Tell the Court, please, why you are here today, what you are here to testify about.” And they’ll say, “I’m here to talk about the fact that I was at so and so school and I was sexually abused by so and so.” I said, “Okay. Fine. Now, did that happen once or more than once?” And invariably they’ll say “More than once.” And I said, “And have you, as part of your preparation for today, identified the times that you recall that this happened?” And they’ll say “Yes.” And I said, “And how many are there?” And they’ll say “Twelve” or “Thirty-three” or whatever.

And I’ll actually have a list. This list is generated by the witness, by the way. And then we’ll basically go through the list. What the list is is basically the episodic memory.

Now, the episodic memory doesn’t necessarily mean that if it were 33, it’s not necessarily 33 times. It could be actually 33 fragments of memory that relate to the same time but the witness doesn’t even know it, if you know what I mean. They could say something like “There was a blood time.” “Okay. And what do you mean by that?” “Well, that was the time when there was bleeding when it happened.” And then they’ll say something like “And there was a TV time.” “And what do you mean by that?” “Well, that was the time where I recall that Bonanza was on TV.”

Now, the witness isn't actually able to say whether or not the blood time happened the same time as the Bonanza time, but the point is it's a memory fragment and we try as much as possible to see if they can elaborate on those particular episodes or things that they recall.

But I have led the evidence that way so that they're actually hearing from the witness the script, but they have these specific times that they remember, and in order to set up the evidence in that way, when they're in my office I say, "Okay. Tell me what happened." And they tell me and it's usually the script. And I say, "Okay. Now, tell me what are some specific times that you remember?" And I actually say to them, "Okay. We're going to create a list of the things -- specific times that you remember and I would like you to put a name to it. I would like you to call it something and I want you to call it something, not me call it something." And that's where you get the kick-the-can time or the blood time or the TV time or whatever. They have the list and I actually -- if I haven't put it on the computer, I've asked them to write it out in their own handwriting, and that also goes to the defence. And I have actually applied for that list to be entered as an exhibit, just as I've asked that age charts be entered as exhibits in historic cases because the facts are just so complicated. You have to organize it for

folks.

So one of the first things, again, I did I the introductory section is make an age chart. Again, I do it on my computer. You go from the birth right to the present. You put the age. You put the grades. You put where they're living at a specific point in time.

But for purposes of court, I would just have the year and the age and the grades that they're in and confirm with the witness that that's true and enter it just for the purpose of the judge and the jury being able to follow. So when they say something like "I'm six years old" or "It happened when I was in Grade 2," that people can look and the witness can look as well and make sure that they don't just get confused because we have trouble, particularly when we're testifying, sorting those things out.

So anyway, all this needs to be done as part of the preparation.

So back to the statements -- I'm sorry, back to going over the evidence, so they will tell me the evidence and, again, I will take notes on the computer and will sort out the scenario about the episodic memory, the script memory, whatever, and if something comes up where they've read about something in their transcript or their statements or whatever, they might say something like "I

know in my statement I said it was the white house, but now I realize it's the red house." And so I'll make note of that.

There are many of my cases where actually those notes that I make at the computer, they go right to the defence. And, in fact, there are cases where the defence, in cross-examination, has my notes and they go, "Isn't it true that you told Mrs. Harvey so and so?" And it probably isn't the best practice, but we just don't have investigators and that to sit in for all of this and so I just hand it over. I know if there were a conflict, I would basically be conceding that that was what the witness told me, unless of course they said something to the opposite.

And so that is completed and then we likely will, if the Victim Services people have not had the opportunity to do it and if it is something that is convenient, then I will go into court with the complainant and at times I've had them actually sit in the witness stand and I'll say, "Okay. Well, this is where I'm going to stand and we'll start off." I might say something like, "Okay. I'm going to ask you the first few questions I'll ask you. Now, why are you here today?" And they say, "Okay. Fine." "Now, I can hear you okay. You might have to raise your voice" or something of that nature.

And if you have issues relating to accommodations, it can get quite complicated because if you have somebody who is making a choice, for example, of a screen or closed-circuit TV, you want to actually show them what a screen looks like and what the closed-circuit TV looks like, and that may mean a visit to the courtroom if you've got that set up, but I know that in my office I've actually borrowed a screen from the local courthouse and set up chairs and everything and shown a witness the two possibilities and have them choose which one that they would prefer.

So that clearly is a necessary part of the preparation, just as another part of the preparation is devising strategies so they're appropriately supported so that they don't end up in a situation where they leave the courtroom and nobody's there supporting them or they don't have a ride home, basically things that are an important part of supporting them through the process.

So, you know, I'm trying to think in the cases I've done recently with the 17 men, for example, those men would always come to my office. I had a binder for every one of them, age charts for all of them.

Another scenario I had recently, the witness refused to use a taxi because she was afraid and so I would meet her always at the police station, but basically this

is what we did. The design process, we go through the statements. We go through the evidence. We design a structure. We work out accommodations and they know that they're free to ask me or tell me what they would like and I tell them I realize that -- “I will always listen to you and I will always do what I can to give you choices. I have limitations on me because I'm a Crown prosecutor and the law and the rules of procedure dictate how this thing will transpire, but I just want you to know that I will always be listening and if there is a way to do this that maintains the integrity and is helpful ultimately to you and the prosecution, then I will try to make it happen”.

That's the philosophy I have and I've often asked for things that complainants or witnesses have communicated to me like that example I gave you of the woman who was concerned about her identity being revealed on the Internet. I just do the legal research so that I can be their conduit on some of those sensitive issues.

**MR. LEE:** I am interested in how you deal also with cross-examination and preparing the witness for what to expect. Do you do anything in that regard or do you leave it to -- how do you get to -- I'm a civil litigator and it's part of my process. The question I always get is, "Okay, yes, that's all fine and well what you are going to do."

**MS. HARVEY:** M'hm.

**MR. LEE:** "But what about the other guy? What is he going to do? That's what I'm scared of." I think that's a big concern.

How do you address those concerns as a Crown in your preparation of a witness?

**MS. HARVEY:** Well, I do tell them about, as we go through the statements, I will say, "Look, one of the reasons why I'm doing this is, the purposes of the statement can be put, one, you can refresh your memory of using it in examination in-chief, but it will also be used in cross-examination. So you should know that the defence lawyer has these statements. They have them. So don't be surprised about that. That's an obligation that we have to disclose this matter.

That is why it is so important for you to read them not only to refresh your memory but to realize that basically this is what this trial is going to be about. It is going to be about no only what happened to you but also about what you said in the past about it".

And so I will pick up the transcript at one point, and I'll say, "So just as an example, here you say it's a white house. Now, let's say, for example, if you're in the stand and you say it's a red house, this is probably what will happen. They'll stand up and say":

"Did you provide a statement to the investigator on this date?"

"Yes, I did".

"And here I'm looking at this line, where you say that it was a white house. And did you say that?"

"Yes, I did."

"And was it true?"

And then you are going to be asked that. And if you said it was a red house, then that's something that's going to have to be dealt with.

And I will say something like “The defence will likely give you an opportunity to explain why there's an inconsistency and, if not, I will see what I can do to give you an opportunity to give an explanation in re-examination”. So I actually describe that, so that they're aware.

Equally, sometimes, I do a role-play because I believe that cross-examination, it's my experience as a prosecutor that often things come up to the benefit of the prosecution through cross-examination. Things that I could never elicit because I'm not actually permitted to ask leading questions.

So I will actually do a cross-examination, and I will like a sample on a benign issue. And so I might do something like I will say, "I'm going to give you an

opportunity to cross-examine me. So I'm telling you I'm a Crown prosecutor, have been for 26 years and I have two kids. Okay. Go at it. Ask me some questions. And you are going to see what is going to be revealed on the basis of your questions". I will actually either myself do a role play or have them do a role play on me and with the view to show basically the merits of cross-examination because there are merits in cross-examination clearly about things that can be described that wouldn't normally be described in examination in-chief.

But I do tell them that sometimes cross-examination gets tough and I'll say things like "You don't necessarily have to address your cross-examiner. There are some police officers I know who prefer actually to look to the judge" and I'd say so "If there is a time that things get difficult, here are some things, strategies that people use to make it easier for them". And so we talk about it from that perspective as well.

And sometimes questions come. "What do I do if I don't know the answer? What would I do if there is something embarrassing or whatever".

**MR. LEE:** As I listen to your answers on these questions, I'm struck by (a) the ease with which you answered that question. Obviously, you've done this; obviously, you have a plan and the fact that you've set out

so clearly for us the objectives, the initial meeting and the things you are trying to accomplish there, the evidence and the emotional and the procedural targets, and I'm struck because I listen to you by the amount of time this must take. Obviously, this isn't a quick process for you. And what I'm wondering is have you given us -- are these steps that you've outlined for us what you would like to do or what you would like to see happen or are these the necessary steps as you see them in a Crown preparing a witness for a historic sexual assault ---

**MS. HARVEY:** Well, I noticed when I was reading the policy for the Ontario Crown where it said "It's not possible to interview all the witnesses but you basically try your best". And I think in a way because I've done serious cases for quite a long time and I have cases assigned to me, and so I just cannot imagine introducing a witness' evidence without interviewing that witness.

And in a sexual assault, I have a personal policy that I always, even if it's in the business of provincial court, I will always meet that witness in advance and preferably on a day other than trial day. And it has been my experience that that has always paid off.

Even the simplest of cases of sex crimes on the face, once you meet with the complainant, it is

something far more complex. And some of the issues that we've talked about in the last day and a half show their head during that interview and it's important that they're dealt with.

So because you've seen my curriculum vitae and the training that I've done and I am constantly questioned by prosecutors on how do you do this? There is really not the time to do this, and this model is not realistic and it doesn't happen. What I would say about that is that I do do it. I know that I work long hours. Many complainants I meet at times that are outside of their work or school time, so that they are no inconvenienced, which means overtime for me, weekends.

But the other thing is with children because you don't really like to meet with them for more than say an hour at a time, I break it up and put it on the calendar. So it means like 45 minutes or half-an-hour sometimes a day, if that's convenient to them, and that is very easy to do. That's very easy to fit into the day.

So I believe that preparing a witness for a child sexual assault historic case, trying to do it quickly is like trying to have a burn heal quickly. It is not something you can do quickly. It's a long process. You're getting people to relive often experiences that took place over many, many years under circumstances where they don't

even really understand what is going on for them psychologically and with their memory and never mind with the law.

And so it is important that this is done with deliberation. It's done slowly. It's done respectfully and that the victim is part of the design of what is done with them because it is a mutual preparation.

**MR. LEE:** Ms. Harvey, those are all my questions and I would like to very truly thank you for coming here. You have been incredibly helpful and I wish you the best.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Mr. Chisholm.

**MR. CHISHOLM:** Thank you Mr. Commissioner. Ms. Harvey, my name is Peter Chisholm. I am counsel for the local CAS.

**MS. HARVEY:** Hello.

**MR. CHISHOLM:** I have no questions for you but would like to thank you for coming here today and sharing your knowledge. Thank you.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Mr. Rose.

**MR. ROSE:** No questions.

**THE COMMISSIONER:** Thank you.

Mr. Scharbach.

**--- CROSS-EXAMINATION BY/CONTRE-INTERROGATOIRE PAR MR. SCHARBACH:**

**MR. SCHARBACH:** Thank you. Good afternoon Mr. Commissioner.

**THE COMMISSIONER:** Good afternoon, sir.

**MR. SCHARBACH:** Good afternoon, Ms. Harvey.

**MS. HARVEY:** Good afternoon.

**MR. SCHARBACH:** Thank you very much for your evidence today. My name is Stephen Scharbach and I am counsel for the Ontario Ministry of the Attorney General, the employer of the Crown attorneys in the Province of Ontario.

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** I have a few questions for you, not many though.

First of all, I would like to touch on the issue of joinder that was raised this afternoon -- sorry, this morning by Mr. Manson. I take it the issue really here is the decision by the Crown whether or not to join various charges whether they are informations or indictments into one proceeding or whether to keep them, to have separate proceedings regarding certain charges. Correct?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And that's a decision that

Crowns make and would you agree with me that it's often a difficult one; one that takes into account many factors?

**MS. HARVEY:** Absolutely. And in fact you never really know the correct answer until after the fact.

**MR. SCHARBACH:** Right. And this is an example of a decision that calls upon a Crown to exercise his or her judgment. Correct?

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

**MR. SCHARBACH:** And it can't be reduced down to a mathematical formula?

**MS. HARVEY:** No, I agree with that.

**MR. SCHARBACH:** And it is also true, I think, isn't it that experienced Crowns, two experienced Crowns faced with the same scenario may come to different conclusions based on their assessment and their exercise of judgment.

**MS. HARVEY:** On that and other issues as well.

**MR. SCHARBACH:** Right. I think you talked a little bit about the disadvantages of joinder and the major one, I sensed, was the fact that it may cause delay in the proceedings.

**MS. HARVEY:** That's joinder under those circumstances where you've already taken the case to a certain point in the procedure and then you are joining.

**MR. SCHARBACH:** Right.

**MS. HARVEY:** But joinder often happens at earlier stages and you don't have those complications.

**MR. SCHARBACH:** But one of the factors a Crown must take into account I suppose is the multiplicity of proceedings.

**MS. HARVEY:** Absolutely. And just imagine the impossibility of getting cases through if we were proving them count-by-count.

**MR. SCHARBACH:** Right. Is that of particular significance in sexual abuse cases, whether they are cases of current sexual abuse or historic sexual abuse?

**MS. HARVEY:** If I understand your question, Mr. Scharbach ---

**MR. SCHARBACH:** --- Scharbach.

**MS. HARVEY:** --- what -- and please stop me if I haven't understood your question and maybe I should ask you to repeat it, but ---

**MR. SCHARBACH:** I am talking in general about joinder.

**MS. HARVEY:** M'hm.

**MR. SCHARBACH:** And as I understood it, Mr. Manson put to you sort of a hypothetical, which involved the case where charges have been laid and indictment had been handed down and then other complainants, other victims

revealed themselves to the police.

**THE COMMISSIONER:** Well, not quite. I think what he said was that the preliminary inquiry was underway.

**MR. SCHARBACH:** Underway.

**THE COMMISSIONER:** Yes, so I don't know that we had finished -- I don't know if it matters all that much, but ---

**MR. SCHARBACH:** Yes.

**MS. HARVEY:** M'hm.

**MR. SCHARBACH:** For my purposes, I don't think it matters, but essentially I think what I am suggesting that we are dealing with is a case where an investigation into certain allegations has been completed. The preliminary is underway or perhaps even an indictment has been handed down and other complainants come forward perhaps even as a result of the publicity of the first cases and reveal themselves to the police. Investigations then are ongoing and take place. Investigations may be completed. And now the Crown is faced with do we hold back the initial set of charges to join them up with the later charges that are to come or do we proceed to trial with the first charges knowing that these other charges involving the same accused, different complainants perhaps overlapping witnesses in some cases may take place.

**MS. HARVEY:** M'hm.

**MR. SCHARBACH:** This is the difficult situation that a Crown may face in some of these cases and I believe you said this morning that it's not uncommon.

**MS. HARVEY:** No, because people do start to feel a sense of confidence when they see others going forward with their cases.

**MR. SCHARBACH:** But the difficulty for the Crown now is do we join them up, if I can put it loosely like that, or do we proceed with the first set of charges, knowing that a second set maybe even a third set of charges is somewhere coming?

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

**MR. SCHARBACH:** And one of the factors I think we agreed that there are many factors a Crown must take into account. You can't boil this down to a mathematical formula, but one of the factors that the Crown must take into account is multiplicity of proceedings.

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** I think we agreed on that. And then my question was, is that of particular significance in sexual assault cases? And I say that because I can envision a scenario where victims, although they may not be testifying to their own victimization, in the second set of proceedings, may also be required to testify.

Take, for example, I'll just take one off the top of my head, a case of a Scout Master or Cub Master, with several children, it may be that some of those children who were victims in the first case, may have to testify with respect to the victimization of other individuals.

**MS. HARVEY:** I guess you could have a situation where maybe their evidence on identity is stronger or something of that nature.

**MR. SCHARBACH:** Well, I'm wondering, does the factor of avoiding multiplicity of proceedings take on special significance when we're dealing with sexual assault cases?

**MS. HARVEY:** Are you talking about the issue of witnesses having to testify more than once?

**MR. SCHARBACH:** Yes.

**MS. HARVEY:** It is clearly something that the Crown would want to avoid, is having to put somebody through that, more than once, for many reasons. Probably the main one being the ordeal that you're putting the witness through, but there are others as well.

**MR. SCHARBACH:** Right. But again, these are some of the factors that the Crown will take into account, when making that decision?

**MS. HARVEY:** One of the variables too would

be the strength of the case with those original three and whether or not the others that had been revealed were actually stronger than the original three. You know that might play a role in the decision-making. It would be ---

**MR. SCHARBACH:** I'm sorry, Ms. Harvey, could you explain what you mean by that?

**MS. HARVEY:** Well, suppose you had a case where you had children who had come forward and they had talked about a fondling scenario and they had some difficulties with their memory, but still the Prosecution was confident that there was enough evidence to proceed. But then subsequently another complainant came forward and actually it was something much more aggravated and there was actually corroborating evidence or something of that nature, and the facts were similar to the first three, however, more aggravated. The Crown may say "You know what, if we couple it with this one, we've actually got a much stronger case and that we actually run the risk of the possibility of an acquittal, because of the frailties in the evidence here, and it might actually be worth the delay to bring in this fourth person who has number one, a more aggravated version and also stronger corroborative evidence".

**MR. SCHARBACH:** Okay, all right thank you.

**MS. HARVEY:** Particularly if it's a similar

facts scenario.

**MR. SCHARBACH:** Right. Again with victim interviews, I understood from what you said yesterday and what you just said in response to Mr. Lee, that there are times when more than one interview with a victim will be necessary. Is that correct?

**MS. HARVEY:** Absolutely. In fact, I would consider it to be unusual that one is enough and particularly, in a historic case.

**MR. SCHARBACH:** And you've very thoroughly gone through the reasons why multiple interviews may be necessary. I just want to suggest there may be one other and that is particularly in the case of sexual assault cases, the victims will be asked, in many cases, to recount details that may be harrowing to them and bothersome for them. In order for them to do that, it may be necessary to establish a rapport, a level of comfort with the victims. Would you agree with me?

**MS. HARVEY:** Yes, sometimes it requires much more than that. You can't event hear anything from the complainants unless they have a therapist present, or something of that nature.

**MR. SCHARBACH:** Right. And, correct me if I'm wrong, but I think I understood from what you said to Mr. Lee that, often you, in your practice, have conducted

those interviews with victims, without the investigating officer present. Is that correct?

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

**MR. SCHARBACH:** But, I got the suggestion from you that perhaps the ideal practice would be to have the investigating officer present?

**MS. HARVEY:** That's what I would prefer.

**MR. SCHARBACH:** Right. And why is that?

**MS. HARVEY:** Well number one, I think it's -- you know, a rapport has already been established with the investigator. It's kind of, I think, a touch that has finesse and professionalism, that there's the demonstration of the matter going from investigator to prosecutor, and it also opens the possibility that there's a record-keeping device and so that, in the event that a matter of controversy arises, or if new evidence arises, it's very easy to take an entire new statement on a new piece and to provide or to fulfill our obligations of disclosure and also, obviate the possibility of the Crown being called as a witness in the proceedings.

**MR. SCHARBACH:** And that leads to another subject that you touched on, the complementary roles of the police and the Crown counsel, in achieving a successful prosecution. I think you mentioned that both functions are necessary in order to conduct the prosecution properly.

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And I think you said it was desirable that the Crown make him or herself available during the investigation stages and it's desirable for the police to be available to the Crown, during the trial preparation, and even in the trial itself?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** Is that correct?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And, I take it that in your experience, it sometimes occurs that, for example, as you just mentioned I think, a witness that you interview for the purposes of preparation for trial, will come up with new information?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** Which will trigger a disclosure obligation?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And those disclosure functions will, in most cases, be carried out by a police officer. Correct?

**MS. HARVEY:** Well, the way it works in British Columbia, is that if something is, well just for example, hypothetically I'm going through a statement with a witness and she makes changes or whatever, I will provide

that to the Defence. However, I've had situations where the witness will say something, "Oh, there's another time with ---", and if it's to the point where I feel that a full statement needs to be taken, I will actually ask to have the investigator do another interview and then that would be disclosed. But in British Columbia, what happens is that the statement would come to me and I would formally do the disclosure.

**MR. SCHARBACH:** Right.

**MS. HARVEY:** Right.

**MR. SCHARBACH:** And are there occasions where the witness reveals new information that requires additional investigation?

**MS. HARVEY:** Absolutely.

**MR. SCHARBACH:** Perhaps, even on the eve of the trial?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** In which case, having the continued involvement of the police officer is a desirable thing?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** I take it?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** Okay.

**MS. HARVEY:** But you know, we do deal with

these conflicting interests, so that you have new information, like I say. And of course, there's an obligation to disclose it, but it may be that you want to stick to the same track, in terms of your trial, because you go to the Defence and say "Look, I'm giving you this disclosure, but I'm not going to leave this out of the witness, because I want the matter to start tomorrow or the next day and I'm prepared to proceed, without the trier fact knowing that piece of information, even though I have no reason to believe that it's not valuable, credible and relevant, but I'm just choosing to proceed this way, just so that we keep this case on track".

**MR. SCHARBACH:** Thank you. If I can move to charge screening or charge approval, as it exists in British Columbia, one interesting difference I think that came out from your testimony, was that in, I think you said New Brunswick, Quebec and British Columbia. The Crowns actually approved the charges that are to be laid whereas in Ontario, the charges are laid by the police and screened after they are laid.

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And, I know that there are pros and cons to both systems, but would you agree with me that, in the Ontario system, the decision of the Crown to withdraw the charge is a transparent one, it's a public

one. It has to be done in Court, on the record.

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And it ---

**MS. HARVEY:** Well, I don't know. We often stay proceedings in British Columbia, off the record. I mean that's something that can be done just by going to the Clerk. But clearly, there is a benefit of doing it on the record for the very reason you say. It's better that members of public actually know that there's a stay of proceedings.

**MR. SCHARBACH:** With respect to the use of expert testimony, I think the thrust of your evidence was that there are many cases where the use of expert evidence would be helpful to a prosecution and appropriate in a sexual assault prosecution?

**MS. HARVEY:** Yes and to the Defence too.

**MR. SCHARBACH:** Right. And you pointed out many cases which have opened the door or endorsed the use of expert evidence for certain purposes.

**MS. HARVEY:** Right.

**MR. SCHARBACH:** But there have been a couple cases which have kind of closed the door a little bit to the use of experts for some purposes. And I'm thinking in particular of the case that you mentioned, *Regina and D.D.*, and I take it that was a case where an expert was sought to

be called, perhaps was called to explain delayed disclosure of sexual abuse. Is that correct?

**MS. HARVEY:** Yes.

**MR. SCHARBACH:** And, is it true that the Supreme Court of Canada, that was a case in the year 2000, the Supreme Court of Canada said that except in exceptional circumstances, that sort of expert evidence in order to explain delayed disclosure, it should not be called. Is that correct?

**MS. HARVEY:** Well, using the rules of Mohan basically, it wouldn't have the necessity. And in fact, there is a part of calling expert testimony is to provide some assistance to the trier of fact to the Judge.

But as we become more educated, some of these things, the judges are actually taking judicial notice of. And so, we do have some cases where, rather than having your expert, you would have your cases and try to ensure that the Defence and the Court are on the same page with you, of actually taking judicial notice of some of these things. And then, of course, you don't have to call expert testimony.

**MR. SCHARBACH:** Was it, speaking from your experience as a Crown, was it a practice that Crowns were calling expert evidence, in order to explain delays in reporting abuse, up till that point, I mean?

**MS. HARVEY:** Well, there certainly are a lot of cases reported, you know, like I see that as a recurring --- it's one of the variables. Often just as in D.D., I believe they talk as well about other issues besides the delay reporting. There's issues like, you know, the recantation or just reporting a little bit, incomplete and then more later, or going back to the accused even though this person is said to have been repeatedly hurting. So, there's a number of factors relating to the behaviour of the complainant besides the delayed reporting, which are kind of an important constellation of behavioural patterns from complainants. And so, it's not only for the delay but other parts of it that are relevant.

**MR. SCHARBACH:** And did that case, from your experience, did that case have a chilling effect?

**MS. HARVEY:** Yes, definitely.

**MR. SCHARBACH:** The calling of expert evidence ---

**MS. HARVEY:** Yes, it did.

**MR. SCHARBACH:** --- on behalf of the Crown?

**MS. HARVEY:** At least amongst my colleagues, who are quite concerned that it might actually be extended to other avenues where experts were being sought to be called by the Crown.

**MR. SCHARBACH:** And, one last small point.

You mentioned accountability of the Crown. You mentioned that they are accountable in several ways, to their employers of course, to the Law Society civilly, potentially for malicious prosecution, toward a malicious prosecution. I just want to suggest to you, I think there are a couple of other ways. Charter applications often call into question the decisions or the behaviour of Crowns, the conduct of prosecutions, in some cases. Would you agree that, although the individual Crown may not be the subject of any remedy, they also are called to account in a public way in those sorts of applications?

**MS. HARVEY:** Yes, I didn't mention that during my testimony, because we're not really accountable, but my goodness, what it's like to have your picture and your name and the criticism of you on the front page of the paper, I mean, although you're not accountable to the media or the public from that point of view, it definitely has an effect on one personally and their reputation. And similarly, if you are the subject matter of an abusive process type argument, yes that has an impact, but that's all in a day off, right?

**MR. SCHARBACH:** Yes.

**MS. HARVEY:** --- of a Crown Prosecutor. So that's the life we have chosen.

**MR. SCHARBACH:** Thank you Ms. Harvey, those

are my questions.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Thank you.

Ms. Makepeace?

**--- CROSS-EXAMINTION BY/CONTRE-INTERROGATOIRE PAR MS. MAKEPEACE :**

**MS. MAKEPEACE:** Thank you Mr. Commissioner. Good afternoon, Ms. Harvey, my name is Jill Makepeace, Counsel for Jacques Leduc and I just have a few brief areas that I'm hoping that you can further assist us with and I'd direct you to Tab 5 of your materials, which is the outline that was prepared and that's at page 8 under the heading "Challenges in Multi-Victim Cases".

**MS. HARVEY:** Yes.

**MS. MAKEPEACE:** And in this section, you provide examples of things that contribute to suspicion about the validity of a complaint. In the second bullet, there's a reference to discussion among alleged victims prior to the investigator taking the initial statement and it goes on further:

> "…which either creates blended versions of events or at least gives the appearance of that."

Now, when you refer to "blended versions of events", do I take that to mean the stories match up? Is

that a fair characterization?

**MS. HARVEY:** Yes, that people are influenced by the versions of others and they wittingly or unwittingly integrate the version of others into their own.

**MS. MAKEPEACE:** Okay. And is it your opinion that, should matching stories emerge or integration emerge between stories, that a prosecutor should turn their mind to the potential that collusion has occurred?

**MS. HARVEY:** Well, let's talk a hypothetical. If you have a scenario, where a witness says one thing in a statement and it's apparent that they've spoken to others and said a new thing, in their statement, and there is some evidence that the reason why there is a change in their statement is because of that conversation or that group counselling or whatever it was that took place, then yes, it is something that the Crown should consider, as to why there was a change in their version.

**MS. MAKEPEACE:** Okay. And would you agree that this concern would probably be greater in a situation, where the alleged victims know each other? It's more likely in those types of cases?

**MS. HARVEY:** Well, it's just that it's more likely to happen if they know each other because that's our experience and it's one of the difficulties, one of the challenges that often a perpetrator would go to victims,

who basically are within the circle, and the circle might be the family or it might be a school or whatever, and so people know each other.

**MS. MAKEPEACE:** Right.

**MS. HARVEY:** So if they don't know each other, then you're not going to have that problem because they won't be talking.

**MS. MAKEPEACE:** They wouldn't likely have the opportunity to collude?

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

**MS. MAKEPEACE:** Moving now to the last bullet on that same page and I'm dealing now with discussions among alleged victims, after the initial statement is taken, while the investigation or prosecution is ongoing.

Now, in response to Professor Manson earlier, I believe you expressed the view that witnesses should be warned or given advice not to discuss their allegations with others.

**MS. HARVEY:** Yes.

**MS. MAKEPEACE:** I think you had said that earlier.

And yesterday, you were mentioning the fact that you are in favour of some sort of therapeutic intervention being made available, prior to the criminal

process being completed and that that shouldn't touch on the facts of a particular case. And you also mentioned that two complainants shouldn't be sitting in the same waiting room together.

Would it be your opinion then that ideally, complainants should be physically separated when at all possible?

**MS. HARVEY:** Yes.

**MS. MAKEPEACE:** Thank you.

And should a Crown prosecutor become aware of discussions among alleged victims, since their original statement was given, despite warnings to the contrary, would it be advisable that they should be re-interviewed -- the alleged victim should be re-interviewed to see if the story has changed?

**MS. HARVEY:** I don't know about that. You see, there's two issues. One is whether or not they are comparing stories and it is having an impact and the other is the impression that is left.

**MS. MAKEPEACE:** Certainly.

**MS. HARVEY:** And there's the possibility of a reasonable doubt being raised, when in fact no discussion whatsoever has taken place. That's why I say it's important, and even though it's impossible in many circumstances, because we're talking about family members

and what you're asking of them is that, at Christmas, they just don't come together. But probably, one of the main reasons why you're doing that is because of the adversarial process and the fact that Defence will basically be suggesting to the trier of fact that they shared the stories, whether or not that's true and whether or not the witness on the stand is -- you know, they're saying "No, we didn't. In fact, we were told not to talk and we didn't talk." But the trier of fact might still be left with a reasonable doubt, if we're talking about family members.

So I think -- you know, I just want to make it clear that it's not my experience that -- my concern is as much for the actual sharing of stories or the actual -- my concern is as much for the impression that's being left, as it is for the actual sharing of stories.

**MS. MAKEPEACE:** Okay. So equally so.

But I guess my question, what it was getting at was more, should a prosecutor turn their mind to that potential and maybe do some investigating to determine whether in fact, you know, have there been discussions? Was there sharing of information and whether or not their story has changed as a result of that? It's more just taking steps to satisfy themselves, I guess.

**MS. HARVEY:** I believe they do need to turn their mind to it, and I personally would suggest that both

the police and the prosecution should do whatever they can do so they are not facilitating the meeting and the discussions amongst witnesses, when a trial is pending.

**MS. MAKEPEACE:** Okay. I'm just going to put a hypothetical to you now. If a prosecutor learns that a third party, who is not part of the investigative or prosecutorial team, makes contact with an alleged victim, solicits information from them about their allegations, advises them perhaps about how to proceed and advises them or provides them with some information about other cases, can you tell me would this scenario be an example of witness tainting in your view?

**MS. HARVEY:** I would have to know more about what they said.

**MS. MAKEPEACE:** Just the fact that they have been approached and asked to divulge details about their allegations and given advice on how to proceed?

**MS. HARVEY:** I would need to know specifically what was said, because there's a lot of people who provide services to victims and witnesses and they're actually doing a helpful service ---

**MS. MAKEPEACE:** Right.

**MS. HARVEY:** --- by informing them about the process.

**MS. MAKEPEACE:** Certainly.

**MS. HARVEY:** Giving them some ideas and it certainly wouldn't be considered tainting.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** So I think that analysis would have to be more comprehensively analyzed.

**MS. MAKEPEACE:** Okay. What if I change that slightly to say that this third party was a police officer who was not acting in the course or under authority and, in fact, was acting contrary to specific orders not to get involved with these types of investigations, would that be an example? Would you be able to qualify whether that was witness tainting?

**MS. HARVEY:** Okay. I guess I need to know what you consider tainting. Are you thinking that I've got some sort of unique understanding of tainting? Because what is -- what do you mean by tainting?

**MS. MAKEPEACE:** Involving -- in becoming involved, I guess, in the process.

**MS. HARVEY:** Well, that's different from tainting, I think.

**MS. MAKEPEACE:** Well, I think I should throw that to you then. I mean, that's the scenario.

**MS. HARVEY:** M'hm.

**MS. MAKEPEACE:** So do I understand that that, in your view, is not enough and that would not

constitute or not necessarily constitute witness tainting or be an example of that? I'm not sure how else ---

**MS. HARVEY:** Okay. Well, you know, I don't use the expression "witness tainting" myself, and so maybe we need a meeting of minds on what witness tainting is. But if witness tainting -- you're suggesting that there is somebody who is trying to influence ---

**MS. MAKEPEACE:** That's right.

**MS. HARVEY:** --- a witness?

**MS. MAKEPEACE:** Yes, hypothetically speaking.

**MS. HARVEY:** And influence a witness. I mean, we all try to influence witnesses, don't we, because I have a child who is frightened to come into court and I'm trying to influence them, to comfort them, to come into court.

But on the other hand, you're talking about an influencing that is somehow an agenda that is inappropriate.

**MS. MAKEPEACE:** That's right. Outside of the criminal justice process, outside of any function. In your example, you are -- that purpose is specific to the court process, I guess, and is a separate agenda, I suppose.

**MS. HARVEY:** But what about a mother who

tries to comfort her child to come into the court, are they tainting?

**MS. MAKEPEACE:** Let's perhaps change it to not dealing specifically with children. I don't know if that makes any difference.

**MS. HARVEY:** You know, because there are -- like Lily Tomlin once said, "We're all in this together alone." And when a witness comes into court, they are very alone and sometimes they seek assistance from friends. And you know what? Sometimes that assistance is sought at a bar over a beer.

**MS. MAKEPEACE:** M'hm.

**MS. HARVEY:** And the friend will say something like, "I'm behind you. It's okay. After you testify, we'll go and have a couple." Is that tainting? No, that is supporting a witness. So I don't know what this police officer said and, frankly, it might have been an agenda that had nothing sinister about it whatsoever --

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**MS. MAKEPEACE:** M'hm.

**MS. HARVEY:** --- that was supportive.

And so, for me to cast judgment on basically what transpired and whether or not it was proper or not proper, I don't feel I could do thatm without actually seeing what was said.

**MS. MAKEPEACE:** Fair enough. I'll move on to the next area then.

There's another reference in the last bullet on page 8 to alleged victims who have already reported their allegations to police, identifying new victims, who had not come forward on their own.

Now, in this sort of a situation, is -- and I take it that would be a concern for a prosecutor or should be a concern?

**MS. HARVEY:** Sorry, I lost you a little bit, just because you were going a bit too fast for me to follow. It might be my age. I apologize.

**MS. MAKEPEACE:** I doubt it. Probably I'm too fast.

Did you want to just take a look then at the bottom bullet?

**MS. HARVEY:** Okay.

**MS. MAKEPEACE:** The last sentence:

> "Witnesses identify new victims who have not come forward on their own."

**MS. HARVEY:** Right.

**MS. MAKEPEACE:** Is that a concern?

**MS. HARVEY:** What do you mean by a concern? Yes, what do you mean?

**MS. MAKEPEACE:** If a witness goes out into

the community, suspects somebody else was also victimized and approaches them about whether or not they were a victim of sexual abuse, is that a concern to a prosecutor that that particular alleged victim is doing that, is going out and speaking to other people that they suspect?

**MS. HARVEY:** Well, you know what? I would prefer that the police did that, but this happens a lot.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** And it's a reality and it's a concern from the point of view of there's more victims out there which is a very unfortunate, tragic thing.

**MS. MAKEPEACE:** Yes.

**MS. HARVEY:** But it's not a concern that would somehow turn me against witnesses and their credibility or, for that matter, the new victims.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** Unless I saw something going on that was collusive or there was some sort of conspiracy, but I've never seen that. So in answer to your question, I would only be concerned that, "Look, it looks like there's more people who have been victimized," and that's too bad. That's a problem.

**MS. MAKEPEACE:** All right.

If we can move to the third bullet in that block that's showing on the screen? The notion of

hysteria, I would just like you to take a read through that bullet.

Now, as hysteria is used in that sentence, is it fair to say that a possible definition is that it's an extreme emotional state?

**MS. HARVEY:** M'hm.

**MS. MAKEPEACE:** And that it could be incited by other people, as well as environmental factors. Is that a fair statement?

**MS. HARVEY:** Well, what happens is -- yes. So it's like so much of what transpires with us, as humans, is that we've got our internal and there's the external stimuli and we all respond to things differently.

So, I heard of a case in the notorious prosecution in British Columbia, *Regina v. Noise*, where there was a child who came forward and was very upset about having been abused by Noise, and as it turned out, he wasn't even at the same school.

So, something upset this child and that child was convinced that they were a victim of abuse of this particular teacher and, as it turned out, the investigation revealed that this child was nowhere near Mr. Noise.

Now, you know what? Maybe that child was abused by someone else and those matters were never

answered. But it's an example where people read things in the media or hear things and they draw conclusions about their own experience that are incorrect and they seem to be steered by their emotional response.

**MS. MAKEPEACE:** Okay. And I take it the number of the conceivable contributors to hysteria are probably endless in terms of thinking of all of the possible things that might actually feed into inciting hysteria. Is that fair to say?

**MS. HARVEY:** I think that's fair to say.

**MS. MAKEPEACE:** And I'm going to run through a list of a few items, and if you can just let me know, whether in your opinion these could be possible contributors?

**MS. HARVEY:** Contributors to ---

**MS. MAKEPEACE:** To hysteria.

**MS. HARVEY:** --- to extreme emotional response?

**MS. MAKEPEACE:** M'hm.

**MS. HARVEY:** Okay.

**MS. MAKEPEACE:** Collusion between alleged victims.

**MS. HARVEY:** You lost me now. You're saying -- so if there's two people who sit down, like a wife and an ex-wife and they're talking about the husband, that

somehow that collusion would contribute to hysteria? I don't understand.

**MS. MAKEPEACE:** Let's say two alleged victims in the community that know each other socially that meet and start discussing their circumstances, and as a result of those discussions -- is it possible that as a result of those discussions that that can contribute to hysteria for one or the other? Is it a possibility?

**MS. HARVEY:** I don't know.

**MS. MAKEPEACE:** Okay. What about the encouragement and facilitation of civil suits, including class action suits?

**MS. HARVEY:** You've got to tell me more because ---

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** I'm sorry, you're losing me on how these are contributing factors.

**MS. MAKEPEACE:** Say a victim is approached and advised that there's going to be a meeting with other alleged victims and we're bringing in a lawyer and we're going to sit down and we're going to talk about what our options are. Is that sort of a setting, that scenario, a possible contributor to this notion of hysteria?

**MS. HARVEY:** Okay. Now, are you also asking me to give a decision or give an opinion on whether or not

it would contribute to misinterpreting, or is it just hysteria?

**MS. MAKEPEACE:** I'm not there yet. Yes, just hysteria.

**MS. HARVEY:** Well, put it this way, I know there is such a thing as litigation stress. I know that there are some people who would want nothing to do with litigation whatsoever, and I know that when those people will be forced into that possibility and if they feel they're being forced in a way that they can't get themselves out of it, it might be emotionally trying.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** So I don't know if that helps. I hope it does.

**MS. MAKEPEACE:** Okay. Moving on to another. If there is rumour and innuendo permeating a community that there's an alleged clan of pedophiles, that rumour floating around, does that feed into the notion of hysteria? Is it possible that it does?

**MS. HARVEY:** Yes, that one's a lot easier for me.

**MS. MAKEPEACE:** Okay. If there's rumour and innuendo permeating the community that there's a conspiracy to cover this up, to cover up the sexual abuse of children allegedly perpetrated by powerful community members, is

that the sort of thing that also may contribute to hysteria?

**MS. HARVEY:** So you're talking about members of the community who feel betrayed by their community and so that they feel powerless, that there's no response to their concerns?

**MS. MAKEPEACE:** That's right.

**MS. HARVEY:** That might be emotionally trying for them.

**MS. MAKEPEACE:** And also, and you may have already answered this, but ongoing and intense media coverage of high profile prosecutions of community members, would that also be the type of thing that might contribute?

**MS. HARVEY:** Yes, particularly if they can somehow connect themselves, like if they know those people or if their children are going to that school or attending that church or whatever, that might be quite concerning for them.

**MS. MAKEPEACE:** Okay. And moving on then to the next part of that then, and I take it from the outline that it is possible that a state of hysteria may shape an alleged victim's conduct. And you provide a couple of examples there, the first being the creation of memories. I think you made an earlier reference to this during your cross-examination by Professor Manson, that -- would this

include making allegations of events that never happened that an alleged victim may come to believe actually did happen? Is that the type of thing you're referring to there?

**MS. HARVEY:** Well, that type of response is extraordinary.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** But it has happened.

Here I'm thinking more of where one -- let's say, an example where you've got a Mr. X and Mr. X met a woman, and in the course of doing that shook her hand and touched her shoulder, and perhaps what would appear to be accidentally brushed against her breast, and then the next day this woman reads in the paper that he's being investigated for sex crimes. When the original encounter took place she felt that the touching of her breast was innocent. After having read about the investigation she decides that it was likely a sinister -- there was a sinister motive and in fact it was an intentional touching of her breast and in fact it was a sexual assault.

So that's the type of thing that I'm talking about in interpreting or misinterpreting conduct.

**MS. MAKEPEACE:** Okay. What about the creation of memories though?

**MS. HARVEY:** Well ---

**MS. MAKEPEACE:** Or are those two concepts linked? I may have lost ---

**MS. HARVEY:** No, they're not linked.

**MS. MAKEPEACE:** So the creation of memories, would that include making allegations of events that never happened but that somebody comes to believe?

**MS. HARVEY:** There is such a phenomena as the creation of memories, and I heard it described by Steven Ceci when I was in Italy in 1992 and he actually played a tape of a young person who was being debriefed after his family members had created a memory for him. So there is a phenomena of that.

Now, that was a laboratory piece of research, and so the researchers are asking us to be cautious that in fact memories can be created.

And the type of thing where it might be created, I heard of another example in the United States where a woman was convinced that her ex-husband was abusing their child and was -- the child found herself in an exercise where the mother was saying basically "Are you sure he didn't do this? Are you sure he didn't touch you? Are you sure he didn't?" And one time the child saw the mother crying and he said "Mom, what's wrong?" and she said "It's because you won't tell the truth about what your father is doing." And eventually through time it was

apparent that the child eventually did disclose some abuse and the therapists and counsellors concluded that that was actually a memory created by the mother's relationship with the child and that in fact it wasn't a real abusive situation.

So as long as there are examples out there about that and as long as we know of some of the reactions that people have about the presence of suspected abusers in our environment, then we need to be cautious about these things.

But it certainly isn't my evidence, and I'm not an expert in this in any event, but I'm sure if you were listening to an expert they wouldn't be saying "So everybody, for every case and every complaint, you have a sex crime. Please look at it and make sure it's not a created memory" because that's not our reality.

**MS. MAKEPEACE:** Okay. But in cases where you see evidence as a prosecutor of this notion of hysteria, those might be the kind of cases where you may turn your mind to that? Is that essentially what we can take away from that bullet?

**MS. HARVEY:** Well, what you can take away from this bullet is that these matters need to be investigated.

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** And a good investigator would uncover this pretty darn quick ---

**MS. MAKEPEACE:** Okay.

**MS. HARVEY:** --- if it were a created memory.

**MS. MAKEPEACE:** Thank you.

And just quickly, one last area, just -- there's a brief reference to wrongful convictions on page 25. If we could flip to page 25 of the outline, and just down slightly. That's perfect.

It's stated there that:

> "Although the emphasis is on murder convictions, the issues and concerns affect child and historic abuse cases as well where identity is the issue."

Would it be fair to say that a prosecutor examining the risk of a wrongful conviction in a sexual assault or a historical sexual assault case ought not to be limited just to those cases where identity is an issue?

**MS. HARVEY:** Okay. So explain to me then what -- you know, because what you're saying, I think, a Crown prosecutor always has to be ---

**MS. MAKEPEACE:** That's what I'm getting at.

**MS. HARVEY:** --- responsible ---

**MS. MAKEPEACE:** Yes.

**MS. HARVEY:** --- about ensuring that -- you know, you've seen the screening tests, and a part of our responsibility is ensuring that not only that you know, what was the -- we call it substantial likelihood of conviction, but it's substantial likelihood of conviction based on good sound evidence.

So yes, an important part of our job is ensuring that the community is protected by our responsible consideration of the investigations and the conduct -- and conducting the trials that we do, but it's a given that we do this within the context that there is the ultimate fairness to the accused and ensuring that no one is wrongfully convicted. And in fact, I know many who say that the Crown prosecutor is more of a gatekeeper for that particular issue and concern than the Defence lawyer.

**MS. MAKEPEACE:** Those are my questions. Thank you very much.

**THE COMMISSIONER:** Thank you.

Mr. Manderville.

**MR. MANDERVILLE:** Good afternoon, Mr. Commissioner. Good afternoon, Ms. Harvey.

**MS. HARVEY:** Good afternoon.

**MR. MANDERVILLE:** My name is Peter Manderville. I'm counsel for the Cornwall Police. I have no questions for you today, but I'd like to thank you,

along with my colleagues, for coming here and providing us with the benefit of your experience.

**MS. HARVEY:** Thank you very much.

**THE COMMISSIONER:** Mr. Kozloff.

**MR. KOZLOFF:** Good afternoon, Ms. Harvey.

**MS. HARVEY:** Good afternoon.

**MR. KOZLOFF:** I'm counsel for the Ontario Provincial Police. As I told you yesterday, I thank you for helping me recover my memories of being Crown prosecutor 25 years ago.

**MS. HARVEY:** I'm sorry about that.

**(LAUGHTER/RIRES)**

**MS. HARVEY:** I hope it wasn't too traumatic for you.

**MR. KOZLOFF:** Some of which are rather traumatic. And I thank you for your evidence as well. Thank you.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** Thank you.

Mr. Wallace.

**MR. WALLACE:** My name is Mark Wallace. I'm counsel for the Ontario Provincial Police Association.

**MS. HARVEY:** Good afternoon, sir.

**MR. WALLACE:** Good afternoon to you too.

I have no questions for you, and I, like the

rest of my colleagues, would like to thank you for your attendance and the insights you've provided us today and yesterday.

Thank you.

**MS. HARVEY:** Thank you.

**THE COMMISSIONER:** All right.

Ms. Tymochenko.

**MS. TYMOCHENKO:** No questions.

**THE COMMISSIONER:** No questions?

**MS. TYMOCHENKO:** No, sir.

**THE COMMISSIONER:** Re-examination?

Do we have anyone else, Ms. Morris? No. That's it.

**MS. MORRIS:** No re-examination, Mr. Commissioner.

**THE COMMISSIONER:** Thank you.

**MS. MORRIS:** I understand that the January 15th and January 18th hearing dates have been cancelled; that is, the Monday and the Thursday of that week.

**THE COMMISSIONER:** So we'll be starting on the 16th then at 10:00 o'clock.

Thank you.

**MS. MORRIS:** Thank you.

**THE COMMISSIONER:** I'd like to thank you once again for coming from so far. On your way home I wish

you the best in this festive season and all the best in your career.

**MS. HARVEY:** Thank you very much, Mr. Commissioner.

**THE COMMISSIONER:** And to all of you, I want to wish you and yours a very great festive season and hope that you will take the time to rest and recharge and we'll see you all on January 16th.

Thank you.

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

The hearing is now adjourned. L'audience est ajournée.

---Upon adjourning at 3:29 p.m./

L'audience est ajourneé à 15h29

# 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-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.

_____

Sean Prouse, CVR-CM