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

Her Majesty The Queen *Appellant*

v.

D.O.L. *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General for Saskatchewan
and the Attorney General for Alberta *Interveners*

Indexed as: R. *v.* L. (D.O.)

File No.: 22660.

1993: June 15; 1993: November 18.[*]

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for manitoba

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[*]Judgment on constitutional questions rendered from the bench on June 15, 1993.

Constitutional law -- Charter of Rights -- Fundamental justice -- Fair trial -- Videotaped statement of young complainant in sexual assault case admitted into evidence pursuant to s. 715.1 of Criminal Code -- Whether s. 715.1 infringes s. 7 of Canadian Charter of Rights and Freedoms -- Whether s. 715.1 offends evidentiary rules against admission of hearsay evidence and prior consistent statements -- Whether accused's right to cross-examine complainant violated -- Whether judicial discretion in s. 715.1 consistent with principles of fundamental justice -- Whether age limit contained in s. 715.1 arbitrary -- Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Constitutional law -- Charter of Rights -- Fair trial -- Public hearing -- Presumption of innocence -- Videotaped statement of young complainant in sexual assault case admitted into evidence pursuant to s. 715.1 of Criminal Code -- Whether s. 715.1 infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Criminal law -- Videotaped evidence -- Accused charged with sexual assault -- Videotaped statement of young complainant made five months after alleged offence admitted into evidence pursuant to s. 715.1 of Criminal Code -- Whether videotape made within reasonable time -- Criminal Code, R.S.C., 1985, c. C-46, s. 715.1.

Criminal law -- Trial -- Reasonable doubt -- Whether trial judge applied proper test for weighing evidence.

Criminal law -- Trial -- Function of judge -- Apprehension of bias -- Examination of witnesses -- Whether trial judge's interventions during trial raised reasonable apprehension of bias.

The accused was charged with sexual assault alleged to have taken place between September 1985 and March 1988. Following a medical examination of the complainant, a 9-year-old girl, the police began their investigation in May 1988 and a videotaped interview of the complainant took place in August 1988. At the preliminary inquiry, the complainant testified before the court. At trial, the Crown sought to introduce the videotaped interview of the complainant pursuant to s. 715.1 of the *Criminal Code*. That section provides that in any proceeding relating to certain sexual offences "in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape". The accused sought a declaration that s. 715.1 was unconstitutional but the trial judge upheld the section. Following a *voir dire*, the videotaped interview was admitted into evidence and the accused was convicted. The Court of Appeal allowed the accused's appeal and declared s. 715.1 unconstitutional. The court held that s. 715.1 contravened ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms* and could not be sustained under s. 1. A new trial was ordered.

Held: The appeal should be allowed. Section 715.1 of the *Code* is constitutional.

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

Section 715.1 does not infringe s. 7 or 11(*d*) of the *Charter*. Section 715.1 does not offend the rules of evidence against the admission of hearsay evidence and prior consistent statements. In addition, as there is no constitutionally protected requirement that cross-examination be contemporaneous with the giving of evidence, the accused's right to cross-examine has not been violated. The admission of the videotaped evidence does not make the trial unfair or not public, nor does it in any way affect an accused's right to be presumed innocent. Moreover, the incorporation of judicial discretion into s. 715.1, which permits a trial judge to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value, ensures that s. 715.1 is consistent with fundamental principles of justice and the right to a fair trial protected by s. 7 or 11(*d*) of the *Charter*. The age limit of 18 contained in s. 715.1 is not arbitrary. This limit is consistent with laws which define the age of majority and with the special vulnerability of young victims of sexual abuse.

The trial judge did not make a reversible error when he concluded that, in the circumstances of the case, the videotape was made within a reasonable time. Nor did he err in stating or applying the test to be used in weighing the evidence. Finally, the trial judge's intervention during the trial did not raise a reasonable apprehension of bias.

Per L'Heureux-Dubé and Gonthier JJ.: The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. It is well established that, in many instances, the court process is failing children, especially those who have been victims of sexual abuse, who are then subjected to further trauma as participants in the judicial process. If the criminal justice system is to effectively perform its role in deterring and punishing child sexual abuse, it is vital that the law provide a workable, decent and dignified means for the victim to tell her story to the court. Section 715.1 is a modest legislative initiative working toward this end. The constitutionality of s. 715.1 is to be examined from a contextual approach which recognizes the staggering numbers of sexual offences reported each year and the innate power imbalance between the abuser and the abused child, which is often tied to both the gender and the age of the victim and the perpetrator. By preserving an early account of the child's complaint and by providing a procedure for the introduction of the child's story into evidence at the trial, s. 715.1 facilitates the attainment of the truth. It also curbs the trauma that a child called to testify in a case of sexual abuse is 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. The limited scope of s. 715.1 is a legislative attempt to balance the objectives of that section with the right of an accused to a fair trial.

Section 7 of the *Charter* entitles an accused to a fair trial but it does not entitle him to the most favourable procedures that could possibly be imagined. Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In particular, children may have to be treated differently by the criminal justice system in order that it may provide them with the protections to which they are rightly entitled and which they deserve. Further, the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. These rules are not cast in stone and will evolve with time. As well, they should not be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just.

The accused's right to a fair trial under s. 7 of the *Charter* has not been infringed by the admission of the videotaped statement pursuant to s. 715.1. The provisions of s. 715.1 accommodate the traditional rules of evidence. First, even assuming that videotaped evidence is hearsay, s. 715.1 does not offend the rules against the admission of hearsay evidence. Under s. 715.1, the concern generally associated with hearsay that the prior statement may be unreliable does not present a real danger because a young complainant whose videotaped statement is admitted at trial through s. 715.1 must testify in court and must adopt the contents of the

videotape. There is no reason to require circumstances of necessity or circumstantial indicators of reliability as prerequisites to the admission of evidence which does not carry the dangers inherent in the admission of hearsay evidence. The rules of necessity and reliability were designed as substitute requirements, in instances where an exception to the rules of evidence is mandated. They do not necessarily apply to legislative initiatives. In any event, the criteria of necessity and reliability can easily be met. Reliability arises from the presence of the child at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court and the accused's ability to cross-examine the child. Necessity stems from the child's possible loss of memory by the time of trial or from the negative consequences that the child may suffer if obliged to testify at trial.

Second, the rationale for excluding prior consistent statements made by a witness is not applicable to s. 715.1. The videotaped evidence is not being admitted to bolster the credibility of the child witness or to provide superfluous information. This evidence is highly relevant and probative since it is the only evidence before the court with regard to the details of the child's sexual abuse. Section 715.1 simply provides a different means of giving evidence.

Third, the opportunity to cross-examine the complainant at trial, rather than at the time of the filming of the videotape, provides an adequate means of testing the complainant's evidence. Under s. 715.1, the manner of questioning, the reaction, the responses and the entire circumstances of the taking of the evidence are before the court through the medium of videotaping. By ensuring an opportunity for the accused to test the videotaped evidence, s. 715.1 provides full

protection for the rights of an accused. Contemporaneous cross-examination is not protected by the *Charter*.

In addition to the power to expunge or edit statements where necessary, the trial judge has discretion under s. 715.1 to refuse to admit the videotape in evidence if its prejudicial effect outweighs its probative value. Properly used, this discretion to exclude admissible evidence ensures the validity of s. 715.1 and is consistent with fundamental principles of justice necessary to safeguard the right to a fair trial enshrined in the *Charter*.

The limit of 18 years of age in s. 715.1 is not arbitrary. Section 715.1 is a legislative attempt to partly shield the most vulnerable of witnesses, children and young women, from the severe effects that all witnesses, regardless of age, suffer in sexual abuse cases. The inclusion in s. 715.1 of all complainants up to the age of 18 is required by their continued need for protection and is in conformity with international and domestic instruments.

Section 715.1 does not infringe s. 11(*d*) of the *Charter*. Out-of-court statements admitted into evidence at trial do not deny an accused the guarantee of a public hearing. Further, the fact that the child's testimony is on videotape in no way colours the accused's guilt or innocence.

The videotaped testimony of the complainant was made within a reasonable time, pursuant to s. 715.1, and was properly admitted into evidence. What is or is not "reasonable" depends entirely on the circumstances of a case. Here, the videotape was made five months after the offence was reported. The trial

judge, after reviewing all the circumstances of the case, concluded that the time period in videotaping the complainant's evidence was reasonable. The trial judge correctly directed himself in law and did not err in his assessment of the evidence.

The trial judge applied the proper test for weighing the evidence. Whether an account given by an accused might reasonably be true is not the proper test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole. The only question for the trier of fact at the end of the trial is whether or not, on the whole of the evidence, the Crown has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If there is a reasonable doubt, the accused must be acquitted.

Finally, in cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the questions being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. The trial judge's conduct in this case did not prevent the mounting of a proper defence, nor did it demonstrate favouritism toward the complainant in such a way as to preclude a fair trial.

Per Major J.: Section 715.1 of the *Code* does not infringe ss. 7 and 11(*d*) of the *Charter*. The conclusions with respect to the non-constitutional issues were agreed with.

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By L'Heureux-Dubé J.

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APPEAL from a judgment of the Manitoba Court of Appeal (1991), 73 Man. R. (2d) 238, 3 W.A.C. 238, 6 C.R. (4th) 277, 65 C.C.C. (3d) 465, allowing the accused's appeal from his conviction on a charge of sexual assault and ordering a new trial. Appeal allowed.

Marva J. Smith and *Deborah L. Carlson*, for the appellant.

Rocky Kravetsky, Jill K. Duncan and *Gene G. Zazelenchuk*, for the respondent.

Ivan Whitehall, Q.C., and *Kimberly Prost*, for the intervener the Attorney General of Canada.

Scott C. Hutchison, for the intervener the Attorney General for Ontario.

Lucie Rondeau and *Dominique A. Jobin*, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Written submissions only by *Jack Watson*, for the intervener the Attorney General for Alberta.

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ. was delivered by

LAMER C.J. -- I have read the reasons of Madame Justice L'Heureux-Dubé and concur in her result. It is my view that s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, is a response to the dominance and power which adults, by virtue of their age, have over children. Accordingly, s. 715.1 is designed to accommodate the needs and to safeguard the interests of young victims of various forms of sexual abuse, irrespective of their sex. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.

I would answer the constitutional questions in the same manner as my colleague. As s. 715.1 neither offends the principles of fundamental justice nor violates the right to a fair trial, it cannot be said to limit the rights guaranteed under s. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The respondent has failed to establish that s. 715.1 offends the rules of evidence against the admission of hearsay evidence and prior consistent statements. In addition, as there is no constitutionally protected requirement that cross-examination be contemporaneous with the giving of evidence, the respondent has failed to show that his fundamental right to cross-examine has been violated. The admission of the videotaped

evidence does not make the trial unfair or not public, nor does it in any way affect an accused's right to be presumed innocent.

Moreover, the incorporation of judicial discretion into s. 715.1, which permits a trial judge to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value, ensures that s. 715.1 is consistent with fundamental principles of justice and the right to a fair trial protected by ss. 7 and 11(*d*) of the *Charter*. The age limit of eighteen contained in s. 715.1 is not arbitrary, but rather is consistent with laws which define the age of majority to be eighteen years and with the special vulnerability of young victims of sexual abuse.

As I have found there to be no violation of either s. 7 or 11(*d*) of the *Charter*, it is unnecessary to consider whether s. 715.1 can be justified under s. 1 of the *Charter*.

Finally, I would agree with my colleague's disposition of the non-constitutional issues in this case. The trial judge did not make a reversible error when he concluded that, in the circumstances of the case, the videotape was made within a reasonable time. Nor did he err in stating or applying the test to be used in weighing the evidence. Lastly, the respondent failed to establish that the trial judge's intervention during the trial raised a reasonable apprehension of bias.

Accordingly, I would allow the appeal and reinstate the conviction at trial.

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

L'HEUREUX-DUBÉ J. -- This case raises a number of complex and important issues. Among these are the accused's right to a fair trial and to face his accuser and the criminal justice system's responsibility to seek the truth. As well, the complexities of dealing with the special circumstances involving child witnesses and the difficulties that child victims encounter when attempting to relay their plight of abuse to the courts must be examined. More precisely, this Court is being asked to determine the constitutionality of s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46 (as amended by c. 19 (3rd Supp.), s. 16), which states:

> **715.1** In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

Judgment was rendered, in part, from the bench on June 15, 1993, answering the constitutional questions in the following terms:

> We reserve our decision as regards the non-constitutional grounds raised by respondent. We are ready to answer the constitutional questions now, with reasons to follow.

1. Does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to the first question is in the affirmative, does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: This question does not arise.

3. Does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If the answer to the third question is in the affirmative, does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: This question does not arise.

Facts

In October 1988, the respondent, D.O.L., was charged with three counts of sexual assault alleged to have taken place between September 1985 and March 1988, and three counts of sexual interference alleged to have occurred between January 1988 and March 29, 1988.

The complainant, R.S., was born on March 12, 1979, and disclosed the sexual occurrences in March of 1988. In May 1988, following a medical

examination of the complainant, the police began an investigation of the allegations. In August 1988, a videotape interview of the complainant took place. The complainant, a female child who was nine years old at the time of the videotaping, indicated that the respondent, her grandfather, had put his hand inside her "privates" and had touched her "chest". She further indicated that this had happened "lots of times". R.S. also mentioned that the respondent had warned her not to tell anybody or else he would hurt her.

The respondent was charged in October 1988. At the preliminary inquiry, held in May and June 1989, the complainant testified before the court. At the trial, held in November and December 1989, the Crown sought to introduce the videotaped interview of the complainant, pursuant to the dispositions of 715.1 of the *Criminal Code*. The respondent moved for a declaration that s. 715.1 was unconstitutional as it contravened ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedom*. The trial judge dismissed the motion, upholding the constitutionality of s. 715.1.

Following a *voir dire*, at which the complainant, her mother and the sergeant involved in making the videotape testified, the videotaped interview was admitted into evidence. The trial judge convicted the respondent on one count of sexual assault. No verdict was entered with respect to the count of sexual interference by application of the *Kienapple* principle. The other counts of sexual assault related to two other complainants.

On June 18, 1991, the Court of Appeal for Manitoba allowed the respondent D.O.L.'s appeal against conviction and declared s. 715.1 of the *Criminal*

Code unconstitutional: (1991), 73 Man. R. (2d) 238, 3 W.A.C. 238, 6 C.R. (4th) 277, 65 C.C.C. (3d) 465. A new trial was ordered.

Judgments

Court of Queen's Bench of Manitoba

At trial, Scollin J. found no merit in the respondent's argument that s. 715.1 of the *Criminal Code* offended the *Charter*. With regard to the correct test to be applied to ascertain guilt, he considered the duty of a judge or jury to determine whether, upon the whole of the evidence, they were satisfied beyond a reasonable doubt that the accused had committed the offence charged. He held that the test to be met is whether the Crown has proven their case beyond a reasonable doubt and that:

> Whether an account given by, or on behalf of, an accused might reasonably be true, is not in my view the honest and proper and established test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole.

Applying this test, Scollin J. found the respondent guilty on one count of sexual assault.

Court of Appeal for Manitoba (1991), 6 C.R. (4th) 277

In four separate and concurring opinions, the Court of Appeal for Manitoba allowed the respondent D.O.L.'s appeal against conviction, declared s. 715.1 of the *Criminal Code* unconstitutional and ordered a new trial.

Helper J.A. (Scott C.J.M. concurring)

Helper J.A. noted the impossibility of enumerating an exhaustive list of the principles of fundamental justice and the importance of maintaining a balance between the accommodation of changing values and the protection of the rights of accused persons. She held that s. 715.1 represents a departure from the general principles of evidence in criminal proceedings. Although Helper J.A. recognized that the purpose of s. 715.1 of the *Criminal Code* was valid and the concern a substantial and pressing one, she expressed grave concern with regard to the effect of the legislation. She stated (at pp. 290-91):

> Section 715.1 clearly offends the common law evidentiary rule that precludes the admission in evidence of previous consistent statements. Its effects, however, are not confined only to common law rules of evidence. The legislation ignores two fundamental elements of the criminal trial process which have developed in our judicial system over the centuries:
>
> (1) the general principle that evidence must be presented in a public courtroom, in the presence of the accused, accompanied by some formality; and
>
> (2) the right of an accused to be present when evidence is presented or recorded in order to have the opportunity to test that evidence by cross-examination of the witness.
>
> Section 715.1 violates both s. 7 and s. 11(*d*) of the *Charter* and results in an unfair trial.

Helper J.A. then considered whether s. 715.1 of the *Criminal Code* may be justified under s. 1 of the *Charter*. Notwithstanding her determination that the purpose of the legislation, increasing evidence in the prosecution of sexual offences, is a pressing and substantial concern to society, she concluded that s. 715.1 did not meet its objective. She held (at pp. 292-93):

> Section 715.1 does not meet its objective. There appears to be little sense in protecting a child from the formality of a courtroom for the purposes of direct examination and yet subjecting him or her to the rigours of cross-examination in the setting which is designed to be avoided by the legislation. To require a child to testify at a preliminary hearing, on a voir dire at trial, to be cross-examined and be shielded only in the giving of direct evidence, falls short of the aim of the legislation.

Further, she discussed whether the rights of an accused are infringed as little as possible by s. 715.1 and held (at p. 300):

> I cannot read into a legislation a requirement that the Crown prove either reliability or necessity. A comparison of ss. 715.1 and 715 leads me to conclude that the criteria of necessity and reliability were specifically excluded from s. 715.1. The result is that the accused faces an impossible onus and the inherent discretion of a trial judge is rendered nugatory. Once the Crown has proved the minimum requirements of s. 715.1, the accused must convince the court that the prejudicial value of the evidence outweighs its probative value or the circumstances of the taking of the evidence are unfair.
>
> The first test cannot be met. There is no question the evidence is prejudicial. Its probative value is the essence of the Crown's case.
>
> The second test is equally inapplicable. The legislation specifically provides for the taking of evidence in the absence of the accused, without his knowledge, without court supervision and without the opportunity at the time to cross-examine. The legislation, therefore, precludes the exercise of any real judicial discretion. It instead provides for the mechanical application of the legislation.

Accordingly, she concluded that the infringement resulting from s. 715.1 may not be justified under s. 1 of the *Charter* and the section was, thus, unconstitutional.

Twaddle J.A.

Twaddle J.A. commenced his analysis by declaring that s. 715.1 of the *Criminal Code* constituted a departure from the general rule that evidence in a criminal trial can only be given by a witness *viva voce* in the courtroom. In reference to s. 7 of the *Charter*, although recognizing that this section does not guarantee adherence to established principles or rules of evidence, he found a principle of fundamental justice in the law of evidence that precluded the admission of videotaped testimony. According to Twaddle J.A., where the possibility exists that an accused may go to prison, an out-of-court statement by a witness can only be admitted to prove the truth of the witness' statement if the guarantees of necessity and reliability are met. Consequently, he considered whether s. 715.1 of the *Criminal Code* addressed the requirements of necessity and reliability. He indicated concern that the section was not limited to instances where the videotaped evidence was necessary in order to protect the young complainant from the trauma of testifying. In his opinion, the desirability to protect a class of witnesses did not meet the criterion of necessity. As to the requirement of reliability, Twaddle J.A. held that (at pp. 312-13):

> The guarantee of reliability is addressed by the requirement that the child testify. But, paradoxically, it is this very requirement which makes the admission of the statement unnecessary. If the statement is to fulfil the reliability test, it must fail the test of necessity.

> In any event, the opportunity which the accused is given to cross-examine the witness at the trial is insufficient to guarantee the reliability of the statement.

Having found that s. 715.1 of the *Criminal Code* infringed s. 7 of the *Charter*, Twaddle J.A. proceeded to determine whether s. 715.1 was justified pursuant to s. 1 of the *Charter*. Although he was convinced that the goals of recording the child complainant's evidence before it is weakened by the lapse of time and protecting the child were of pressing and substantial importance, he maintained that the first part of the goal was achieved without regard to the right of the accused to reliable evidence. Twaddle J.A. was also of the view that, since s. 715.1 did not exempt the child from giving evidence at the preliminary inquiry or from being subject to cross-examination at trial, the purpose of the section was not achieved. He concluded that the section could not be justified under s. 1 of the *Charter*.

O'Sullivan J.A.

O'Sullivan J.A. agreed with the reasons of Helper J.A. and Twaddle J.A. However, he wrote separate reasons on three issues not considered by them, the burden of proof, the time factor and the discretion conferred upon the trial judge.

With regard to the burden of proof, O'Sullivan J.A. felt that the trial judge erred in imposing too high a burden on the respondent. With regard to the time factor, he determined that the trial judge made an error in holding that the tape was taken within a reasonable time of the alleged offences. Finally, O'Sullivan

J.A. held that a discretion conferred upon the trial judge to exclude evidence on the ground of unfairness should not be read into s. 715.1 but, if such a discretion did exist, it should be to prevent against evidence being rehearsed, coached or led.

Lyon J.A.

Lyon J.A. concurred with the common results arrived at by his colleagues. He did not agree, however, with O'Sullivan J.A. that the trial judge imposed too high a burden on the respondent. In considering the general rule to determine guilt or innocence of an accused and its application, he wrote (at pp. 322-23):

> I am satisfied that the sheet anchor test in any criminal prosecution, indeed, the only fundamental rule of general application in determining guilt or innocence, is whether the Crown, on the totality of the evidence, has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If, on the other hand, the trier of fact is left with a reasonable doubt as to the accused's guilt, the accused is entitled to the benefit of that doubt and he must be acquitted. There is no alternative or substitute for this basic principle of law.

The Issues

The four following constitutional questions were stated by the Chief Justice on September 16, 1992:

1. Does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to the first question is in the affirmative, does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and

democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, in whole or in part, limit the rights guaranteed under s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

4. If the answer to the third question is in the affirmative, does s. 715.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

As I noted earlier, the judgment rendered from the bench on June 15, 1993 answered questions 1 and 3 in the negative and, as a result, questions 2 and 4 did not need to be answered.

In addition to the above constitutional issues, the respondent raised the following three non-constitutional issues:

1. Whether the videotaped testimony of R.S. has been recorded within a reasonable time after the offence, pursuant to s. 715.1 of the *Code*.

2. Whether the trial judge erred in failing to use the "might reasonably be true" evidentiary test to determine if the accused should be convicted or acquitted.

3. Whether the trial judge's interjections and commentary during the questioning of the witnesses created a reasonable apprehension of bias.

The reasons underlying the Court's unanimous decision as regards the constitutional questions, as well as the decision with regard to the non-constitutional matters remain to be dealt with.

The Context

At the outset, I believe that it is important to recall the context in which the determination of all the issues involved in this appeal must be considered. As I wrote in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647:

> It is my view that the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis. The strength of this approach was discussed by Wilson J., in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1352. She states at p. 1355 that, "(o)ne virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context."

In the case at hand, the horrible ordeal through which R.S. has suffered for the past eight years of her now 14-year-old life, is sadly not an uncommon occurrence in our present day Canadian society. Further to our dismay, the anguish and hardship to which R.S. has been subjected depict a typical situation of child sexual abuse. R.S. is a little girl who was fondled on multiple occasions by someone whom she knew and trusted, her grandfather. R.S. did not immediately disclose the incidents for she feared the consequences of telling. Since disclosure, R.S.'s world has been further upheaved by the development of a rift in her family unit. Each year, in Canada, the number of children who face traumatic situations of sexual abuse and the resulting aftermath, similar to that endured by R.S., increases. This trend has been well documented in the Report of

the Committee on Sexual Offences Against Children and Youths (*Sexual Offences Against Children* (1984)), a report often referred to as the Badgley Report, as well as in many other publications and studies. From 1983 to 1988, reports of sex crimes increased over 100 percent, reaching a staggering 29,111 offences across Canada in 1988 (Department of Justice Canada, Research Section, *Sexual Assault Legislation in Canada: An Evaluation* (Report No. 5 1990), at p. 28). Regrettably, children represent a significant percentage of those victimized. It has been estimated that almost 80 percent of sex crimes are committed against girls and boys and young women and men under the age of 20 (N. Bala and M. Bailey, "Canada: Recognizing the Interests of Children" (1992-93), 31 *J. Fam. L.* 283, at p. 292). The Badgley Report warns that one in two females will be the victim of unwanted sexual acts. Further, the fact that children are most often sexually abused by an adult in a position of power or trust increases the pain suffered by the victim. In fact, studies indicate that 75 percent of perpetrators are known to the children whom they abuse (B. W. Dziech and Judge C. B. Schudson, *On Trial: America's Courts and Their Treatment of Sexually Abused Children* (2nd ed. 1991), at p. 8, citing a *Los Angeles Times* poll and the American Humane Association statistics on child abuse victims). This relational power imbalance also serves to delay, as it did in this case, or ultimately in many cases, to prevent disclosure. The respondent's use of threats of reprisal should R.S. tell of her abuse, likely had a much stronger impact on R.S. who trusted, loved and respected D.O.L.

Another issue that must be kept at the forefront of this analysis is the innate power imbalance which exists between the abuser and the abused child. Statistics of the Institute for the Prevention of Child Abuse reveal that in Canada one in four girls and one in ten boys will be victims of sexual assault before they

reach the age of 18 (R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15, at p. 16). Another important concern in my view, one that, judging from their concurring opinions, some colleagues do not seem to share, is the power imbalance tied to the gender of the victim and perpetrator. However, since according to the above statistics and the fact that the Badgley Report has observed that 98.8 percent of suspected perpetrators of child sexual assault are male, it cannot be ignored. Further, the Rogers Report (*Reaching for Solutions* (1990)) identified persistent social attitudes in which women and children continue to be viewed as sexual objects. Those who are objectified are then blamed for their own victimization, which results as a consequence of their objectification (Rogers Report, at pp. 11, 17-18). The issue of gender as it relates to child sexual abuse has, in many instances, been overlooked (L. Clark, "Boys Will Be Boys: Beyond the Badgley Report" (1986), 2 *C.J.W.L.* 135, at p. 137). In fact, the Badgley Report remarks, without any further comment or analysis, that all of the assailants in a particular study were adult males. In her comments on the Badgley Report, Clark cites numerous examples from the report where the fact that the perpetrators of sexual abuse were almost exclusively male continues to go unnoticed. In essence, it appears that the problem, detailed by Clark, A. H. Young ("Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992), 11 *Can. J. Fam. L.* 11) and many other authors, is a failure to recognize that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age. Young comments in her article (at pp. 20-21):

> One cannot help but be struck by the parallel between the historical discrediting of children, and that of women who report sexual assaults, as reflected in the following passage from the eminent evidence

> scholar, John Wigmore [*Wigmore on Evidence*, vol. 3A (Chadbourn rev. 1970), at p. 736]:
>
> > Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by their inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.

The innate power imbalance between the numerous young women and girls who are victims of sexual abuse at the hands of almost exclusively male perpetrators cannot be underestimated when "truth" is being sought before a male-defined criminal justice system. In this light, I suggest that throughout this analysis one must continue to have regard to the context exposed by this Court in *Seaboyer, supra*. We cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions within the criminal justice system which hold stereotypical and biased views about the victimization of women. In the report of the Solicitor General of Canada, *Canadian Urban Victimization Survey: Reported and Unreported Crimes* (1984), the statistics in this regard are noted at p. 10:

> Analysis of reasons for failure to report incidents confirms many of the concerns which have already been noted by rape crisis workers -- that women fear revenge from the offender (a factor in 33% of the unreported incidents) and, even more disturbingly, that they often fail to report because of their concern about the attitude of police or courts to this type of offence (43% of unreported incidents).

(See also L. L. Holmstrom and A. W. Burgess, *The Victim of Rape: Institutional Reactions* (1983), at p. 58, and P. Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 217.) These stereotypical

views are equally relevant where children are involved. A recognition of the gendered nature of child sexual abuse and of the way in which young women are particularly victimized does not, of course, imply the denial of the trauma and pain experienced by boys and adolescent victims of sexual abuse. They are also too often silenced by a society which tends to disbelieve them and to stigmatize them by calling into question their sexual identity once they do disclose the abuse. We live in a society which continues to blame even the most innocent of victims.

Legislative Background

Child sexual abuse has been described as the perfect crime (B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 *St. Mary's L.J.* 279, at pp. 280-306). The combination of the power imbalance between the victim and the perpetrator, both through the dynamics of age and gender, acts in conjunction with the fact that there are likely no other witnesses to the crime other than the assailant and the young victim. Further, difficulties faced by the young complainant as she tries to seek justice in the somewhat alien criminal justice system act to limit the attainment of the truth in the court process. Unfortunately, the barriers to justice faced by child victims remain almost as steadfast today as they have for decades. In fact, despite the increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction rate remains unchanged. In 1986, only one in five of those charged with child sexual assault were convicted compared to a conviction rate of four out of five of those accused of other offences (A. McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990), 19 *Man. L.J.* 549, at p. 563). As

"increasing numbers of sexual assault cases involving children come through the courts, it has become apparent that the traditional treatment of children and their evidence is unsatisfactory" (Young, *supra*, at p. 11 (synopsis)). Professor Bala succinctly sets out the problem with which courts are faced:

> The traditional response of the Canadian criminal justice system to child sexual abuse has contributed to the "double victimization" of children. Because of their social, psychological, economic and intellectual positions, children are the most frequent victims of unwanted sexual acts. Our legal and social systems failed our children, initially by allowing them to become victims. And when cases of sexual abuse have been dealt with by the legal system, children have too often been the victims of "secondary trauma", produced by their mistreatment in that system.
>
> ("Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (1993), 232, at p. 233.)

In an attempt to remove or limit the barriers encountered by child victims of sexual assault and the urgent need to end the cycle of abuse, where an abused male frequently becomes an abuser and an abused female is often revictimized (McAllister, *supra*, at p. 295), the enactment of s. 715.1 of the *Code* was precipitated.

I suggest that a proper starting point for discussion of the legislation must be in the context of developing a criminal justice system that, as the Rogers Report, *supra*, proposes (at p. 57): "[used] to its fullest extent must be an important part of the strategy for dealing with child sexual abuse". As M. Brennan stated at the Commonwealth Law Conference, with respect to the problems related to child sexual abuse in the courts:

> The fundamental question remains: how can "truth" be an outcome of a process which restricts and actively denies the experiences of one of the major players?
>
> ("The Battle for Credibility" (1993), 143 *New Law Journal* 623, at p. 626.)

Section 715.1 of the *Criminal Code* seeks to include the experience of young complainants in the criminal justice system. The respondent alleges that, as a result of this enactment, principles of fundamental justice, particularly with regard to a fair trial, are infringed. Both at trial and at the Court of Appeal, as well as in the argument submitted to this Court, the crux of the argument revolved around the larger purpose, as compared to the actual effect of the legislation. Accordingly, it is essential to address the goals of the legislation, as apparent from the section.

I agree with the submission that the goals of s. 715.1 are not unique but multifaceted. First, I find that the section is designed to preserve an early account of the child's complaint in order to assist in the discovery of the truth and to provide a procedure for the introduction of the child's story into evidence at the trial. R. G. Mosley, senior general counsel for the Department of Justice, said when introducing s. 715.1 before the Standing Senate Committee on Legal and Constitutional Affairs that:

> ... the videotape ... is simply a means of getting the child's earlier statement before the court in the belief that that early statement will be an accurate and, hopefully, more complete account of what took place.
>
> (Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings*, Issue No. 2, November 20, 1986, at p. 2:23.)

Secondly, the procedures set out in s. 715.1 are designed to diminish the stress and trauma suffered by child complainants as a byproduct of their role in the criminal justice system. This "system induced trauma", as described by J. R. Spencer and R. H. Flin (*The Evidence of Children: The Law and the Psychology* (1990), at pp. 290-97) and by Professor Bala ("Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", *supra*), often ultimately serves to revictimize the young complainant. Further, the most recent report of the House of Commons entitled *Four-Year Review of the Child Sexual Abuse Provisions of the Criminal Code and the Canada Evidence Act (formerly Bill C-15)* by the Standing Committee on Justice and the Solicitor General, dated June 1993 (at p. 11), indicates that s. 715.1 was intended to preserve the evidence of the child and to remove the need for them to repeat their story many times. It is often the repetition of the story that results in the infliction of trauma and stress upon a child, who is made to feel that she is not being believed and that her experiences are not being validated. In response to those who suggest that the purpose of s. 715.1 is in no way geared to assist the child witness, it would be difficult to imagine how the legislators could have ignored the benefit such a provision would have in limiting the strain imposed on child witnesses, who are required to provide detailed testimony about confusing, embarrassing and frightful incidents of abuse in an intimidating, confrontational and often hostile courtroom atmosphere. Finally, and most importantly, the limited scope of the rule is, in my view, a legislative attempt to balance these objectives with the rights of an accused to a fair trial.

Whilst the primary purpose of s. 715.1 may be the attainment of truth, the section is particularly focused on the needs of children and the special protections that they require in order to expose that truth. Children, for example,

find it stressful to face their perpetrator while they are testifying and to tell their story in front of strangers. It is these types of concerns at which s. 715.1 is aimed. In the words of Kerans J.A. in *R. v. Meddoui*, [1991] 2 W.W.R. 289 (Alta. C.A.), s. 715.1 is "a modest modification of the existing law of evidence to recognize the difficulties some child witnesses have in the articulation of their testimony" (p. 295). An alternate view was recently expressed by the Ontario Court of Appeal in *R. v. Toten* (1993), 83 C.C.C. (3d) 5 where Doherty J.A. stated (at pp. 20-21):

> ... I do not agree that s. 715.1 is intended to protect the young complainant from the trauma associated with testifying in a public forum and in the presence of the accused. Indeed, s. 715.1 has been criticized because it fails to provide that protection.

Doherty J.A. goes on to quote comments made by Professor Spencer ("Child Witnesses -- A Further Skirmish" (1987), 137 *New Law Journal* 1127), regarding proposed English legislation admitting videotapes. Professor Spencer contends (at p. 1128):

> The courts are not concerned with protecting witnesses, or defendants, or anyone, except as something secondary to their main purpose, which is discovering the truth in order to do justice.

Assuming that the above quote supports Doherty J.A.'s assertion, which is not clear to me, I disagree with Doherty J.A. on this point. I suggest that the *Charter* requires that we bring these multiple considerations foremost in our mind, as truth cannot be attained in a vacuum. In my opinion, Professor Spencer, in fact, gives credence to the multifaceted purposes of legislation such as, s. 715.1 of the *Criminal Code*. In our quest for the truth, if the defendant's rights must not be infringed, neither must the complainant be further victimized. Children require

special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved. These special requirements stem not so much from any disability of the child witness, but from the fact that our ordinary criminal and courtroom procedures have been developed in a time when the participation of children in criminal justice proceedings was neither contemplated nor plausible. A "court system, established with adult defendants and witnesses in mind, does not easily accommodate children's special needs" (G. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (1992), at p. 3). Children have suffered and continue to suffer immense hardship from the court process. I do not believe that, when drafting s. 715.1, the legislators could have ignored detailed accounts, such as set out by Spencer and Flin, *supra*, at p. 72:

> I was accused of lying, fabrication and made to feel as though I was the accused and not an innocent nine-year-old victim....The defence lawyer treated me roughly as though I was 19 instead of nine-year- old, shouting at me, muddling me, confusing me. I hated him and still do for the way he treated me. The trouble is that after 23 years I still have horrible dreams now and then -- not about the incident at the cinema [the assault], but of the court appearance I made.
>
> . . .
>
> At the age of seven I was indecently assaulted by a lad who was known to our family. Trying to explain to my parents was hard but to stand up in court and explain was impossible. He sat there watching me all the time. Of course he got away with it like so many do.

It has also been observed that court proceedings often have severe and dire consequences on a child's ability to get on with her or his daily life. In a significant number of cases, the fear of contaminating required testimony has forced the delay of needed therapy and counselling (Spencer and Flin, *supra*). Finally, a research paradigm designed to calculate the incidence of stress suffered by child witnesses revealed many instances of nervous behaviour by children

testifying in court. Children called to testify demonstrated great nervousness through acts such as twisting hair, attempting to leave the witness stand or the courtroom before the end of the session and in one instance crying (P. E. Hill and S. M. Hill, "Videotaping Children's Testimony: An Empirical View" (1987), 85 *Mich. L. Rev*. 809, at p. 816).

In response to the respondent's concerns, one must now ask whether the force of s. 715.1 meets the multifaceted objects set out above. Again, using the words of Kerans J.A. in *Meddoui*, *supra*, at p. 295, I agree that s. 715.1 does:

> ... [offer] the witness the choice, even if the witness can recall the events in question, 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.

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. In this regard I strongly disagree with Helper J.A. when she states (at pp. 292-93):

> Section 715.1 does not meet its objective. There appears to be little sense in protecting a child from the formality of a courtroom for the purposes of direct examination and yet subjecting him or her to the rigours of cross-examination in the setting which is designed to be avoided by the legislation. To require a child to testify at a preliminary hearing, on a voir dire at trial, to be cross-examined and be shielded only in the giving of direct evidence falls short of the aim of the legislation.

In fact, although the aim of s. 715.1 is not to completely eliminate the need for the child to testify in court, as pointed out by the appellant, the current formulation of s. 715.1 leads to this end in a very significant number of cases. There is strong confirmation that videotaped evidence may often assist in eliciting a guilty plea, once the accused and his counsel have viewed the child describing the incident (D. Whitcomb, E. R. Shapiro and L. D. Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* (1985), at p. 60). Further, in the case at hand, the use of the videotape allowed the Crown prosecutor to proceed with her case while asking very few questions of the complainant. In addition, although the defence counsel had a full opportunity to question R.S., counsel chose only to ask three questions with respect to the sexual acts. Therefore, in R.S.'s case, the use of the videotape evidence almost totally eliminated the need for her to recount once again the sexual violations of her body.

A further advantage afforded by s. 715.1 is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which, according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand. Scientific study has indicated that, as compared to the courtroom setting, the quality and reliability of children's testimony is significantly enhanced in a smaller, more intimate, videotape environment (Spencer and Flin, *supra*). The numerous other advantages of videotaped evidence include the fact that videotaped testimony enables the court to hear a more accurate account of what the child was saying about the incident at the time it first came to light. Secondly, the tape of an early interview will reveal how the child was questioned. Thirdly, a suspect may have the opportunity to view the videotape during the course of an investigation.

Fourthly, the videotape of an early interview, if used in evidence, can supplement the evidence of a child who is inarticulate or forgetful at trial. I find that these numerous advantages gained through the implementation of s. 715.1 are concrete. Even though the section has not been used extensively, researchers indicate that "these devices have had some positive effects in terms of reducing the "system induced" trauma to children of involvement in criminal proceedings" (Bala and Bailey, *supra*, at p. 293). For the children who benefit, a few instances mean a great deal more than statistics. It has been found that the length of time children were in the stand decreased with the use of video. As well, there appeared to be a benefit to the victims in that they could get on with treatment. Ultimately:

> If a child is compelled to be physically present in court, the psychological cost can be quite severe. This cost may ultimately be passed on to society if, as a result of the child's inability to testify, a guilty perpetrator is improperly released.
>
> (Hill and Hill, *supra*, at p. 827.)

Section 715.1 of the *Criminal Code* acts to remove the pressure placed on a child victim of sexual assault when the attainment of "truth" depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. 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.

It is interesting to note that state legislatures in the United States have endeavoured to redress the difficulties of child testimony in a manner similar to s. 715.1 of the *Criminal Code*. In fact, as of 1991, at least 37 states permitted the

introduction of a child's videotaped statement into evidence under certain conditions (see M. A. Rittershaus, "*Maryland v. Craig*: Balancing the Interests of a Child Victim Against the Defendant's Right to Confront his Accuser" (1991), 36 *San Diego L. Rev*. 104, at p. 105). Each state approached the task of balancing the rights of the accused and the attainment of truth in a slightly different manner (J. C. Yuille, M. A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (1988), at p. 44). For example, the Fla. Stat. Ann. § 92.53 (West 1992) provides that videotaped statements may be used where there is "a substantial likelihood that a victim or witness who is under the age of 16 would suffer at least moderate emotional or mental harm if he were required to testify in open court".

A number of state Acts have been criticized on the grounds of potential constitutional invalidity, as a result of infringements on the rights of the accused. In particular, both the United States Constitution and numerous state constitutions guarantee the defendant the right to confront those witnesses testifying against him or her at trial, a right on which the Canadian *Charter* is silent. In addition, concerns similar to those presently before this Court have been raised. These include the administering of an oath to the child witness and the right to cross-examination (McAllister, *supra*, at p. 316).

The United States Supreme Court first examined the constitutionality of these legislative enactments in 1988 in *Coy v. Iowa*, 487 U.S. 1012 (1988). In *Coy*, the issue was whether a screen placed in front of the witness infringed upon the accused's right to confront his accuser. While the United States Supreme Court, in this case, found that the accused's right to confront his accuser was

infringed, subsequently in *Maryland v. Craig*, 110 S.Ct. 3157 (1990), it re-examined the constitutionality of similar legislation in the Maryland statute, with the use of one-way closed-circuit television and its effects on the rights of the accused. In *Craig*, the "Court modified its definitional view of the confrontation clause to allow for case-by-case exceptions to face-to-face confrontations" (Rittershaus, *supra*, at p. 106). In delivering the opinion of the majority of the United States Supreme Court, O'Connor J. stated at p. 3167:

> We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.

It is my opinion, that s. 715.1 of the *Criminal Code* similarly realizes this important objective. This being said, does s. 715.1 infringe the accused's rights under ss. 7 and 11(*d*) of the *Charter*.

Constitutionality of Section 715.1

Our Court has reached the conclusion, in its oral judgment delivered from the bench, that s. 715.1 of the *Criminal Code* is consistent with ss. 7 and 11(*d*) of the *Charter*. Sections 7 and 11(*d*) assert:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **11.** Any person charged with an offence has the right
>
> . . .

> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

It must be recalled that the respondent's challenge to the constitutionality of s. 715.1 pursuant to ss. 7 and 11(*d*) of the *Charter*, is solely framed on a breach of the principles of fundamental justice and the right to a fair trial. Accordingly, the respondent's concerns focus primarily on evidentiary rules: the admission of hearsay evidence, prior consistent statements, the lack of opportunity for contemporaneous cross-examination, the scope of judicial discretion, and the effect of the age of the complainant. I will survey each of these points in turn.

Section 7

I will first deal with the respondent's concerns with regard to the breach of his rights under s. 7 of the *Charter*. Given the legislative background, the respondent's argument appears to be that the procedure in s. 715.1 threatens to deprive him of his right to liberty in a way which does not accord with the principles of fundamental justice by depriving him of a right to a fair trial.

Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses. In *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, this Court recognized the need to balance the accused's interests in a criminal trial with

the interests of society. (See also *R. v. Seaboyer, supra*, at pp. 603-4 and 622.) The respondent submits that the effect of s. 715.1 of the *Criminal Code* is to allow, as evidence at trial, statements taken out of court "without any of the procedural requirements, controls and safeguards that are built into the traditional trial process and that have become fundamental to our system of justice". One must recognize that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice.

In the case at hand, in the determination of what is fair, one must bear in mind the rights and the capabilities of children. As McLachlin J. recognized in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 133: "... it may be wrong to apply adult tests for credibility to the evidence of children". Wilson J. expressed a similar view in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55, in reference to the appeal judge's treatment of the child witness' evidence:

> . . . it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults.

Children may have to be treated differently by the criminal justice system in order that it may provide them with the protections to which they are rightly entitled and which they deserve. Even in this particular case, when the interests of the child witness may seem completely at odds with those of the accused, one must recall the words of La Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362:

> It seems to me that s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

Therefore, the question is not whether the accused can imagine a situation where his rights would be greater but rather, whether s. 715.1 violates his rights. In this respect, the respondent points to numerous rules of evidence in an attempt to demonstrate such a violation. In his view, the admission of videotaped statements by a child complainant under s. 715.1 results in the admission of hearsay and prior consistent statements. He further points to the lack of opportunity for contemporaneous cross-examination. Although s. 7 does not guarantee strict adherence to particular rules of evidence, but, in fact, guarantees that a person shall not be deprived of her or his liberty in a manner contrary to the principles of fundamental justice, I will deal with each of these concerns in turn.

Before dealing specifically with these arguments, however, it is important to note recent developments in the law of evidence. The modern trend in this field has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just. A just result is best achieved when the decision-makers have all relevant and probative information before them. It would seem contrary to the judgments of our Court (*Seaboyer* and *B. (K.G.), supra*) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth seeking process. Consequently, adherence to such strict rules as suggested by the respondent, besides not being constitutionally required, may result in valuable information not being brought to the court's attention. Moreover, the Court has recently sought to further remove obstacles to the truth seeking process,

in a genuine attempt to return to the basic goal of truth-finding (see *R. v. Khan*, [1990] 2 S.C.R. 531, *R. v. W. (R.)*, *supra*, and *R. v. Marquard*, [1993] 4 S.C.R. 000). Rules of evidence, as much as the law itself are not cast in stone and will evolve with time. This is amply demonstrated by even a superficial overview of our legal history and the way in which rules were developed through the centuries. In order to deal with the respondent's specific arguments, I will now discuss his concerns relating to hearsay.

Hearsay

The respondent submits that s. 715.1 of the *Criminal Code* infringes the rule against hearsay and, consequently, infringes the principles of fundamental justice. However, as legal history dictates, even an exception to the rule regarding hearsay is not really an exceptional occurrence. In fact, it has been observed that exceptions to the hearsay rule are "as "fundamental" as the rule" (A. McGillivray, "*R. v. Laramee*: Forgetting Children, Forgetting Truth" (1991), 6 C.R. (4th) 325, at p. 334, commenting on *Ares v. Venner*, [1970] S.C.R. 608).

The concern, with regard to the admissibility of hearsay evidence, is that an out-of-court statement may be relied upon as proof of the truth of its contents without any opportunity, through cross-examination, to test its veracity. In the case at hand, even assuming for the sake of argument that the videotaped evidence is hearsay, traditional considerations which govern here, such as those that were before this court in *Khan*, *supra*, are not present. In *Khan*, the young declarant was not available for cross-examination. As a result, the Court decided that the tests of necessity and reliability had to be met before the hearsay statement

could be admitted into evidence, thus creating a judicial exception. However, in the present case, a child, whose videotaped statement is admitted at trial through s. 715.1, must testify in court and must adopt under oath the statement that she or he has made on the videotape. The concerns enunciated in *Khan, supra*, are simply not present here. Once the child at trial adopts the videotaped evidence, that evidence is no longer strictly hearsay. The trier of fact will then be able to assess the credibility of the child. In the words of Doherty J.A. in *Toten, supra*, at p. 34:

> I can see no reason to require circumstances of necessity or circumstantial indicators of reliability as pre-requisites to the admission of evidence which does not carry the dangers inherent in the admission of hearsay evidence.

The rules of necessity and reliability were designed as substitute requirements, in instances where an exception to the rules of evidence is mandated. These rules do not necessarily apply to legislative initiatives. In the instance of s. 715.1, consideration must be had for the prerogative of Parliament to reform the law of evidence and to adopt, in so doing, its own substitute rules to insure reliability and necessity; in this case, the availability of the child witness and the possibility of cross-examination. This prerogative should not be unduly limited by a court, without a clear basis for justification (*R. v. Smith*, [1992] 2 S.C.R. 915). There is none here.

In any event, in the case at hand, the tests of necessity and reliability can easily be met. Reliability arises from the presence of the child at trial, the adoption under oath of her videotaped statements, the opportunity to observe the child in the videotape and in court and the accused's ability to cross-examine the child. Necessity stems from the child's possible loss of memory by the time of trial

or from the negative consequences that the child may suffer if obliged to testify at trial. Therefore, in this regard, I disagree with the findings of Twaddle J.A. that the necessity test does not import the need to protect witnesses from having to testify at trial. The severe consequences that could result should the videotape not be admitted as evidence and the child is unable to give relevant and reliable evidence at trial, in addition to the law's duty to protect children in such circumstances, in my view meet the test for necessity. As Professor Young (*supra*, at p. 35) points out in relation to the appeal court judgment in this case:

> The Court's concern with the absence of the necessity requirement from the videotape provision is misplaced for a few reasons. First, the requirement that one would have to show necessity in each case to justify the admission of videotaped evidence would once again force children to conform to adult norms which were not developed with them in mind. One of the positive elements of the videotape provision ... is precisely the fact that it contemplates the particular realities of children and the fact that they may have trouble repeating or indeed recalling all the details in court.

The respondent's argument as to hearsay must fail.

Prior Consistent Statements

The respondent's second line of attack on the constitutionality of s. 715.1 of the *Criminal Code* is that the admission of prior consistent statements violates the fundamental principles of justice. The general evidentiary rule with regard to the admission of prior consistent statements is expressed by Wigmore:

> When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more

> probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.
>
> (*Wigmore on Evidence,* vol. 4 (Chadbourn rev. 1972), {SS} 1124, at p. 255.)

In my opinion, the above rationale for excluding prior consistent statements made by a witness is not applicable to s. 715.1 of the *Criminal Code*. This Court has dealt at length with evidentiary concerns, and the potential violation of an accused's rights in this regard, in *Seaboyer, supra*, and, most recently, with respect to videotaped testimony in *B. (K.G.), supra*.

Although the admittance of a prior consistent statement would, perhaps, be considered an exception to the general rule, the facts of this case are quite different from situations regularly caught by the rule against prior consistent statements. As a result of s. 715.1 of the *Criminal Code*, the prior consistent statement is not being admitted to bolster the credibility of the child witness or to provide superfluous information. The videotaped evidence is the only evidence before the court with regard to the details of the child's sexual abuse. It is, in fact, the evidence itself, as if the child were giving it in open court or in lieu of open court evidence. Thus, I agree with the appellant that the videotaped evidence is highly relevant and probative and is neither "unnecessary [or] valueless". Section 715.1 of the *Code* simply provides a different means of giving evidence. In that sense, it cannot even be said that it affords an exception to the rule against the admissibility of prior consistent statements, the rationale of which does not apply in this case.

I would dismiss this argument.

Cross-examination

Finally, the respondent argues that cross-examination of the young complainant at trial, rather than at the time of the filming of the videotape, does not provide sufficient opportunity to test the evidence of the child witness. When dealing with a similar issue in *B. (K.G.), supra*, the Court accepted the notion that the opportunity to cross-examine at trial provides an adequate means to test the evidence of a witness. In *B. (K.G.)*, it was found that contemporaneous cross-examination was not protected by the *Charter*, in a case dealing with a prior inconsistent videotaped statement which was admitted for the truth of its contents. In the present case, the sole difference is that the videotaped statements have been adopted by the witness and are consistent. As a result of the adoption, the concern that the prior statement may be unreliable is considerably diminished, if not annulled, because the witness, present in front of the court and the accused, endorses the truth of her past statements. As the Court found in *B. (K.G.)*, the concerns with respect to the potential problems associated with hearsay and reliability of evidence are not significant when videotaped testimony is involved. Under s. 715.1, the manner of questioning, the reaction, the responses and the entire circumstances of the taking of the evidence are before the court through the medium of videotaping. The Court in *B. (K.G.)* held that cross-examination at trial was sufficient to remedy the absence of opportunity to cross-examine at the time of making the initial statements. *A fortiori*, the same rationale applies to videotaped prior consistent statements, such as the one at issue here.

Further, in *R. v. Potvin,* [1989] 1 S.C.R. 525, this Court considered a provision which was somewhat similar to s. 715.1 of the *Criminal Code.* In that case, s. 643(1) of the *Code* was challenged. It provides that, in instances where certain prior conditions are met, evidence initially given at a preliminary inquiry may be read in at trial, when a witness is unable to give further testimony at trial. Wilson J., speaking for the Court, held that, while the accused does have a fundamental right to cross-examine a witness, this examination does not have to occur at the trial. These remarks of Wilson J. were followed in *R. v. Argue*, Ont. Ct. (Gen. Div.), October 2, 1991, unreported, at p. 10, by Tobias J. who disagreed with Helper. J.A.'s views in the present case. In *Argue, supra*, Tobias J. found that s. 715.1 of the *Criminal Code* provides full protection for the rights of an accused, both at common law and under the *Charter*, by ensuring an opportunity for the accused to test the videotaped evidence. I agree. In the case at hand, I do not find that the accused's right to cross-examination will be thwarted by the fact that cross-examination is not contemporaneous and, *per se*, the inevitable delay in cross-examination does not render s. 715.1 constitutionally deficient.

In conclusion, therefore, it is my opinion that the respondent's rights under s. 7 of the *Charter* have not been infringed by the admission of videotaped testimony under s. 715.1 of the *Criminal Code* and the provision is, accordingly, constitutional. It does not infringe the principles of fundamental justice guaranteed by s. 7 of the *Charter*.

Section 11(*d*)

I will now turn to the respondent's submissions that s. 715.1 of the *Criminal Code* violates his right under s. 11(*d*) of the *Charter* "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Many of the same concerns as arise in considering "the principles of fundamental justice" guaranteed under s. 7 may be protected under s. 11(*d*). However, as I have already dealt with these issues, I will focus, at this time, solely on the concerns which fall directly under s. 11(*d*). In this regard, the respondent submits that the fact that out-of-court statements are admitted into evidence at trial denies him the guarantee of a public hearing. I do not find this submission persuasive. Out-of-court statements are admitted into evidence in judicial proceedings everyday without any suggestion that the trial is unfair or not public. Further, the fact that the child's testimony is on videotape, in my opinion, in no way colours the accused's guilt or innocence. The respondent's submissions on this point are minimal and, frankly, do not deserve a longer discussion. I do not find that s. 11(*d*) of the *Charter* is infringed by s. 715.1 of the *Criminal Code*.

Judicial Discretion

Even if one were to conclude that s. 715.1 creates an exception to the general rules of evidence, which I do not, it would be a very minimal exception indeed. In this regard, I agree with the appellant's submission that the wording of s. 715.1 itself supports the interpretation that such a provision accommodates traditional rules of evidence and judicial discretion. Thus, in addition to the power

to expunge or edit statements where necessary, the trial judge has discretion to refuse to admit the videotape in evidence if its prejudicial effect outweighs its probative value. Properly used, this discretion to exclude admissible evidence ensures the validity of s. 715.1 and is conversant with fundamental principles of justice necessary to safeguard the right to a fair trial enshrined in the *Charter*. Most recently, and following earlier decisions, in *Baron v. Canada*, [1993] 1 S.C.R. 416, this Court held that residual judicial discretion may be constitutionally required in order to provide a mechanism for balancing the rights of the accused and those of the state.

It is further important to note that s. 715.1 does not operate in a vacuum. In fact, at trial, Scollin J. directly asked counsel if there were any parts of the videotaped testimony that would be inadmissible had the child been in the witness box. Counsel explicitly replied that there were not. This judicial discretion has its foundation in the judge's duty to ensure a fair trial for the accused (*R. v. Corbett*, [1988] 1 S.C.R. 670). In *Corbett*, when referring to the rules of evidence Dickson C.J. observed at p. 697:

> ... basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

Section 715.1, in my view, has been carefully crafted to leave room for the application of this principle, in allowing for judicial discretion to reject

evidence where its probative value is outweighed by its prejudicial effect. All relevant evidence must be admissible unless it is excluded for compelling policy reasons. La Forest J. expressed the view in *Corbett, supra*, at p. 745, that:

> ... "fairness" implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.

In a case where the protection of s. 715.1 is called upon, the child victim must testify at trial and attest to the truth of the statements made earlier as recorded by videotape. The child may then be subjected to cross-examination on the contents of the taped evidence and the making of the tape. In addition to the child adopting all or part of her prior statements, other limitations exist in that the videotape will only be admissible for a victim under 18 years of age and the video must be made within a reasonable time. However, even before the videotape may be admitted, a *voir dire* must be held to review the contents of the tape and to ensure that any statements made in the videotape conform to the rules of evidence. Any statements which are in conflict with rules of evidence may be expunged from the tape. There are a number of factors which the trial judge could take into account in exercising his or her discretion to exclude a videotaped statement:

(a) The form of questions used by any other person appearing in the videotaped statement;

(b) any interest of anyone participating in the making of the statement;

(c) the quality of the video and audio reproduction;

(d) the presence or absence of inadmissible evidence in the statement;

(e) the ability to eliminate inappropriate material by editing the tape;

(f) whether other out-of-court statements by the complainant have been entered;

(g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);

(h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;

(i) whether the trial is one by judge alone or by a jury; and

(j) 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.

In conclusion on this aspect, consideration must be had for the prerogative of Parliament to make such reforms to the law of evidence from time to time as best serves the interests of justice. The recent decision of our Court in *B. (K.G.), supra*, best illustrates such need. As I stated above, this prerogative

should not be unduly limited without a clear basis for justification. The provisions of s. 715.1 accommodate the traditional rules of evidence as well as judicial discretion. As such, these provisions are not unconstitutional.

Age Limit

The final argument put forward by the respondent with respect to the constitutionality of s. 715.1 and ascribed to by Helper J.A. on appeal, is to the effect that the age of the complainant affects the viability of s. 715.1 of the *Criminal Code*. According to the respondent, the limit of 18 years of age is arbitrary and as such renders the section unconstitutional. I disagree. Whether the complainant is a young child or an adult woman, all victims of sexual abuse who are required to relive, through detailed testimony, the horrendous events through which they have suffered, experience doubly what is already significant pain. There is a need for greater recognition of the severe effects that all witnesses, regardless of age, suffer in such instances. Section 715.1 is a legislative attempt to partly shield the most vulnerable of those witnesses, children and young women. The purpose of the legislation remains the same regardless of the age of the complainant and the need for protection may even be enhanced in the case of young women. A young woman of 15, 16 or 17 years of age will, in most instances, be in a situation of power imbalance *vis-à-vis* the perpetrator, as a result of both her sex and her age. As well, there will be many instances where the accused is in a position of trust and this may often result in additional emotional turmoil and confusion. Young women are particularly vulnerable at the age when they commence to assert their sexuality. As a result, such an experience in

adolescence, may be even more traumatic and have more long term effects than if suffered at an earlier age.

Empirical data sheds some light on this issue. For example, a Toronto study indicated that the highest percentage of reported rapes that were classified by the police as unfounded, were in the 14- to 19-year-old age group. In this age group, 69 percent of reports were classified as unfounded (Clark, *supra*, at pp. 143-44). This trend of disbelief continues and worsens when the charge is one of gang rape or multiple rape. Clark in her article, at p. 144, states:

> ... that this [survey] indicates clearly that those aged thirteen to nineteen (especially fourteen to seventeen) are seriously discriminated against in terms of getting any legal redress for their multiple sexual victimization.

The United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (Article 1). This international convention, to which Canada is a signatory, demands that Canadian children under the age of 18 be protected as a class (Articles 19 and 34). In all Canadian provinces, the age of majority is 18 years of age or more and, in addition, legislation such as the *Young Offenders Act*, R.S.C., 1985, c. Y-1, applies to children up to the age of 18. I find that the inclusion of all children up to the age of 18 under the protections afforded by s. 715.1 of the *Criminal Code* is required by the continued need for such protection and is in conformity with international and domestic instruments. As such, it is in no way arbitrary and, accordingly, it was perfectly legitimate for Parliament to draw the line where it did. A claim of unconstitutionality of s. 715.1 on such a basis must be rejected.

In conclusion, s. 715.1 of the *Criminal Code* applies to a class of crimes where the complainants are young and in which the subject matter of the crime requires that the child provide intimate and embarrassing details about the events that occurred -- the unwanted interference with the child's body. The children involved are generally scared, helpless and in emotional turmoil. Their world has fallen apart. In such circumstances as described here, which are far from unique, they feel betrayed by someone whom they should have been able to trust and are often revictimized by a criminal justice system that places them in the spotlight. They are subjected to repeated questioning and gruelling analysis whereas they would expect such treatment to apply rather to the person responsible, in their view, for criminal acts. If the criminal justice system is to effectively perform its role in deterring and punishing child sexual abuse, it is vital that the law provide a workable, decent and dignified means for the victim to tell her or his story to the court. In my opinion, s. 715.1 is a modest legislative initiative working toward this end. For the reasons outlined above, I find that s. 715.1 does not infringe either s. 7 or 11(*d*) of the *Charter*. A s. 1 analysis is, therefore, unnecessary.

Non-Constitutional Issues

I now turn to the three non-constitutional issues, which I reproduce here for the sake of convenience:

1. Whether the videotaped testimony of R.S. has been recorded within a reasonable time after the offence, pursuant to s. 715.1 of the *Code*.

2. Whether the trial judge erred in failing to use the "might reasonably be true" evidentiary test to determine if the accused should be convicted or acquitted.

3. Whether the trial judge's interjections and commentary during the questioning of the witnesses created a reasonable apprehension of bias.

I will deal with each question in order.

Reasonable Time

Section 715.1 provides that "a videotape [be] made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of". In this case, a five-month period of time elapsed between the time the offence was first reported and the making of the videotape. The respondent alleges that such a lapse of time is not "reasonable" and, consequently, the videotape should not have been admitted into evidence. This was the finding of Helper J.A. on appeal. I disagree. What is or is not "reasonable" depends entirely on the circumstances of a case. The trial judge in this case, taking into consideration all such circumstances came to the conclusion that the lapse of time in this instance was reasonable. On the *voir dire* the trial judge stated:

> But in the end of the day, the test must be, has the Crown proved beyond a reasonable doubt that the videotape was made within a reasonable time after the alleged offence?
>
> . . .
>
> In this case I am satisfied that the, despite the unnecessary delay by the police, the eventual making of the tape in August was within a

> reasonable time after the alleged offence. ... I simply observe that in this, in this context, [s.] 715.1, where you are dealing with young children, what is reasonable in one case may not be in the other. But the boundaries of reasonableness are indeed almost as variable as the historical boundaries of Poland. But I do think in this case given the ages, given the age involved, that the tape satisfies the test of [s.] 715.1, and accordingly, the tape, in respect of [R.S.] will be marked Exhibit 1.

As this Court has repeatedly said, a court of appeal should not interfere lightly with findings of fact unless it concludes that the trial judge has made an egregious error either by failing to recognize or misinterpreting an important and relevant piece of evidence or by reaching an erroneous conclusion (see *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, at pp. 572-73; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *M. (M.E.) v. L. (P.)*, [1992] 1 S.C.R. 183; *R. v. Duguay*, [1989] 1 S.C.R. 93; and *Lensen v. Lensen*, [1987] 2 S.C.R. 672). In this case, the Court of Appeal did not indicate which such error the trial judge committed, nor did they state upon which facts they relied in order to reverse the trial judge's findings of fact. In my view, the Court of Appeal simply substituted its opinion to that of the trial judge. This, in my view, it was not entitled to do.

Beyond the facts of this case, however, what should the determination of the reasonableness of the length of delay take into consideration? In reaching a conclusion as to the reasonableness of time, courts must be mindful of the fact that children, for a number of reasons, are often apt to delay disclosure. As McLachlin J. wrote in *R. v. W. (R.)*, *supra*, at p. 136:

> . . . victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

Studies abundantly confirm this fact as part of the child abuse syndrome. (See, among others, R. C. Summit, "The Child Sexual Abuse Accommodation Syndrome" (1983), 7 *Child Abuse & Neglect* 177, at pp. 181-88; and G. Renaud, "Judicial Notice of Delayed Reporting of Sexual Abuse: A Reply to Mr. Rauf" (1993), 20 C.R. (4th) 383.)

Further, depending on where the child resides and whether facilities are available, as well as the necessity of prior investigation to ensure the seriousness of the allegations, some delay will necessarily accrue. On the other hand, such determination must also take into account social science data which makes clear that recollection decreases in accuracy with time. Flin and Spencer in "Do Children Forget Faster?", [1991] *Crim. L.R.* 189, at p. 190, indicate that, although children may have clear and accurate memories at the time of the occurrence, studies illustrate that children's memories may fade faster than those of adults. There is, thus, a clear advantage to gathering evidence from a child as early as possible. Videotaped evidence offers one avenue to accomplish this end. The child's evidence is gathered and preserved, many months and often years, before the trial is held.

The reasonableness of the delay in gathering such evidence may further depend on a number of factors which only a case-by-case analysis will be able to determine. This approach is not new. The reasonableness of a search, for example, requires a case-by-case analysis, as do a number of other instances. This case-by-case analysis is the function of the trial judge. In the present case, the trial judge, after reviewing all the circumstances of this case, concluded that the delay in videotaping the child's evidence was reasonable. My own reading of the

evidence brings me to the same conclusion. Accordingly, since the trial judge correctly directed himself in law and did not err in his assessment of the evidence, it was an error on the part of the Court of Appeal to intervene.

I now turn to the respondent's second non-constitutional concern, the appropriate test for the determination of guilt or innocence.

Appropriate Test

The respondent submitted a brief to the trial judge with regard to the appropriate test for weighing the evidence and in particular with regard to assessing the credibility of witnesses. He argued that the proper test was whether an account given by, or on behalf, of an accused might "reasonably be true". The trial judge did not agree and explained:

> Whether an account given by, or on behalf of, an accused might reasonably be true, is not in my view the honest and proper and established test of whether the Crown's evidence should be rejected. It is simply one factor in assessing the overall impact of the evidence as a whole. If one were to determine criminal cases simply on an academic test, unrelated to all the other facts, of whether something might reasonably be true, much of the impact of truly and compellingly credible Crown evidence such as that here, would go for naught, and truth would be subjugated by plausibility.

In my view, the trial judge was correct, as was O'Sullivan J.A. who succinctly enunciated the test as follows (at p. 317):

> The only question for the trier of fact at the end of the trial is whether or not, on the whole of the evidence, the Crown has proved its case beyond a reasonable doubt. If it has, the accused must be convicted. If there is a reasonable doubt, the accused must be acquitted.

This is the proper test on which Cory J. in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at pp. 757-58, expanded as follows:

> A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The respondent's submissions on this point, also made to us, cannot succeed.

The respondent further argues that the trial judge erred in his assessment of the evidence. In my view, the trial judge, having applied the proper test, correctly assessed the evidence. It is clear that he believed the complainant, such as he had the right to do and found that the Crown had proven its case beyond a reasonable doubt. The respondent has not succeeded in convincing me that the trial judge was wrong.

Reasonable Apprehension of Bias

The final issue raised by the respondent is whether the trial judge may have acted in such a manner as to raise a reasonable apprehension of bias, as per *Brouillard v. The Queen*, [1985] 1 S.C.R. 39. In *Brouillard*, Lamer J., for the Court,

held that the judiciary should not be seen as "entering the ring" or acting on behalf of one of the parties. However, he wrote p. 48:

> ... although the judge may and must intervene for justice to be done, he must nonetheless do so in such a way that justice is *seen to be done*. It is all a question of manner. [Emphasis added; italics in original.]

The respondent argues, while conceding that the trial judge can and should ask questions of witnesses in the course of their testimony, that the trial judge exceeded his role and participated in the proceedings to such an extent that an apprehension of judicial bias resulted.

It is my view that, in the case at hand as well as in other cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the questions being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm. The trial judge, in this case, did not prevent the mounting of a proper defence, nor did he demonstrate favouritism toward the witness in such a way as to preclude a fair trial. I find that the trial judge in this instance did nothing more than "intervene for justice to be done".

With regard to the non-constitutional issues raised, then, the respondent has conveyed no persuasive argument that the trial judge erred either in his

findings of fact or as to the reasonableness of the time factor involved in making the videotaped statement or in stating the proper test or in its application to the facts of the case or, finally, that the trial judge demonstrated bias.

Conclusion

The respondent's attack on the constitutionality of s. 715.1 of the *Criminal Code* is unfounded. Both the context and the legislative background indicate that Parliament was rightly concerned at one point with the treatment of abused children by the judicial system, as well as the consequences for those children who recount in court difficult, at times horrendous, experiences. With this notable purpose in mind, as well as social science data and stories told by abused children and without ignoring the rights of an accused to a fair trial, s. 715.1 was enacted. The goal pursued by such legislative enactment was, and continues to be, the protection of child witnesses and the attainment of the truth through the mechanism of videotaped statements. 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. Thus, the constitutionality of s. 715.1 of the *Criminal Code* is ensured.

In assessing legislation such as s. 715.1 of the *Criminal Code*, courts must be mindful that:

> The child's experience with the criminal justice system will color his or her future interactions with it. A negative experience may result in an unwillingness to report crimes later on. Some adult women, molested as children, hesitate to report the sexual assault of their own children because of the way they were treated by the legal system.
>
> (G. Goodman and V. S. Helgeson, "Child Sexual Assault: Children's Memory and the Law" (1985), 40 *U. Miami L. Rev.* 181, at p. 206.)

In the words of the then Minister of Justice Ramon Hnatyshyn, when Bill C-15, which implemented s. 715.1 of the *Criminal Code* was introduced, we must

> ... affirm the rights of our children and our youth, both boys and girls, to the integrity of their person as well as access to the justice system.
>
> (House of Commons Legislative Committee on Bill C-15, *Minutes of Proceedings and Evidence*, Issue No. 1, November 27, 1986, at p. 1:18.)

As to the other issues raised in this case, the trial judge correctly applied the principles as well as the proper test for weighing the evidence and, in the discharge of his duties, did not demonstrate any bias that would have vitiated the trial. His decision must stand.

Accordingly, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the conviction at trial.

The following are the reasons delivered by

MAJOR J. -- I have read the reasons of Justice L'Heureux-Dubé in this appeal. The constitutional questions were answered on June 15, 1993 and I agree with the disposition of them.

I agree with the conclusion respecting the non-constitutional questions and that the appeal be allowed and the conviction be reinstated.

Appeal allowed.

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Solicitor for the intervener the Attorney General for New Brunswick: Paul M. LeBreton, Fredericton.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.