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Bill C-2: A New Law for Canada's **Child Witnesses**

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Bill C-2[FN1] introduces significant procedural and substantive amendments that are intended to increase protections for children, women and vulnerable adults from various forms of exploitation. It strengthens child pornography laws by broadening the definition and increasing penalties, and it creates several new offences, including sexual exploitation of adolescents, advertisement of child pornography and voyeurism. As well, it changes the provisions and principles of sentencing for child-related offences involving abuse, neglect or sexual exploitation, including a minimum mandatory sentence for certain sexual offences. The legislation also has significant amendments that facilitate the giving of testimony by children and other vulnerable witnesses. While these new procedural provisions are likely to be most commonly applied in sexual abuse cases, they apply to any case in which a child or vulnerable adult is a witness.

This article deals with the procedural and evidentiary reforms in Bill C-2, and considers their effect on Canada's criminal justice system. While the new offence and sentencing provisions will apply only to offences occurring after they came into force November 1, 2005, the procedural and evidentiary provisions which amend the *Criminal Code* and *Evidence Act* apply to trials held after they come into force January 2, 2006, even if the offences occurred earlier.[FN2]

Overview and Context

Historically, the common law regarded children as inherently unreliable. In 1893, Canada enacted its first statutory provisions concerning child witnesses, permitting children to give unsworn evidence, provided a court found that the child "possessed sufficient intelligence" and understood "the duty to speak the truth."[FN3] A child's unsworn evidence was viewed with suspicion, and there was a statutory requirement for corroboration of a child's unsworn testimony. Further, no steps were taken to accommodate children when they testified in court, and children did not frequently testify. In the 1980s there was an increased awareness of the under-reporting of child abuse, and a growing body of research about child witnesses. There is a large body of psychological research which establishes

that children as young as four years of age can provide important, reliable evidence about events that they have experienced or observed.[FN4]

In 1988, there were significant amendments to the procedural and evidentiary law governing child witnesses, allowing the use of such testimonial aids as videotaped statements, screens and closed circuit television.[FN5] The *Canada Evidence Act* was also amended to permit a child who was able to "communicate the evidence" to testify on a promise to tell the truth. In 1993, the Supreme Court of Canada upheld the constitutional validity of a number of these provisions, emphasizing that these reforms facilitated the truth-seeking function of the criminal justice process without compromising the rights of the accused to a fair trial.[FN6]

While prior reforms have been significant, there remained substantial concerns about the treatment of vulnerable persons in the justice system, and the difficulty in prosecuting cases in which they are witnesses. Even after the 1988 reforms, in some important respects the justice system failed to treat child witnesses fairly. The Preamble to Bill C-2 states that Parliament "wishes to facilitate the participation of children and other vulnerable witnesses" in the criminal justice system "while ensuring that the rights of accused persons are respected." The court system requires a fair and balanced approach to witnesses, one that recognizes that children have different needs and capacities than adults, and that, like adults, they can provide reliable evidence, as well as lie or make mistakes in their recollection of events.

Bill C-2 changes the approach for determining if child witnesses are competent to testify, allowing children to testify if they are able to understand and respond to questions. The new legislation will facilitate use of testimonial aids, including support persons, screens and closed circuit television, in cases involving children and vulnerable adults. It also facilitates the use in court of video recorded statements made by a child or disabled adult, if the witness adopts the content of the recording when he or she testifies.

One note about terminology in Bill C-2: consistent with recent practice in statutory drafting, the term "victim" is used rather than "complainant." The definition section of the *Criminal Code*, s. 2, provides that the term "victim includes the victim of an alleged offence."

The Competency Requirement: Section 16 of the *Canada Evidence Act*

The competency inquiry (or *voir dire*) has long been a critical, initial challenge for child witnesses. For young children these inquiries could be confusing and intimidating, and sometimes resulted in children who were capable of giving important evidence being prevented from testifying.

Under the 1988 version of s. 16 of the *Canada Evidence Act*, before a child under the age of fourteen can testify, the court is required to conduct an inquiry to determine if the child understands "the nature of an oath" or solemn affirmation. Those without religious beliefs relating to an oath or who choose not to testify under oath may solemnly affirm, which has the same legal effect as testimony under oath. Interestingly, it seems that judges rarely ask children to affirm, and there are no reported Canadian cases in which children have been asked questions about their understanding of the solemn affirmation.

Historically, in order to demonstrate an understanding of the oath, children were required to state that they expected "divine sanctions" if they told a lie under oath. More recently, it has been accepted that the focus of the inquiry about the oath should be whether the child understands the moral significance of making a commitment to tell the truth, and appreciates the importance of telling the truth in court proceedings, and not on the spiritual significance of an oath.[FN7] However, many trial judges have continued to ask children intrusive questions about religious beliefs and observances as part of the inquiry about the oath.[FN8]

If the child cannot demonstrate an understanding of the nature of an oath, s. 16(3) permits a child to testify if the child is "able to communicate in court . . . on promising to tell the truth." While the 1988 legislation did *not* state that there should be an inquiry into a child's understanding of such concepts as "truth," "lie" or "promise," the courts have interpreted s. 16(3) to mean that a child could only give unsworn testimony if the court conducts an inquiry to satisfy itself that the child can *demonstrate* an understanding of the duty to speak the truth.[FN9] This involves inquiring into the child's understanding of the nature of a "promise," and into the child's understanding of the meaning of "truth" and "lie."[FN10] Adults are not asked these challenging questions before being asked to testify,

and laboratory based psychological research has established (not surprisingly) that a child's ability to correctly answer questions about the meaning of various such abstract concepts as "truth" and "promise" is not related to whether a child will actually tell the truth.[FN11]

The final requirement for competency to testify under the 1988 *Canada Evidence Act* is that a child, giving either sworn or unsworn testimony, must be "able to communicate the evidence." In *R. v. Marquard*, McLachlin J. indicated a relatively brief inquiry could satisfy the "ability to communicate" test, stating that the judge should explore "in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court."[FN12] This is usually done by asking the child questions about a past event, like a previous birthday, that is not the subject of the proceedings.

The New Competency Standard: s. 16.1 of the *Evidence Act*

Bill C-2 leaves s. 16 of the *Canada Evidence Act* essentially unchanged for proposed witnesses fourteen or older whose mental capacity is challenged. A new s. 16.1 establishes a completely new approach for qualifying children under the age of fourteen, and securing their commitment to telling the truth to the best of their ability.

> **Person under fourteen years of age**
>
> 16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.
>
> **No oath or solemn affirmation**
>
> (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
>
> **Evidence shall be received**
>
> (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
>
> **Burden as to capacity of witness**
>
> (4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
>
> **Court inquiry**
>
> (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
>
> **Promise to tell truth**
>
> (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
>
> **Understanding of promise**
>
> (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
>
> **Effect**

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

The new provision begins with the statement in s. 16.1(1) that children are "presumed to have the capacity to testify," while s. 16.1(4) places a burden on the "party who challenges the capacity" of a child to "satisfy the court that there is an issue as to the capacity" of the child "to understand and respond to questions." Subsection 16.1(4) might suggest that there is an onus on the party not calling the child as a witness (usually the accused) to raise the issue of competence. However, s. 16.1(5) provides that if the judge "is satisfied that there is an issue" as to a child's capacity to "understand and respond to questions," then before permitting the child to testify, the judge "shall conduct an inquiry" to determine whether the child is "able to understand and respond to questions." The words of s. 16.1(5) clearly suggest that the court itself or the party calling the child witness (usually the Crown) may also raise the issue of a child's competence, though the effect of ss. 16.1(1) and (4) is that there will be a presumption of competence at the inquiry.

It is clearly preferable for the child for any issues about competency to be dealt with prior to the child giving evidence; further, there might be some risk of a mistrial if a child is called as a witness and begins to testify without an inquiry and then proves unable to answer most of the questions posed. The practice of taping of investigative interviews with the child by police or social workers and disclosure to defence counsel of the tapes should minimize these risks, as defence counsel should be in a position to have assessed whether the child is competent to answer questions prior to the child being called to the stand. It would also be a good practice for judges to ascertain at the time that a child is called to the stand whether the defence is challenging the competence of the witness, or accepts the child's competence.

The words of the new s. 16.1(5) are different from the words of the inquiry carried out under the 1988 provisions, which focused on whether the child "is able to communicate the evidence." The former competence inquiry concerned the capacity of the child to communicate about past events in general.[FN13] A child was required to be capable of giving more than "yes" or "no" responses to straightforward questions.[FN14] The courts also required that the child demonstrate an ability to distinguish between fact and fiction, and a capacity and a willingness to relate to the court the essence of what happened to him or her.[FN15]

Given the new test of "ability to understand and respond to questions," the issue under the new test is whether the child has basic cognitive and language abilities. Whether a child witness is able to understand and respond to questions will be a matter for the judge to determine, and expert testimony will not normally be required.[FN16] In "exceptional circumstances," where the child would be so traumatized by the experience of appearing in court even for the limited purpose of establishing the inability to understand and respond to questions, an expert might be called to establish that the child is *not* able to testify.[FN17] If the inability to testify is established to the satisfaction of the court, this may be a ground for establishing the "necessity" for the admission of hearsay evidence instead of having the child testify.

In theory, the new language concerning communication capacity suggests a somewhat less onerous inquiry, but in practice the application of the test is likely to be very similar to the part of the old inquiry that focused on the child's capacity to meaningfully communicate evidence in court. It is submitted that, as required by the Supreme Court in applying the test in the 1988 *Evidence Act* in *R. v. Marquard*,[FN18] there should be a relatively brief inquiry into whether the child has the capacity to remember events and answer questions about those events. The inquiry into the child's capacity should be conducted by having the judge or counsel ask the child questions about a non-contentious past event. The judge has a duty to ensure that the questions that are posed to the child during this inquiry, and later in the proceedings, are appropriate to the child's stage of development, with age appropriate vocabulary and sentence structure.[FN19]

Prior to the 1988 amendments, trial judges always took the lead in actually asking the child questions, and counsel would then be given the opportunity to ask further questions. As with the 1988 provisions, Bill C-2 specifies that "the court shall conduct" any inquiry necessary to establish the competency of a child witness to testify. It has been held that under the 1988 provisions it is sufficient for the judge to control the process and make the determination of competency to testify, but it is not necessary for the judge to take the lead in asking the questions.[FN20] Judges increasingly appreciate that the counsel who calls the child as a witness (almost always the prosecutor) is a more

suitable person to take the lead in questioning the child. The prosecutor should have met the child before court and the child will be more familiar with that counsel, and more comfortable in answering questions from that person during the invariably stressful first minutes in the courtroom.[FN21] This approach continues to be appropriate under the new provisions in s. 16.1.

Subsection 16.1(2) and (6) provide that a child under fourteen years of age shall not testify under oath or solemn affirmation, but rather shall give a "promise to tell the truth." These provisions remove the possibility that a judge or counsel might want to attempt to determine whether a child might be permitted to testify under oath by requiring the child to answer questions about the nature of an oath, or intrusive questions about religious understandings or observance. This will ensure that all child witnesses receive the same treatment.

Subsection 16.1(6) specifically requires a child to make a "promise to tell the truth" before testifying. The process of a witness -- whether a child or an adult -- making a commitment to tell the truth has symbolic importance for all of those involved in the justice process. Further, psychological research suggests that children who have promised to tell the truth may be more likely to tell the truth, even if they are not able to provide a *definition* of "promise" or "truth."[FN22] (Interestingly, there is no comparable research for the effect of an oath, solemn affirmation or promise on adults.)

However, in a very significant change from practice under the 1988 law, s. 16.1(7) specifies that "[n]o proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court." This provision is clearly intended to preclude the judge or counsel from asking a child questions about the definition or meaning of such abstract concepts as "promise", "truth" and "lie" as a condition of being permitted to testify. Under the new provision, it is clear that children are not expected to demonstrate that they understand the duty to speak the truth or can define abstract concepts. These changes to the competency inquiry reflect the psychological research which demonstrates that the previous cognitively based inquiry might exclude children who were in fact competent to give honest, reliable answers to questions.

A result of the changes to the competency test for children is that children and adults are now treated in a more similar manner. By requiring children to demonstrate that they understood the "nature of an oath or solemn affirmation," judges were requiring more of children than of adults. Adults are not asked to define abstract concepts like "oath" before they are permitted to testify, even though a significant portion of adult witnesses are not able to give a good definition of this abstract concept. Children (and often adults) often understand and correctly use words without being able to answer questions that require them to provide a definition. For both adults and children, the process of promising or swearing an oath serves to impress on the witness and others in the court the solemnity of the occasion. While having a child promise to tell the truth provides no guarantee of the honesty of the witness, it does no harm, and may do some good.

Though Bill C-2 does not provide detailed directions about how a judge is to deal with a child who is called as a witness, the language used in the new s. 16.1 suggests that when the child takes the stand, after initial introductions, the judge or counsel who has called the child as a witness should ask the child preliminary questions about name, and such matters as age, school, and residence, and then about one or two past events not related to the matters at issue, such as a previous holiday.[FN23] This initial questioning is intended to allow the court to ascertain whether the child is "able to understand and respond to questions." This questioning about non-contentious matters may also help the court to understand the child's speech and vocabulary, and will help the child feel less uncomfortable in court and hence able to be a more effective witness.

While s. 16.1(7) makes clear that the answering of questions about the promise is not to be a condition of the child testifying, it is submitted that the judge may give the child simple instructions about the role of a witness in court.[FN24] This might include brief instructions about the importance of telling the truth.[FN25] The child may also be encouraged and instructed during this initial period about the need to give responses that are as detailed as possible. Children should also be reminded that, if there are questions which they do not understand, they should indicate this to the court, and if there are questions that they cannot answer, they should not guess at answers, but rather should respond "I don't know."[FN26]

Section 16.1(8) makes clear that if a child testifies after giving a promise to tell the truth, this "shall have the same

effect" as if the child testified under oath; that is, there is to be no discounting of the evidence of a child merely because the child has not given an oath. This new provision addresses a common judicial view that, under the 1988 Act, there was a distinction between the sworn and unsworn testimony of a child. It has not been uncommon, in the charge to the jury, for the judge to advert to the fact that a child did not testify under oath as a possible reason for discounting the child's testimony, [FN27] even though there is no legislative authority for this practice and no research to support it. This practice should no longer occur, since all children will testify on the basis of a promise to the truth. While a judge might caution a jury about inconsistencies or frailties in the testimony of any individual witness, including a child, there should not be a warning for classes of witnesses, such as children.

In the past, the intrusive inquiry required by s. 16 was upsetting to children, a waste of court time and did nothing to promote the search for the truth. Some children who could give honest, reliable evidence were precluded from testifying, potentially resulting in miscarriages of justice. The changes created with the passage of Bill C-2 should address those concerns, by making it simpler for child witnesses to testify, through the introduction of a more logical competency test. Social science research establishes that the old practice of requiring children to "correctly" answer cognitive questions about the meaning of such abstract concepts as "oath", "truth", or "promise" did not increase the likelihood that a child would give honest or reliable testimony. Examining a child witness' ability to meaningfully understand and answer questions is a more realistic criterion to use to determine whether a child is competent to testify. If the child is found "able to understand and respond to questions" about past events, the child will invariably have sufficient basic understanding of the concepts involved to give him or her some appreciation for the significance of "promising to tell the truth." Asking the child to promise to tell the truth but not expecting the child to explain the significance of this undertaking is the same as how adults who testify under oath are treated.

Accommodating Child Witnesses -- Timing of Applications

The 1988 amendments to the *Criminal Code* were intended to facilitate the giving of testimony by children by recognizing and accommodating their vulnerability, including provisions for court orders to allow the use of testimonial aids such as a screen and closed circuit television, and to permit a support person to sit close to a child to provide emotional support. These provisions, however, have not been frequently used.[FN28] Bill C-2 is intended to address the limited use of the accommodation provisions in a number of ways.

One significant limitation to the 1988 provisions is that applications were generally only made at the start of the trial, and in some cases at the start of a child's testimony. This was stressful for children, as they did not know how they would be testifying, and in particular whether they would again have to see a person who they were claiming had harmed or threatened them. It also made it difficult for prosecutors and police to prepare for the use of such aids, in particular to know whether closed circuit television equipment should be arranged. As a result of the uncertainty about whether accommodations would be permitted, prosecutors were reluctant to request them, which contributed to their limited use.

Bill C-2 addresses the limited use of the accommodation provisions in a number of ways. One significant change is that applications for the use of accommodation provisions can be made "*before* the proceedings begin to the judge or justice who will preside in the proceedings," as well as during the proceedings. The pre-trial (or pre-preliminary inquiry) applications can be made to allow a support person to sit close to the witness (s. 486.1(2.1)), to permit use of a screen or closed circuit television (s. 486.2(2.1)) and to prohibit personal cross-examination (s. 486.3(4.1)). There are no provisions that explicitly govern how these early applications are to be made. Clearly such Crown applications are to be made on notice to the accused. It would seem that the application may be made without written documentation,[FN29] though if the application is contested by the accused, the Crown should be prepared to adduce evidence to support the application.

The early applications will facilitate logistical preparation, and should provide children and other vulnerable witnesses with more certainty about the court process, and hence reduce their stress and increase their effectiveness as witnesses.

Support Person: s. 486.1

In addition to changes in the law, over the past two decades there have been great improvements in the training of police, prosecutors and social workers in the support of victims, especially child victims. Court-related services have

been established across Canada for children and other vulnerable persons who are victims and witnesses. The workers in these services provide emotional support and information about the unfamiliar and often intimidating justice system, and can provide some help in preparing witnesses to testify. Children who are adequately prepared and supported during the court process are more likely to be effective witnesses, and less likely to be traumatized by the experience of testifying.

Subsections 486(1.2)-(1.4) of the *Criminal Code*, added in 1993,[FN30] allow for the court to permit a support person to sit close to a witness who is under the age of fourteen or suffering from a physical or mental disability. This support person is often a victim-witness worker, but might be a parent or other person, provided that the person is not a witness or otherwise involved in the proceedings. Bill C-2 enacts s. 486.1, significantly expanding the scope of ss. 486(1.2)-(1.4). While the 1993 provisions applied only to a list of specified offences, the new s. 486.1 will apply to "any proceeding." This change recognizes that children and vulnerable persons may find it difficult to testify in any type of case. The 1993 provisions apply to a witness who has a mental or physical disability, or who is under the age of fourteen years; the new provision raises the age from fourteen to eighteen (as well as applying to disabled witnesses), recognizing that adolescents are vulnerable and often are more embarrassed or intimidated by the court process than younger children.

One of the most significant aspects of the new s. 486.1 is that it creates a presumption that children or disabled persons who want to have a support person near when they testify should be able to do so. This new approach is indicated by the language of the provision: the child witness "shall" testify with a support person nearby, "*unless* the judge or justice is of the opinion that the order would interfere with the proper administration of justice." The previous provision was phrased such that child witnesses were only to be permitted to have a support person nearby if the judge or justice deemed it to be *required* for the "proper administration of justice." For children and disabled witnesses, there is now a presumption that this order will be made if requested, with an onus on the party opposing the application to justify the refusal.

There is also a significant addition to this provision, with s. 486.1(2) giving a court the discretion to allow a support person to sit near any witness if this is considered "necessary to obtain a full and candid account from the witness of the acts complained of." The test in s. 486.2(2) has the same wording -- "necessary to obtain a full and candid account" -- as the 1988 provisions for use of the screen or closed circuit television (the 1988 s. 486(2.1)). The new s. 486.1(3) provides a list of factors to be considered in an application under s. 486.1(2): the witness' age, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances the judge may consider relevant. Subsection 486.2(2) may be used in "any proceedings," but is most likely to be invoked in a sexual assault or domestic violence case.

Some of the provisions of the old ss. 486(1.2)-(1.4), which provide some protections for the accused when testimonial aids are being employed, have been retained in the new s. 486.1. Subsection 486.1(4) continues to require that the judge shall not permit a person who is a witness to sit near the child unless "doing so is necessary for the proper administration of justice" (1993, s. 486(1.3)). Like its predecessor, the new s. 486.1(5) provides that a judge may order that, while the witness is testifying, the witness and support person not communicate to each other (1993, s. 486(1.4)). Further, the new s. 486.1(6) provides that "[n]o adverse inferences may be drawn from the fact that an order is, or is not, made under this section." The new s. 486.1(6) is intended to codify the common practice under the 1993 law of having judges caution juries against drawing an adverse inference against the accused from the fact that support person is sitting close to the accused.

The new s. 486.1 should result in more frequent use of support persons and, as a result, should have a positive impact on the experience of children and other vulnerable persons who are testifying in court. While the proper administration of justice remains the ultimate concern under s. 486.1, the court experience should not be unnecessarily traumatic for children, or other vulnerable witnesses. With a presumption in favour of an order being made, there may be greater expectations for prosecutors to request this type of support for vulnerable witnesses.

Closed Circuit Television and Screens: s. 486.2

Children and adolescents often find the experience of seeing the accused in court profoundly distressing, affecting both their emotional well-being and their ability to properly testify. They are often afraid of seeing their (alleged) assailant again and, even if they cannot see the accused because a screen is used, children find it very difficult to

communicate in (what for them is) a very large, strange and intimidating setting -- the court room. When children and adolescents are under the stress of having to recall the abusive or frightening experiences in the intimidating court environment, their emotions and behaviour may regress, especially if the case involves intra-familial abuse or abuse by an adult with a close relationship with the child. Adolescents can be just as upset as young children when testifying because they have a better understanding of sexual matters and feel more shame, embarrassment and humiliation. Adolescents can be extremely self-conscious, and shy away from being the "centre of attention," especially around strangers and can be very concerned about how others will view them. There have been cases of child witnesses so frightened or embarrassed on the witness stand that they were unable to answer questions.[FN31] Greater use should be made of screens, and especially of closed circuit television, which removes the child from the court room; these testimonial aids can reduce the trauma of testifying for children, and permit them to more fully answer questions about their experiences.

The use of closed circuit television is now commonplace in portions of the United States, the United Kingdom, Australia and New Zealand, and since 1988 legislation in Canada has allowed a judge to permit a child to testify from behind a screen or from another room via closed circuit television. However, such provisions have not been frequently used in Canada, and in particular too little use was made of closed circuit television.[FN32]

Subsection s. 486(2.1) of the *Criminal Code*, as enacted in 1988, provides that for a number of listed sexual and violent offences, the court *may* permit a witness under the age of eighteen at the time of the proceedings or having difficulty in communicating evidence due to a physical or mental disability to testify behind a screen or from another room via closed circuit television. Such an order can only be made if the judge is of the opinion that this is "necessary to obtain a full and candid account of the acts complained of from the complainant or witness." The Crown is obliged under the 1988 provision to establish an "evidentiary basis" to justify the making of such an order, which might, for example, come from a parent or mental health professional who has worked with the child.[FN33] Judges had considerable discretion in deciding whether to permit a vulnerable witness to testify from behind a screen or via closed circuit television. The uncertainty about how this provision would be applied may have contributed to Crown prosecutors being reluctant to make applications under s. 486(2.1). The limited use of this provision reflects, in part, the lack of resources, sensitivity and training, but prosecutors and judges also have been constrained by the wording of s. 486(2.1).

Bill C-2 enacts s. 486.2(1), considerably expanding on the scope of the old s. 486(2.1) and the range of situations in which a witness may testify from behind a screen or via closed circuit television. The list of offences for which witnesses may testify using testimonial aids has been eliminated, allowing a child or other vulnerable witnesses to testify via closed circuit camera or behind a screen in any type of case. This is a significant change as there have been cases, for example, in which young children have witnessed the murder of a parent but been denied the opportunity to testify from behind a screen or via closed circuit television because that offence was not included on the list.

Further, if application is made under s. 486.2(1), the judge or justice "shall" make the order to allow a child under eighteen years or a disabled adult to testify from behind a screen or via closed circuit television, "unless the judge . . . is of the opinion that the order would interfere with the proper administration of justice." Children and adolescents will now be allowed to testify from behind a screen or via closed circuit television unless this would prejudice the right of the accused to a fair trial. The changes made to the law are significant because the 1988 provision placed an onus on the Crown or witness to justify the necessity for use of a testimonial aid, while the new provision creates a presumption that a witness under the age of eighteen years may testify from behind a screen or outside the courtroom, without the Crown being expected to provide an evidentiary basis for making the order.

In the past, a major problem with the use of screens and closed circuit televisions was that the issue of their use was only addressed during the proceedings, often as the child was about to take the witness stand. In some cases the prosecutor may have felt that there was in effect a choice between proceeding without the testimonial aid, and arguing a contested motion on the day of court with the risk of perhaps not having enough time to hear all the evidence. The presumption in favour of use of such aids in s. 486.2(1) and the previously noted possibility under s. 486.2(2.1) of making an application for use of such devices *before* the trial begins should encourage their use.

Subsection s. 486.2(2) allows an application to be brought by the prosecutor or a witness to allow *any* witness to testify from outside the courtroom via closed circuit television or behind a screen. This new provision recognizes

that some adults, especially in domestic violence or sexual offence cases, may be vulnerable to intimidation. An order is only to be made if the judge is of the opinion that this is "necessary to obtain a full and candid account from the witness of the acts complained of." This test is the same as was used under the old s. 486(2.1), which allows a child or disabled adult to testify from behind a screen or via closed circuit television, and some of the case law under that provision may still be relevant to these applications. In particular, under s. 486.2(2) the onus will continue to be on the Crown to establish an "evidentiary basis" for the making of an order concerning an adult witness.[FN34] This could be by having testimony from a mental health professional who has treated the witness or, as discussed above, under s. 486.2(6), the witness might testify at the application hearing, using the protections afforded by the device. In some cases, the submissions of counsel may be sufficient. Subsection 486.2(3) provides that the factors that the judge must consider in ruling on the application to allow an adult to testify from behind a screen or via closed circuit television are the same as those listed in s. 486.1(3) to allow a support person to sit near an adult witness. The onus will be on the applicant, usually the Crown, to satisfy the court of the need for such an order.

The new s. 486.2(6), like the former s. 486(2.11), provides a procedure for dealing with possible testimony from the vulnerable witness at the application for making the order for use of a testimonial aid. The judge may permit the witness to make use of the device while testifying on the application. This provision might be useful when an application is being made under s. 486.2(2) for the use of a testimonial aid for a vulnerable adult. However, for a child under eighteen or a disabled adult witness, s. 486.2(1) now creates a presumption that such a device will be used. For these vulnerable witnesses, it will no longer be necessary for the Crown to provide an "evidentiary basis" for the making of an order, and the onus will be on the accused to justify a refusal to make the order by establishing that the use of such a device "would interfere with proper administration of justice." Thus, it will be rare for a child or disabled adult to testify on a s. 486.2(6) application.

Subsection 486.2(8) provides that "no adverse inference may be drawn from the fact that an order is, or is not, made" for the use of a screen, closed circuit television or other device. This codifies what seems to have been a common practice under the 1988 law: jurors are to be cautioned about not drawing an inference against the accused because a child testifies via closed circuit television or from behind a screen. Jurors can be informed that this is usually done in cases involving children and vulnerable witnesses. Subsection 486.2(8) reflects an understandable desire to protect the rights of the accused when testimonial aids are being used, and to ensure that their use does not lead to wrongful convictions.

Certain important aspects of this testimonial aid provision are not altered by Bill C-2. The fundamental trial process of examination and cross-examination are not changed by use of these devices. As before, under the new s. 486.2(7), a witness shall only to be permitted to testify from outside the court room if arrangements are made to enable the accused, judge and jury to watch the testimony by closed circuit television or some other means, and the accused must be permitted to communicate with counsel while watching the testimony.

There have been research studies about the effects of the use of closed circuit television. One theme of the research is that children who testify via closed circuit television are less anxious and fearful, and as a consequence they tend to be more relaxed and audible when testifying.[FN35] Some prosecutors, however, are concerned that children who testify using closed circuit television may appear less credible or convincing. As L'Heureux-Dubé J. observed in *R. v. Levogiannis*:

> it has been remarked that Crown prosecutors are reluctant to request the use of screens because they are concerned that the young complainant may not come across as credible or the child's testimony may have less of an impact . . . The use of a screen could very well be held against a child complainant, who might be judged to be an unreliable witness, because she or he is unable to look the accused in the eye, rather than against the accused.[FN36]

The results of research studies, both in actual cases and in mock juror simulations, are not totally consistent about the effects of having a child testify via closed circuit television or from behind a screen. Some research suggests that this may result in jurors being less likely to convict an accused if a child uses a testimonial aid,[FN37] perhaps because the children are more emotionally distant from the jury or less emotional while testifying, [FN38] but other studies have found that the use of such devices had no effect on conviction rates.[FN39] While there is clearly a need for further research into the use of testimonial aids, it seems that there is no basis for the concerns of some

defence counsel that the use of such devices may result in wrongful convictions. On the other hand, there may be some basis for prosecutors to be somewhat cautious about the use of such aids in cases in which a child is able to effectively testify without such an aid, as their use may have some effect on credibility assessments. It is, however, submitted that the emotional well-being of a child should not be jeopardized for the sake of increasing the likelihood of a successful prosecution.

Accused Not to Personally Cross-examine Vulnerable Witness: s. 486.3

The new s. 486.3 extends the protections first introduced in 1993 when s. 486(2.3) was enacted,[FN40] restricting the opportunity of a self-represented accused to personally cross-examine vulnerable witnesses. The 1993 provision directs the judge in sexual and violent offence cases, on the application of the prosecutor or a witness, to make an order preventing an accused from personally cross-examining a child witness under the age of eighteen, "unless the proper administration of justice" requires this, and if this is done, directing the judge to appoint counsel for the purpose of cross-examination of the child. This provision was intended to spare children from being directly confronted by an alleged abuser, which might be both emotionally traumatic and render effective communication by the child virtually impossible. The new s. 486.3(1) extends the 1993 provision by stipulating that it applies to "any proceeding" in which a child is a witness.

Further, the new s. 486.3(2) allows a judge to make an order preventing personal cross-examination by an accused of an adult witness if doing so is necessary "in order to obtain a full and candid account of the acts complained of." Thus, with children there is a presumption under s. 486.3(1) that if an application is made, an order will be made to prevent personal cross-examination, while under s. 486.3(2) it is necessary for the applicant to justify the reason for the making of such an order. However, for adult victims in harassment cases, the new s. 486.3(4) creates a presumption that an order will be made.

Publication Bans: ss. 486.4 & 486.5

There have long been provisions for court orders to prohibit the publications of identifying information about victims in sexual assault cases and children. These have afforded greater protection to victims, and encouraged reporting of sexual offences.

Bill C-2 largely re-enacts the provisions of ss. 486(3) to (5) without significant changes in ss. 486.4 and 486.5, although including references to the new child pornography provisions and clarifying some of the issues about the process for making the application.

Video recorded evidence: s. 715.1

The potential evidentiary value of video recordings of interviews with vulnerable witnesses has been recognized in many countries, including Canada, with the enactment of s. 715.1 *Criminal Code* in 1988, dealing with interviews with children under the age of eighteen, and the enactment of s. 715.2 in 1998, dealing with interviews with physically or mentally disabled persons.[FN41] Bill C-2 modestly extends these provisions.

Section 715.1 of the *Criminal Code* was an important innovation, recognizing that video recorded evidence can provide an accurate record of the child's statements, made when the child's memory is relatively fresh and in a relatively non-threatening environment.[FN42] The use of videotaped statements can be an important device to aid in the search for the truth of the allegations; if the child has been subject to inappropriate suggestive questions by investigators, this also may be revealed on a videotape.

While police video recording of investigative interviews with vulnerable victims is now common in Canada, the use of videotapes in criminal prosecutions has been limited. Such recordings can be particularly useful for capturing the evidence of children while their memories of the events in question are still relatively fresh. A child's memory fades more quickly than an adult's, and a child may be better able to give a full account of the events if interviewed in a less intimidating surrounding than a court. Bill C-2 should encourage more use of such recordings in court, although in cases where children have a good memory and communication ability, prosecutors may prefer not to use a recording, as a child's detailed in-court testimony can provide more compelling evidence.

Bill C-2 retains the main features of the previous law, as a video recording of a prior interview in which a vulnerable witness "describes the acts complained of" is only admissible if made within a reasonable time after the alleged offence, and the witness testifies and "adopts the contents." As before, s. 715.1 deals with children under eighteen at the time of the alleged offence, while s. 715.2 deals in a very similar way with an adult alleged victim or other witness who is "able to communicate the evidence but may have difficulty in doing so by reason of mental or physical disability." Bill C-2 extends s. 715.1 and s. 715.2 by allowing video recordings to be used in any proceeding, not just a list of specified violent and sexual offences. Thus, for example, it will be possible to have a video recording of an interview admitted in a murder case, which was not possible before Bill C-2 came into force.

Further, provided that the recording was made within a reasonable time of the alleged offence and is adopted by the vulnerable witness, it shall be admitted into evidence "unless the judge is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice." Bill C-2 thus makes clear that there is a presumption of admissibility of a recording that meets the statutory criteria, although a judge has the discretion to exclude the recording if its admission would be unfair. Such an exclusion might, for example, occur if the recording was made by a potentially biased person, such as in a case of sexual abuse allegations against a parent involved in a custody dispute, a recording is made by the other parent of a child's statement. In some cases, the recording may include statements by the child that would not ordinarily be admissible, such as allegations against the accused that are not part of the charges before the court and not admissible, for example, under the similar fact rule; although a court might decide to have the recording edited, in order to admit only the portions that are not unfairly prejudicial, in some cases it will not be possible to do so without destroying the integrity of the prior interview, and the recording should be excluded.

Bill C-2 should encourage the use in court of recordings of interviews with vulnerable witnesses, although there remain important issues of resources and training to ensure that this provision is properly implemented.

Conclusion

While the justice system at one time operated on the basis of erroneous stereotypes about the inherent unreliability of children, psychological research conducted over the past two decades has led to a better understanding of children as witnesses. Research also has examined the experience of children as witnesses, and the changes enacted by the passage of Bill C-2 reflect the increased awareness of the capacities and needs of children and other vulnerable witnesses. Some of the changes, such as the new competency test in s. 16.1 of the *Canada Evidence Act*, will permit children to serve as witnesses who previously would have been prevented from testifying. Other changes in Bill C-2 will enable children and other vulnerable witnesses to testify in a more effective manner, while experiencing less trauma and anxiety. Although children will continue to feel a great deal of stress, and in some cases suffer emotional trauma, from the testifying, the new provisions are a clear improvement. The changes in Bill C-2 should both enhance the truth-seeking function of the criminal justice system and reduce the stress on children and other vulnerable witnesses from their involvement in the legal process.

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FN1. 38th Parliament, 1st Session, Royal Assent July 20, 2005, enacted as S.C. 2005, c. 32. Child witness provisions in force January 2, 2006; offence provisions in force November 1, 2005.

FN2. See R. Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1997), 190.

FN3. For a discussion of history and development of Canada's child witness laws, see Bala, "Child Witnesses in the Canadian Criminal Justice System: Recognizing Their Needs & Capacities" (1999), 5 (2) *Psychology, Public Policy and the Law* 323.

FN4. See e.g. Carole Peterson, "Children's long-term memory for autobiographical events" (2002), 22 *Developmental Review* 370; and S.J. Ceci & M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, DC: American Psychological Association, 1995).

FN5. R.S.C. 1985, c. 19 (3rd Supp.).

FN6. *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289, 25 C.R. (4th) 285 (S.C.C.); *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 25 C.R. (4th) 325 (S.C.C.). See also *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, 154 D.L.R. (4th) 13, 120 C.C.C. (3d) 225, *(*sub nom. *R. v. F. (C.))* 11 C.R. (5th) 209 (S.C.C.).

FN7. *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.) at 380, leave to appeal to S.C.C. refused (1983), 48 N.R. 319 (S.C.C.). In *R. v. F. (W.J.)* , [1999] 3 S.C.R. 569, 27 C.R. (5th) 169 (S.C.C.) at 591 [S.C.R.] (hereinafter "*W.J.F.*"), McLachlin J. commented on the "absurdity of subjecting children to examination on whether they understood the religious consequences of the oath."

FN8. N. Bala, K. Lee, R.C.L. Lindsay & V. Talwar, "A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000), 38(3) *Osgoode Hall L. J.* 409.

FN9. See *R. v. McGovern* (1993), 82 C.C.C. (3d) 301, 22 C.R. (4th) 359 (Man. C.A.) at 304-5 [C.C.C.], leave to appeal to S.C.C. refused (1993), 84 C.C.C. (3d) vi, 25 C.R. (4th) 123 (note) (S.C.C.); and *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C. C.A.).

FN10. N. Bala, J. Lee & R.C.L. Lindsay, "*R. v. M. (M.A.)*: Failing to Appreciate the Testimonial Capacity of Children" (2001), 40 C.R. (4th) 93.

FN11. V. Talwar, K. Lee, N. Bala & R.C.L. Lindsay, "Children's Conceptual Knowledge of Lying and its Relation to their Actual Behaviors: Implications for the Court Competence Examination" (2002), 26 *Law and Human Behavior* 395.

FN12. *R. v. Marquard*, [1993] 4 S.C.R. 223, 25 C.R. (4th) 1 (S.C.C.), at paras. 236-237.

FN13. *R. v. Marquard*, *ibid*.

FN14. *R. v. Caron* (1994), 94 C.C.C. (3d) 466 (Ont. C.A.).

FN15. *Ibid.* at 471.

FN16. *R. v. Parrott*, [2001] 1 S.C.R. 178, 39 C.R. (5th) 255 (S.C.C.).

FN17. *Ibid.*

FN18. *R. v. Marquard*, [1993] 4 S.C.R. 223, 25 C.R. (4th) 1 (S.C.C.), at paras. 236-237.

FN19. See J. Schuman, N. Bala & K. Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 *Queen's Law Journal* 251. In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 25 C.R. (4th) 285 (S.C.C.) L'Heureux-Dubé J., writing for the entire Supreme Court of Canada on this point, gave judges the authority to intervene whenever a child is asked inappropriate questions (at 471 [S.C.R.], emphasis added):

> in . . . cases involving fragile witnesses such as children, *the trial judge has a responsibility to ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and*

> *to ask subsequent questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm.*

FN20. *R. v. R.G.F.*, [1997] A.J. No. 409 (Alta. C.A.), at paras. 24-26.

FN21. *R. v. Peterson* (1996), 106 C.C.C. (3d) 64, 27 O.R. (3d) 739, 47 C.R. (4th) 161 (Ont. C.A.); leave to appeal to S.C.C. refused [1996] S.C.C.A. no. 202 (S.C.C.).

FN22. V. Talwar, K. Lee, N. Bala & R.C.L. Lindsay, "Children's Conceptual Knowledge of Lying and its Relation to their Actual Behaviors: Implications for the Court Competence Examination": (2002) 26 *Law and Human Behavior* 395; V. Talwar, K. Lee, N. Bala & R.C.L. Lindsay, "Children's lie-telling to conceal a parent's transgression: Legal implications", (2004) 28 *Law and Human Behavior*, 411.

FN23. For a discussion of the type of "pre-interview" questioning that should be carried out to allow for the best "interview", see J. Schuman, N. Bala & K. Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999) 25 *Queen's Law Journal* 251; and M.E. Lamb, K.K. Sternberg & P.W. Esplin, "Conducting Investigative Interviews of Alleged Sexual Abuse Victims" (1998) 22 *Child Abuse and Neglect* 813, at 818-819.

FN24. It is submitted that this is as an aspect of the inherent obligation and power of the presiding judge to control the court process. See *R. v. A.A.*, [2003] O.J. 4 (C.A.) on the inherent powers of a presiding judge, including a justice of the peace, to control the court process, and in the context of a youth court proceeding to ensure that a young person understands the significance of the charges that he faces, even if his counsel waives the reading of the charges.

FN25. The *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 151 provides that a youth justice court judge shall "instruct" a child witness under twelve "as to the duty to speak the truth and the consequences of failing to do so," and may give such instructions to a young person who testifies.

FN26. Young children often do not understand all that an adult questioner asks, but have been socially trained to "guess" at what is being asked and "respond". They will usually try to provide an answer to a question even if they did not understand it, or do not know how to answer it. It is appropriate for the judge to remind a child of the importance of saying that they did not understand a question, and to not guess at answers.

FN27. See *R. v. Demerchant* (1991), 66 C.C.C. (3d) 49 (N.B. C.A.). In G.A. Ferguson & J.C. Bouck, *Canadian Criminal Jury Instructions*, 3rd ed. (Vancouver, Continuing Legal Education Society of British Columbia, 2002), vol. 1, p. 4-65- 2, it was suggested that a judge should charge the jury in the following way:

> Despite the fact that [the child witness] did not testify under oath . . . to tell the truth, you may still accept or reject (his/her) evidence in the same way you accept or reject the evidence of any other witness.

Ferguson and Bouck went on to propose a further "discretionary instruction that may be given in appropriate circumstances" that would summarize the specific concerns about a particular child's testimony, and then concluded that "there is a dangerous risk of relying on (his/her) unsworn evidence standing alone without some other supporting or confirming evidence." It is submitted that under Bill C-2, it is improper in a jury charge to make reference to the fact that a child's testimony was unsworn.

FN28. N. Bala, R.C.L. Lindsay & E. McNamara, "Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes" (2001), 44 *Crim L.Q.* 461.

FN29. Contrast s. 486.5(4) of Bill C-2 which specifically requires that an application for a prohibition on identifying information is to be "in writing."

FN30. S.C. 1993, c. 45, s. 7.

FN31. N. Bala, "Child Witnesses in Canadian Criminal Courts: Recognizing Their Capacities and Needs" (1999),

(5)2 *Psychology, Public Policy and Law* 322, at 328.

FN32. N. Bala, R. Lindsay & E. McNamara, "Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes" (2001), 44 *Crim. L. Q.* 461.

FN33. *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 25 C.R. (4th) 325 (S.C.C.).

FN34. *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 25 C.R. (4th) 325 (S.C.C.). In *R. v. Smith* (1993), 141 A.R. 241 (Alta. C.A.) the Alberta Court of Appeal held that the submissions of counsel, if accepted by the court, might be a sufficient basis for making such an order at a preliminary hearing.

FN35. G.S. Goodman *et al*, "Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims" (1992), 57 *Monographs of the Society for Research in Child Development* 5 Serial No. 229; and G. Davies & H. Westcott, "The Child Witness in the Courtroom: Empowerment or Protection?" in M. S. Zaragoza *et al*, eds., *Memory and Testimony in the Child Witness* (Thousand Oaks, Cal.: Sage, 1995), 199-217.

FN36. *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 25 C.R. (4th) 325 (S.C.C.).

FN37. J. Swim, E. Borgida and K. McCoy, "Videotaped versus In-court Testimony: Assessing Mock Jurors' Perceptions of Child Witnesses" (1993), 14 *J. Applied Social Psych.* 5; D.F. Ross, S. Hopkins, E. Hanson, R.C.L. Lindsay, K. Hazen and T. Eslinger, "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse" (1994), 18 *Law and Human Behavior* 553.

FN38. J. Swim, E. Borgida and K. McCoy, "Videotaped versus In-court Testimony: Assessing Mock Jurors' Perceptions of Child Witnesses" (1993), 14 *J. Applied Social Psych.* 5; D.R. Ross, S. Hopkins, E. Hanson, R.C.L. Lindsay, K. Hazen and T. Eslinger, "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse" (1994), 18 *Law and Human Behavior* 553; R.C.L. Lindsay, D.F. Ross, J.A. Lea and C. Carr, "What's fair when a child testifies?" (1995), 25 *Journal of Applied Social Psych.* 870; and H.K. Orcutt *et al*, "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-circuit Trials" (2001), 25 *Law and Human Behavior* 339.

FN39. K. Murray, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trial* (Edinburgh: The Scottish Office, HMSO, 1995).

FN40. S.C. 1993, c. 45, s. 7.

FN41. S.C. 1998, c. 9, s. 8.

FN42. See *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, 154 D.L.R. (4th) 13, 120 C.C.C. (3d) 225, *(*sub nom. *R. v. F. (C.))* 11 C.R. (5th) 209 (S.C.C.).

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