OUTLINE OF EVIDENCE

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CHALLENGES IN THE PROSECUTION OF CHILD ABUSE AND HISTORICAL SEXUAL OFFENCES: CRIMINAL LAW, POLICY AND PRACTICE

An ideal child abuse prosecution entails getting before the trier of fact all of the relevant evidence and applicable law in order to provide the fullest opportunity to reach a principled decision. Where a child witness is involved, protecting the child from further trauma is of paramount concern.

1. INTRODUCTORY COMMENTS ABOUT THE PAST

Credibility

- Women and children who alleged sexual abuse were not considered credible. Corroboration was required for children who were not prepared to swear an oath or too young to understand an oath and a child whose evidence was not sworn could not corroborate another child. Corroboration was required of the identity of the offender.

Understanding of the dynamics of abuse

- A delayed complaint was seen to be suspect and the jury was warned of the frailties of such a complaint. Judges warned juries that the evidence of children who provided sworn evidence was subject to frailties and those whose evidence was not sworn required corroboration as a precondition to a conviction.

Sexual Offences

- Sexual offences were discriminatory. Women could not be held accountable for certain offences (e.g. indecent assault on male).

- Sexual offences did not reflect the realities of what sexual activity took place with children. For example, an adult encouraging a child touching an adult penis was interpreted to be the application of force from the child, not the adult.

Investigation

- Children were interviewed by a police officer who wrote out what was said in statement form. At times the notes paraphrased what was said without reference to what was asked.

- Little was known about the theory of human memory, the effects of trauma and structured interview techniques. It was expected that a child could give details about when events took place, the order of events and the nature of the act in a manner beyond the developmental age of that child.

- Sexual abuse in the family that was identified was considered a family problem not requiring a criminal justice response.

- Police agencies, child welfare agencies, Crown prosecutors and some judges did not see child abuse as a police matter warranting being dealt with in criminal court.

- Bodily fluids could be identified as originating sexually but could not be identified to a specific person.

- Witnesses about whom there was abundant documentation (such as disabled, mentally ill and foster children) were vulnerable to credibility challenges based on the contents of records about prior and even unrelated events in their lives written by others.

Court Preparation

- Remnants of the Barrister/Solicitor separation suggested that Crown prosecutors should not interview child witnesses in advance of trial.

- Justice personnel without any expertise in children were assigned to cases. There was little appreciation that they and the courts could benefit from expertise on children, the thought being that because we were all once children and had offspring, we knew enough.

- There were no victim services agencies, nor specialized programs to prepare children for their testimony.

- Children sat with the accused nearby while waiting to be called into the courtroom. Other members of the public waiting for various court matters also mingled with the waiting child and family.

The Child Witness in Court

- Judges questioned children under the age of 14 to determine if they were sufficiently intelligent to testify.

- The testimony of non-Christian children who did not understand the oath was considered less credible than that under oath and corroboration of identity of the accused was required.

- The courts did not hear from experts about how children communicate, cognitive and sexual development, dynamics of abuse and other related issues and made decisions of fact based on the current common sense of the times.

- Children were expected to come into the courtroom with the accused and tell their story *viva voce* in adult terms.

- The courtroom set up was as that in every other trial, with no child accommodating features, i.e.: separation from the accused and closeness to support. The courtroom furniture was too large for children and they had to sit on tables or arm rests to be seen. Their voices could not be heard.

- An accused was free to cross-examine a child witness.

- The trier of fact only heard previous statements of children victims if raised by the defence to contradict on inconsistencies.

- The trier of fact received a general warning on the frailties of the evidence of children.

- A man of good character was considered an unlikely person to abuse a child.

Sentencing

- Family physicians, who were not experts in the field, provided expert evidence in support of the risk of re-offending for the sentencing of offenders.

- The offender sentenced to a provincial sentence of less than two years incarceration with probation gave a larger range for monitoring than a federal sentence of incarceration (2 years or more of incarceration).

- If an offender posed a substantial risk, the only option was a dangerous offender designation with either a definite of indefinite sentence. (1997 amendments to the *Criminal Code* allowed for a long term offender designation.)

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2. THE CHALLENGES FACING A PROSECUTION

Delayed Disclosures of Abuse

- The first challenge for the prosecutor is the reality that reports are often delayed, which hampers effective evidence collection. The passage of time and normal forgetting may affect memory recall of the events, potential physical evidence

may be lost or no longer accessible, and witnesses may not longer be available and so forth.

- Immediate reporting enables the separation of the offender from the victim, which prevents ongoing victimization. It also separates the victim from persons who may influence or appear to influence the victim's version of events. The victim will have a fresh recall of events when they are immediately reported. The collection of evidence is more likely with the fresh crime scene still intact (bodily fluids for DNA and the presence of alcohol and drugs, photographs of the crime scene, the victim and the suspect, documentation of physical and psychological injury and the seizure of physical evidence such as sex toys, videos and clothing).

Reasons Victims May Not Go to the Police:[1]

- Do not understand what they are experiencing is abuse or a criminal offence or both
- Fears of or threats from the offender
- Social stigma of being a sexual assault victim
- Feeling embarrassed, ashamed, or blamed for being sexually assaulted
- History of negative experiences or mistrust of police or other authorities
- Concerns about the negative reactions, criticism, shame, or judgment of family, friends or community
- Fear of being disbelieved, especially if the abuser is in a perceived position of power or esteem in the community
- Fear that private aspects of their life will be exposed and judged by family, friends or others

Reasons Victims May Go to the Police:

- To protect themselves or others (i.e. a younger sibling) from future harm
- To remove an abusive family member from the home
- To expose the offender for who s/he really is

[1] Daylen. J., van Tongeren Harvey, W. and O'Toole, *Trauma Trials and Transformation*, (Toronto, Irwin Law 2006)

- To have their voice heard and the truth revealed
- To promote personal healing
- To qualify for criminal compensation programs
- To pursue civil action, and their civil lawyer has told them to report as a prerequisite to civil redress
- To make the offender finally accept responsibility and apologize
- To force the offender to get some help
- To provide others an explanation for why they are the way they are
- To have what was done to them taken seriously
- To obtain justice - having the offender punished and publicly held accountable
- To model for their children the civic duty to report
- To make the abuse to stop

Factors that Contribute to a Person/Community/Society Feeling Confident to Report when they are Sexually Assaulted:

- Stories in the media and in their circles that suggest a victim is treated well and protected
- Prevention of further attacks by reporting the offender
- Victim's privacy was maintained after reporting
- Confidence in the justice system (starting with the local police)
- Knowing about the system and how to engage in advocacy for self or child/youth

Challenges in the Investigation

- A successful prosecution starts with an effective investigation. It is too late to resurrect a case at trial stage.

Victim Interviews

- The child/youth must be interviewed as part of the investigation. An ideal interview will be conducted promptly and by an experienced child/youth interviewer in a child/youth friendly interview room. The interviewer will have knowledge of child development and communication issues. The interviewer will have knowledge of memory theory: from which age children recall episodic memories, reasons people cannot recall and questions to ask consistent with how the human memory works.

- The interviewer will know the relevant law related to: the elements of the offences, private record issues (diaries, medical records), the law of previous sexual complaint, the use of video recordings and child/youth witness accommodations.

- The interview will be conducted according to established practices related to: interview structures (step wise interview), the timing and numbers of interviews, the seizure of drawings, 3rd parties in the room, room set up and so forth. The interview will be video recorded with audio and logged back up.

Investigative Considerations

- An ideal investigation includes: effective parallel victim support through victim services programs, creative follow through from the details of the allegation to refute or substantiate the allegation, the use of warrants and authorizations where appropriate (e.g. search warrants and DNA warrants), effective interviewing of the suspect with admissibility as a focus, medical examination of the victim by skilled and experienced medical personnel and follow through by the investigators up to and including the trial stage and sentencing.

Challenges in Charge Assessment/Screening

- The police or Crown prosecutors in British Columbia, New Brunswick and Quebec conduct charge assessment. An ideal charge approval is conducted from the starting point of a comprehensive investigation by skilled investigators. An ideal charge approval process is conducted within the framework of written policies to encourage principle-based decision-making where the exercise of discretion is required (e.g. credibility assessment, diversion and so forth) and appeal and review procedures.

- Some of the challenges in charge assessment/screening include: a lack of confirming evidence, a history of false allegations or other indications of unreliability such as an apparent motive to falsify, his word against hers, a poorly conducted interview does not allow the reviewer to make a fair assessment, technical breakdowns of equipment during interviews, delays in getting forensic results, disparities in decision making amongst personnel, at different locations and for different types of offences and delays in both investigation and charge assessment/screening due to the shortage of resources.

Challenges in Disclosure

- Balancing the privacy rights of the victim and the disclosure rights of the accused is a major challenge in disclosure. Lack of privacy is a major factor for victims in not reporting sex crimes and disclosure entails revealing the identity and/or particulars of victims who are clearly at risk of being re-victimized. Maintaining the confidence of victims once disclosure issues become known to them can be difficult.

- Other challenges in disclosure include disclosure management by the police and Crown counsel and retaining counsel and conducting hearings in respect of third party records.

Challenges in Trial Preparation

- There are diverse views on the need for and manner in which trial preparation should occur. Early assignment of prosecutions is important and early trial dates should be sought. Other challenges in trial preparation include: organizing the material in historic cases, managing new information, managing the recanting witness, preparing the child victim in advance and managing inappropriate influence on the witness (especially friends, family or the accused).

Challenges in the Trial

- Challenges in the trial include: delayed trial dates, adjournments and court time limitations such as pressure to hurry, interruptions by other cases and cases being split into parts.

- Challenges for victims include the recognition and identification of the accused in court.

- Child witnesses on the stand are particularly subject to intimidation as a result of the courtroom environment (court personnel, counsel, accused, family and other members of the public audience in court). Cognitively, they are expected to recall events in order, recall previous interviews and understand the process. Court days are long and the child witness requires stamina. A child friendly courtroom includes children's chairs, microphones and closed link video capability. Also, videotaped statements of child witnesses can be tendered as evidence.

- The witness of historical abuse faces normal forgetting and memory confusion. These cases tend to lack confirming evidence. There can be divisiveness in families over the complaint.

- These types of prosecutions can involve expert battles (e.g. false memory syndrome) and credibility assessments can be based on outdated and erroneous assumptions.

- Publicity can be problematic, as media coverage tends to reveal the identity of the victim and judgments are now frequently accessible through the Internet.

Challenges in Sentencing

- Challenges in sentencing include dealing with offenders who insist they are innocent and offenders who refuse assessment and treatment. Psychological assessments cannot be ordered without consent. Character letters from friends and family who insist the offender is innocent and cast aspersions on the victim are problematic.

- Other challenges include risk assessments conducted by non-experts in the field and new facts revealed in victim impact statements.

- Challenges related to tailoring appropriate sentences include *Criminal Code* limits for community supervision, the availability of resources to provide treatment and the applicability of s.161 *Criminal Code* orders prohibiting the offender from attending near certain public places and other facilities where persons under 14 years of age may be present and from obtaining employment which may involve the offender being in a position of trust or authority over persons under 14 years of age (prior to 2005, not all of the modern provisions applied to historic offences).

Challenges in Multi-victim Cases

- Often the first investigator in a multi-victim case is a first responder who does not appreciate the significance of the first complaint in relation to the multi-victim case and therefore does not investigate the matter with that possibility in mind.

- People start to talk before the investigator gets a chance to take initial statements. This dynamic either creates or gives the appearance of creating blended versions of events. Multi-victim cases often involve persons who know each other, which contributes to suspicion over the validity of complaints.

- Persons may allow the hysteria to shape their conduct – including creation of memories, misinterpreting conduct as sinister and so forth.

- Witnesses meet with each other outside of the investigation and in spite of warnings not to do so, to discuss the case. Witnesses require re-interviewing to see if the versions are consistent with one another. Witnesses identify new victims who have not come forward on their own.

- The emotional impact of the victimization affects not only the victim, but also entire communities. Therefore, outreach, communication and therapeutic intervention is required on a large and expensive scale. Vigilantism may occur against a suspect.

- Multi-victim cases often involve victims who are mentally or physically challenged or vulnerable for some other reason. These characteristics call for investigative and prosecutorial strategies outside the mainstream.

- Often multi-victim complaints are of historic events (thus many victims over time) so evidence is lost, destroyed or forgotten.

- Dealing with many people affects resource availability and funding. Not all police can respond quickly to large-scale demands quickly enough for the reality of the dynamics of this type of investigation. Having a multitude of persons involved in the investigation may encourage different methods and standards of conduct, which causes problems later on at trial.

- Vast quantities of material create disclosure challenges.

Challenges in Multi Agency Joint Investigations (Police and Protection Workers)

- Multi agency joint investigations may involve conflict over differing mandates (e.g. the evidence a social worker required for a protection case is different from that required in a police investigation).

- There can be scheduling and other logistical challenges in getting people together for joint interviews and mistrust over levels of skill for interviewing may exist.

- Personnel may interpret privacy and confidentiality rules to mean that no sharing of information can take place.

Cooperation Between the Police and Crown Counsel

- The roles of police and Crown counsel are separate but interdependent.

- Most Crown counsel have not been investigators and may not appreciate the rigors of investigative work. Police see the cases in their early stages and may not have a comprehensive knowledge of the facts that Crown counsel come to know in preparation for trial. In most provinces, the police do not sit in during court cases to see the results of their actions. It is desirable that the police play a role in the trial preparation stages as well as the investigative stages.

- Having Crown counsel available during the investigative stage encourages police to ask their advice. Police are not required to take the advice of Crown counsel but likely will follow up on recommendations made by them.

- It is equally desirable that Crown counsel play a role in investigative stage because this helps ensure that evidence gathered will be admissible (e.g. warrants, accused statements) and that statements from victims address legal issues that the Crown is expected to prove (e.g. definition of consent). The manner not only the content of the statement taking will affect the manner in which the witness is treated at trial (e.g. admissibility of evidence of a complainant's sexual activity [*Criminal Code* s. 276], spouse may be charged [*Criminal Code* s. 278], leading questions, documentation of evidence, videotaping).

- Cooperation is particularly critical in child abuse cases in the areas of the manner and content of child interviews, follow up requests before charge approval, disclosure management, risk assessment, supporting family through the criminal process and pre-trial interviews.

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3. HIGH PROFILE CANADIAN CASES

1. Martensville
2. Mt. Cashell
3. O'Connor
4. Shearing
5. Ewanchuk
6. Bernard
7. Jericho
8. Noyes
9. Oughten

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4. OUTLINE OF SYSTEMIC CHANGE

Proclamation of Criminal Legislation that has had an impact on child abuse and historic abuse prosecutions

Names of Bills and Date of Enactment

<u>Charter of Rights and Freedoms 1982</u>

- (Badgley Report 1984)

Bill C-127, 1983 Amendments to the *Criminal Code* and the *Canada Evidence Act*

- Abrogated the rule that required the prosecution to show the complaint was recent in determining the strength of the complaint.

- Repealed the offences of rape and indecent assault in favour of sexual assault that focuses on the degree of force as an aggravating factor rather than as the type of sex act.

- Repealed any requirement for corroboration in sex crimes allegations (except children).

- Codified and expanded the circumstances where consent is vitiated.

Bill C-15, 1988 Amendments to the *Criminal Code* and *Canada Evidence Act*

- (The Report of the Special Advisor on Child Sexual Abuse 1990)

Bill C-49, 1992 Amendments to the *Criminal Code*

- Developed the procedure for determining whether the victim will be asked questions related to other sexual activity.

- Codified and expanded even further circumstances where consent is vitiated.

- Codified the circumstances in which belief in consent is not a defence.

Bill C-79, 1999 Amendments to the *Criminal Code*

- Expanded the availability of protection from personal cross-examination by a self-represented accused for victims and witnesses of sexual offences and personal violence offences, up to the age of 18

Bill C-15A, 2002 Amendments to the *Criminal Code*

- Created the offence of luring by the use of a computer.

Bill C-2, 2005-2006 Amendments to the *Criminal Code* and *Canada Evidence Act*

- Created new offences of voyeurism.

- Expanded the circumstances where the court may consider that a youth is sexually exploited.

- Amended the provisions related to accommodations to shift the onus allowing witnesses under 18 or who are disabled to receive accommodations without having to fulfil a threshold test (testimony outside the court room, behind a screen or other device that would allow the witness not to seen the accused and allowing the presence of a support person).

- Provided minimum sentences for most sexual offences involving children.

- Provided that the abuse of any child is an aggravating factor for the consideration of the sentencing judge.

Further significant amendments include:

- Amendments to the *Criminal Code* expanded accommodations to all witnesses in other crimes besides sex crimes.

- DNA warrants provided a manner to obtain samples from an accused.

- Amendments to the sentencing provisions:
  - Articulated the principles of sentencing including that abuse of one's child (amended to any child in 2005) and abuse of authority are aggravating factors.
  - Provided a sentencing regime for long term and dangerous offenders.
  - Provided for conditional sentences.

- Privacy and Freedom of Information legislation has also contributed to the exchange (or lack of) of information amongst authorities.

Challenges in the Implementation of New Federal Legislation

- To be effective, implementation of new legislation requires:

  i. Review and drafting of provincial policies and practice directives for affected personnel (Judges, Crown, Courts, police, corrections, victim assistance, support staff and so forth)
  ii. Review of provincial legislation that may require amendments to conform with the federal legislation
  iii. In some cases equipment and renovations are required (e.g. courtroom design for closed circuit)
  iv. Imparting information to stakeholders as well as providing training (knowledge, skills and attitude development)
  v. Designing forms and precedents for justice personnel
  vi. Integrating changes into computer systems and databases in use
  vii. Developing position papers for Charter challenges
  viii. Training and related preparation for the defence bar

ix. Public education including public forum meetings and publications and websites

- Timing of proclamation does not always coincide with the interests of the provinces:

  i. January is mid fiscal period
  ii. Implementation may require many months

- Justice personnel may be ideologically opposed to the objectives and potential impact of the legislation.

- Without a comprehensive implementation strategy the spirit of the amendments never take hold in practice (e.g.: Bill C-15)

Cases that Changed the Map (in Chronological Order)

R. v. Smellie (1919) 14 Cr App R 128 :

- The court has an inherent discretion over the procedures in the courtroom and in this case to move the accused out of the sight of the child testifying where the protection of the child witness was required.

R. v. Pottle (1978), 49 C.C.C. (2d) 113 (Nfld. C.A.):

- Provided new ground for similar acts committed by an accused to be admitted in the case for the prosecution to establish guilt in anticipation of a defence of innocent association. In addition, the case allowed for the evidence of a child who provided sworn evidence to corroborate the testimony of a child victim who provided unsworn evidence. The next significant analysis of similar fact evidence by the Supreme Court of Canada was in 1990 in the case of *R. v*. *B. (C.R.),* [1990] 1 S.C.R. 717.

R. v. Burden (1981), 64 C.C.C. (2d) 68 (B.C.C.A.):

- Touching can be an assault.

R. v. Kostuck (1986), 29 C.C.C. (3d) 190 (Man. C.A.):

- Acquittal entered on appeal where the expert had testified that when a child discloses sexual abuse, she or he is usually telling the truth.

R. v. Chase, [1987] 2 S.C.R. 293:

- Provided guidelines on what is “sexual” in a sexual assault, the term having a broader definition than referring solely to parts of the body.

- The test is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances

surrounding the conduct, including threats that may or may not be accompanied by force, are relevant. The accused's intent or purpose, as well as his motive if such motive is sexual gratification, may also be factors in considering whether the conduct is sexual. The offence is one requiring a general intent only.

R. v. D.(L.E.), [1989] 2 S.C.R. 111:

- Provided guidelines on the admissibility of similar fact evidence in sex crimes. In this case, evidence of previous sexual penetration was not admissible in a trial on a charge of sexual touching (assault).

R. v. *Brooks* (1989), 47 C.C.C. (3d) 276 (Alta C.A.):

- Sexual intercourse with a female under the age of 14 can be charged as a sexual assault.

R. v. *Cadden* (1989), 48 C.C.C. (3d) 122 (B.C.C.A.)

- Having children commit fellatio on the accused can be charged as a sexual assault.

R. v. F.E.J. (1989), 53 C.C.C. (3d) 64 (Ont. C.A.):

- Allowed a greater scope for the admission of expert evidence about the disclosure of child sexual abuse.

- Properly qualified expert opinion evidence about the general behavioural and psychological characteristics of child victims of sexual abuse is admissible for certain purposes. In order to assist a trier of fact in deciding whether in a particular case a recantation by a child of her allegations of sexual abuse should lead to a doubt about the witness's credibility, expert evidence about the general behaviour patterns of children in similar circumstances can be admitted.

Nelles v. Ontario, [1989] 2 S.C.R. 170:

- The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution.

R. v. *Khan*, [1990] 2 S.C.R. 531:

- Articulated a hearsay exception for evidence of a child’s statement where necessity and reliability exist.

- The judgment recognized the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse, the issue being one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to retell and relive the frequently traumatic events surrounding the episode in a long series of encounters with parents, social workers, police and finally different levels of courts.

R. v. B. (C.R.), [1990] 1 S.C.R. 717:

- Allowed for the introduction of similar fact evidence.

- Evidence adduced solely to show disposition or propensity is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to the general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. Where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high to permit its reception. The trial judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, for the purpose of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

R. v. B.(G.), [1990] 2 S.C.R. 30:

- Evidence of children is to be assessed differently than that of adults.

- The credibility of every witness who testifies before the courts must be carefully assessed, but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children. 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.

R. v. Kilabuk (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.):

- Set parameters for the quality of videotaped interviews affecting the admissibility of statements.

R. v. Stinchcombe, [1991] 3 S.C.R. 326:

- Required that the prosecution provide all relevant material to the defence with few exceptions.

- All relevant material includes both that which the Crown intends to introduce into evidence and that which it does not, whether the material is inculpatory or exculpatory. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel have a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty

to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

R. v. Seaboyer, [1991] 2 S.C.R. 577:

- Successful challenge of *Criminal Code* s.276, which restricted the right of the defence on a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions.

R. v. V.K. (1991), 68 C.C.C. (3d) 18 (B.C.C.A.):

- There are no automatic assumptions of unreliability because of the age of the child witness or the type of offence.

R. v. W. (R.), [1992] 2 S.C.R. 122:

- The notion (at common law and codified in legislation) that the evidence of children was inherently unreliable and was therefore to be treated with special caution was eliminated.

- Various provisions requiring that a child's evidence be corroborated have been repealed. The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults.

- Also, there is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses that characterize the evidence offered in the particular case. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

Khan v. College of Physicians and Surgeons of Ontario (1992), 76 C.C.C. (3d) 10 (Ont. C.A.):

- Necessity found to include normal forgetting for a child abused as a toddler.

R. v. B.(K.G.), [1993] 1 S.C.R. 740:

- Established the circumstances in which a previous inconsistent statement may be admissible for the truth of its contents following a *voir dire* on the issue. Formerly, prior inconsistent statements were admissible only to impeach a witness's credibility.

- Evidence of prior inconsistent statements of a witness other than an accused is substantively admissible on a principled basis, the governing principles being the reliability of the evidence and its necessity. However, in the present context, the Court adapted these criteria. As a threshold matter, prior inconsistent statements are only be admissible if they would have been admissible as the witness's sole testimony, lest what would be excluded as the witness's primary evidence be admitted under the reformed rule simply because the witness has recanted.

- There will be sufficient circumstantial guarantees of reliability to allow the substantive use of the statement: (1) if the statement is made under oath, solemn affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement; (2) if the statement is videotaped in its entirety; and (3) if the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness at trial respecting the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those, which the hearsay rule traditionally requires.

- Unavailability is not an indispensable condition of necessity. The criterion of necessity was given a flexible definition, capable of encompassing diverse situations. In the case of prior inconsistent statements, evidence of the same value cannot be expected from the recanting witness or other sources. Where a sufficient degree of reliability is established, the trier of fact should be allowed to weigh both statements in light of the witness's explanation for the change.

R. v. *V. (K.B.)*, [1993] 2 S.C.R. 857

- Allowed for a finding that the act of grabbing a child's genitals for discipline was a 'sexual' assault even though the offender was not motivated by seeking sexual gratification.

R. *v.* Levogiannis, [1993] 4 S.C.R. 475:

- Provides a comprehensive legal hallmark on the needs of children witnesses and the failings of the system in the past.

- “The examination of whether an accused's 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 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 s. 486(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 (A. McGillivray, "Abused Children in the Courts: Adjusting the Scales after Bill C-15" (1990), 19 Man. L.J. 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 S.Ct. 3157 (1990), at p.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." (Per L'Heureux-Dubé J.)

R. v. L. (D.O.), [1993] 4 S.C.R. 419:

- Upheld the constitutionality of Section 715.1 of the *Criminal Code*, which allows a court to admit previously recorded statements where adopted by the witness, as part of the trial.

- Section 715.1 of the *Code* is a response to the dominance and power which adults, by virtue of their age, have over children. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.

R. v. Osolin, [1993] 4 S.C.R. 595:

- Provided a new perspective related to the privacy of victims' records.

- Cross-examination for the purpose of showing consent or impugning credibility which relies upon groundless rape myths and fantasized stereotypes is improper and should not be permitted. The trial judge must consider all of the evidence presented at the *voir dire* to determine if there is a legitimate purpose for the proposed cross-examination. In each case he must carefully balance the accused's right to a fair trial against the need for reasonable protection of a complainant. If at the conclusion of the *voir dire* the cross-examination is permitted then the jury must be advised as to the proper use that can be made of the evidence derived from the cross-examination.

- In this case, there was a notation in the complainant's medical records indicating that she was concerned that her attitude and behaviour might have influenced the accused. While the trial judge was correct in refusing to permit cross-examination for the purpose of determining "what kind of person the complainant is", cross-examination on the medical records, in particular the notation, should have been permitted for the purpose of determining whether there was evidence to

support the defence of honest but mistaken belief in consent or an allegation of fabrication. The privacy of the complainant is an interest that merits protection, as does the need for a relationship of confidence between a patient and her psychiatrist, but the cross-examination on the complainant's medical records, within the guidelines outlined, should have been permitted to ensure a fair trial and to avoid a miscarriage of justice.

R. v. François, [1994] 2 S.C.R. 827:

- Provided flexibility and guidelines in credibility assessments.

- The Court ruled that it cannot be inferred from the mere presence of contradictory details or motive to concoct that the complainant's evidence should necessarily be rejected in its entirety or even in part.

R. v. Ay (1994), 93 C.C.C. (3d) 456 (B.C.C.A.):

- Established guidelines on the admissibility of previous consistent statements. What is admissible is the fact that there was a prior complaint: when it was made and to whom.

- An amendment to the *Criminal Code* in 1983 abrogated the rules relating to evidence of recent complaint. One of the rules with respect to recent complaint which was abrogated was the requirement that the trial judge direct the jury that an adverse inference could be drawn against a complainant where there was no evidence of a complaint made at the first possible opportunity. This rule was abrogated out of recognition that there are many reasons why victims of sexual assault do not complain at the first available opportunity, or even for many years later which have nothing whatever to do with the credibility either of the complaint or the subsequent testimony. If the full purpose underlying Parliament's abrogation of this particular rule is to be achieved, then evidence of when a complaint was first made, why it was not made at the first available opportunity if that was the case, and what it was that precipitated the complaint eventually made, must be receivable as part of the narrative, in order to ensure that the jury had all of the evidence of the complainant's conduct necessary to enable them to draw the right inference with respect to her credibility.

- The prior complaint is admissible under the narrative exception to the rule against prior consistent statements but is not admissible to gauge the consistency and thus, the credibility of the complainant's evidence at trial. Accordingly, unless it is necessary to provide the context for some other circumstance relevant to the jury's consideration, the actual content of the prior complaint has no relevance and is inadmissible. The Crown is entitled to relate the fact of the complaint to the allegations before the court. However, evidence of such prior complaint must be described in general terms only, without details of what was actually said, to prevent the jury from drawing an inference of truthfulness in respect of the complainant's evidence at trial by reason of its apparent consistency with what was previously said.

R. v. O'Connor, [1995] 4 S.C.R. 411:

- Established guidelines and a procedure related to the production of third party private records.

- When the defence seeks information in the hands of a third party (as compared to the state), the onus is on the accused to satisfy a judge that the information is likely to be relevant: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. A relevance threshold, at this stage, is a requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production. Upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. In making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In balancing the competing rights in question, the following factors should be considered: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record.

R. v. Audet, [1996] 2 S.C.R. 171:

- Established guidelines in determining whether a person is in a position of authority or trust in the offence of sexual exploitation.

- Parliament passed s. 153 of the *Criminal Code* (offence of sexual exploitation) to protect young persons who are in a vulnerable position towards certain persons because of an imbalance inherent in the nature of the relationship between them. In a prosecution under this section, the Crown does not have to prove that the accused actually exploited his or her privileged position with respect to the young person. To attain its objective in passing s. 153(1), Parliament chose to criminalize the sexual activity itself, regardless of whether it is consensual (s. 150.1(1) of the *Code*), in so far as it involves a person who is in a position or relationship referred to in s. 153(1) with respect to the young person.

- The words "authority" and "trust" used in s. 153(1) must be interpreted in accordance with their ordinary meaning and the term "position of authority" must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. In declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual contact with a young person, Parliament

intended to direct the analysis to the nature of the relationship between the young person and the accused rather than to their status in relation to each other.

- Although teachers are not in a *de jure* position of trust or authority towards their students, they are in fact in such a position in the vast majority of cases given the importance of the role entrusted to them by society. In the absence of evidence raising a reasonable doubt as to the existence of a position of trust or authority, to conclude that a teacher is not in such a position towards his or her students would be an error of law.

R. v. Esau, [1997] 2 S.C.R. 777:

- Raised issues related to mistaken belief in consent where a complainant is intoxicated.

- Before a court should consider the defence of honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence. There was an air of reality to the defence of mistaken belief in consent where the complainant was intoxicated when she and the accused had sex. She testified that she did not remember having sex with the accused, but that she would not have consented because he was her cousin. The accused testified that she was a willing participant. By accepting some, perhaps all, of the complainant's evidence and some of the accused's evidence, the jury could reach the conclusion that the complainant was too intoxicated to give legally effective consent, the accused did not know that the complainant was too intoxicated to consent and, though intoxicated, the complainant behaved in a manner indicating consent.

R. v. Carosella, [1997] 1 S.C.R. 80:

- Raised concerns related to the destruction of records in the possession of support centres.

- The Supreme Court of Canada noted that confidence in the system would be undermined if it condoned conduct designed to defeat the processes of the court by an agency that receives public money and whose actions are scrutinized by the provincial government. Thus, the destruction by a support centre of notes made by a social worker during an interview with the complainant justified a stay of proceedings in a gross indecency prosecution. There was no alternative remedy which would cure the prejudice to the accused's ability to make full answer and defence. Irreparable prejudice would be caused to the integrity of the judicial system if the prosecution was continued due to the absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence.

R. v. Ewanchuk, [1999] 1 S.C.R. 330:

- Relevant for cases involving youths 14 and older, where *Criminal Code* s.150.1 (Consent no Defence) does not apply. There is no implied consent by the victim's actions. Consent is determined subjectively by what is in the mind of the complainant. There is no defence where the accused hears no and interprets this as a yes (consent). Absence of consent considered as an element of the *actus reus* of sexual assault and also in the context of a defence of honest but mistaken belief in consent raised in the *mens rea* stage of the inquiry.

R. v. Gabriel (1999) 137 C.C.C. (3d) 1 (Ont. Sup. Ct. J.):

- Articulates the importance of a victim impact statement in a sentencing hearing and provided guidelines for victim impact statements.

- The victim impact statement serves a number of purposes, including: the court receives relevant evidence in respect of the nature of the offence, victim loss and information revealing the individuality of the victim and the impact of the crime on the victim's survivors. It also allows for victim participation in the process.

- The victim impact statement is not, however, the exclusive answer to the civilized treatment of victims within the criminal process. Communication with victims of crime by prosecutorial authorities, victim/offender reconciliation projects, and community support initiatives for victims are as, or more, essential.

- A criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime -- an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.

- Victim impact statements should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence". The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment. Criticism of the offender tilts the adversary system and risks the appearance of revenge motivation.

- Attempts to state, or presumably to restate, the facts of the offence usurps the role of the prosecutor and risks inconsistency with, or expansion of, prior trial testimony, or facts read in, and agreed to, on the guilty plea appearance. The Attorney General represents the public interest in the prosecution of crime.

- Recommendations as to penalty must be avoided, absent exceptional circumstances, i.e., a court-authorized request, an aboriginal sentencing circle, or as an aspect of a prosecutorial submission that the victim seeks leniency for the offender which might not otherwise reasonably be expected in the circumstances. The freedom to call for extraordinary sentences, beyond the

limits of appellate tolerance, unjustifiably raises victim expectations, promotes an appearance of court acceptance of vengeful submissions, and propels the system away from necessary restraint in punishing by loss of liberty.

R. v. Bremner (2000), 146 C.C.C. (3d) 59 (B.C.C.A.):

- Provided an analysis of the historical development of victim impact statements (legislation and caselaw) and provided guidelines for the use of victim impact statements.

- The fairness of sentencing proceedings can be adversely affected by inappropriate material in victim impact statements, such as recommendations for sentence and the use of psychiatric diagnostic terms. Sentencing proceedings are between the convicted person and the state. A victim is not permitted to have a role in suggesting the length or kind of sentence to be imposed, and the *Criminal Code* provisions with respect to victim impact statements are not intended to erode the usual rules of expert evidence. Furthermore, a victim should not seek to achieve personal revenge through a victim impact statement.

R. v. D.D., [2000] 2 S.C.R. 275:

- In the context of the calling of experts, clearly articulated the treatment of delayed reporting in determining the validity of the complaint.

- Expert opinion is admissible if exceptional issues require special knowledge outside the experience of the trier of fact. Expert opinion is not necessary and thus not admissible to explain delayed reporting. The doctrine of recent complaint in sexual assault cases as a principle of law no longer exists in Canada and a failure to make a timely complaint must not be the subject of an adverse inference based upon rejected stereotypical assumptions of how persons react to sexual abuse. A trial judge should instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in reporting, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

R. v. Darrach, [2000] 2 S.C.R. 443; (1998), 122 C.C.C. (3d) 225 (Ont. C.A.):

- Established guidelines for questions related to previous sexual conduct.

R. v. Handy, [2002] 2 S.C.R. 908:

- Placed restrictions on similar fact evidence in sexual assault cases.

- The general exclusionary rule that similar fact evidence is presumptively inadmissible has been affirmed repeatedly and recognizes that the potential for prejudice, distraction and time consumption associated with the evidence generally outweighs its probative value.

- Issues may arise, however, for which its probative value outweighs the potential for misuse. Similar circumstances may defy coincidence or other innocent explanation. As the evidence becomes more focussed and specific to the charge, its probative value becomes more cogent. The onus is on the prosecution to show on a balance of probabilities that the probative value of the similar fact evidence outweighs its potential for prejudice. The principal driver of probative value is the connectedness of the evidence to the alleged offences. Factors that may support admission of such evidence include the proximity in time of the similar acts, similarity in detail, the number of occurrences of similar acts, similarities of circumstances, and any distinctive features.

- Similar fact evidence does not cease to be propensity evidence because it relates to an issue other than general disposition. Exclusionary factors include the inflammatory nature of the similar acts, whether the Crown can prove its point with less prejudicial evidence, the potential for distraction, and whether admitting the evidence will consume undue time.

R. v. Regan, [2002] 1 S.C.R. 297; (1999),137 C.C.C. (3d) 449 (N.S.C.A.); (1998), 124 C.C.C. (3d) 77 (N.S.S.C.):

- Discussed the role of the Crown and the police in investigations and prosecutions.

R. v. Leduc (2003), 176 C.C.C. (3d) 321 (Ont. C.A.), leave to appeal to S.C.C. refused 179 C.C.C. (3d) vi:

- Established guidelines applicable to when the Crown is challenged on disclosure issues mid trial.

R. v. C.N.H., [2006] B.C.J. No. 782 (B.C.P.C., Y.J.C):

- Allowing for the accommodation of a closed link / screen as provided for in s. 486.2 of the *Criminal Code* is constitutionally sound.

Other Realities that Changed the Map

Technology

- Closed-circuit television or video link
- Videoconferencing
- Digital recordings
- Internet

Medical

- Colposcope
- Research on the healing of genital injuries

Forensic Science

- DNA mapping

Social Science

- Cognitive interviewing
- Validity assessment
- Effect of abuse
- PTSD (post traumatic stress disorder)
- Patterns of offending
- Risk assessments

Public Awareness

- Media
- School Prevention Programs

Wrongful Convictions

- Some refer to the 1980s as the *Witch Hunt* decade.
- There have been successful civil suits by persons having been wrongfully charged and convicted in Canada, see: *Report on the Prevention of Miscarriages of Justice* 2004 (Department of Justice Canada). Although the emphasis is on murder convictions, the issues and concerns affect child and historic abuse cases as well where identity is the issue.

The role of Interveners at the Appellate Level

- Interest groups inform the appellate bench.

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5. INTERNATIONAL PERSPECTIVES

- The Statute of Rome, the foundation for procedure at the ICC (International Criminal Court), provides for a participatory role by the victim and counsel.

- In jurisdictions where justice systems are guided by the inquisitorial approach (e.g. Germany), the procedures are profoundly different and the lax rules of hearsay allow professionals to provide the evidence of children.

- In the common law adversarial systems the child victim has always been required to provide *vive voce* evidence. Recent developments in the United Kingdom, the United States of America and Canada have relaxed this requirement.

- See Appendices for the IAP (International Association of Prosecutors) and ICCLR (The International Centre for Criminal Law Reform and Criminal Justice

Policy) Guidelines for the Effective Prosecution of Child Abuse[2] and the more recent UN International Guidelines for the treatment of child witnesses.

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6. ACCOUNTABILITY OF THE CROWN LAWYER

- Supervisor and employer (discipline or termination)
- Potential civil suits (financial awards)
- Provincial Bar (discipline or disbarment)

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7. EXPERIENCE AS IT RELATES TO THE USE OF TECHNOLOGY IN THE TRIAL INVOLVING A VULNERABLE WITNESS

- I intentionally took on prosecuting crimes against children in 1981. I had been a prosecutor for 1½ years.
- I made applications to move the accused to a distance from the child in the courtroom and showed a video of a child's statement (in sentencing), from 1982 to1987, before 1988 when such innovations were legislatively approved.
- **1987 Expert Witness** – I was an expert witness in Ottawa before a Parliamentary committee when Bill C-15 was introduced. This is the Bill that introduced the use of a videotaped interview as a hearsay exception and the use of closed-circuit video monitors. At first reading, the Bill was drafted to have the accused outside of the room where the child would be testifying. I went to Ottawa with a paper describing approximately 15 real examples of how children were doing in my cases (the effects of these cases on child witnesses and their evidence) and suggested many changes including that the screen be available as an alternative to closed-circuit video monitors because of the complications around the latter.
- **1988 Lecture in London, U.K.** – Represented Canada and presented the reforms related to children and their evidence to representatives from the Commonwealth Countries.
- **1988 Conference on Videotaping** - I conceived and promoted the conference on Videotaping in 1988, which was organized by Shelley Rivkin (Justice Institute) and Jan Rossley (Criminal Justice.)

[2] Note: The writer provided by invitation a training session for prosecutors from throughout the world at Sydney, Australia in 2001 based on these guidelines.

- **1988 R. v. Brian Dick** (Rowles J., B.C.S.C., Judge and Jury) - Made my first application for closed-circuit video monitors in 1988 in Prince Rupert. The child complainant was 6. The prosecution related to an allegation of abuse in a church day care centre with 21 children victims. There were two co-accused and the counts were severed into two trials in Prince Rupert and Vancouver. Mike Luchenko and I prosecuted this case and called 8 children in the two trials. The application was not allowed for the closed-circuit video monitors in the first trial (in Prince Rupert) because the six year-old's fear was generalized and not specific to the accused. When she was brought up the stairs after the application, she froze upon seeing the accused and we did not call her as a witness in that case. The accused testified, admitted the acts against that child and was convicted. The RCMP identification section set the equipment up for us with the plan that the child would be in an office across the hall.

- **1989 R. v. Sandra Dick** (Campbell J., B.C.S.C., Judge and Jury) - In the next trial in Vancouver, we were prepared again with a child psychologist on hand. The child refused to come into the courtroom late in the afternoon on a Friday. We then had the weekend to prepare. We spent the following Monday defending the section allowing for the use of the closed-circuit television from a constitutional challenge and Tuesday morning setting up the equipment for the out of court testimony. The child testified from one of the rooms near the Judge's chambers. She testified and did well. In the end, after hearing the testimony of all of the children, the jury acquitted the second accused.

- **1990 R. v. Bennett** (Vickers, B.C.S.C., Judge and Jury) – I made another application that failed in Campbell River. This case involved a young adult who lived life with Down syndrome. Her mother's boyfriend had abused her. The complainant had a speech impediment that became more noticeable under stress. Two experts, a psychometrist and psychologist (Dr. Yuille) were called on the competency hearing. Again the application for closed-circuit television was not allowed because her fears and stress were not specific to the accused. She testified and stuttered significantly, but following the recommendations of the experts, she was given props and was able to show her evidence with ease. Dr. Yuille had told the jury that she had memory of the events but not of the words to describe them. After very poignant testimony from this young woman, the jury convicted.

- **1992 Expert Witness** – Invited to speak to a parliamentary committee in Ottawa once again regarding Bill C-15.

- Made several applications for both the acceptance of videotape and closed-circuit television while prosecuting in provincial court in Abbotsford from 1994-2000.

- **1999 R. v. M.A.M**. (Rounthewaite, J., B.C.P.C., Abbotsford) In the M.A.M. case (which was appealed successfully on a different issue), the child was the cousin of the youth M. She was seven years old when she testified. She testified in a separate room and the tape of her interview with the police was shown to her while testifying. I arranged the equipment in advance, but was told through the registry that the judge had said this was presumptuous on the part of the Crown. The child promised to tell the truth, gave a brief examination in chief, and then we went into a *voir dire* on the *Criminal Code* s. 715.1 application. The child did not at first recognize herself in the video but eventually did when asked if she had seen the video before, which she had the week before (or so) in the Crown office. This triggered her memory. When she was prepared for court, the Crown brought a screen to the office and used an empty room with props to show her the alternatives. She actually chose the closed-circuit television procedure over the screen and the father was called on the application to describe this preparation and preference.

- **May 2000 – R. v. T.R.M** (Warren J. B.C.S.C., Judge Alone) – I made application for an eight year old to testify from Calgary by video link. During her testimony she was shown the videotape of her interview with the police. The testimony was prepared in advance with three video link sessions. A social worker with a child witness agency in Calgary assisted with the preparation and testimony. All of the exhibits were copied and sent to Calgary in advance. The child saw the videotape in advance as well. In this case, the judge said the transcript must be that of the video and not the audiotape. Also, counsel agreed to edit portions of the transcript where the child witness alluded to previous acts. I don't think this worked very well and it originated from the fact that at the charge approval stage where certain crimes that were described were not charged..

- **May 2001 – R. v. Kumar** (Singh J., B.C.S.C., Judge and Jury) – I made application for the tendering into evidence of a videotape of a young adolescent's description of her father's beating of her uncle in an aggravated assault case. The videotape was shown in a voir dire but not admitted into evidence because the child said the police coerced her into telling her account of the beating. In this case the Crown also canvassed with the children the possibility of using the closed-circuit video television but they wanted to be in the same room as their father. The room was ready for them in case they needed it and it was not used for the testimony of the one child who testified.

- **March 2002, D.W. et al** (B.C.P.C., Abbotsford)**–** I arranged for videoconferencing with an adolescent witness as part of the preparation in the case best known as the "Mission Suicide Bullying Case". This was arranged through the registry. The day of the meeting, even though the arrangement had been confirmed in advance, it took a lot of effort to find someone who knew how to make the arrangements.

- **April 2002 – R. v. R.G.** (B.C.S.C., Judge Alone) – I made application for an 11-year-old child to testify using closed circuit television. The application lasted three days. During this time the clerk had not been able to get the equipment working. During the application the Crown called the investigating officer, the father, the victim assistance worker and the Crown from the preliminary inquiry. The events at the preliminary inquiry related to the child's fear were not on the record. The Crown had taken notes upon which she relied to describe the events. The child had said she felt the accused was staring at her. He was moved to behind the podium. The child testified in the *voir dire* as well. The Court and defence decided the best set up was to remove the accused and put him in the jury room with a television monitor. The judge could see the accused. He raised his hand when he had an issue. We tried to use props with the child but they could not be seen by the accused.

- **Summer 2003** – I lectured at an international conference at The Hague on the use of video technology to protect the vulnerable witness.

- **2004-2005 – R. v. B.M.** (, B.C.S.C. Judge Alone) – In a case where the eight year-old child was a witness in a murder trial against her father, we interviewed the child at the pretrial stage by using a walkie talkie whereby the officer asked questions from counsel who were located in another room. At the preliminary inquiry and before *Criminal Code* amendments allowing it, the child was permitted to testify outside the courtroom. At the trial, by consent of counsel the transcript was filed and the tape played rather than recalling the child to testify.

- **2005-2006** – Seconded to CJB headquarters to implement Bill C-2, which included significant reform in the use of technology to protect the child and vulnerable witnesses.

- **2006 R. v. Sims** (B.C.S.C. Judge Alone)– In a case with a complainant who was age 14 at the time of the abuse, the tape of a previous interview was played. A corroborating adult witness who was ill with kidney failure testified from a separate room. This is an important case on the issue of consent because the complainant was 14 and took drugs from the accused as part of the sexual abuse scenario. The court ruled that in the circumstances there was no voluntary consent.