Crown Counsel
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# The Use Of Technology with The Vulnerable Witness

## Some Legal and Practice Issues for the Prosecution

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The writer wishes to acknowledge:
Professor Nick Bala of Queen's University for permission to quote from his work and to Diane Crossley of the A.G. library in Victoria and for her assistance in the research of this paper.

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***The writer advises colleagues to not rely on the contents of this paper for court purposes without checking the references in advance.***

***The views expressed in this paper do not represent the position of the Ministry of the Attorney General of British Columbia.***

Chapter 1

# INTRODUCTION

## PAPER OBJECTIVES

Participants will receive knowledge related to:

- circumstances that call for the use of video technology for vulnerable witnesses ,
- the law around:
  - use of video link in court proceedings,
  - use of pre recorded statements on video in court proceedings,

  (with emphasis on witnesses with extraordinary needs or out of province)
- set up and use of the equipment,
- scheduling and canceling equipment for video or link use,
- witness management and examinations in chief and cross examinations when the equipment is used.

## ABOUT THE AUTHOR – (604) 660-8722

***Wendy van Tongeren Harvey*** has been a crown counsel practicing in the Province of British Columbia since 1980 .

Ms.vT. Harvey is best known for her work in the area of prosecution of crimes of violence against persons who experience vulnerabilities, eg: children, persons with disabilities. She has shown an interest in this area since 1981 as a prosecutor both with court work and also in areas of training, training material creation, writing, public speaking, policy development and legislative reform. She has close to ten published works as a co-author including the Canadian Best Seller, *So You Have to Go to Court* ( Lexis Nexis Butterworths, 1986).

Since 1984 to present she has played a significant role in training police, crown, social workers and judges throughout the country. She has offered a recent series of workshops on child witness issues, with Dr. John Yuille and Wayne Roberts (Rtd RCMP) to local communities (Justice Institute of B.C.). She represented Canada in Italy and the U.K. at international conferences in 1992 and 1988 and was asked by the I.A.P. and ICCLR to train prosecutors from throughout the world on effective child abuse prosecutions in Sydney, Australia , 2001. She has been an expert witness in Canadian legislative reform before parliamentary committees in 1987 and 1992.

Ms. vT Harvey currently prosecutes in the Supreme Court in New Westminster, and teaches part time at a local university college. She continues to write and update her published work. She published an update to her 1993 book Harvey/Dauns - *Sexual Offences Against Children and the Criminal Process (* Lexis Nexis Butterworths', 2001) and is currently co-writing *Trauma, Trials and Transformation* (Irwin Publications, in press 2003) and *Child Welfare Law* – "Preparing Children for Court" (in press 2003).

Ms. vT Harvey has two children and three step children and lives on a farm in Langley, with her husband, Leo, and family.

Chapter 2

# AN OVERVIEW OF THE ISSUES

## Legal Reform

In 1988, Parliament introduced provisions in the *Criminal Code* designed to enhance the child witness' experience when testifying by using video technology. The principles underlying the Bill C-15 amendments have now been extended to embrace other vulnerable witnesses.

Professor Nick Bala writes:[1]
(shaded areas reproduced with permission from Prof. Nick Bala)

> In 1993, the Supreme Court of Canada upheld the constitutional validity of these provisions, emphasizing that they facilitate the truth-seeking function of the criminal justice process, without compromising the rights of the accused to a fair trial. 2
>
> However, these testimonial aids are still used relatively rarely in Canada, even in cases with young children.3 The limited use of these provisions is in part due to resource issues and the lack of access to appropriate facilities. But there also seems to be a continued reluctance by justice system professionals to use the facilities that are available.
>
> Prof. Nick Bala – Queen's University, 2001

In 1999, the *Criminal Code* was amended to facilitate the reception of evidence by audio and video transmission where the witness is out of province or out of Canada. These amendments are designed to modernize evidentiary procedures consistent with the advances of technology. Unlike the 1988 amendments, they are not motivated by vulnerable witness concerns. The courts in B.C. started using videoconferencing in 1996. Since November 1998

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[1] Bala, N. et al, "Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes," 44 Criminal Law Quarterly 1,

[2] *R*. v. *L.(D.O.)*, [1993] 4 S.C.R. 419 [hereinafter *D.O.L.*]; *R.* v. *Levogiannis* [1993] 4 S.C.R. 475 [hereinafter *Levogiannis*]. See also *R.* v. *F.(C.C.)*, [1997] 3 S.C.R. 1183 [hereinafter *C.C.F.*].

[3] See e.g L. Sas, *I'm Trying to Do My Job in Court. Are You? Questions for the Criminal Justice System* (London Family Court Clinic, 1999), p. 56 - 59. In a study of 913 Ontario cases involving child victims (352 were under 11 years of age), in only 6 cases was a screen used at the preliminary inquiry and in 10 cases was a screen used at trial. Three used closed-circuit television at their preliminary inquiry and only one child used closed-circuit television at trial; videotapes were used in only 7 cases at the preliminary inquiry and 5 at trial.

the courts have been using the technology far more frequently in some court locations which are permanently equipped with the necessary technology. This changing cultural climate has further accelerated the acceptability of practice to use technology for the vulnerable witness testifying within or out of province.[2]

## What is the Technology?

Simply put, these are the applications:

1 The witness testifies outside of the courtroom (or even outside the courthouse) and the vive voce evidence is received in the courtroom simultaneously via transmission to a television monitor.

2 The witness testifies and a previous video recording of the complaint forms part of the testimony.

3 The witness does not testify at the trial and a video recording of the complaint is admitted for the truth of the contents.

Most of us are aware of the basic vcr technology described in application 2 and 3 above. The transmission of images from another room in the same court house or from another country is significantly more technical. The equipment requirements were described in a paper presented to Crown Counsel by Lari-Ann Gilbert in September of 2001 as follows:

> Video conferencing is a highly advance technology which, with the use of computers, cameras, televisions and other equipment, allows for participants, who are not in the same room or community, to engage in simultaneous visual and oral communications.
>
> Videoconferencing operates through a "CODEC" unit at each location. Each unit has a minimum of one camera and one microphone. It is a specialized computer that performs their functions to code and decode video and audio signals for transmitting on a digital network. These audio and video signals are transmitted between the two units through ISDN line. The Integrated Services Digital Network is a switched-circuit network that used digital technology. ISDN lines consist of two channels, each of which is capable of transmitting date at either 56 or 64 kilobits per second. Long distance tolls are applicable to each ISDN channel in use when connecting sites outside the local calling are of the site initiating the connection. ISDN is only available in certain areas of the province. In other areas, Switched 56 or DataDial 56 services may be available.
>
> Videoconferencing is not available in areas not serviced by ISDN or Switched 56.

[2] In Vancouver, October 1999, The Attorney General of the Province attended a Symposium on the Child Witness, (Society for Children and Youth) and announced the initiative to use technology with children witnesses. This was part and parcel of the initiative generally to use videoconferencing in the B.C. Courts.

## What is the Law Regarding Evidence by Video ?

## An Introductory Summary

RE: Videolinks:

- There are provisions in the *Criminal Code* that allow for an application for the witness to testify outside the courtroom (or behind a screen) in certain circumstances and if required for the court to receive a *full and candid account*. (S.486(2.1)).

- There are provisions in the *Criminal Code* for a witness to testify from a different location where out of province or out of country. (S.714.1 and S.714.2).

RE: Pre-recorded interviews:

- There are provisions in the *Criminal Code* to allow the Crown to apply to admit the pre-recorded investigative interview of the offence, if certain preconditions are met and if the contents are adopted by the witness. The witness must still testify.(S.715.1 and S.715.2).

- There is common law authority to enter the prerecorded video taped investigative interview as evidence for the truth of the contents , if the preconditions of trustworthiness and necessity exist. (*R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.)).

## The Signals That Suggest The Possibility Of The Use Of Technology In Receiving The Evidence:

**A combination of the following:**

- **violent offences, and/or sexual offences,**
  **and**
- **witnesses under 18 years when the trial takes place,**
- **witnesses who have a physical disability (eg: cerebral palsy, deaf),**
- **witnesses who have a mental disability (eg: down syndrome),**
- **witnesses are out of the province**
  **and/or**
- **video recordings that form part of the investigation of the offence,**
- **video recordings that form part of the offence.**

Chapter
3

# VIDEOCONFERENCING WITHIN THE COURTHOUSE (AKA CLOSED CIRCUIT TELEVISION)

## Introductory Comments

One of the greatest fears that some child victims have about testifying in court is of seeing the perpetrator of their abuse again. For some children, especially younger ones, there may be a fear that he may physically harm them, for others there is psychological distress at seeing him again. In some cases a perpetrator may attempt to intimidate a witness with a facial expression or hand signal. In some cases, the child may become completely silent on seeing the perpetrator again, or may start to cry or even become physically ill. For some children, it is not just the presence of the accused that is distressing; they may be intimidated into silence by the court room itself, for the child a very large and foreign room filled with strangers.[6] Bala at page 463.

## The Criminal Code Sections [3]

It is within the trial judge's discretion to allow a witness to testify in a room other than the courtroom, with the evidence being transmitted by closed circuit where certain criteria are met.

### *Criminal Code* Section 486

**486(2.1) Testimony outside court room** - Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272 or 273 and the complainant or any witness, at the time of the trial or preliminary inquiry, is under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability,

[6] L. Sas et al, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project*, Child Witness Project, London Family Court Clinic Inc., September 1993 at xvi. [hereinafter *After the Verdict].*

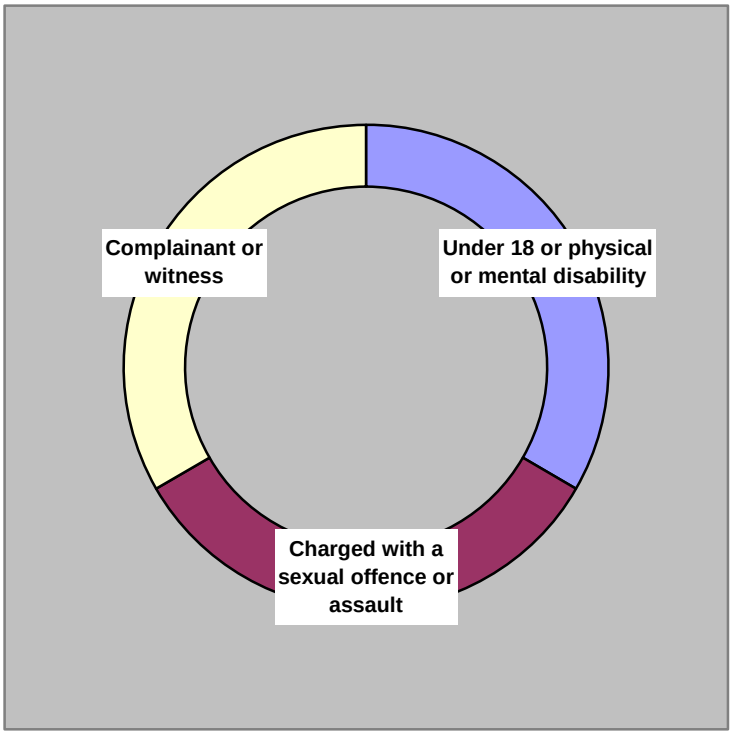
[3] Section 72 of the *B.C. Evidence Act* allows a person under the age of 19 who is alleged to have been physically or sexually abused to testify outside the courtroom. This is designed to accommodate witnesses in civil proceedings.

the presiding judge or justice, as the case may be, may order that the complainant or witness testify outside the court room or behind a screen or other device that would allow the complainant or witness not see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant or witness.

**(2.11) Same procedure for opinion** – Where the judge or justice is of the opinion that it is necessary for the complainant or witness to testify in order to determine whether an order under subsection (2.1) should be made in respect of that complainant or witness, the judge or justice shall order that the complainant or witness testify pursuant to that subsection.

**(2.2) Condition of exclusion –** A complainant or witness shall not testify outside the court room pursuant to subsection (2.1) or (2.11) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant or other witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

## Variables in allowing video conferencing for vulnerable witnesses



## The Constitutionality of the Section

*R. v. Levogiannis , [*1993] 4 S.C.R. 475 ,(1993), 85 C.C.C. (3d) 327, upholds the constitutionality of Section 486's allowing the screen. (The threshold test for the use of the screen is the same as the videoconferencing.)

In *Levogiannis* and in an unanimous decision, Madam Justice L'Heureux Dube writes on behalf of the court. Among the many considerations examined by L'Heureux Dube J. , is the goal of the of the court process to seek the truth and integral to that goal, the need that the evidence of all those involved, including children, be given in the way that is most favourable to eliciting the truth. She observes the courts failing children particularly , and especially those who are victims of abuse and who are subjected to further trauma as participants in the judicial process. In giving her reasons, she refers to social science literature. She urges that our system recognize children may need different treatment, that research shows that confrontation may not work for children. She also acknowledges the trend to relax barriers for children. In *Levogiannis,* the court states that the language of the section is clear enough and that the right to confront is not an absolute one. It is subject to qualification in the interests of justice.

## Some Benefits to the Witness

Professor Nick Bala writes[4], in connection to the research on the response of the justice personnel to the use of screen and closed circuit television and the benefits to the witness:

> The vast majority of judges (96%) agreed that s.486(2.1) is a "useful" provision , while 94% agreed that it is "beneficial" to the child. The judges demonstrated an understanding of how this provision can help diminish the particular difficulties children face in the formal and sometimes frightening atmosphere of the courtroom:
>
> - In rare instances, it may provide the only effective means of 'freeing' the child from the intimidating inhibition of confronting Accused in the courtroom, or the intimidating presence of others in the courtroom (relatives, etc.)
> - Reduces the stress for the child witness and thereby tend to assist with the receipt of clear and useful evidence.
> - Comfortability is a component of truth telling - making any witness comfortable does not impair trial process. ... A comfortable witness testifies best - both in direct and cross. We have to create the best atmosphere for all witnesses to testify.
> - Children, especially young children, are at a distinct disadvantage when challenging or attacking an adult particularly one who may be in a position of authority over them.

[4] Infra footnote 1.

One judge said: “The presence of the accused is often overwhelmingly frightening to the child.” The screen can be especially useful when the accused is a family member or a relative, and the child will feel “bad” for telling the truth about them, said one judge.

[…]A large majority of Crown counsel (86%) believe testifying behind a screen or via closed circuit television is “beneficial” to the child witness. They recognize that the use of these testimonial aids can insulate the child witness from the potential harshness of the courtroom and, in some cases may be the only way for the child to be able to testify. Bala at page 464-466

## Reluctance of Prosecutors

This survey of justice workers revealed that s.486(2.1) is being used, but also finds support for the criticism offered by Sas et al that the Crown does not make applications for its use often enough.[Sas *After the Verdict* at page 111]. It is noteworthy that as a large majority of applications are successful; the low use of s. 486(2.1) appears to be more due to Crown reluctance to make applications than to judicial reluctance to permit their use. Bala at page 469.

The B.C. A.G.policy acknowledges and encourages the use of accommodations for children witnesses.

**Child Abuse - Physical and Sexual**
**Date:** **October 1, 1999**
**File No.:** **56620-00 (Physical); 56670-00 (Sexual)**
**Policy No.:** **CHI 1**
**Reference:**
**Cross-Reference:** **ALT 1; DIS 1; NAT 1.1; REC 1.1; RES 1Abuse Rece**

**Recent amendments to the Criminal Code and the Canada Evidence Act provide measures to lessen the trauma to the child during the prosecution process. […]Another provision allows the use of devices to obstruct the child’s line of vision to the accused where the court finds this necessary to obtain a full and candid account from the child. This can be done with a screen or other device or a closed circuit television arrangement where the child testifies in a room separate from the courtroom and the accused.**

## Advance Identification and Preparation for the Procedure

An application under S.486(2.1) calls for systemic early identification of child/special needs witness cases. For uppermost effectiveness the case needs to be assigned at least one month in advance of trial.

- **Meet witness(es) in advance**

The crown needs to meet the witness in advance to assist in preparation of the application and to identify and document evidence of the witness' needs i.e.: *full and candid account*. The process may include talking to family members, counselors, and/or police and even crown lawyers (at the preliminary hearing) who may also provide evidence on the need of a special aid.

- **Determine if screen or video conferencing:**

> Eighty-nine percent of victim witness workers stated they believe the closed circuit television provision is useful, primarily because it keeps the child away from the accused and out of the court room entirely. The child's trauma is minimized and the accused is not able to exercise any kind of covert control over the child witness. As one victim witness worker put it:
>
> [Closed circuit television] is the best option for kids who require testimonial aids. Much easier on the child - does not feel like a courtroom - no distractions, more comfortable to talk with two lawyers than all the court, staff. I've been very impressed with this option. My sense is that kids will give truthful and candid evidence when relaxed and comfortable. I have sat with kids on the stand and when you look up at all the people it's very intimidating. I felt like I was back in grade 2 and called upon to answer a question that I didn't know. I clearly remember thinking 'I'll just not answer for long enough and they'll leave me alone.' I think that's often how kids feel in a courtroom.
>
> Ninety-four percent of the victim witness workers said testifying via closed circuit television is beneficial to the child witness. This provision "addresses the child's biggest fear - talking about the offence in front of the perpetrator." Bala at page 468.

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 wording of the Section, is the suggestion an inhibition to testify exists 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 from a number sources:

- family members may give examples where the witness has expressed or demonstrated 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 non- leading manner designed to elicit valid information and not instill fears that may not even be there until someone suggested it.

One such method would be to emphasis the child's strengths and then ask what might get in the way of the child doing her best job. Ask if it makes any difference who is in the room with her/him.

The *Code* does not specify how one decides the method but the case law suggests that it is not a hierarchal decision whereby the more the fearful the witness the more s/he qualifies for the closed circuit.

Variables that contribute to the choice:

- Do you have access to 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?

For example: In *the M.A.M.(2001, B.C.C.A.) case,* at the provincial court level, there was a session before court in the crown office with a 7-year-old, where pictures were drawn illustrating court practice methods and child's emotions (happy face, sad face, angry face etc.). The child's father was present. A screen was present. The child emphatically stated she wanted the closed circuit. The father testified at the application and the closed circuit was allowed.

The crown may hear an argument for blocking the accused instead of the child , based on the wording of the Section. Also, there may be instances that the defense seek the use of the screen for their own child witnesses.

Some reasons that defense might oppose the technology are :

1. The procedure inhibits the accused in the often misunderstood *right* of the accused to face the accuser, (actually this is a right to have the witness present in the court forum and be subject to cross examination),

2. To obtain a tactical advantage of hearing the evidence or submissions lead by the Crown in the voir dire.

3. Provide a potential ground of appeal if opposed and granted by the court nevertheless.

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. On the other hand, this was the preferred procedure recently in *R. v. R.G. (April 2002 , S.C.B.C.)*

- **Communication With The Defense**

Crown needs to tell the defence lawyer of the plans to make the application as soon as possible and to disclose the evidence anticipated in the application. This may create a new inquiry into therapists and the like including an application for third party records.

- **Timing Of The Application:**

The timing of the application is determined by a number of variables:

- When did the crown become aware of the need?
- Is the defence agreeing?
- How long will the application take?
- Is the witness to be called on the application?
- Is there any doubt on the competency of the witness?

The easiest route is to call the evidence in the trial before the child testifies. This will mean excusing the jury. In the recent *R. v. R.G.* case, the voir dire was three days long. The child (age 9) testified during the voir dire using the technology.

Some judges may consider it presumptuous if you set up the equipment before the granting of the order, and others will consider you ill prepared if you haven't. The jury probably should not see the equipment if the application has not been made.

These applications take tremendous patience and good will as well as good communication strategies. Murphy's Law is sure to prevail without constant vigilance (and sometimes even with).

Professor Bala had this to say about the application and timing:

> Crown prosecutors also typically have a heavy caseload and feel time-pressured, making it difficult to make use of these testimonial aids. The prosecutor may be reluctant to take an hour or more of "valuable" court time to argue a contested motion for use of a testimonial aid. Unfortunately, often there is not the court time available to argue the motion in advance of a hearing. So the Crown may prosecutor face a difficult choice : proceed without a testimonial aid, or argue the motion the day of court and run the risk of perhaps not having enough time to hear all the evidence. The lack of court time that often prevents the arguing of a motion for use of a testimonial aid before the hearing also means that children do not know in advance, whether they will be testifying with or without testimonial aids. The uncertainty of "how" they will be testifying can be very stressful to children.
>
> Bala at page 469.

- **Arranging the Required Equipment:**

The setup design will determine the equipment required. Some court houses already have a child witness room. Be wary that some rooms do not allow the witness to see in the courtroom. You and others might not consider this adequate.

Any arrangements for equipment start with **filling out a form,** and communicating with the Registry in the Courthouse where the trial will take place.

If you are ordering equipment to set up a separate room, you will need:

- 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.

This application calls for a dress rehearsal. Expect an equipment or operator error in most cases on the first attempt.

## Procedure and Evidentiary Basis for the Application

A *voir dire* is required for the application. The crown makes the application preferably by calling witnesses who know the complainant, who will provide information generally about that witness' communication of the complaint . They will describe specifically observations relatied to the needs of the witness in the circumstances at hand, with examples. Hearsay is admissible here. E.g:*Sally normally has no trouble telling me things, but she is totally silent on this. She says she is ashamed and is afraid of the Mr. X.*

Originally,many of the applications (in the 1980's) were based on submissions of counsel. The current trend is to call evidence particularly since *Levogiannis.* An expert is not always necessary in an application but may provide useful evidence, *R. v. M(P) (1990, Ont. C.A.).*

The type of witness called on the voir dire might be the police officer who is aware of the child's ability at the initial interview, a social worker who is familiar with the child, therapist or a parent. It is not enough that a parent merely testify that in her opinion the child should not testify in front of the accused. The crown called the crown lawyer from the preliminary hearing in the case of *R. v. R. G. (*2002, B.C.S.C.). And it is not necessary that the judge see the subject witness as part of the voir dire,but the crown may chose to call him/her and a screen or closed circuit is used for this testimony. *C.Criminal Code* S. 486 (2.1)

The presence of a mental or physical disability does not require expert evidence *R. v. Lanthier (1997, Ont. C.J.), R. v. Buckley, (1994, S.C.)*

The court must be satisfied on a balance of probabilities the use of screen or videoconferencing is necessary to get a full and candid account *. R. v. Olscamp (1995, Ont. Ct. Gen.Div.).* And evidence of some sort must be presented to lay the foundation even where the defence agrees. *Levogiannis (1993, S.C.C.) and R. v. Dubreuil (1998, Ont. C.A.), R. v. Smith (1993,Alta C.A.), R. v. H. (D.) (1990,N.B.Q.B.)*

The courts do not require that the child be put through trauma to determine the merits of the application. Evidence of the capabilities and demeanour of the child, and the nature off the allegations and the circumstances of the case will assist.

And the voir dire should be separate from the competency inquiry so the issues are clearly identified and analyzed. *( R. v. S. (S.M.)1995, Alta.C.A.)*

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. *R. v. Peterson (1996, Ont.C.A.)* In *Levogiannis (at page 492),* L'Heureux-Dubé J. stated for the Supreme Court that the judge need not find "exceptional and inordinate stress on the child" in order to merit the use of the special measures.

The intent of the legislation is to protect the witness from the accused . This means the accused and witness are separate and communicate to the courtroom by use of technology. The section specifies that the witness be out of the room without further specifics. In the recent *R. v. R.G.(2002, B.C.S.C.)*case the accused was invited out of the room into the jury room and watched the trial from a monitor. The child was in court with everyone else. The judge could see the accused on the monitor and the latter would signal if he had a need to communicate with his lawyer (Mr. Coleman)

There are some examples where courts of appeal have held the foundation laid at trial was insufficient:

- In *Re. M(P) (1990, Ont. C.A.)* the only witness on the voir dire was the complainant .
- In *R. Testor (1993, Ont. C.A.)* the social worker said she might freeze

There are examples where courts of appeal have upheld the judge's decision to allow an accommodation:

- *R. v. S.(S.M.) (1995, N.B.C.A.)* – 7 year old and screen relying on transcript from preliminary hearing and social worker and the child.
- *R. v. H.(D.)(1990, N.B.Q.B.)* –the trial judge looked to the transcript at preliminary hearing which showed the child was not able to testify due to her fear of the accused.
- *R,. v. O'Neill(1995,Prov Div)* -there was evidence from the complainant's mother and school teacher and a videotape which showed difficulty on the part of the child. A therapist said to testify would re-traumatize the child and the court felt imperative that accused not be in the same room.

## Where the Offence Sections are not Included

If the offence is not enumerated the judge may rely on an inherent discretion to receive the evidence of a witness by some extraordinary means. An example offered in *Crimes Against*

*Children* is that of *R. v. Cipillone (1999 Ont. Gen Div)* where the accused was charged with murder.

In the B.C. experience, in the case of *R. V. Letourneau, (1994,* . Also, *R. v. Threatful* (cite unknown) where the screen was allowed with children testifying against their mother is a physical abuse case.(Vernon Registry, D. Gardner, Crown counsel ).

The writer recalls, as well, the case of *R. v. Ingram* (B.C.C0.Ct. 1985- cite unknown) where in the preliminary hearing the 5 year old child testified with the accused seated at the back of the courtroom at the direction of the court. This case took place before the accommodations were legislated in 1988 based on the authority of *R. v. Smellie, (1919*[5]*)* giving the trial judge the discretion to conduct the proceedings in his/her court room to meet the needs of the circumstances before him/her.

## Once the Application is Granted

- **Physical Location of the Parties**

The set up (where every one sits) for the testimony, varies. The most important points are that *the witness is separate* ,and that *the accused can see and hear the evidence* and still *communicate with counsel* (486(2.2).

In some locations the child goes in a previously prepared room with a support person. In the New Westminster design, the child cannot see the courtroom and the questioning takes place with a speaker who is not seen.

The writer most often has used a set up with the witness, and both counsel in one room and the judge, sheriff, clerk and accused in another. This was the examining counsel is with the child. The inquiry is done by the judge whose face is seen by the child on the monitor in the adjoining room, not dissimilar from what an accused will see in a remand appearance.

In *S. L*.,(2001. B.C.S.C.) the judge had herself in that room with counsel. In *Milot* (1994, B.C.S.C.)the judge didn't want the defence lawyer with the child.

Where there are two defence lawyers, you just separate them and one stays with the client. If only one, some signaling procedure is required.

[5] Cited in *R. v. Levogiannis*, In *R. v. Smellie (1919), 14 Cr. App. R. 128, the accused appealed his conviction of assaulting, ill-treating, and neglecting his daughter, who was about 11 years of age. During the trial, before the appellant's daughter was called to give her evidence, the appellant was compelled by the warder, by order of the court, to sit upon the stairs leading out of the prisoner's dock, out of sight of the witness while she gave her evidence.*

- **The Witness on the Stand**

The child will be shown the set up in advance. The crown is the best one to do this in accompaniment with a victim assistance worker and the clerk. This is often not done until minutes before the actual testimony unless the equipment is set up in advance.

Once the witness takes the stand, if required a s.16 inquiry takes place. The inquiry usually but not always entails the judge asking the witness questions. The witness preferably will see the judge who asks the questions either in person or via the monitor.

If the child is out of the courtroom, the atmosphere is very informal. A child may tend to want to speak out of turn or speak quiet and personally . (This happened in the *R. v. R.G.(2002. B.C.S.C.*) case where the child was in the courtroom with the judge and counsel.)

There may be a s.715.1 application during the child's testimony. 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.

In devising the strategy to allow the accused to speak to his lawyer, ensure the accused cannot speak out or signal to the witness or by heard by him/her.

Children may use props to communicate. A flip chart is a common prop. This may not be possible here as the writing or drawing cannot be seen on a small monitor.

- **The Use of Exhibits**

Counsel needs to get exhibits that will be shown to the child in advance. Usually the courtroom is not far from the viewing room and a sheriff or clerk can play a role in bringing them back and forth. This does need to be worked out and an agreement reached. In some cases, copies of documents or photos can be produced.

- **Identifying the Accused**

If the only issue at trial is the identity of the accused, counsel may need to consider whether it is appropriate for the witness to leave the in court identification to the end of the testimony. In one case in Vernon, the screen was lifted at the very end of both examination in chief and cross examination. The parent of the child was very distressed and yelled at the counsel to stop this. He had not been privy to the discussions of the judge and counsel on the plan and was surprised. In most cases, the identity is not an issue and that the Accused is "Uncle Fred", "Gramps" or "my coach, Bill," can be proven by other witnesses in the courtroom.

- **Warning to the Jury**:

*R.v. Letourneau (1994, B.C.C.A..)* offers an example of a charge to the jury to dispel an impression the jury has that the special procedures reflect one way or another on the

credibility of the witnesses or the guilt of the accused. In that case, an adult witness who used screen due to fear of the gallery. BCCA said the warning as articulated was enough.

## The Application is Denied

Where an application has been denied, the crown will make a choice on the next plan. The trial is an ongoing process, and there may be circumstances where once the witness is on the stand, s/he demonstrates a fear and is inhibited to provide *a full and candid account*. Counsel may consider re-opening the application. The wording of this re-opened application needs to be clear. It is a chance to make observation and state the obvious and now seek the aid now that the issues have become so clear.

Of course, the witness has been traumatized by now, and in cases where there is reluctance or profound silence, the crown may seek the admission of a previously provided statement rather than subject the witness to anything more vive voce.[6]

Another possibility is adjourning for the day and having the witness return to give videolink evidence the next day if the witness if willing to do so and in the judgment of the crown some benefit would be gained which surpass the injury already created.

One can surmise that such an event is vicariously traumatic for everyone.

## Examples of cases: **(from most to least recent)**

*R. v. Dooley and Dooley – January 2002 Toronto, Ontario*
This was the murder trial of the parents of seven year old Randal Dooley. His older brother was permitted to testify via closed circuit television from another room in the courthouse.

*R. v. R.G. (2002), New Westminster Registry XO56997R( Unreported April 4, 2002)* At trial the crown applied for closed circuit television. Although the defence indicated they did not oppose the application they required a foundation be laid and disputed the crown's claims and the set up proposed. The voir dire lasted close to three days. The child testified during the voir dire while using the set up. The court did not approve of the child being in a room by herself and not seeing the courtroom. A set up was established, whereby the accused agreed to leave the courtroom and hear the evidence from the jury room via the link. The child stayed in the court both for the application , which was granted, and for her testimony that followed. On the application, the crown called a number of witnesses, including the crown lawyer from the preliminary hearing who described the difficulties the child had during those proceedings. She felt the accused was staring at her and he was asked to move.

[6] See *R. v. F (W.J.) [1999] 3 S.C.R. 569* where the S.C.C. affirmed that necessity could be inferred from the child freezing on the stand. But see *R. v. Wyattt (1997) 115 C.C.C. (3d) 288 *(BCCA*) where the B,C. Court of Appeal did not support the procedure of entering transcripts from the preliminary hearing where the witness would not finish the cross examination.

*R. v. S.J.L (2001), 155 C.C.C. (3d) 338, reverses R. v. S.J.L.* Unreported Victoria Registry 96319D (February 19,1999) Madam Justice Dorgan. This case was successfully appealed on other grounds.

At trial the Crown applied for both the closed circuit television and for the previous video tape to be entered. Both were granted at the preliminary hearing. The therapist testified that C was concerned and agitated about going to court and talking about the gross stuff (page 7). She said he would testify especially if by closed circuit television. The court described the set up (at page 10):

i) C be in the jury room which is much smaller than the courtroom
ii) C be with his therapist to support him
iii) Others in the room with C are crown counsel, Defence counsel , the court clerk and the Judge
iv) the accused will be in the public courtroom
v) The Judge will have a view of the public courtroom but c would not.
vi) The set up will be in advance.

*R. v. Cooper – (Calgary .Alberta – May 2000)*
An example where a police officer testified behind a screen to block his identity (undercover officer) I a murder trial.

*R. v. Otuomagie (Edmonton., Alberta – January 2000 )*
An example where a 24 year old woman with cerebral palsy wites on a special computer system and her words are transmitted onto the wall on a screen.

*R. v. Poslowsky* [1997] B.C.J. No. 2585 , October 15, 1997, (B.C.S.C.)
The accused was charged with attempted murder and aggravated sexual assault of the nine year old complainant. He had lured her into a neighbour's house and choked and raped her, carrying her body to a field where she was left presumably to die. At trial ,the victim testified behind a screen with consent of both the accused and the defence. The Court instructed itself on the law as enunciated by R. v. M.(P.) (1990), 42 O.A.C. 153 (Ont. C.A.)

*R. v. Trefy* (1997) Halifax
An example where two prosecution witnesses were permitted to testify with a screen in a sexual assault trail. Both women, a 73 year old with cerebral palsy and a 68 year old with paranoid schizophrenia, have limited intellectual ability and were afraid to face the accused.

*R. v. Lanthier [1997] O.J. No. 4238 (Ontario Court of Justice – Provincial Division)*
The complainant had a developmental disability and the crown sought the use of the screen by calling the investigating officer. The application succeeded and the court confirmed that expert evidence was not necessary to describe the complainant's disability.

*R. v. Grey [1996]* O.J. No. 4743 (Ontario Court of Justice- Provincial Division)
Provides an example where the court allows the appointment of counsel for the cross examination of the child even where the offence is not enumerated in the section.

*R. v. Olscamp* , (1995) 26 W.C.B. (2d) 487 (Ontario Court General Division)
The trial judge did not allow the child to testify with a screen. She was 13 and not related to the accused. There was evidence that she was fearful of the accused attacking her and that he might retaliate when released. The court must be satisfied on a balance of probability that the screen was necessary to receive a full and candid account. The fears here would not be allayed by the use of a screen. The complainant testified at the preliminary with a screen and had no difficulty.

*R. v. S.M.S. [1995] N.B.J. No. 116 (N.B.C.A.)*
The complainant, the daughter of the accused , was five at the time of the incident and 7 when she testified. The trial judge dealt with the issues of the screen and the inquiry at the same time. The court considered the transcript from the preliminary hearing and the social worker. The evidence showed the child was hesitant to testify in front of her father. On appeal by the accused ,the appeal of conviction was dismissed. The Court of appeal was critical of the fact the two inquires were held together.

*R. v. Milot, [1994] B.C.J. No. 111 (B.C.S.C.)*
The Crown applied to have the 7 year old testify from an interview room with closed circuit. The defence felt a screen was adequate. The application was allowed and the defence counsel was to be in a separate room for cross examination. The child here was afraid.

*R. v. Textor [1993] O.J. No. 3181 (Ont. C.A.)*
Evidence that the child might freeze or might not be able to give her evidence was not sufficient. And the court relied on other factors that were not evidence.

*R. v. Levogiannis [1993] 4 S.C.R. 475 (S.C.C.)*
A psychologist testified that the 12 year old was experiencing a great deal of fear about testifying. The Section was challenged constitutionally and upheld.

*R. v. M (P) (1990) [1990] O.J. No. 2313 (Ont. C.A.)*
The trial judge allowed the 12 year old child witness to use a screen. The application was disputed. The crown made submissions that she had had trouble at the preliminary hearing because of the persons in the courtroom and being in the presence of the accused. There was evidence that she had discomfort with persons in the room and did not like the accused. The defence disagreed. The complainant was called and said she did not like the accused and did not want to know that he was there. On appeal to the O.C.A., a new trial was ordered. as there was an insufficient evidentiary base for the screen. The evidence that was adduced related to the people in the courtroom rather than the presence of the accused.

Chapter
4

# VIDEOCONFERENCING FROM OUTSIDE THE COURTHOUSE

## Video conferencing to prepare a witness for trial

The videoconferencing technology is useful not only to receive evidence but to meet the out of town witness in advance.

Crown arranges with the witness a time to meet at a video conferencing site ( in B.C. preferably a courthouse with the equipment) , fills out the forms, sends the statements in advance to the witness ,and, on the interview day attends at the site (in B.C.usually a courthouse) making the link.

The writer used this technology to prepare a child witness who testified from Calgary. The child , with a professional supporting adult, attended at a location in Calgary. The crown attended at Douglas College in their videoconferencing facility. Through this medium, the child and support person met three times with the crown before trial date, covering both evidentiary and procedure concerns in advance.

Also, recently on the Youth Mission “Bullying” case, one adolescent witness , attended at the Nelson Courthouse where she was interviewed by the Crown who was present in the Abbotsford Courthouse. The Crown sent the youth her statement in advance which was read out loud in the interview by link. This was particularly important because the witness was a relative of one of the accused and an assessment was required for any bias or reluctance or both.

## The *Criminal Code* Sections

WITNESS TESTIMONY

Sections 714.1 to 714.4 establish various rules for the introduction of testimony by video and audio link depending on the location of the witness and the type of technology used to transmit the evidence. All sections apply to witnesses called by either the prosecution or the defence. These new provisions are sections of general application which provide an alternative to existing specialized legislation, such as the current Criminal Code provisions dealing with close circuit television appearances by children in sexual assault prosecutions. They should be used vigorously to assist vulnerable witnesses and expedite hearing dates.

From Practice Bulletin Number 39 – March 29, 1999

**Criminal Code Section 714.1**

**714.1 Video links, etc – witness in Canada** – A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including

(a) the location and personal circumstances of the witness;
(b) the costs that would be incurred if the witness had to be physically present; and
(c) the nature of the witness' anticipated evidence.

**714.2(1) Video links, etc. – witness outside Canada** – A court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

**(2) Notice –** A party who wishes to call a witness to give evidence under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than ten days before the witness is scheduled to testify.

## Some Benefits to the Witness

The benefits to the witness are clear. Not only does the witness avoid being in the courtroom with the accused, s/he doesn't even have to be in the same building or town. In the *T.M.* case the child was clearly relaxed in her testimony. She was not caught up in the tension and formality of the courtroom .Equally, the stress of travel to a new and strange place is eliminated.

## Advance Identification and Preparation for the Procedure

> From Practice Bulletin Number 39 – March 29, 1999
>
> The Branch strongly endorses the use of appropriate technology in criminal proceedings to improve the responsiveness of the Criminal Justice System to the needs of witnesses, accused and the public in a timely, secure and efficient manner at a lower cost than traditional procedures.
>
> Not less than ten days notice is required before a witness from outside the country can testify by video link. Notice is not required for a witness testifying from somewhere in Canada. From

The most obvious feature for identification is the out of province/country witness. Where the crown would apply for closed circuit or screen, the legislation leans in the favour of the crown's to have the witness out of the court room (and presence of the accused) but for another reason.

If the application is contested, the crown will be wise to call evidence both related to the "full and candid account" Section 486 criteria and the "location, circumstances, costs, nature of evidence" criteria of Section 714.1.

## Once the Application is Granted

- Physical Location of the Parties

The witness will require a support person present with him/her who will be in camera view but not in a position to cue the witness.

Counsel will be limited in where they can move. *Out of range* means *out of sight* to the witness.

Crown may consider retaining a professional (social worker, psychologist) to assist with this when a vulnerable witness is testifying. That person will be key in preparing the witness with the crown on evidentiary matters , preparing on the competency inquiry, assisting in handling the exhibits both pre-trial and during the testimony.

In *R. v. T.M.,* (2000, B.C.S.C.) the support person testified during the trial and described who she was, her credentials, what had taken place to prepare the child. She gave a full description of the set up at her end in Calgary so that both ends were satisfied with the integrity of the set up.

Counsel ,in these cases, are under unusual pressure to be succinct. Even more than the usual time constraints exist. The equipment has been scheduled usually with no flexibility to spend more time than scheduled. Counsel is challenged to truly evaluate the time estimate and the questioning process and limit the testimony to relevant matters.

- Exhibits

The exhibits anticipated must be considered individually and in advance. A plan must be formulated so not to interfere with the flow of the testimony.

These are some (humble ) suggestions , which relate to the handling of exhibits generally:

i) Make copies of documents and photos and send these to the other part , in advance
ii) Use a document camera (not all court houses have these),
iii) Copy labels of physical exhibits and send to the witness in advance.
iv) Take photos of exhibits and send to the witness in advance.

All of the material handled by the witness should be returned by courier and filed as exhibits in the trial proper.

These matters will be worked out in advance at the pre-trial conference and applications.

Rarely, is it absolutely essential that vulnerable witnesses handle critical exhibits. The bloodied nightie, knife, pornographic movie is often best identified by the police. The usual exhibits for a vulnerable witness are the tools used to communicate, for example: the drawing of body parts, drawings of the accused's genitalia and the like.

You might want to make sure a Bible is at the distant site should the witness wish to swear an oath. Not all the sites are at a court house. The one in Calgary was an office furniture store.

- Identity of the Accused

Most crimes against child and/or vulnerable persons are committed by persons known to them. Identity can be proven through others pointing out the accused and the complainant merely describing who s/he is in context.

In the *Oughton* case in B.C., in the early 1980's[7] there were over fifty children who were victims of the accused. In the prosecution, the issue was identity. He was a serial rapist who inflicted sexual violence on children (and in at least one case their mother) in the Lower Mainland. He often made the children take their clothes off and do sexual things to him. He at times had a knife. In some cases, he told the children if they said anything, he would come back and kill them. He was best known as the *paper bag rapist* because he followed a modus operendi on more than one occasion where he put a paper bag on the head of his victims apparently to avoid future identification. The defense admitted that the children were sexually assaulted, but identity was in issue. Less than ten actually testified on the issue of identity.

This may be the type of case where the video link may not work. The Crown may have to resort to a strategy used by Dana Urban in a case in Nelson, where the witnesses wore sacks over their heads so not be identified by their assailant.

[7] Mr. Robert Gillen, Crown counsel and Mr. Glen Orris, for the Defence.

## Examples of cases: From most to least recent

*R. v Young [2001] C.C.S. No. 16732 (Sask. Court of Queens Bench)*
Crown not permitted to use videoconferencing evidence where witness in murder trial in B.C. Witness had seen suspect immediately before and after the murder. The cost saving was not great and the crown failed to show any other reasons.

*R. v. Keiller and Coles – May 2, 2001 Winnipeg*
An example where 18 people testify by videoconferencing from the U.S. and Canada in a major Internet scam case. Most would go to an FBI office where a studio is set up.

*R. v. Shrubsall – April 23, 2001 Halifax. Nova Scotia*
An example where 12 witnesses in a dangerous offender proceeding testified from Buffalo, N.Y.

*R. v. T.R.M, May 2000– (Warren B.C.S.C. judge alone)*- Made application for a 8 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 videolink 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 in advance. The child saw the videotape in advance as well. This is the case where the judge said the transcript must be that of the video and not the audio tape. Also counsel agreed to edit portions of the transcript where she alluded to previous acts. I don't think this worked very well and it originated from the fact that at charge approval the dates were limited.

*R. v. Dix [1998] A.J. No. 486*
Crown was granted leave to have the former escort service employee testify in a murder trial from New York City.

Chapter
5

# VIDEO RECORDINGS OF THE INVESTIGATIVE INTERVIEW AND THE WITNESS *DOES* TESTIFY

## Introduction

As awareness and reports of child abuse increased in the 1980's, it became increasingly common for police and social workers to videotape investigative interviews with children. Such videotapes could be shared with different investigators, reducing the need for repeated intrusive interviews. Such videotapes provide a record of events made relatively soon after the events in question, when the child's memory is likely to have the most detailed recollection of the events. Furthermore, they are made in a relatively supportive setting, permitting a child to fully discuss often embarrassing and sensitive matters. It must, however, be recognized that some children will only disclose incrementally, and so the initial videotape may not be a complete description of all of the abuse that the child has suffered.

Bala at page 472.

## The Criminal Code Sections

Section 715.1 of the Criminal Code is a statutory exception to the rule that hearsay is inadmissible. It permits for out-of-court statements to be admitted if the following conditions are met:

(a) the complainant is under the age of 18;

(b) the offence is one of an enumerated list of offences (predominantly sexual offences but includes crimes of violence);

(c) the video was made within a reasonable time following the alleged offence;

(d) the complainant describes the acts complained of; and

(e) while testifying he or she adopts the contents of the videotape.

Similarly, Section 715.2 provides a similar hearsay exception for complainants or witnesses who are able to communicate the evidence but may have difficulty doing so by reason of a mental or physical disability.

**Criminal Code Section 715.1 and 715.2**

**715.1** In any proceeding relating to an offence under section 151, 152, 153, 155, or 159, subsection 160(2) or (3), or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272, or 273, in which the complainant or other witness was under the age of eighteen years at the time of the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness, while testifying, adopts the contents of the videotape.R.S.1985, c 19 (3d Supp.), s. 16; 1997, c. 16, s.7.

**715.2(1) Evidence of complainant –** In any proceedings relating to an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272 or 273 in which the complainant or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, a videotape, made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of is admissible in evidence if the complainant or witness adopts the contents of the videotape while testifying.

**(2) Order prohibiting use –** The presiding judge ma6y prohibit any other use of a videotape referred to in subsection (1).

## The Constitutionality of the Section

In *R. v. L.(D.O.),(1993,S.C.C.)*, this section was held to be constitutionally valid. L'Heureux-Dubé noted the fundamental importance of having videotape evidence before the court. She stated, at p. 308-310:

> As previously stated, s. 715.1 of the Criminal Code is an attempt to facilitate the attainment of the truth and to curb the trauma that children called to testify in cases of sexual abuse are forced to endure. Although s. 715.1 does not totally eliminate the need for a child to speak in front of the court, the end goal of making the criminal justice process more accommodating to children is accomplished.
>
> . . . . .
>
> Section 715.1 ensures that the child's story will be brought before the court regardless of whether the young victim is able to accomplish this unenviable task.

And at p. 326:

> To achieve the required degree of fairness to the accused, as prescribed by ss. 7 and 11(d) of the Charter, on the other hand, Parliament ensured that judges enjoy the necessary discretion to set aside, edit or disallow such statements if their prejudicial effect outweighs their probative value. Moreover, preconditions to the admission of such statements were imposed. These include requirements that the child adopt her or his statements at trial, that the child be made available for cross-examination and that the applicability of the section be limited to certain sexual offences against children under 18 years of age. It is my view that Parliament has been successful in striking a balance between the rights of the accused, the fairness of the trial and the interests of society. The fundamental principles of justice have not been infringed, nor does the application of s. 715.1 to children of 18 years of age or less constitute such an infringement.

## Some Beneifits to the Witness

The witness takes the stand, watches the video and adopts the contents. This obviates the necessity of the witness having to telling the complaint over again.

Professor Bala, in his research found:

> The primary purpose of s.715.1 is to permit the court to hear what is probably the best recollection of events the child can offer.[15] The existence of the videotape can also reduce the extent of trauma to the child as a result of testifying[16] by lessening the amount of time the child witness actually spends providing viva voce evidence and protecting the witnesses from seeing their alleged abuser as they testify against him or her.
>
> Ninety-two percent of judges who responded believe s.715.1 is a useful provision. Some of the comments from judges include:
>
> Often children are too intimidated by the courtroom setting to testify about personal issues and allowing them to adopt a statement [made in] more relaxed circumstances ensures that the issue can be tried.
>
> Given the delay between the original statement of the child and court appearance, more useful tool than viva voce evidence at times!
>
> It assists by graphically illustrating the child's demeanour in a more friendly environment and also provides insight into the manner in which the statement was elicited.
>
> It increases the likelihood that the allegations will come before the court. There are many acquittals in child sexual assault cases, but I think it is preferable that the

[15] *Ibid.* at 1194.
[16] *Ibid.* at 1193.

accused be put to their defence rather than the Crown be non-suited because the child can't remember or won't talk.

There are several useful aspects of this provision identified by the judges. A videotaped statement made within a reasonable time of the alleged offense will likely capture the earliest, freshest, and most detailed recollection of events.[17] When it can take a long time to proceed to trial on such a matter, the video provides the trier of fact with an image of the child as he or she was near the time of the alleged offense. There can, for example, be a considerable difference in development, both intellectual and physical, between a child at three or four when a videotape is made, and the same child six months to a year or more later when a trial may be completed. Bala at page 474.

The witness then has a choice about whether they tell the whole story again or not.

[8] In *R. v. R.E.M*, Mr. Justice Romilly, cites at length from the *R. v. L.(D.O )*case in dealing with issues related to a videotaped statement of a child:

> In *R. v. L.(D.O )*, supra, at p. 308, Madam Justice L'Heureux-Dubé adopted the words of Kerans J.A. in R. v. Meddoui, supra, where Kerans J.A. stated that s. 715.1 does:
>
> ...[offer] the witness the choice, even if the witness can recall the events in questions, to refer while testifying to an earlier taped account provided that the witness can recall the taping and can and does affirm that, at the taping, he was honest and truthful. When the witness makes such a reference, the tape becomes evidence in proof of the truth of its contents.

And in *CCF"* Mr. Justice Cory said in paragraph 21

> "[…]the primary goal of the section is to create a record of what is probably the best recollection of the event that will be of inestimable assistance in ascertaining the truth. The video record may indeed be the only means of presenting the child's evidence. For example, a child assaulted at the age of three or four years may have very little recollection of the events a year or two later when the child is attempting to testify at trial."

## The Reluctance of Prosecutors

In our survey of justice workers in Ontario, 54% of Crown attorneys had made between one and five applications under s.715.1 and 2% had made eleven or more. Forty-four percent had never made such an application. Of those who had made such applications 65% said they were successful 100% of the time. Ninety-five percent of the Crown attorneys surveyed believe that s. 715.1 is "useful," allowing the court to receive as full an account of the alleged's acts as possible. One Crown respondent commented:

[17] Ibid.

[8] Cited in R. v. R.E.M. *[para42]*

In chief and cross about the abuse, if the video has done 'the talking' for them first [it's useful]; better recall at the time the statement is taken, therefore, better record of the child's evidence; consequently, the 'I don't remember' and the 'I don't know's' can be answered by the video evidence; observe the child's demeanour on video, usually recorded in a less hostile environment.

However, several Crown counsel commented that the benefit of the provision to the child is limited because the child is subject to full cross-examination. Use of a videotape may leave a child "cold" and not fully prepared to answer questions in cross-examination. Sometimes children do not pay much attention while the videotape is being shown and the child may not be ready for the detailed questioning on cross-examination.

Fifty-five percent of judges in our survey had heard between one and five applications to admit videotaped interviews of a child witness. Seven percent had heard from six to ten, and 2% had heard 11 or more. Of those who had heard applications, 64% of judges said 100% were successful. Ninety-two percent of judges who responded believe s.715.1 is a useful provision. Some of the comments from judges include:

Often children are too intimidated by the courtroom setting to testify about personal issues and allowing them to adopt a statement [made in] more relaxed circumstances ensures that the issue can be tried.

Given the delay between the original statement of the child and court appearance, more useful tool than viva voce evidence at times!

It assists by graphically illustrating the child's demeanour in a more friendly environment and also provides insight into the manner in which the statement was elicited.

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There are several useful aspects of this provision identified by the judges. A videotaped statement made within a reasonable time of the alleged offense will likely capture the earliest, freshest, and most detailed recollection of events.[17] When it can take a long time to proceed to trial on such a matter, the video provides the trier of fact with an image of the child as he or she was near the time of the alleged offense. There can, for example, be a considerable difference in development, both intellectual and physical, between a child at three or four when a videotape is made, and the same child six months to a year or more later when a trial may be completed.

Judges observed that Crown prosecutors do not always use videotaped statements that they have. The Crown prosecutor may, for example, call the child to testify and only seek to introduce the video only if the child omits significant details or is too overwhelmed to answer questions in chief. Said one judge: "If there is a video that *prima facie* meets the 715.1 criteria, I think Crowns should rely on the video more than they do, as primary evidence."

[17] *Ibid.*

Some judges observe that the existence of videotapes may in some cases give defence counsel greater opportunities for challenging the Crown's case than it would have had without them. The defence will have access to videotapes as part of Crown disclosure, regardless of whether or not the prosecution uses the videotape. The tape provides a record of the process of interviewing by police and child protection workers. The defence may be able to demonstrate inappropriate questions or suggestive interviewing techniques. Also the defence may be able to argue that the child's allegations are a product of suggestive interviewing creating false "memories."

Judges consider that videotapes can be very useful for assessing witness credibility:

Very useful in assessing credibility to actually see and her tone of voice etc. and to compare testimony.

It provides the court with a complete view of the child in a less formal setting than the courtroom but it most of all provides the court with a very precise view of the interviewer and the tone of the whole scene.

The video contains far more visual evidence than mere words.

## Advance Identification and Preparation for the Procedure

Cases often come to the crown for charge approval without a copy of the videotape. Cases of vulnerable witnesses may even be scheduled for trial without advance assignment. Clearly, using this section calls for crown at charge approval stage to order from the police a copy of the tape and to assign the file in advance.

The crown will be required to view the video tape and to observe:

i) Is the audio acceptable and if not , is the audio tape in the file?
ii) Are there part s of the tape that should be edited before court?[9](Other negative behaviour, addresses and phone numbers, other personal matters not relevant and prejudicial)
iii) Were there other persons in the interview besides the child and interviewer?
iv) Were other persons seen in range of the camera?
v) Were the noises and or voices not accounted for in the video?
vi) Does the interview cover material not relevant such as assaults by others?
vii) Is the transcript from the video or the audio tape?
viii) What is the quality of the interview?

It is acceptable for crown to be prepared to offer an edited tape.

[9] Thereby making a version of the tape with the edited portion out. The transcript would alos require an edit. Counsel will have two version therefore, the a tual and the edited.

An example where this was considered judicially , was described by Mr. Justice Romilly *in R. v. R.E.M. [*para43] :

> In R. *v. A. (J.F.) (1993), 82 C.C.C. (3d) 295*(Ont. C.A.) it was held that the videotape evidence of the child could not be prompted by her mother. None of the responses should have been admissible under s. 715.1. The court held that the child's mother should not have been questioned during the interview with the child and should not have been permitted to prompt the victim or otherwise make any questioned during the interview with the child and should not have been permitted to prompt the victim or otherwise make any statements about the allegations. The court held that if these comments were made they should have been excised from the tape before it was offered as evidence. In addition, the victim should not have been asked about other occasions when she was sexually abused by the accused.

Most courtrooms and crown offices have vcr equipment now but it must be sought in advance if a tape will be shown in court.

The crown will determine whether the tape might be shown either with a 715.1/2 or a Khan hearsay exception.

The video tape will be shown to the witness as part of the pre-court preparation. Most children find this exceedingly boring and will not usually sit and listen to the whole thing. You might want to know which parts are most important in advance. On the other hand, any contact with the child is your “teacher” to enhance your awareness and skills on ensuring excellent communication in the courtroom. That the child is fidgeting and distracted may be a cue to you to anticipate this in court and create the unique plan for the unique child.

In a study in 1994, Dr. Yuille made certain recommendations related to showing a child the pre-recorded interview. The result demonstrated that the child’s memory would be properly refreshed upon seeing the recording. One important caveat exist however, where there are concerns about the nature of the original interview. Clearly, it is not helpful to show a child an excessively leading interview as part of the application.

Before any application, the interviewer officer must review the tape and compare the transcript. One cannot assume this is done by the police agency in advance. The time to do this is not mid trial.

Some courts may be critical that an audio tape is made for the transcript when the section calls for admissibility of the video tape.

## Procedure and Evidentiary Basis for the Application

If the preconditions are met, the recorded investigative interview can be entered for consideration by the trier of fact at both the preliminary hearing and the trial. Both the tape and a transcript of the interview will be tendered as exhibits.

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.Criminal 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.)

> Before a videotape can be admitted in evidence under s. 715.1, the judge must hold a voir dire to determine whether it was made "within a reasonable time" and to ensure that the child adopts the contents. The judge may decide to exclude or edit the videotaped statement if it contains inadmissible statements, for example about other abusive acts that are not the subject of the charges, or where its prejudicial effect outweighs its probative value, or where its admission will operate unfairly to the accused.[13]
>
> In R v C.C.F., the Supreme Court held that a child on the witness stand has "adopted" a videotaped statement if she recalled "giving the statement and testified that she was then attempting to be honest and truthful...[even if she no longer has ] a present recollection of the events described." Justice Cory went on:
>
> .. s.715.1 has built-in guarantees of trustworthiness and reliability which eliminate the need for such a stringent requirement for adoption. Further, a lack of present memory or an inability to provide testimony at trial regarding the events referred to in the videotape as a result of the youthfulness and the emotional state of the complainant increases the need to consider the videotaped statement.[14]
>
> Bala at page

- **Test for Adoption**

Mr. Justice Romilly gives an extensive review of the law related to the tapes in the recent case of *R. v. R.E.M.*

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[13] *In R. v D.O.L. L'Heureux-Dubé J. offered the following factors for trial judges to consider in determining whether to admit or exclude a videotaped statement under s.715.1 ([1993] 4 S.C.R. 419, at 463):*

- *the form of questions used by any other person appearing in the videotaped statement.*
- *any interest of any person participating in the making of the statement.*
- *the quality of video and audio reproduction.*
- *the presence or absence of inadmissible evidence in the statement*
- *the ability to eliminate inappropriate material by editing the tape*
- *whether other out-of-court statements by the complainant have been entered*
- *whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim)*
- *whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant.*
- *whether the trial is by judge alone or by a jury; and*
- *the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.*

[14] C.C.F., supra, note 2 at 1201.

[para37] In R. v. F.(C.C.) (1997), 120 C.C.C. (3d) 225(S.C.C.) the Supreme Court of Canada resolved the test to be applied to determine if the videotaped statement of a child under s. 715.1 of the Code has been adopted. In doing so, they resolved the conflict that existed between R. v. Meddoui(1990), 61 C.C.C. (3d) 345 (Alta. C.A.) and R. v. Toten (1993), 83 C.C.C. (3d) 5 (Ont. C.A.). The Court preferred the reasoning in Meddoui on this issue as they were of the view that s. 715.1 had built-in guarantees of trustworthiness and reliability. Cory J. writing for the Court stated, at pp. 239-240:

> In light of the clear aim and purpose of s. 715.1, I cannot accept the Ontario Court of Appeal position that the same meaning of adoption should be used in the context of the videotaped statements of a child as was applied to prior inconsistent statements. Adoption is not a term with a static legal meaning which must apply in all circumstances. The strict adoption test for prior inconsistent statements was necessary to ensure a reasonable degree of reliability before allowing the statements to be admitted for the truth of their contents. However, s. 715.1 has built-in guarantees of trustworthiness and reliability which eliminate the need for such a stringent requirement for adoption. Further, a lack of present memory or an inability to provide testimony at trial regarding the events referred to in the videotape as a result of the youthfulness and the emotional state of the complainant increases the need to consider the videotaped statement. The test set out in Toten (1993), 14 O.R. (3d) 225, would prevent a child who has little, or no memory of the events from "adopting" the video and it would therefore be inadmissible under s. 715.1. However, it is precisely in this situation that the video is most needed. Children, particularly younger ones, are prone to forget details of an event with the passage of time. A videotape made shortly after the event is more likely to be accurate than the child's viva voce testimony, given months later, at trial. It is quite possible that a young child will have a recollection of going to the police station and making the statement and of her attempt to be truthful at the time yet have no memory of the unpleasant events. This is particularly true where the elapsed time between the initial complaint and the date of trial is lengthy. If effect is to be given to the aims of s. 715.1 of enhancing the truth-seeking role of the courts by preserving an early account of the incident and of preventing further injury to vulnerable children as a result of their involvement in the criminal process, then the videotape should generally be admitted.

In his decision, Mr. Justice Romilly also describes his interpretation of the law as it relates to interviews before the taped one, inconsistent vive voce evidence and similar matters. Those segments are reproduced below for the convenience of the reader.

- **The Pre-Video Interview**

He says at paragraph 41:

> A pre-video interview only affects weight not admissibility. Witness tainting was ruled to be a question of weight not admissibility in R. v. Buric, [1997] 1 S.C.R. 535. It is preferable that police officers conducting the interview ask the child simple, open-ended questions,although it is recognized that in some situations it is necessary to ask leading questions.

- **Inconsistency With Viva Voce Testimony**

And at paragraph paragraph 39:

> In R. v. F.(C.C.), supra, the court pointed out that when a judge rules that the statement has been adopted, the threshold degree of reliability has been met and the videotaped statement is admissible as evidence. That evidence, together with the viva voce evidence at trial, could comprise all of the evidence-in-chief of the complainant. Matters dealing with the circumstances in which the video was made, the veracity of the witness' statements, and the overall reliability of the evidence are matters for the trier of fact to consider when assessing the weight to be given to the videotaped statement. Even if defence counsel, in cross-examination elicits evidence which contradicts any part of the video, this does not render those parts inadmissible; rather, inconsistencies go to weight.

- **Where Complainant Cannot Remember The Contents of Their Statement**

At paragraph 38:

> Where a complainant cannot remember the contents of his or her videotaped statement it is difficult to effectively cross-examine them on their statement. In R. v. F.(C.C.), supra, the court pointed out that notwithstanding the inability to cross-examine a complainant because of his or her lack of memory, there were sufficient guarantees of reliability to accept the Meddoui approach to "adoption". Cory J., writing for the Court, stated at p. 241:
>
> > I recognize that the Meddoui approach to "adoption" gives rise to another problem. Specifically, a witness who cannot remember the events cannot be effectively cross-examined on the contents of his or her statement, and therefore the reliability of his or her testimony cannot be tested in that way. However, it was recognized in R. v. Khan, [1990] 2 S.C.R. 531...; R. v. Smith, [1992] 2 S.C.R. 915...; and R. v. B.(K.G.), [1993] 1 S.C.R. 740, that cross-examination is not the only guarantee of reliability. There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanour, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These indicia provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events. Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence. In Meddoui, it was recommended that in such circumstances, the trier of fact should be given a special warning similar to the one given in Vetrovec v. The Queen, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1) of the dangers of convicting based on the videotape alone. In my view, this was sage advice that should be followed.

- **Disclosure of the tape to the defence**

The defence must have access to view the video tape of the interview and show it to his/her client to properly prepare the case. The tape can be released conditionally however. In *R. v. Wilson* [2001*] O.J. No. 37 (Ont. Sup. Ct. of Justice.)* the court approved

of the practice that the tape be returned to the crown after the appeal period had passed. A sample undertaking is attached for reference.

The concern of releasing the tape without return is that it may find its way on the book case of an accused person available for any viewing in the future, may be copied and distributed or worse still shown on a public broadcast.

## Once the Application is Granted

- Physical Location of the Television Monitor

Usually in provincial court, there is one monitor for all to watch. This setting may place the accused in closer range to the child which is counter productive. Designing the viewing in advance with additional linked monitors would enhance the viewing. (Commercial Electronics 604-669-5528 in the Lower Mainland).

- Exhibits

During the testimony of the interviewer in the voir dire, enter and identify the videotape, the transcript and if permitted the audio tape as well as any exhibits that were seized during the interview itself. Enter these in the voir dire for identification, and later where appropriate at trial.

## Examples of cases: **(most to least recent)**

*R. v. R.v.R. [2002] C.C.S.No. 127*
The accused who was a 57 year old minister and neighbour to the 21 year old complainant, was convicted of sexual assault at trial. C was developmentally challenged and was institutionalized before trial. She did not appear to testify even though she had been subpoenaed. The court admitted videotapes of her complaint to the police and to the mother applying the Khan test of necessity and reliability. The prognosis for ther being available one day to testify was uncertain. Plus the vide itself showed she knew the difference between truth and lies. Accused appeal dismissed on this and other grounds.

*R. v. S.J.L (2001), 155 C.C.C. (3d) 338, reverses R. v. S.J.L.* Unreported Victoria Registry 96319D (February 19,1999) Madam Justice Dorgan.
At trial the Crown applied for both the closed circuit television and for the previous video tape to be entered. Both were granted at the preliminary hearing.
The court allowed the Crown to show the videotape pursuant to section 715.1 where there was passage of time of 2 years 4 months when the C lived with the accused

and 4 years from the bruising noted. The statement was more than one year after he spoke to his mother.
On appeal to the B.C.C.A., the Accused appeal was allowed on the basis that the court should not have allowed the videotapes to have been entered under Section 715.1. One of the purposes of section 715.1 is to preserve an early account of the child's complainant in order to assist in the discovery of the truth. The trial judge focused on the time from the disclosure to the tape and not the time of opportunity and the tape. Forty-five months is too long for the intent of Parliament in enacting this section

Chapter
6

# VIDEO RECORDINGS OF THE INVESTIGATIVE INTERVIEW AND THE WITNESS *DOES NOT* TESTIFY

## The Common Law

The previous videotaped recording of the complaint may be admitted the truth of its contents, under the common law exception articulated in *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 (S.C.C.) The party eliciting the evidence must satisfy the court on a balance of probabilities that the admission is necessary and that the statements are trustworthy.

Necessity can be established on numerous basis: incompetence to testify, inability to testify, unavailability to testify, or harm to the complainant. *R. v. R. R.* paragraph 37, citing *R. v. Khan* at page 546.

The court cannot rely solely on expert evidence that the witness is not competent , *R. v. Parrott* 2001 SCC 3 but may hear evidence that to testify would be traumatic to the child, 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.).

Although it is not necessary to put the witness through a testimony to prove inability to testify and demonstrate the trauma*, R. v. R.R. , R. v. Rockey* , [1996] 3 S.C.R. 829, 110 C.C.C.(3d) 481, 2 C.R. (5th) 301 (S.C.C.) once the witness has frozen on the stand, this demonstration may be enough to produce the necessity without further evidence being called. *R. v. F. (W.J.),* [1999] 3 S.C.R. 569, 138 C.C.C.(3d)1.

To demonstrate reliability, the court will look to:

> Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw a strict list of

> considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. Khan at page 105.
>
> In some video interviews the interviewer actually asks the witness the difference between truth and a lie and communicates rules to tell the truth before the interview starts. This ritual may be considered evidence going to reliability. R. v. R.R. at paragraph 30.

Cases with vulnerable witnesses call for a principled approach;

> The 'principled' approach to hearsay in R. v. Khan, supra, and amplified in R. v. Smith, [1992] 2 S.C.R. 915, 75 C.c.C. (3d) 257, and R. v. Starr, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, permits flexibility I the application of rules governing the admissibility of hearsay evidence. This approach allows the court to be more responsive to situations in which the evidence emanates fro a particularly vulnerable witness or complainant. Pursuant to this approach, if out-of –court statements are reliable and reasonably necessary, they may be admitted for their truth. (Emphasis mine) *R. v. R.R.* at paragraph 33.

The principles concerning a child as developed by the Supreme Court of Canada, can also apply to an adult who has severe developmental disabilities *R. v. R.R.* at paragraph 37.

The court will not look to extraneous evidence consistent with the content of the complaint to find reliability. *R. v. Starr (2000), 147 C.C.C (3d) 449 (S.C.C.)*

## Procedure and Evidentiary Basis for the Application

Crown preparing for a prosecution with a vulnerable witness and a reliable video recording of the complaint, usually find themselves in the position of preparing for the contingency of either a 715.1 or a *Khan* type application.

The necessity to make a Khan application , may appear obvious to all if the child tries and does not fulfil the competency test or is intimidated by the process into silence. *R. v. F. (W.J.)*

Alternatively the child may testify and forget the complaint *R. v. Hanna* (1993), 80 C.C.C. (3d) *289 (B.C.C.A.) , or* testify but not be able to adopt the contents of a videotape and the evidence may be admitted on a hearsay exception *R. v. Burk (1999), 139 C.C.C. (3d) 266 (Ont. C.A.)* In either case the crown will inform the court to elicit the evidence as hearsay in a voir dire.

Alternatively, the witness may demonstrate a terror in advance, and the crown will call evidence to either use a closed circuit link or in extreme cases, or call the hearsay recipient and enter a voir dire to determine admissibility.

No matter how this comes about, crown counsel should summarize and contemplate whether their video statement is reliable in advance.

Context:
Is there a motive to lie?
Is there evidence in the investigation of a tendency of the witness to lie on sexual matters (reputation to lie)?

Contents of statement:
Is it in context?
Is the language appropriate to the age and condition of the witness?
Are the questions posed open ended (rather than leading)?
Does the witness discuss the importance of speaking the truth in the complaint ?
Is the witness alone in her complaint (or do parents or caregivers provide answers)?

There is some authority that consistency of the complaint is not enough to render a statement inadmissible. *R. v. Workman (1998), 188 W.A.C. 87 (Alta C.A.) and R. v. Pearson (1994), 95 C.C.C. (3d) 365 (B.C.C.A.)*

Where there is more than one videotape, each may be admissible if it shows a progress in of reconstructed memory,. *R. v. R.R., R. v. D. (G.N.) (1993), 81 C.C.C. (3d) 65 at p. 78 (Ont. C.a.), leave to appeal to S.C.C. refused 82 C.c.C. (3d) vi*: and each statement is considered on its own. Examples where multiple statements have been included are*: R. v. D.(G.N.), R. v. Dubois (1997), 118 C.C.C. (3d) 544 (Que. C.A.); R. v. Pearson (1994), 95 C.C.C. (3d) 365 (B.C.C.A.); R.v. W. (L.T.) (1995), 95 W.A.C. 47 (Sask.C.A.)); R. v. D.(D.), [1994] N.W.T.R. (Reference Maleszyk Crimes Against Children at page 7-18.)*

## Weight to be Given to the Videotaped Evidence

The video out of court statement will not be given the same weight as vive voce testimony and must be considered in the context of other evidence of the trial that will either support or weaken the reliability of the statement. 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.).

## Examples of cases: **(most to least recent)**

*R. v. R.v.R. [2002] C.C.S.No. 127*
*The accused who was a 57 year old minister and neighbour to the 21 year old complainant, was convicted of sexual assault at trial. C was developmentally challenged and was institutionalized before trial. She did not appear to testify even though she had been subpoenaed. The court admitted videotapes of her complaint to the police and to the mother applying the Khan test of necessity and reliability. The prognosis for her being available one day to testify was uncertain. Plus the vide itself showed she knew the difference between truth and lies. Accused appeal dismissed on this and other grounds.*

*Regina v. PARROTT2001 SCC 3 (S.C.C.)See CASP Memo #:695 by William F. Ehrcke, Q. C. Parrot Walter Parrott was charged and convicted of sexually assaulting a mature woman who had suffered since birth from Down's Syndrome and had been in institutional care for almost 20 years. Shortly after the assault the police conducted a videotaped interview of the complainant which the Crown sought to rely on at trial pursuant to the principled exception to the hearsay rule in Regina v. Khan, [1990] 2 S.C.R. 531 in substitution for her direct testimony in court. The S.C.S. had concerns that the although there was evidence she was not competent , neither did she testify nor was there evidence that it would be traumatic for her to do so.The trial judge erred both in admitting the expert evidence and in making a ruling without seeing and hearing the complainant in person. The issue of testimonial competence is one which trial judges are eminently qualified to assess.*

Chapter 7

# OTHER VIDEO RECORDINGS OF THE COMPLAINANT

## Introduction

Video cameras are everywhere. The prosecutor may find themselves in situations where the witness/complainant has been taped as part of the commission of the offence, immediately before or after the offence under circumstances which are relevant to the proof of the offence, as part of the disclosure to parents, as part of the medical examination, and as part of a disposition of the child's evidence and as a recording of the impact of the complainant and or family of the offence. The following is a collection of practice issues and law related to these other contingencies.

## Some Issues Related to Other Videotaped Evidence

- **Sentencing victim impact statements**

In the case o f *R. v. Gregoire – Prince George Provincial Court No. 2001-10840-* A video compiled by the parents of a teenage girl killed in a car accident was played at the sentencing hearing **.**

Similarly, in *R. v Lacasse* – Abbotsford Provincial Court, at a driving without due care sentencing hearing, in Abbotsford, the crown showed the court a video of the defendant walking the victim across the road a the same cross walk where he had struck her at the time of the offence causing serious injury. The victim had asked the young man do this to assist him with his trauma over the event.

- **Videos of the complainants in the sexual act**

In the case of *R. v. W.A.O. [2001]S.J.No. 316, (Sask.C.A.)* the accused was not entitled to a copy of the videotape that he took of the complainant during the sexual assault.

- **Depositions in advance of trial**

In Canada, there also is a need for legislative reform. A number of American states have legislation allowing for the admission of such videotaped pretrial depositions.[23] The deposition occurs in the presence of prosecution and defence counsel and the child is subject to cross-examination at that time. This allows the child to give evidence while the incident is relatively fresh in his or her mind, providing the best evidence to the court. Most significantly the child can testify at a relatively early stage in the process, and then get on with his or her life without being involved in court proceedings that often drag on for months or even years. The child may then have therapy without any argument that this "contaminated" the child's evidence. The accused's right of cross-examination is preserved in the deposition format. Legislation should be enacted in Canada to allow a court to receive a videotape of a pre-trial examination and cross-examination instead of having the child testify in criminal court. Bala at page 483.

[23]See e.g "Legislative Responses to Child Sexual Abuse: The Hearsay Exception and the Videotape Deposition" (1985), 34 Catholic University Law review 1021; Wisconsin W.S.A. 967.04(7); the constitutionality of this provision was upheld in *State v Thomas,* 442 N.W. (2d) 10 (Wis. 1989)

# Appendix A

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# Appendix B

**Relevant Legislation Sections**

**Canada Evidence Act**

| | |
|---|---|
| s.6 | 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 |
| 714.1 | Witness in Canada testifies by video link |
| 715 | Videotape of interview is admissible if contents adopted |

# 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 videoconferencing.

**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. 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

**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

**BC Courts' Network Of Videoconferencing Sites**
http://home.ag.gov.bc.ca/courts/projects/vc/vc_index.html

**Public Sites for Videoconferencing Within B.C.**
http://www/bced.gov.bc.ca/vidcon

# Appendix E

**CHECKLIST FOR CLOSED CIRCUIT**

1. Identify the potential need (youth, disability, crimes of sexual or physical violence.)
2. Meet with the child and team members to determine real need
3. Determine the defense position on the Crown application (but even with consent, Crown should call some evidence),
4. Provide disclosure relating to the application
5. Determine when and schedule witnesses for when the application will take place
6. Arrange the set up with the registry (with 7 days notice)
7. Check the equipment set up and support persons, in advance with the child, defense counsel and other relevant parties.
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.

# Appendix F

**CHECKLIST FOR VIDEOCONFERENCING**

1. Identify the potential need (out of town, province, country)
2. Contact witness or intermediary to determine agreement with the witness that evidence will be received in this fashion rather than coming to B.C..
3. Determine the defense position on the Crown application, identity and exhibits.
4. Fill out form, including approval signature from the Administrative Crown
5. File form with Registry in the Courthouse affected
6. Arrange communication with ADCOM to identify and arrange the out of Province site. Include pretrial witness interviews in these arrangements.
7. Connect with an out of town agency to assist in the advance court preparation of the witness in that city. Seek the credentials of the person named and provide to defense. Schedule precourt interviews using the link.
8. Arrange a date with the Judicial Case Manager to apply to the court for the procedure chosen (in some cases before the trial takes place.)
9. Determine when and schedule witnesses for when the testimony will take place.
10. Communicate directly on an ongoing basis with the registry to ensure all is in place in advance.
11. Check the equipment set up and support persons, in advance with the child,defense counsel and other relevant parties.
12. Determine what exhibits will be used and send copies to the intermediary for the witness.
13. Attend for pre-court interviews with the witness and explain the procedure as well as the use of exhibits.
14. On court day, dress rehearse to ensure you are in range of camera and can be heard.

SMILE YOU'RE ON CAMERA

# Appendix G

No.00000

In the Provincial Court of British Columbia
Held at Pleasantsville

Regina vs. Ian Dowrong

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UNDERTAKING

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WHEREAS the accused, Stewart Ian Dowrong, is charged with sexual offenses on Information No.00000

WHEREAS Mr. Defence Lawyer, represents the accused as his lawyer in this matter,

WHEREAS the complainant in this matter is the accused's child and is seven years old at the time of the drafting of this undertaking,

WHEREAS members of the Abbotsford Police Department interviewed the child complainant on April 6, 2002, and the interview was audio and videotaped,

WHEREAS the audiotape (without picture) has been provided to Mr. Defence Lawyer for review,

WHEREAS the crown seeks to fulfil its mandate to provide full disclosure to the accused while protecting the privacy rights of the complainant,

Counsel for the Crown agrees to release a videotape (with picture) of the said interview,

Upon receipt of the said videotape, Mr. Defence Lawyer, Counsel of the accused, agrees to the following terms of an undertaking:

1. I shall not copy or cause to be copied the said videotape,

2. I shall not show or cause the tape to be shown on any public broadcast,

3. I shall not show or cause the tape to be shown save and except under circumstances directly related to the preparation of the defence of my client,

4. I shall return the tape to the Pleasantsville Crown Counsel office, within seven days after the appeal period in this matter is passed.

Dated this ____day of_____,_2002

_____
Counsel or the Crown

_____
Counsel for the Accused, Stewart Ian Dowrong

# Appendix H

EXPERIENCE OF *WVTH* AS IT RELATES TO THIS TOPIC

- Had made applications for moving the accused to a distance from the child in the court room and showed a video of a child's statement (in sentencing),from 1982 – 1987, and before 1988 when such innovations were legislatively approved.

- **1987 Expert Witness** - Was an expert witness in Ottawa in 1987 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. The first reading had the accused outside the room. Writer went to Ottawa with a paper of real examples of how children where doing in my cases (I gathered about 15 or so) and suggested many changes including that the screen be available as an alternative to closed circuit because of the complications around the latter. I was told (by Rick Mosley-D of J, Ottawa) that it was my submission on the screen that encouraged Parliament to amend the Bill and include it.

- **1988 Lecture in London, U**.K –represented Canada and presented the reforms related to children and their evidence to representatives from the Commonwealth Countries.

- **Conference on video tape** – 1988 – Conceived and Promoted the conference on videotaping in 1988 which was organized by Shelley Rivkin (Justice Institue) and Jan Rossley (Criminal Justice.)

- **1988 R. v. Brian Dick –** (Rowles, S.C. judge and jury )- Made my first application for closed circuit was in 1988 in Prince Rupert (Dick). The child complainant was 6. I had 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 in the first trial (in Rupert) because the 6 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 for that case. The accused testified and 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 be in an office across the hall.

- **1989 R. v. Sandra Dick** – (Campbell, 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 at late afternoon on a Friday. We had the weekend to prepare. We spent Monday defending the section from a constitutional challenge and Tuesday morning setting up the equipment. The child testified from one of the rooms near the judge's chambers. She testified and did well. In the end after hearing all the children, the jury acquitted the second accused.

- **1990- R. v. Bennett** (Vickers, S.C. judge and jury) - Made another application that failed in Campbell River in 1990 (Bennett). This was a case with a young adult who lived life with down syndrome. She had been abused by her mother's boyfriend. The complainant had a speech impediment that became more exaggerated under stress. Two experts, a psychometrist and psychologist (Dr. Yuille) were called on the competency hearing. Again the application 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 it. After a very poignant testimony from this young woman, the jury convicted.

- **1992** – Expert witness – Invited to speak to Parliamentary committee once again in Ottawa regarding Bill C-15.

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

1999 R. v. M.A.M. (Rounthwaite, p.c.j.Abbotsford) 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 when she testified. She testified in a separate room and the tape was shown to her while testifying. I recall arranging the equipment in advance, but was told through the registry that the judge had said this was presumptuous 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 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 over the screen and the father was called on the application to describe this preparation and preference.

1999 The P case 1999,(McAlpine, pcj Abbotsford) the 11 year old complainant was very articulate. When she was on the stand, the crown did not introduce the video. Later, during cross it became apparent that the video content would be helpful to the court in the assessment and an application was made at the end of the crown case. The defence then was permitted to cross examination the child on the video (so she was brought back.) The audio was very weak so the court heard the audio from a tape recorder played simulataneously.

- **May 2000– R. v. T.R.M** (Warren B.C.S.C. judge alone)- Made application for a 8 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 videolink 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 in advance. The child saw the videotape in advance as well. This is the case where the judge said the transcript must be that of the video and not the audio tape. Also counsel agreed to edit portions of the transcript where she alluded to previous acts. I don't think this worked very well and it originated from the fact that at charge approval the dates were limited.

- **May 2001 – R. v. Kumar** (Singh S.C. judge and jury) – Made application for receipt of videotape of young adolescent of her father's beating of her uncle in an aggravated assault case. The videotape was shown but not admitted because the child said the police coerced her into her account of the beating. On this case the crown also canvassed with the children the possibility of using the closed circuit but they wanted to be I 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, Abbotsford Provincial Court –** Videoconferencing with a 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 it had been confirmed it took a lot to find someone who knew what to do.

- **April 2002 – R. v. R.G. ( B.C.S.C. judge alone)** – Made application for a 11 year old child to testify using closed circuit television. We started the application which 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 hearing. The events at the preliminary hearing 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 too. The court and defence decided the

best set up was to remove the accused and put him in the jury room with a tv 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.