The Child Witness

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The Child Witness

PART ONE A CONTEXTUAL SUMMARY

(A) A long time ago…

In his book *The Evidence of Children*, John Spencer, describes the roots of the adversarial system, which has evolved into the British and the eventually the Canadian system of justice.
At page 65[1]

> "The accusatorial system had its origins in the pre-rational world of ordeals, when the method of trial was for one of the parties to accused the other, whereupon the court decreed that one or other should be floated in water, or burnt in the hand with a hot iron, or made to swallow a 'cursed morsel' with a feather in it, to enable God to show whose cause was just. When the Church withdrew its support for ideals in 1215 this caused a general problem throughout Europe. The English and the Scots kept to the traditional pattern, but replaced the judgement of God with a group of neighbours called to find their verdict on the matter; that is, the neighbours were compelled to take an oath, and say whose cause was just, on the basis of their local knowledge if they had any, or their hunch if they did not. "

(B) In the more recent past…

This historic context has given rise to certain basic tenets in our criminal trial process, namely:
(a) The trial is an event in court on a given day where the evidence is presented vive voce,
(b) The witnesses are called and examined in chief or in cross within an adversarial context,
(c) The witnesses are expected to give their evidence in front of the other side so that they can be properly challenged,
(d) The trial takes place in open court to which the public and media have access.

We advanced, and historically in a criminal trial it was on the basis of the vive voce word of the witness that the trier of fact determined guilt or innocence.

The child then had an ordeal of his/her own because when that witness was a child, the law:
(1) required that children satisfy a "sufficient intelligence" test before being considered competent (allowed) to testify at all,
(2) considered children who understood the consequences of swearing on the bible, so gave "sworn" evidence more credible than those who could not,
(3) precluded charges being forwarded at all with children giving unsworn evidence where no corroboration existed (and corroboration at one time needed to confirm the identify of the accused)[2],
(4) considered children witnesses as a class of witness less reliable than adults[3],
(5) considered female complainants of sexual offences less reliable than other complainants of other offenses[4],
(6) tested the credibility of children based on lay adult expectation based on adult witness standards,
(7) prohibited previous (out of court) statements made by the child to be considered by the trier of fact,
(8) expected children to testify vive voce in front of the accused, in an open courtroom as would any other adult witness.

(C) **In the year 2000…**

The current picture is somewhat different. The law now:

(1) requires that children satisfy a "ability to communicate the evidence" test before being considered competent (allowed) to testify at all,
(2) considers children whether they swear on the bible, promise or affirm on an equal credibility footing,
(3) does not require a warning against the reliability of the child witness nor against the reliability of the sexual offence complainant,
(4) tests the credibility of a child based on a case by case consideration of the evidence without strict expectation that a child perform developmentally as an adult would ,
(5) allows for the previous statements made by the child to be considered by the trier of fact if circumstances where necessity and trustworthiness exist,
(6) provides for children to testify vive voce using a variety of protections to ensure a "full and candid" account the proper "administration of justice."

(D) An Overview

Important principles recently articulated by the British Columbia Supreme Court and Supreme Court of Canada regarding children witnesses:
(Paraphrased with Direct quotes in italics)

(1) Child abuse**:**
The extent of sexual abuse of children in this country is a tragic fact.
(L'Heureux Dube J. in W.J.F. at page 7)

(2) On the trauma of testifying**:**
Young complainants often suffer tremendous stress when required to testify before those whom they accuse (L'Heureux Dube J. in Levogiannis at page. 483)

Separating the child witness from his or her alleged abuser does not erase the trauma of testifying. (L'Heureux Dube, J. in W.J.F at page 7.)

(3) On Assessing credibility*:*
Rather than classify individuals and automatically consider them less reliable, the modern approach is to consider unreliability of evidence through an evidentiary base.
(Wood, J. in V.K. at page 30.)

There is no assumption that that children's evidence is less reliable than the evidence of adults. (McLachlin J. in W. (R.). at page 143.)

"*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 adults.*" R. v. W.(R.) (1992) 74 C.C.C. (3d) 134 at page 142 and 143.

Since children may experience the world differently from adults, it is hardly surprising that details

important to adults like time and place may be missing from their recollection" (McLachlin L in R. v. W.(R.) at page 143.where she adopts the reasoning of Wilson, J. in R. v. B.(G.) (1990), 56 C.C.C. (3d) 200 at pp 219 and [1990] 2 S.C.R. 30, 77 C.R. (3d) 347.

We should approach the evidence of children not from the prospective of rigid stereotypes but by taking account the strengths and weaknesses which characterise the evidence offered in the particular case. (*McLachlin, J. in R.W. at page 143 and Wilson in G.B. at pages 219-220)*

When an adult testifies to events from childhood, the evidence should be considered in the context of the age of the witness at the time of the events to which she was testifying where there are inconsistencies on peripheral matters like time and location.
(see McLachlin, J.,W.(R.). at page144)

PART TWO DISCUSSION REGARDING THE CHILD WITNESS IN CANADIAN CRIMINAL PROCEEDINGS IN THE NEW MILLENNIUM

(A) Competence[5]

(1) Is the child permitted to testify at all?

A child under 14 is presumed not competent to testify until so determined by the trial judge. Section 16 of the Canada Evidence Act requires a *competency inquiry* where the child him/herself is questioned.

The Section calls for an inquiry on:
Whether the child understands the oath or affirmation and whether the child is able to communicate the evidence. However counsel may admit competency .*R. v. Fong* (1994) , 92 C.C.C. (3d) 171 (Alta. C.A.)

The threshold test for competency is:
Is the child:
1.Able to effectively communicate the evidence, and
2. Understands the truth and why it is important to tell the truth?
Canada Evidence Act s.16
R. V. Farley (1995), 40 C.R. (4th) 190, 99 C.C.C. (3d) 76 (Ont. C.A.)
D.P.P. v M. [1997] 2 Cr. App. R. 70 (Q.B.D.)

And, which has been interpreted to mean the witness' ability and willingness to tell the truth and also the capacity to perceive, to recollect and to communicate the evidence,*R. v. Marquard* (1993), 85 C.C.C. (3d) 193 (S.C.C.), at the time the child takes the stand. *R. v. Donovan* (1991), 65 C.C.C. (3d) 5111 at pages 518-519. (Ont. C.A.)

See R. v. M.A.M. where the B.C. Court of Appeal ordered a new trial, in a two to one majority, because in their view the trial judge should not have allowed the five year old child to testify as she did not demonstrate a moral requirement to tell the truth. *R. v. M.A.M.* (2001 151 C.C.C. (3d) 22 (B.C.C.A.) leave to appeal to the S.C.C. refused, [2001 S.C.C.A. No. 62.

(2) Requirement of an ***competency inquiry***

Even a very young child is entitled to an inquiry. (That is, the judge is not to prejudge a child as not competent without an inquiry.)
R. v. C. (K.C.) (1992), 73 C.C.C. (3d) 343 (Alta. C.A.)

What procedure does the judge follow to decide if the child is developmentally able to testify? The child must be interviewed in open court (may be in front of the jury) by the trial judge or counsel to determine if s/he is permitted to testify. There is no need for experts to testify during this stage.
1. The inquiry usually starts with the judge asking questions of the child.
2.It is within the discretion of the Court to allow counsel who is calling the child to ask the child questions.
3. Before counsel asks the questions, the Court should seek the position of both counsel,
4.The court should hear submission from both counsel regarding the competency of the child.
5.Whether the defence cross examine the child as part of the inquiry is a matter within the discretion of the judge.

C.E.A. S.16
R. v. Peterson (1996), 106 C.C.C. (3d) 63 (Ont. C.A.); *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.C.A.), *R. v. F.(R.G.),* [1997] 6 W.W.R. 273(Alta C.A.), *R. V. Budin* (1981), 20 C.R. (3d) 86, 58 C.C.C. (2d) 352 (Ont. C.A.)

What if there is none? A person who is a child at the time of the trial (rather than at the time of the event witnessed) may not testify unless an inquiry is conducted *R. V. Marquard* (1994), 25 C.R. (4th)1 (S.C.C.), *R. V. Donovan* (1991) , 65 C.C.C. (3d) 511 (Ont. C.A.), *R. V. McKay* (1975), 31 C.R.N.S. 224, 23 C.C.C. (2d) 4 (B.C.C.A.)

In M.A.M. the B.C. Court of Appeal objected to a mother testifying during the inquiry on her thoughts on the capacity of the child to understand a promise.

(3) Nature of testimony

A child who is able to communicate the evidence may testify under oath, affirmation or upon promising to tell the truth.

Does the child testify under oath, solemn affirmation or *upon promising to tell the truth* ?
The judge determines the nature of the testimony based on the child's responses in the inquiry
The child must show an understanding of the meaning of truth, promise and/or the oath and affirmation.
Even for the oath there is no requirement that the child be questioned about religious beliefs. It is a matter of moral conscience.
R. v. Taylor (1970), C.C.C. (2d) 321 (Man. C.A.)

Promise to tell the truth
What is expected from the child?
Since the child must at least *promise to tell the truth* upon testifying there is
some requirement of an understanding of the concepts around this.

A witness must understand what a promise is, and the importance (moral obligation) of keeping it.

R. V. McGovern (1993) , 22 C.R. (4th) 359, (Man. C.A.) And 84 C.C.C. (3d) vi (S.C.C.)
R. v. Rockey, [1996] 110 C.C.C. (3d) 76 (S.C.C.)

Promise to tell the truth
What does the child do to promise? The child must actually promise *R. v.Wilson* (1995), 38 C.R. (4th) 209 (N.S.C.A.), *R. v. C.W.G. (Y.O.A.)* 39 B.C.A.C. 264, (B.C.C.A.)

(B) Credibility of the child who testifies

What is the jury (trier of fact) told about how to consider the child's credibility?
Historically [6]children and female complainants were considered less credible and corroboration was required for a conviction. This is no longer the law.
1.There is no assumption that children are less credible.

2.Tests of credibility relevant to adults should not be applied to children.
3. The requirement for corroboration has been removed. .
*R.v. Marquard, [*1993] 4 S.C.R. 223, *R. v. W.(R),* [1992] 2 S.C.R. 122, 13 C.R. (4th) 257, 74 C.C.C. (3d) 134.
C.C.Code S. 274

Romilly, J. in *R. v. G. (J.D)*

> In R. v. B(G.), [1990] 2 S.C.R. 3 at page 55, The Supreme court of Canada stated that since children may see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from their recollection. The court suggested that judiciary should take a common sense approach when dealing with the testimony of young children and not expect the same standards from young children as they expect from adults.

In *R. v. W.(R.),* [1992] 2 S.C.R. 122, McLachlin J. said at page 134

> As Wilson J. emphasised in B.(G.), these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilty, whether the complainant be an adult or child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterise the evidence offered in the particular case.
>
> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to 'adult' or 'child' standards – to do so would to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. 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. But I would add this. 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 to peripheral matters which 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.

In *R. v. K.(V.)* (1991) 68 C.C.C. (3d) 18 (B.C.C.A.), Wood, J.A. stated at page 29:

> As was pointed out by Dickson J. in Vetrovec, there is an infinite range of circumstances that can arise in the criminal trial process, and it would not only be impossible, it would be self-defeating, to attempt any precise guidelines for the exercise of the discretion in favour of giving the caution.

And at page.30:

> The focus of the new discretion, which has replaced the old common law rules of practice, is the potential for the witness's evidence to be unreliable, No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable.

The crown is not entitled to call evidence specific to the credibility of the child. *R. v.Jmieff* (1994), 51 B.C.A.C. 213, (B.C.C.A.)

And that a witness is a child does not take away from a requirement of the court to assess inconsistencies and other similar difficulties in the evidence. *R. v. Horton* (1999), 133 C.C.C. (3d) 340 (B.C.C.A.*), R. v. P. (L.A.)* [2000] M.J.

No. 483 ,October 23, 2000, (Man.C.A.).

(C) **Hearsay**

(1) Common law rule of hearsay

Can the receiver of the child's words (oral or recorded) give the evidence instead of the child? Another witness can testify instead of the child and describe the words the child said to him/her if certain criteria are met. This is within the trial judge's discretion to include if necessity exists and the circumstances of the conversation render it reliable.

This may include testimony at a prior trial where the witness' recollection of events is lost due to passage of time. *R. v. Hanna* (1993), 80 C.C.C. (3d) 289 (B.C.C.A.)

Necessity exists where:
The child is physically unavailable (not merely a choice not to call however) (
The child is not competent, (The court cannot rely on expert evidence that the witness is not competent), *R. v. Parrott* 2001 SCC 3
To testify would be traumatic to the child,
The child is unlikely to give a coherent and comprehensive account.
R. v. Rockey (1996), 110 C.C.C. (3d) 481, 2 C.R. (5th) 301 (S.C.C.)

This has been expanded recently to include the child freezing on the stand while testifying. *R. v. Khan*, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1, 59 C.C.C. (3d) 92, *R. v. F. (W.J.)*, [1999] S.C.J. No. 61, October 15, 1999, (S.C.C.).

(2) Weight of the word of the child - ie: hearsay. What *is the jury told if the child's word is admitted through another person?*

Hearsay evidence calls for a special warning to the jury on the complexities of weighing such evidence. And in some cases it may be excluded where the prejudice outweighs the probative value.
1.Was the witness describing what was said reliable?
2. The traditional means to test are missing.
3.The evidence is to be weighed in the context of the other evidence introduced at trial
R. V. A.(S.) (1992), 76 C.C.C. (3d) 522, *R. V. Hawkins*, [1996] 3 S.C.R. 1043, 111 C.C.C. (3d) 129 (S.C.C.).

(3) Section 715.1 the Videotaped interview

When is a recording of the child's words admissible when the child testifies?
In some cases the recorded investigative interview can be entered for consideration by the trier of fact at both the preliminary hearing and the trial.

The preconditions include:
The video is made within a reasonable time from the offence
The complainant or other witness, who is under 18 at the time of the offence, testifies and adopts the contents of the videotape.
The accused is charged with one or more of the sexual or physical assault offences listed.

The same applies to older witnesses with a mental or physical handicap.
*C.C.Code*s. 715.2 and *R. v. C.F.F.* , [1997] 3 S.C.R. 1183, 120 C.C.C. (3d) 225, 11 C.R. (5th) 209. (S.C.C.)

The constitutionality of introducing a videotape of the complainant's statement regarding the offence was upheld by the Supreme Court *in R. v. L. (D.O.),* [1993] 4 S.C.R. 419 (S.C.C.)

(D) Recent Complaint

Historically, a delayed complaint was considered unreliable.

The law of recent complaint was abrogated in 1983. Children may still be asked about delayed reporting, by both the crown and the defence. That the report is delayed does not render it unreliable in itself. The failure to make timely complaint must not be the subject of an adverse inference based upon rejected stereotypical assumptions of how persons react to sexual abuse.
To do so is a reversible error of law. *R. v. W. (R.),* [1992] 2 S.C.R. 122, R. v. M(P.S.) (1992), 77 C.C.C. (3d) 402 (Ont. C.A.) at pp. 408-9, R. v. T.E.M. (1996), 187 A.R.

This is a matter of instruction to the jury.

The Crown is not entitled to call expert evidence about the psychology of delayed reporting as it is not necessary nor relevant in light of the abrogation. *R. v. D.D. [2000] S.C.J. No 44, [2000] C.C.S.A. No. 20800.*

The child may still tell of the report if it forms part of the narrative or to rebut an allegation of recent fabrication.

C.C.Code s. 275
R. V. F.(J.E.) (1993), 85 C.C.C. (3d) 457 (Ont. C.A.)
R. V. Owens (1986), 33 C.C.C. (3d) 275 (Ont. C.A.)
R. V. B.(D.C.) (1994), 91 C.C.C. (3d) 357 (Man. C.A.)

(E) Previous Sexual Conduct

*Can a child be asked about **previous sexual conduct** of the child?* There is an inquiry at the trial to determine the admissibility of evidence, which may include questions that may be asked of the child, concerning any previous sexual activity.

Any evidence of previous sexual activity is not admissible merely to show that consent is more likely or that the child is not believable due to previous sexual activity alone. The process to determine admissibility is set out in the Code. It requires advance notice to the Crown and complainant and particulars of the application. This enables the Crown to talk to and prepare the complainant in advance for change in the trial due to this application and its outcome. The court may admit the evidence where; it is of specific instances of sexual activity, is relevant to an issue at trial, has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
C.Code s. 276
R v. B.(O.) (1995), 103 C.C.C. (3d) 531 (N.S.C.A.),
R. v. Darrach [2000] S.C.J. No. 46 (S.C.C.)

(F) Private records of the child

When is the accused entitled to private records about the child?
If the a accused is charged with one of the sections contained in s.278.2 and the records fit within the definition of record the *Code,* the accused does not have access unless so ordered and with conditions
The court looks to:
1.full answer and defence,
2.probative nature

3.privacy of witness
4.discriminatory belief or bias
5.prejudice to personal dignity and privacy
6.society's interest around reporting
7.society's interest around treatment for complainants
8.integrity of trial process
C.C.Code s. 278.1-278.91

If the accused is charged with an offence not listed in 278.2 but there is a reasonable expectation of privacy, the common law applies to protect the privacy interests of the child and therefore the records will not be provided without an inquiry.
R. v. Mills [1999]S.C.J No. 68 (S.C.C.)

*Once private records are provided, can the **child be asked about the content***?
What questions are asked is dependent on the rules of relevancy

(G) Leading Questions

Leading questions in examination in chief may be permitted to assist child witnesses who does not understand , however a party is not entitled to lead its main witness on the crucial issues to the point of merely asking the witness to approve a recital of events by counsel, but such questions may diminish the weight of what is given in response.
R. v. Caron (1994), 94 C.C.C. (3d) 466 (Ont. C.A.)

It is recommended that counsel become aware of the continuum of free narrative to leading question and if counsel has to ask leading questions to assist a child that he/she shift to non leading immediately thereafter rather than stay in the leading question zone.

(H) Protections Available to the Child Witness

(1) Cross examination of the child by accused?
Who is going to ask me questions?

If the accused does not have a lawyer, the court appoints another lawyer to cross-examine the child who is under 14. The accused shall not cross-examine unless the court is of the opinion that the proper administration of justice requires the accused personally conduct the cross-examination. *C.C.Code* s. 486 (2.3)

(2) Closed circuit television[7]
Does he have to be in there?

(See also screen below) It is within the trial judge's discretion to allow the child to testify in a room other than the courtroom, with the evidence being transmitted by closed circuit.
The child must be under 18 at the time of the trial.
The circumstances are such, between the child and the accused, that such is procedure is necessary in order to receive a full and candid account.
Code s.486

If the child is out of province, with consent of counsel , the child may be permitted to testify by videolink pursuant to section 714.1 of the Code.

Screen/Closed Circuit Television
Can the child testify in another room or with a screen between him/her and the accused?

The prerequisites are:
1.Complainant or witness
2.Sexual and some offences related to physical violence
3.Trial or preliminary hearing
4.Under 18 or mental or physical handicap
Within the court's discretion with the test of to obtain a full and candid account.

If the witness is required to testify to determine the procedure, a screen or closed circuit is used for this. *C.Code* S. 486 (2.1)
*R. v. L, [*1993] 4 S.C.R. 475 upheld the constitutionality of Section 486's allowing the screen.

There is no hierarchy of test that says first testify, then use the screen, then use the closed circuit. The Crown can seek the closed circuit from the beginning.

(3) Exclusion of the public
Do people have to be in there when I testify?

The court may order the public out of the courtroom during the testimony of the child.
In determining proper administration of justice the Code is specific that the interests of witness under the age of fourteen years are safeguarded with sex offences, or acts of violence used or attempted. If sexual offences, the judge must give reasons if the public is allowed. S. 486 (1), (1.1), (2)

(4) Support Person
Can my mom be there when I go in?

The crown or witness can apply for a support person for a child under 14 at the preliminary hearing or trial.

The child or the crown makes the application. Whether there is a support person allowed is within the discretion of the judge.

The court may also order that no communication take place between them during the trial. *C.Code* S. 486.(1.2)

(5) Ban of publication of the child's identity.
Is everyone going to know about this?

The court may order that there be no publication in any record that would tend to identify the complainant The court shall inform the witness under 18, or a complainant of a sexual offence, of their right to apply for a ban on publication. Upon application by the prosecutor or the witness, the court may make an order. *C.C. Code*
S. 486(3)

(6) Other communication strategies.

Section 6 of the C.E.A. provides that a witness who is mentally or physically challenged may use what technique is necessary to communicate the evidence.

(I) Preparation in advance
What's going to happen in there?

(1) Preparation by Crown counsel on the Evidence
It is expected that counsel would prepare the child for the inquiry by explaining the courts expectation of the child witness, and concepts of promise, and telling the truth.
If not, the judge may do so.
It is acceptable for a parent to instruct the child on these expectations and concepts.
R. V. Brown (1951), 12 C.R. 388, 99 C.C.C. 305 (N.B.C.A.)

(2) Preparation by Victim Assistance Agencies

The Ministry of the Attorney funds agencies throughout the Province of British Columbia to assist in the preparation of child witnesses involved in criminal trials. Primarily specialised, community-based victim service programs do this work. The Ministry also funds police-based victim services and Crown Victim/Witness Services based in prosecutors' offices, which serve a range of victims. If there is no specialised community-based program in a community police-based or Crown–based programs may prepare and support child witnesses.

Victim service workers liase with the Crown counsel of their area to facilitate a joint preparation. The focus of the victim service is court orientation and accompaniment and the Crown counsel prepares the child on the evidence and other related matters.

Other Provinces, (for example Ontario and Alberta) offer court Preparation courses for children. The children expecting to testify in Criminal court attend several weeks of classes to learn about the court Experience. British Columbia does not have any "court school" type Programs.

The Ontario Ministry has created various materials for children going to Court, including the workbook "What's My Job in Court" and the web page "Cory, the Dog" found at www.tcac.on.ca.

In 1996, Victim Services Division of the B.C. Ministry of Attorney General produced a research report and guidelines on *Working with Aboriginal Child Victim Witnesses*. These guidelines have been widely distributed to victim service providers and aboriginal service providers throughout B.C..

In 1997, Victim Services Division produced a report, *Children and other Vulnerable Witnesses A Guidebook on Court Design.* Work is currently proceeding to implement some of the recommendations of this report, including the funding of 20 court locations to enable children's testimony to be provided through closed circuit TV and videotape.

PART THREE SOCIAL AND LEGAL REFORM AND CHILD VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

It is clear that despite the reforms of the last two decades, the needs of children are still not consistently being met in the criminal process. Concerned law makers, practitioners and parents continue a dialogue and listen for room for improvement.

Recommendations by the Roundtable held by the Society of children and Youth of B.C. in partnership with the Justice Institute of B.C. - 2000

After a day long the symposium , the group developed the following as priorities in better meeting the needs of children witnesses:

- Establish a specialized provincial resource team on child abuse and neglect,
- Facilitate and support the establishment and ongoing operation of local interagency coordinating committees on the criminal justice response to child abuse and neglect,
- Develop and implement a coding and tracking system for expediting and monitoring cases of child abuse/neglect through the criminal justice system,
- Develop and implement a comprehensive training plan on responding to child abuse and neglect, for all sectors of the criminal justice system,
- Develop and implement a province-wide plan to made criminal court facilities more accommodating to child victims/witnesses,
- Develop and implement training programs on child abuse/neglect and child witness issues mandatory for judges,
- Introduce a Bill to amend s.486 of the Criminal Code to make testimonial supports more widely available to child witnesses,
- Explore legislative reform ,
    - To enable child advocates to be appointed in cases involving child victim's witnesses,
    - To enable communication with child witnesses to occur through a communication intermediary,
    - To enable child witnesses under 14 to testify without first undergoing a competency hearing
    - To enable child witnesses to give evidence and are cross-examined on the evidence by way of a videotaped pre-trial disposition.

Child Victims and the Criminal Justice System – A Consultation Paper
The Department of Justice Canada, Family, Children and Youth Section
November 1999

The Department of Justice has circulated a consultation Paper asking the Canadian practitioner their views on the following issues for law reform:

- Should testimonial supports be made more widely available to children?
- Are there any other ways in which testimonial support could be given to children in court?
- Should the videotape procedure be made available to all child witnesses in criminal proceedings, regardless of the offence involved?
- Should police and other professionals be encouraged to develop guidelines or standards on appropriate methods of conducting videotaped interviews of children to help ensure the interviews will be admitted in evidence?
- Should out-of-court statements made to third parties by children alleging crimes committed against them be admitted to prove the truth of the statements, providing the statements are made in circumstances supporting their reliability?
- Should there still be an additional requirement to show ”necessity”?
- Would it be more appropriate to provide that any delay in the trial or preliminary hearing will not deprive the child witness of needed support?
- Would it be preferable to make these types of assistance available to child victims and witnesses regardless of the offence, if it would help reduce their trauma and enable them to testify more fully and accurately?
- Should the general age of consent to sexual activity be changed? If so, what would be an appropriate?
- Is there a need to amend the Criminal Code to clarify that no apparent consent or acquiesce can be considered a mitigating factor in sentencing where consent is specifically stated not to be a defense to a charge involving a child victim?

Appendix A
Number of Children Witnesses
in British Columbia in 1998 and 1999

Year	Child Status	Sexual Assault Victims/Witnesses	All child Victims/Witnesses	%
1998	under 10	275	582	47.3
1998	11-14	251	1031	24.3
1998	15-18	253	1874	13.5
	All	779	3487	22.3
1999	under 10	151	470	32.1
1999	11-14	176	753	23.4
1999	15-18	160	1293	12.4
	All	487	2516	19.4

Courtesy of Lee Porteus,
Senior Policy Lawyer,
Ministry of the Attorney General,
Victoria, British Columbia.

Appendix B

THE USE OF CLOSED CIRCUIT TELEVISION FOR THE CHILD WITNESS

CHECKLIST FOR CROWN COUNSEL[8]

1. Early identification of need:
Systemic identification of child/special needs witness cases
Is there a system in your office to identify these cases in advance? If not create one.
Is there likelihood that a witness requires this aid?
The case needs to be assigned at least one month in advance of trial.

2. Meet witness(es) in advance
-the crown needs to meet the witness in advance to assist in preparation of the application
collect evidence of needs i.e.: *full and candid account*
-others including family members, counselors, and/or police may provide evidence on the need of a special aid

3. Determine whether a screen or closed circuit needed (before court):
The Code section states that the method may be permitted in order to receive a full and candid account from the witness. Implicit in the section is an inhibition to testify because of the presence of the accused.

The crown will determine if there are indicators of the child being inhibited by the presence of the accused.
-family members may give examples demonstration of fear or silence
-the child's statement may contain comments or indicators
-the child's therapist may have heard something from the child

The child him/herself might be asked. The writer suggests this be done in a none leading manner.
E.g.: Go through child's strengths and then ask what might get in the way of the child doing her best job.
Child who will not tell of the abused, tells in closet, and later told her dad would be in the room, what would that be like for you? Would it be better if he was or was not in the same room?

4. Determine whether to specifically ask for the closed circuit rather than the screen:
The Code does not specify how one decides the method.

Variables that contribute to the choice:
Do you have a screen?
Do you have time for a closed circuit link up? (This may mean adjourning the trial.)
What is the position of the defense?
What does the child say about preference? Example: Session before court with a 7-year-old. Pictures were drawn illustrating methods and child's emotions (happy face, sad face, angry face etc.). The father was present. A screen was present. The child emphatically stated she wanted the closed circuit. The father testified at the application.

The writer's experience that once an aid is sought, the defense prefer the closed circuit to the screen. Also, the writer's view is that the closed link does a far better job at separating the child from the accused.

5. Communicate with the Defense
- tell of plans to make the application
- disclose the evidence you anticipate calling in your application

6. Arranging the Equipment:

- Arrange through the court registry at least one week in advance
- Test the equipment in advance to ensure the technology meets the intention of the Code

7. Required Equipment:

- two cameras, at least three large monitors and
- if a s.715.1, two extra monitors and a VCR.
- a table and three chairs
- one chair suitable for the size of the child
- a bible (if an oath is anticipated)
- any drawing equipment

8. The application in court:

Ideally the application will be raised at the pretrial conference and settled before trial date. This would mean systematically setting a date for such application prior to the trial date in these types of cases.

The crown makes the application preferably by calling witnesses who will provide information generally about child communication and specifically relating to the needs of the child at hand with examples. I.e.: *children will be frightened to say things. This child told me during a session that she is afraid of the accused.*

The dilemma is that the application may be made the child takes the stand is not allowed to testify under the s.16 criteria.

Or the equipment is ordered and set up and the application is not allowed. In one case the judge criticized the crown for setting up the equipment in advance as being a presumptuous step. (On the other hand not to be prepared causes delays).
Also, calling a therapist may lead to an application for the therapist's notes under section 278.2 of the Code.

9.Once the application is granted:

The child takes the stand
The child sees the judge on the monitor and the lawyers are in the same room as the child
A section 16 inquiry takes place.
Counsel needs to get exhibits that will be shown to the child in advance.
The atmosphere is very informal. The child may tend to want to speak out of turn or speak quite personally.
There may be a s.715.1 application during the child's testimony. In which case the crown enters a voir dire and the child is shown the video on a separate monitor. There is another linked monitor in the courtroom.
The strategy must be communicated on how the accused might speak to his lawyer. The accused should not speak so that the child hears him/her.

CHECKLIST FOR CLOSED CIRCUIT

BE CARING, CURIOUS AND COURAGEOUS

1. Identify the potential need
2. Meet with the child and team members to determine real need
3. Determine the defense position
4. Provide disclosure relating to this issue
5. Arrange when the application will take place
6. Arrange the equipment with the registry
7. Check the equipment set up in advance with defense counsel
8. Show the child the set up in advance
9. Remember the exhibits
10. Ensure there are supports outside to stay with the child on breaks and to debrief him/her at completion.

SMILE YOU'RE ON CAMERA

Appendix C

Sample Procedural Guide for Videolink with a Child Witness
Supreme Court of British Columbia

In the Matter of R. v. T.R.M.

Procedure for May 16, 2000

Subject: The evidence of K M and Adult Accompaniment via closed link.

Issues: Integrating efficient use of scheduled video link time and compliance with the requirements of Canadian Law in a criminal trial.

Discussion:

1. The Crown's case relating to the complaint involving K.M. consists of the vive voce evidence of the child as well as her previous statement, which was recorded on videotape.
2. The Crown has started a voir dire to determine the admissibility of a videotaped interview of the complainant K.M..
3. The witnesses on the 715.1 voir dire include Det. Yaciansky and the child interviewee, K.M. who is 8 years old and resides in Calgary.
4. The interviewer, Det. Yaciansky, is in examination in chief on the voir dire, and must still be cross-examined before a determination can be made of the admissibility of the tape.
5. This determination needs to be made before the remaining vive voce evidence of the child.
6. The child's evidence is via video link, which is scheduled for the entirety of the court day of May 16.
7. The Crown intends to call Adult Accompaniment who will give her evidence by video link as well. The Crown anticipates her evidence will be less than 15 minutes in total.
8. Calgary is one hour ahead of us so the child may have basic needs at different times than the persons in New Westminster.

Recommended Procedure:

1. Crown applies to have the child, K.M. and the supporting Adult Accompaniment, testify by video link by consent.
2. Court rules on whether the child can testify using the video link procedure.
3. Court conducts the inquiry to have the child promise to tell the truth pursuant to section 16 of the Criminal Code.
4. The child is asked to promise to tell the truth.
5. Adult Accompaniment is sworn or affirmed as well.

6. Child is asked preliminary questions by the Crown counsel.
7. Child is shown the tape in the entirety without interruption (about one half-hour).
8. Child is asked questions relevant to the adopting of the contents in examination in chief.
9. Child is asked questions by the defense relevant to the Section 715.1 application.
10. Child is given a lunch break while Det. Yaciansky is cross-examined on the voir dire.
11. Court makes a ruling on the admissibility of the videotape.
12. Crown applies to have the evidence of the voir dire become evidence in the trial proper.
13. Child returns and gives evidence in whole (examination in chief and cross-examination).
14. Adult Accompaniment gives her evidence in whole (examination in chief and cross-examination).
15. Once the video link testimony is complete, Det. Yaciansky returns to the stand to continue her evidence in chief outside of voir dire.

Appendix D

Relevant Legislation Sections

Canada Evidence Act
s.6 Section accommodates witnesses with physical disability
s.16 Competency Section for children under 14 and adults whose capacity is challenged

Criminal Code
486(1) Members of public may be excluded from court
486(1.1) Exclusion of witnesses under 18 where sexual offences
486(1.2) Support person – under 14, or physical or mental disability
486(1.3) Support person if proper administration of justice
486(1.4) Court may order no communication- support person and witness
486(2) Court to give reason why no exclusion of public
486(2.1) Closed circuit or screen – under 18 or mental or physical disability
486(2.11) Witness testifies using screen/closed during application for same
486(2.2) Judge and accused must see testimony of child and
accused must be able to communicate with counsel
486(2.3) Accused shall not personally cross examine child
486(3) Ban of publication of the witness identity
486(4) Judge to inform witness under 18 and complainant's of offenses of right for ban
486(5) Offence to publish identity of complainant /witness
658 Proof of age
659 Abrogates any common law rule to warn the jury
714.1 Witness in Canada testifies by video link
715.1 Videotape of interview is admissible if contents adopted

Appendix E

Common Impeachment Strategies:
(From **"The Child Witness"** by Michelle Fuerst and Christopher Bentley – 1997)

What are the procedural protections and how can defense counsel counter them?

Section 16 – the inquiry

Although the issues for the inquiry are capacity to testify, the questions that are asked become relevant if the child is permitted to testify , as evidence on the issue of credibility later in the trial.

Defense will likely prefer that the Judge ask the questions rather than the Crown.

Expect the suggestion that child has merely memorized the questions from Crown.

Defense may seek the child not be questioned in the inquiry in front of the jury if there is likely a potential prejudice to the accused. On the other hand, if a child is not permitted to testify, but an inquiry has been conducted in front of the jury, the defense may rely on the child's behavior during to the inquiry to discredit the crown's case based on hearsay evidence.

Expect defense will attempt to discover whether the child is remembering events or remembering what people have told him/her about events.

The Screen/Closed Circuit

Expect an argument against blocking the accused instead of the child , based on the wording of the Section.

There may be instances that the defense seek the use of the screen for their own child witnesses.

Reasons that defense will oppose the screen are:

1. "Inhibition in the traditional right of the accused to face the accused"
2. The evidence or submissions lead by the Crown in showing a screen is needed, will provide all parties with information about the child that may be used later in the trial.

Certain crown have tried to have the accused removed from the courtroom rather that blocking the child and have been met with strong objection from the defense.

Section 715.1

There should be a voir dire to test the admissibility during which the defence may seek an entire chronology of the making of the video, as well as the logistics of the recording itself (eg: who was present, was there discussion in advance, are there breaks in the tape, do parts not make sense as if they relate to advance preparation, gestures of positive reinforcement during the interview .)

If the content seems flawed, defence may argue the tape should not be entered at all or that parts should be edited.

Defence will likely object to the tape being entered if it is made after a delayed disclosure or if the police/social services have not videotaped the child in the early stages of the investigation.

Defence may seek leave to have their expert interview the child. In some cases defence may seek to call the child as part of a crown application when the crown does not call the child.

Appendix F

Vulnerable Witness Pre-Court Checklist

	Issue	Comment
1	Application for a ban of publication	
2	Application for a closed courtroom Section 486 (1)	
3	Application for a screen pursuant to Section 486(2.1)	
4	Application for a closed circuit link Section 486(2.1)	
	Is the procedure consented to by counsel?	
	What is the set up?	
	Date the equipment is required?	
	Is a videotape anticipated as part of testimony?	
5	Application for closed link Section 714.1	
6	Inquiry pursuant to Section 16 of the Canada Evidence Act i. to determine competence ii. to determine oath, affirmation or promise to tell the truth	
	What is the nature of the objection if the witness if over 14?	
	Who will ask the questions of the subject witness?	
	Will screen or closed circuit be used for the inquiry?	
	Will the support person be present for the inquiry?	
	Will other witnesses testify in the inquiry??	
	Is there any objection to the inquiry being conducted in front of the jury?	
	Date and time of Inquiry	
7	Application for counsel to cross examine the child	
8	Application for a support person.	
9	The physical seating arrangement for the witness	
10	Entrance into the courtroom.	
11	Application for an interpreter	
12	Application for extraordinary communication strategies	
	Expert evidence as part of the application.	
13	Nature of questioning by counsel.	
14	Timing of the testimony to accommodate all parties and the witness.	
15	Relative positions of counsel and the accused and the witness.	
16	Where will the witness wait pending testifying?	
17	Are there medical or other related issues to be addressed?	

	Issue	Comment
18		
19		
20		
21		
22		

Draft only

See an earlier version in the *Child Witness Manual* page 167.

Please forward ideas for further draft to W.V.T. Harvey, Lee Porteus or Frances Gordon.

Appendix G

Summary from "Developmentally Appropriate Questions for Child Witnesses" by Nicholas Bala et al, (1999), 25 Queen's L.J. 251-04

Level determined by:

1. **linguistic (semantics, syntax, pragmatics)**
2. **cognitive (to perceive, store information, concepts, and reason)**
3. **emotional (reaction to separation from parents, ability to deal with intimidation etc.)**

Usual Problems:

- **inappropriate vocabulary**
- **double negatives**
- **confusing sentence structure**

There are four periods of development: i) 0-2, ii) 3-6, iii) 7-10, iv) 11-18

Preschoolers, (3 years to 6 years)

- **many words and grammar rules they do not understand**
- **will not understand legal terms**
- **may not use adult terms for genitalia**
- **ask child to use word in a sentence**
- **the more the syllables less likely to know it**
- **may not know primary colours**
- **mix up prepositions (before/after, above/below)**
- **mix up this/that, give/take**
- **understand concrete objects**
- **interpret words literally**
- **may not understand pronouns**
- **embedded phrases should be avoided**
- **use simple subject verb sentences**
- **avoid negatives**
- **(Isn't it true that?)**
- **not likely to know difference between "know", "think", and "guess"**
- **may not understand behind the words they use**
- **do not ask for number of times**
- **cannot tell time yet may have the name of the months**
- **cannot distinguish long or short time**
- **ask "what was on TV?" "Where was mommy?"**
- **cannot put in order**
- **dimensions not likely available**
- **may not be able to tell bigger or smaller**
- **cannot attribute motive ("Did he enjoy putting his finger in his bum?)**
- **cannot speculate about others**
- **body language will not hide their true feelings**
- **avoid "why" questions**
- **can only focus on one issue at a time**
- **avoid "do you remember…." type questions**
- **avoid two verb tenses in one question**

MIDDLE CHILDHOOD (7 years to 10 years)

- **difficulty with negatives and passive voice and more than one verb tense**
- **still use concrete levels of reasoning**
- **ensure the child understands the word the child uses**
- **avoid jargon and legal terms**
- **avoid long sentences**
- **avoid "do you remember…." type questions**
- **cannot apply their logic abstractly to others (ie: making laws)**
- **can give information on time (day, month etc.)**
- **able to make logical link (wearing short and therefore summer)**
- **cannot estimate distance nor size**
- **cannot compare periods of time ("was it three or four years ago?")**
- **cannot give number of times accurately**

ADOLESCENTS (11years to 18 years)

- **consider linguistic and cognitive development**
- **consider emotional and social development**
- **confusing or embarrassing questions may cause a reaction in the child**

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Canada's Mental Health, June/September 1990,

Harvey, W., Daylen, J., Sexual Offences and Victim's Rights ,(in press, Irwin Publications, Toronto, publication date unknown)

Weblinks:

National Clearing House on child Abuse and Negliect (US)
http://www.calib.com/nccanch/

Advance training for Prosecutors (US)
http://www.ndaa.org/training/courses/childproof.html

Dr. T. Lyon on children witnesses
http://hal-law.usu.edu/users/tlyon/

Nick Bala's home page
http://qsilver.queensu.ca/law/bala/bala.htm

BC Institute of Family Violence
www.bcifv.org

THE CHILD WITNESS:

Related Practice Directives and Practice Bulletins
Directly related **No. 39 Use of Video and /audio links in Criminal Proceedings** **No.34 Person with Disabilities s.153.1;New Rules Applicable to Jurors and Witnesses**
Indirectly related **No.3 Prosecutions for possession of "child pornography pursuant to s.163.1(4) of the Criminal Code** **No.20 Criminal Code Amendments re: Sexual Exploitation of Children**

Related Papers and Manuals in Folioviews
Directly related The Child Witness Manual
Indirectly related Cook's Tour by Hank Reiner

Related Videos Available Through the Ministry of the Attorney General
The Investigative Interview **- Ministry of Social Services, 1988** ***The Child Witness*** **- Western Judicial Education Centre , 1990** ***The Child Witness Series*** **- Ministry of the Attorney General - 1994** ***Kirstie's Story*** **- The Justice Institute - 1995** ***Charting New Waters*** **- The Justice Institute – 1996**

Table of Cases

[1] Spencer, J. and Flin, R.(1990). *The Evidence of Children.* London, U.K. Blackstone Press Limited

2. For an example of the rigors of the corroboration rule see *R. v. Scott* (1973), 15 C.C.C. (2d) 234 (N.S.C.A.) an incest case that the 16 year old complainant was a virgin was not corroborative, as it did not implicate the accused and the girls; complaints to her mother were not "independent."

[3] The rationale of this rule was articulated by the Supreme Court of Canada in 1962 in *R.v. Kendall* (1962), 132 C.C.C. 216, at 220. The basis of the rule of practice, which requires the Judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1.His capacity of observation.2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility. (Wigmore on Evidence, 3rd ed., para.506.)Abrogated by statue in 1994 see s. 659 Criminal Code.R.S.C. 1985, c.C-46.Abrogated by statute ss.246.4 and 586 of the Criminal Code, R.S.C. 1970, c.C-34, and s.16 Canada Evidence Act, R.S.C. 1970, c.E – 10, as amended S.C. 1987, c.24 (in force 1 January 1988).

4 As regards sexual offences, s. 246.4 (now s. 274) of the Criminal Code, R.S.C. 1979, c.C-34, as enacted by S.C. 1980-81-82, c.125 (in force 4 January 1983).

5. Since as early as the Badgely report of 1984, there has been controversy over whether there should be a competency hearing at all. Recently in the Department of Justice Canada Discussion Paper "Child Victim and the Criminal Justice System" November 1999 again the questions is asked "should child witness be placed on the same footing as adult witnesses by eliminating the requirement for a competency hearing?"

6 Amendments to the *Criminal Code*, repealed the statutory requirement for corroboration and the common law requirement for a warning to the jury.

7. Projects relating to the implementation of Section 714.1 to 714.1, i.e. the use of video link in criminal procedures generally have encouraged courtroom designs to include equipment and environments for s.715.1 applications. (As per Andrea Ross - Ministry of the Attorney General, 1999)

[8] This Checklist was drafted by the author for a CLE conference and is not approved of nor intended to reflect the position of the Ministry of the Attorney General.