Legal and Procedural Issues Support

BILL C-2

An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c.32

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Child Witness Competency and Testimonial Accommodations for Witnesses Under 18 and Other Vulnerable Persons – The Implications of the January 2, 2006 Amendments

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TABLE OF CASES

R. v. Marquard (1993), 85 C.C.C. (3d) 193 (S.C.C.)
R. v. Meddoui (1990), 61 C.C.C. (3d) 345 (Alta. C.A.) leave to appeal refused (1992), 69 C.C.C. (3d) vi
R. v. Milot, [1994] B.C.J. No. 1111 (B.C.S.C.)
R. v. Olscamp (1995), 26 W.C.B. (2d) 487 (Ont. Ct. (Gen. Div.))
R. v. O'Neill, [1995] O.J. No., 4077 (QL), 29 WCB (2d) 351 (Ont. Prov. Div.)
R. v. Peterson (1996), 106 C.C.C. (3d) 64 (Ont. C.A.) leave to appeal refused [1996] 3 S.C.R. xii.
R. v. Poslowsky, [1997] B.C.J. No. 2585, October 15, 1997, (B.C.S.C.)
R. v. Rockey, [1996] 3 S.C.R. 829, 110 C.C.C. (3d) 481 (S.C.C.)
R. v. S. (J.J.) (1991), 104 N.S.R. (2d) 385 (C.A.)
R. v. S. (S.M.) (1995), 160 N.B.R. (2d) 182, [1995] N.B.J. No. 116 (QL), 26 W.C.B., (2d) 459, leave to appeal to S.C.C. refused 171 N.B.R. (2d) 160n, 201 N.R. 398n (N.B.C.A.)
R. v. V.C.A.S., [2002] S.C.J. No. 37 (S.C.C.)
R. v. Smith (1993), 46 W.A.C. 241, 141 A.R. 241, [1993] A.J. No. 401 (QL), 19 W.C.B. (2d) 569 (Alta C.A.),
R. v. Smith, [1992] 2 S.C.R. 915 (S.C.C.)
R. v. T. (E.) (1993), 75 O.A.C. 396, [1993] O.J. No. 3181 (QL), 22 W.C.B. (2d) 169 (C.A.), leave to appeal to S.C.C. refused 72 O.A.C. 347n, 175 N.R. 322n sub nom.
R. v. *Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.)
R. v. Wilson (1995), 38 C.R. (4th) 209 (N.S.C.A.)
R. v. Wilson, [2001] O.J. No. 307 (Ont. Sup. Ct. of Justice)
R. v. Wyatt (1997), 115 C.C.C. (3d) 288 (BCCA)
Vetrovec v. The Queen, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1 (S.C.C.)

IMPORTANT POINTS

On January 2, 2006 Parliament proclaimed in force amendments to the *Criminal Code* (*Code)* and *Canada Evidence Act* (*CEA*) [1] with a view to enhance a child's credibility in the eyes of the law as well as the availability of accommodations provided to witnesses under 18. Further, the principle of encouraging testimony without the intimidating presence of the accused and the formality of the courtroom was extended to witnesses of all ages who may now apply to the court for these accommodations as well. Witnesses under 18 will be presumed to be entitled to the accommodations, whereas witnesses over 18 (with minor exceptions) will have to satisfy the court of the need. This paper discusses some of the implications to Crown counsel of the new Bill C-2 amendments.

These amendments are based on a principled approach to receiving evidence from witnesses who may be afraid of testifying; a fear that is often exacerbated by their vulnerability due to age, disability or other factors. There is already a body of jurisprudence that will assist in applying, and in some cases, defending the new provisions.

In 1988, Parliament amended the *Criminal Code (Code)* with provisions designed to enhance the child witness' credibility in a criminal trial as well as their experience when testifying. The threshold test for competency became *ability to communicate the evidence* rather than *sufficient intelligence* and the ritual before testimony allowed for an affirmation or a promise to tell the truth as well as the oath. The requirement for corroboration of a child's evidence was repealed.

The legislated accommodations in 1988 included:

- allowing a child victim of a sexual offence to testify outside of the courtroom using video technology or behind a screen or other device, if necessary to receive a full and candid account,
- allowing for a support person,
- the admission of a previously recorded statement if certain preconditions were met,
- the appointment of counsel to conduct the cross examination rather than the accused personally.

The underlying principle behind these reforms was to create an environment in the criminal process that welcomed the child's complaint into this forum, meeting the needs of the child victim in sex crimes by encouraging testimony without some of the intimidations inherent in the criminal court process.

Subsequent amendments to the *Code* expanded the principle to allow the accommodations for young witnesses whether or not victims, in prosecutions of crimes of violence as well as sexual crimes. [2]

The leading Supreme Court of Canada cases that have interpreted the Bill C-15 sections since their proclamation in1988 are:

R. v. Marquard (1993), 85 C.C.C. (3d) 193 (S.C.C.) – Nature of the s. 16 C.E.A. inquiry, threshold test is capacity to observe, recollect and communicate.

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1 Bill C-15, Assented to 20th July, 2005 and proclaimed in force in part November 1, 2005 and January 2, 2006.

2 Bill C-79 proclaimed in force December 1, 1999

R. v. Levogiannis, [1993] 4 S.C.R. 475, (1993), 85 C.C.C. (3d) 327, upholds the constitutionality of Section 486's allowing the screen.

R. v. L. (D.O.) [1993] 4 S.C.R, (1993) 85 C.C.C. (3d) 289, 25 C.R. (4th) 285, (S.C.C.), upholds the constitutionality of s.715.1 allowing the admissibility of a previously video recorded statement.

R. v. F. (C.C.), [1997] 3 S.C.R. 1183, 120 C.C.C. (3d) 225, 11 C.R. (5th) 209 (S.C.C.), describes the procedure in determining the admissibility of the videotaped statement including the necessity of a voir dire.

All of the above provide important direction that is also applicable to C-2 provisions.[3]

COMPETENCY OF THE WITNESS UNDER FOURTEEN

Children are now presumed competent to testify

The former s.16 of the *Canada Evidence Act (CEA)* presumed that children under 14 were not competent to testify and required that witnesses under 14 undergo an inquiry to satisfy the court that they are able to communicate the evidence*. Under the new provision s.16.1, the child witness will be presumed competent; no inquiry is required unless the competency is challenged.* The process is explicitly described in the CEA.

A child under 14 is presumed to have the capacity to testify (s.16.1 (1)) and shall testify upon promising to tell the truth (s.16.1 (6)). Any party who challenges the capacity of the child witness, carries the burden of satisfying the court there is an issue as to the capacity of the witness to understand and respond to questions (s.16 (1)). The court will then conduct an inquiry to determine if the witness is able to understand and respond to questions. During the inquiry the witness will not be asked questions regarding their understanding of the nature of a promise to tell the truth (16.1(7)).

The threshold test for competency is whether the child is able to understand and respond to questions (s.16.1 (3)). The previous test for competency was "ability to communicate the evidence" which was interpreted to mean the witness' ability and willingness to tell the truth and also the capacity to perceive, to recollect and to communicate the evidence, *R. v. Marquard* (1993), 85 C.C.C. (3d) 193 (S.C.C.), at the time the child takes the stand. *R. v. D.D.* (1991), 65 C.C.C. (3d) 511 at pages 518-519. (Ont. C.A.) Also, see *R. v. M.A.M.* where the B.C. Court of Appeal ordered a new trial, in a two to one majority, because in their view the trial judge should not have allowed the five year old child to testify as she did not demonstrate a moral requirement to tell the truth. *R. v. M.A.M.* (2001) 151 C.C.C. (3d) 22 (B.C.C.A.) leave to appeal to the S.C.C. refused, [2001] S.C.C. No. 62.

S.16.1 is distinguishable from the previous section. Even if the capacity is challenged, the witness is not required to meet any tests related to "evidence" or "ability to tell the truth" nor "capacity to perceive, to recollect and to communicate the evidence." A purposive interpretation of the section suggests that the

3 Besides the Bill C-2 provisions, Section 6 of the C.E.A. provides that a witness who is mentally or physically challenged may be permitted to give evidence by any means "that enables the evidence to be intelligible".

witness merely needs to demonstrate an ability to understand and respond to questions. The section does not specify that the questions asked during the inquiry relate to the evidence or to legal context in which the child is a witness.

Challenging the child witness who is under 14

The section stipulates that the party challenging the capacity of a child witness must *satisfy* the court that there is an issue as to the capacity of the proposed witness (s.16.1 (4)) and if the court is *satisfied,* the court conducts an inquiry (s.16.1 (6)). The onus is on the party raising the issue. Challenging the capacity of the witness starts with submissions from the defense (if the child is a witness for the Crown) as to why the capacity of the witness is challenged. The application may include affidavit material or the calling of evidence. The defense may rely on the statement the child gave to the police if there is evidence that the child does not have the capacity to understand and respond to questions in the investigative interview.

For an inquiry to take place the court must be *satisfied* it is required. What does *satisfied* mean in this context? Other provisions in the *Code* stipulate a similar threshold. s.742.1 uses similar language in that the court must be *satisfied* that the serving of the sentence in the community would not endanger the safety of the community. In s.278.5(1) the judge may seek the record from the person who has custody of the record if the court is *satisfied* that certain preconditions are met. The court may then order release of the documents if the court is *satisfied* (s.278.7(1)) they are relevant.

Previously, if the s.16 inquiry (which was required for all children under 14) was not held, the witness was not qualified to testify. *R. v. Marquard* (1994), 25 C.R. (4th) 1 (S.C.C.), *R .v. D.D.* (1991), 65 C.C.C. (3d) 511 (Ont. C.A.), *R. v. McKay* (1975), 31 C.R.N.S. 224, 23 C.C.C. (2d) 4 (B.C.C.A.) As of January 2, 2006, if the court finds that an issue regarding the child's capacity is raised and no inquiry is conducted, this will constitute a ground of appeal.

If the capacity of a very young child was challenged, under pre 16.1 law, even a very young child was entitled to an inquiry. (That is, the judge is not to prejudge a child as not competent without an inquiry.) *R. v. C. (K.C.)* (1992), 73 C.C.C. (3d) 343 (Alta. C.A.)

The Nature of the Inquiry

Section 16.1(5) states the court shall conduct an inquiry. This is the same language as s.16 and has been held to mean the judge retains control of the inquiry although counsel may ask questions.

If there is an inquiry, the case law related to the former s.16 is helpful in determining the procedure. The child must be questioned in open court (including in front of the jury) by the trial judge or counsel to determine if s/he is permitted to testify. There is no need for experts to testify during this stage. Although counsel may ask the questions of the witness, it is important the judge maintains control in the inquiry.

1. The inquiry usually starts with the judge asking questions of the child.
2. It is within the discretion of the court to allow counsel who is calling the child to ask the child questions.
3. Before counsel asks the questions, the court should seek the position of both counsel,
4. Whether the defense lawyer cross examines the child as part of the inquiry is a matter within

the discretion of the judge.

5. The court should hear submissions from both counsel regarding the competency of the child.

R. v. Peterson (1996), 106 C.C.C. (3d) 63 (Ont. C.A.) leave to appeal refused [1996] 3 S.C.R. xii.
R. v. Ferguson (1996), 112 C.C.C. (3d) 342 (B.C.C.A.), R. v. F. (R.G.), [1997] 6 W.W.R. 273 (Alta C.A.),
R. v. Budin (1981), 20 C.R. (3d) 86, 58 C.C.C. (2d) 352 (Ont. C.A.) leave to appeal to the S.C.C. not allowed 58 C.C.C. (2d) 352 n

In *M.A.M.* the B.C. Court of Appeal objected to a mother testifying during the inquiry on her thoughts on the capacity of the child to understand a promise. There is some benefit in calling expert evidence where the witness has a disability where the impact of the disability is not obvious to the observer. For example a person observing another who has a physical disability may assume there is a mental disability. This is particularly likely if the physical disability interferes with the manner in which the witness communicates. A person who is deaf or who has cerebral palsy and communicates with words formed differently than the mainstream may be seen to be mentally disabled. Expert evidence can set this straight and provide creative ideas on how to receive the evidence outside of the traditional methods of communication, by using props, or special computer systems that project words on the wall for example.

Promise to tell the truth

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

A child who testifies does so after promising to tell the truth. Case law before C-2 stipulated that if the evidence is taken without a promise, it is wrongfully taken and a subsequent conviction will be quashed. *R. v. S. (J.J.)* (1991), 104 N.S.R. (2d) 385 (C.A.) except where the evidence revealed the child's understanding and commitment to tell the truth. *R. v. Barsoum* (1991), N.W.T.J. No. 171 (N.W.T.C.A.)

Although previously the child promising to tell the truth had to demonstrate an understanding of what a promise is, and the importance (moral obligation) of keeping it, *R. v. McGovern* (1993), 22 C.R. (4th) 359, (Man. C.A.) and 84 C.C.C. (3d) vi (S.C.C.), *R. v. Rockey*, [1996] 3 S.C.R. 829, 110 C.C.C. (3d) 481 (S.C.C.), that is no longer the case because s.16.1(7) C.E.A. now stipulates that those questions are not to be asked.

Implications for Crown Counsel

1. Crown counsel will need to know if the capacity of the child witness is being challenged in advance. This is a matter that should be canvassed with counsel before the preliminary hearing or trial date.
2. Crown counsel should recognize that there is a burden on the party challenging the capacity of a child witness to satisfy the court that the witness's ability to understand and answer questions is an issue before an inquiry should be held.
3. Crown counsel may be asked to meet disclosure requests that touch on the issue of capacity.
4. Crown counsel may be required to meet applications for an inquiry with submissions that point out evidence that the child understands and responds to questions.

5. Crown counsel may be required to participate in inquiries including the calling of evidence related to the capacity of the child and may want to ensure that a child is not asked questions regarding their understanding of the nature of the promise to tell the truth.

Crown have relied on *R. v. Khan* [1990] 2 S.C.R. 531 (S.C.C.) to admit previously recorded statements where the child witness has not satisfied the competency requirements in the former s.16. Now that witnesses are deemed competent, this may mean that the necessity requirement is not met for those cases and the hearsay exception is not available.

SECTION 486 – BAN OF PUBLICATION, CLOSED COURT, CCTV, SCREENS, SUPPORT PERSONS, AND APPOINTED COUNSEL

Crown Policy and the s.486 and s.715.1 Accommodations

Criminal Justice Branch policy (CHI 1 – Crimes Against Children and Vulnerable Youth 2005) has been revised and reads as follows:

> *Crown Counsel should consider applying, at the first instance, for an order under section 486 of the Criminal Code, directing that the identity of a complainant or witness and any information that could disclose the identity of the complainant or a witness shall not be published in any document or broadcast in any way.*
>
> *Crown Counsel must inform the child or youth witness and the parent or guardian about the accommodations available under section 486 of the Criminal Code, unless impracticable to do so. Crown Counsel should make an application for an order where appropriate, taking into account all relevant factors, including where the witness requests one of the accommodations. The court can make an order:*
> *for the exclusion of the public,*
> *for a support person,*
> *for the child or youth to give testimony from a different room or behind a screen or other device,*
> *for cross examination by appointed counsel (where the accused is unrepresented).*
>
> *Crown Counsel should consider whether presentation of evidence by videotape, as provided by s.715.1 of the Criminal Code, is appropriate. Utilization of such a procedure does not preclude the child or youth from having to testify.*

Criminal Justice Branch policy (SEX 1 – Sexual Offences 2005) contains similar provisions to CHI 1 and indicates that Crown Counsel should consider a request for a ban of publication and must inform the complainant or witness in a sexual offence about the accommodations available under s. 486 of the *Criminal Code*, unless impracticable to do so. The accommodations include the exclusion of the public, a support person, testimony outside the courtroom or from behind a screen, and appointment of counsel for cross examination where the accused is not represented.

Section 486 (1) - Ban of publication

The presiding judge may order a ban of publication of information that could identify the complainant or witness in offences that are listed in the section. This is not new. The new section includes more sexual offences including voyeurism (s.162), child pornography (s.163.1) and luring a child (s.172.1), plus the historic offences (s.486.4(1)(a)). If a multi-count Information or Indictment contains one of the offences, that is enough to qualify for the ban (s.486.4(1)(b)).

The ban is mandatory where those offences listed are charged (s.486.4(2)(b)) and an application is made by the complainant, prosecutor or a witness under 18. The court has an obligation to inform the witness under 18 and complainants in those proceedings of their right to a ban (s.486.4(2)(a)). The court shall also make an order on its own motion that any information not be published in any way that could identify a witness under 18 or any person who is the subject of the child pornographic representation.

The ban is discretionary if applied for by any other victim or witness either on their own behalf or by a prosecutor. The procedure for the application is set out (s.486.5(4)) and must be in writing to the presiding provincial court judge or to Supreme Court justice with notice to the accused, the prosecutor (if not their application) and to other parties affected setting out the grounds of the application (s. 486.5(5)).

The factors to be considered in this discretionary application are set out in s.486.5(7).

The ban is wide sweeping and includes broadcast or transmission. Many of these cases with bans in the past are found on the internet web pages and are available for public viewing. Although cases are marked "ban on publication" the identities are often obvious based on the surrounding facts. Neither the contract transcript transcribers nor the court registries edit the judgments. Certain publishers have taken on the responsibility and on line searches do bring up cases where publishers have redacted parts, noting same in their own name, in an effort to protect the identity of the parties involved while still communicating the legal outcome of a case.

It is an offence punishable by summary conviction not to comply with a non publication order. (s.486.6(1)) The ban on the original proceeding also covers any subsequent breach prosecution (s. 486.6(2)).

Implications for Crown Counsel

- Consider applying for bans at an early stage in prosecutions where the witnesses are under 18, represented in child pornography or complainants in sex crimes.
- Discuss with the court aspects of the case that would tend to identify the applicant to ensure non publication of identity orders are effectively worded and that identity is not inadvertently disclosed by the court through the wording of judgments given by the court.
- Advance written notice is required for cases in Vancouver Supreme Court pursuant to the present pilot project involving media notification.

Section 486(1) - Closed courtroom while the witness testifies

The court may order members of the public out of the courtroom for all or part of any proceedings if the judge or justice opines it is in the interest of public morals, the maintenance of order, or the proper

administration of justice or is necessary to prevent injury to international relations or national defense or national security.

The "proper administration of justice" is defined in s.486 (2) to require that the interests of witnesses under the age of 18 are safeguarded in all proceedings. It is not limited to sex crimes or crimes of violence.

If sexual offences are charged, no matter what the age of the victim, the judge must give reasons if the order is not granted and the testimony is to take place in open court - s.486(2)(b).

Implications for Crown Counsel

- Trial Crown counsel are best placed to determine if this is an issue for those witnesses under 18 who are testifying in the courtroom. It will not usually be an issue to close the court if the witness testifies from outside of the courtroom.
- An application requires preparation and may require taking the court and counsel through the relevant sections and case law.
- The court may wish to hear from the witness why the court room needs to be closed to receive the testimony as part of determining the interests of the young witness.
- The necessity for an application may be addressed at the earliest possible date in order to allow time to determine the position of the defence and obtain an accurate estimate of the court time needed for the application.
- In practice, these applications are often made at the time the witness testifies, as there may be no members of the public present.
- Ensure the court order to close the courtroom to the public allows a support person to remain where appropriate.

Support Persons

Section 486.1(1) presumes a witness under 18 or a person with a physical or mental disability in any proceedings for any offence who wants a support person of their choice nearby while testifying shall be entitled to that unless contrary to the proper administration of justice. Similarly, an adult may make application for a support person, but with a threshold test: the judge must be of the opinion it is <u>necessary to obtain a full and candid account from the witness of the acts complained of</u>. (s.486.1 (2))

This provision is designed to assist a witness whose stress may be lessened by having a known person near them while testifying. The application may be made either by the prosecutor or the witness at the time of or before the proceedings. The application is made before the judge or justice who will preside at the subsequent proceedings (s.486(2.1)).

An application may be made for a support person in addition to other applications. The support person may sit in the witness room during out of courtroom testimony, behind the screen or other device with the witness, and near the witness in a closed court testimony.

A small child may be permitted to sit in the lap of an adult support person.

Application for a witness under 18

The Crown will inform the defense and court in advance of the application and advise them the witness is under18. This will be sufficient unless the defense has grounds for arguing that the accommodation would be contrary to the proper administration of justice.

Application for a witness who is an adult (without disabilities)

Although the witness under 18 or with a disability will likely be allowed to testify with a support person upon request, the adult witness must introduce evidence that would allow the court to opine it is necessary (s. 486.1(1)). The factors the court shall consider for an s. 486.1(2) order include:

1. the age of the witness,
2. whether the witness has a mental or physical disability
3. the nature of the offence
4. the nature of the relationship between the witness and the accused
5. any other circumstances that the judge or justice considers relevant.

In interpreting these sections, Crown can anticipate that age is important for younger immature or fragile elderly witnesses. A disability may interfere with a witness being able to come to court and sit through testimony, and a support person can assist with this. Offences where the witness is fearful, intimidated or embarrassed may tend to sway the judge towards ordering support. These will include crimes such as sexual offences, home invasion, robberies, extortion, kidnapping, assaults and threats. Testifying may particularly be stressful where there is a relationship between an accused and the witness and a lingering menace or connection still exists at the time of testifying. Upon making the application, the Crown may make submissions or introduce evidence. There is no provision that allows the witness to testify on the application with a support person nearby.

In those applications pre Bill C-2, where the applicant needed to demonstrate the accommodation was required to receive a full and candid account, the courts have held that:

1. The court may hold a *voir dire (R. v. (H.) B.C*. (1990), 58 C.C.C. (3d) 16, 79 C.R. (3d) 119, 66 Man. R. (2d) 174 (C.A.)
2. There must be an evidentiary foundation (even if consented to) *R. v. M. (P.)* (1990), 1 O.R. (3d) 341, 42 O.A.C. 153 (C.A.).
3. Mere preference or discomfort was not enough *R. v. M. (P.)* (1990), 1 O.R. (3d) 341, 42 O.A.C. 153 (C.A.).

Support person of the witness' choice

There may be a case where a witness chooses to have a family member, friend or therapist, for example, to be their support person where that person is also a witness in the proceedings. This may be permitted only if the judge or justice considers it necessary for the proper administration of justice (s.486.2 (4)).

Clearly, if the Crown can arrange the order of witnesses so that the support person has already testified before the applicant, this may assist in the application where there are no alternative supports available.

Preparation of the witness and the support person

Both the witness and the support person will require preparation in advance on the issue of their respective roles during the testimony and during the breaks as well. The issues to be discussed include the following:

- The formality and protocols of the court setting which apply equally if the testimony is outside the courtroom.
- The support person is present but does not participate in the testimony of the witness unless specifically asked to do so.
- If the support person perceives some communication is required, for example, if the witness breaks down or asks for something, the support person should speak to the judge before intervening.
- The position of the witness and the support person in the court room.

Ensure when seating a support person that if the objective is to have the witness see the support person, that the former does not have to look at the accused to see their support. In some cases, the judge has actually told the support person to sit behind the witness so that there is no communication. In other cases, the support person has been allowed to sit in the same box as the witness. Crown counsel should know in advance what seating will work best and tell the judge.

A support person may sit with a witness who is testifying out of the courtroom. If counsel remain in the courtroom, the support person may also be able to assist where the witness is having some difficulty, for example, with the equipment or the exhibits.

The court may also order the witness and support person not communicate while the witness testifies (s.486(1)(5)).

Implications for Crown Counsel

- Early identification of witnesses who need or are eligible to ask for a support person
- Informing witnesses under 18, with a disability and in sexual crimes of the availability and discussing the options
- Informing those witnesses where the need exists that they may apply for a support person and identifying any evidence that substantiates the need
- Ensuring the chosen support person is available for the court date and notifying same
- Contacting defence to determine their position
- Communicating to the defence and to the Court, he intention to apply on behalf of the witness for a support person
- Ensuring the court room set up will accommodate the support person
- Preparing the witness and support person on their roles

- Working out in advance where everyone will sit

Examples of cases

R. v. Peterson (1996), 27 O.R. (3d) 739 (Ont. C.A.)– the child sat with her father who assisted when she could not be heard.

R. v. George (1996), 94 O.A.C. 76 (Ont. C.A.) – the victim in a sexual assault sat with her mother.

R. v. R. v F. (C.C.) (1996), 88 O.A.C. 397 (upheld by the Ontario Court of Appeal) the judge allowed a six year old to testify while sitting on his aunt's lap.

Section 486.2 - Closed Circuit Television and Screens

The former s.486(2.1) allowed children under 18 and witnesses with a disability to apply to testify outside of the courtroom or behind a screen or other device if it was necessary to receive a full and candid account of the evidence where the accused was charged with the prerequisite offence (sexual or involving violence).

Section 486.2(2) allows all witnesses under 18 to make such an application and presumes it will be allowed regardless of the offence type, unless the judge is satisfied it would not interfere with the proper administration of justice.

An adult may make an application to testify from outside the court room behind a screen for any offence charged, the threshold test being necessary to obtain a full and candid account (s.486.2(2)).

Applications for persons under eighteen (at the time of trial)

The practical consequence of the wording of the section is that the witness under 18 will likely receive the accommodation upon request, whereas the adult witness must satisfy the court that there is a need.

There is no language suggesting the witness under 18 must show need and in fact the provision that allows for the witness under 18 to testify using the accommodation during the application itself is no longer in the *Code.* Presumably there is an assumption that the applicant under 18 need never have to testify as part of the application.

The application will be allowed unless the judge is of the opinion that the order would interfere with the proper administration of justice (s. 486.2(1)).

Applications for persons over eighteen with a disability

The wording in s. 486.2(1) relating to the person with a disability is quite specific and creates a particular result. It is not enough that the witness have a mental or physical disability. Rather, the witness must have a disability and be able to communicate but may have difficulty doing so by reason of the disability.

It may be that the effects of a disability are exacerbated by the stress of testifying so that the witness

cannot testify in that state. The witness may stammer or otherwise physically react preventing speech. With the stress reduced by being in a separate room, the witness' disability may still be apparent but the ability to communicate effectively is enhanced.

Applications for adult witnesses (without a disability)

S.486.2(2) applications.

As already stated, in a s.486.2(1) application, the young applicant must merely show they are a witness under 18. Then the onus shifts to the opposing party to demonstrate why such an order would interfere with the proper administration of justice.

For the s.486.2(2) applications for adult witnesses there are prerequisites to be met to satisfy the court that the witness requires this form of assistance, namely:

1. The adult is a witness in a criminal proceeding for any offence
2. The accommodation is required for *a full and candid* account of the acts complained of, considering the factors listed in s.486.1(3), namely:
    a. the age of the witness,
    b. whether the witness has a mental or physical disability
    c. the nature of the offence
    d. the nature of the relationship between the witness and the accused
    e. any other circumstances that the judge or justice considers relevant

A voir dire is required for the s. 486.2(2) application, as this was the practice for child witnesses, prior to January 2, 2006, if the application was made in the course of the trial or preliminary hearing. The Crown makes the application, and may call witnesses who know the complainant and can provide information generally about communications with the witness and specific observations related to the needs of the witness in the circumstances at hand, with examples.

In *R. v. Levogiannis*, [1993] 4 S.C.R. 475, (1993), 85 C.C.C. (3d) 327 (S.C.C.) L'Heureux Dube indicated that the evidence in an application need not take any particular form. Some of the considerations on which a decision could be based include [at p.340] evidence of the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case. This evidence is often elicited by way of hearsay e.g.: Sally normally has no trouble telling me things, but she is totally silent on this. She says she is ashamed and is afraid of the accused, Mr. X.

The courts have never required that a child witness be put through trauma to determine the merits of the application.

In *R. v. Smith* (1993), 46 W.A.C. 241, 141 A.R. 241, [1993] A.J. No. 401 (QL), 19 W.C.B. (2d) 569 (Alta C.A.), the court relied on the submissions of the prosecutor which was considered sufficient as he was an officer of the court. The current trend is to call evidence, particularly since *Levogiannis*. The most cautious approach is to present some evidence on applications that require proof of necessity, even if there is

consent by the defence.

In addition, it may not be necessary that the judge see the witness for whom the application is being made, as part of the voir dire, but the Crown may choose to call him/her and a screen or closed circuit is used for this testimony (s.486.2(6)).

Other witnesses called on the voir dire might be the police officer who is aware of the child's ability at the initial interview, a social worker who is familiar with the child, a therapist or a parent. The Crown lawyer who conducted the preliminary hearing was called on the application at trial in the case of *R. v. R. G.* (2002, B.C.S.C.).

It was not enough, however, that a parent merely testify that in her opinion the child should not testify in front of the accused. An expert was not always necessary in an application but could provide useful evidence, *R. v. M. (P)* (1990), 1 O.R. (3d) 341, 42 O.A.C. 153 (C.A.). 1 O.R. (3d) 341, 42 O.A.C. 153, 11 W.C.B. (2d) 593 (Ont. C.A.),

The presence of a mental or physical disability does not require expert evidence *R. v. Lanthier* ,[1997] O.J. No. 4238 (QL), 36 W.C.B. (2d) 189 (Prov. Div.) (Ont. C.J.), *R. v. Buckley*, [1994] Y.J. No. 85 (QL) (Y.T.S.C.)

The court must be satisfied <u>on a balance of probabilities</u> the use of a screen or videoconferencing is necessary to get a full and candid account. *R. v. Olscamp* (1995), 26 W.C.B. (2d) 487 (Ont. Ct. (Gen. Div.)). Evidence of some sort must be presented to lay the foundation even where the defense agrees: *R. v. Levogiannis*, [1993] 4 S.C.R. 475, (1993), 85 C.C.C. (3d) 327 (S.C.C.) and *R. v. Dubreuil* (1998), 125 C.C.C. (3d) 355, 110 O.A.C. 135, 38 W.C.B. (2d) 250 (C.A.), Ont. C.A.), *R. v. H. (D.) (*1990), 55 C.C.C. (3d) 343, 105 N.B.R. (2d) 8, 9 W.C.B. (2d) 355 (N.B.Q.B.)
Where the competency of the witness is challenged, the s.486 voir dire should be separate from the competency inquiry so the issues are clearly identified and analyzed. *R. v. S. (S.M.)* (1995, Alta .C.A.)

The following cases provide examples of evidence relied upon by courts in ordering the accommodations. *R. v. S. (S.M.)* (1995), 160 N.B.R. (2d) 182, [1995] N.B.J. No. 116 (QL), 26 W.C.B., (2d) 459, leave to appeal to S.C.C. refused 171 N.B.R. (2d) 160n, 201 N.R. 398n (N.B.C.A.) The evidence of the 7 year old was received with use of a screen where the crown relied upon a transcript from the preliminary hearing and evidence from a social worker and the child.

*R. v. H. (D.) (*1990), 55 C.C.C. (3d) 343, 105 N.B.R. (2d) 8, 9 W.C.B. (2d) 355 (N.B.Q.B.) – the trial judge looked to the transcript at preliminary hearing which showed the child was not able to testify due to her fear of the accused.

R. v. O'Neill [1995] O.J. No., 4077 (QL), 29 WCB (2d) 351 (Ont. Prov. Div.) – there was evidence from the complainant's mother and school teacher and a videotape which showed difficulty on the part of the child. A therapist said that to have the child testify would re-traumatize the child and the court felt it imperative that accused not be in the same room.

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

In *Re. M (P)* (1990), 1 O.R. (3d) 341, 42 O.A.C. 153, 11 W.C.B. (2d) 593 (Ont. C.A.), the only witness on the voir dire was the complainant. The trial judge allowed the accommodation, however Morden, A.C.J.O. found that an evidentiary base had not been established.

In *R. v. Textor* (1993), 75 O.A.C. 396, [1993] O.J. No. 3181 (QL), 22 W.C.B. (2d) 169 (C.A.), leave to appeal to S.C.C. refused 72 O.A.C. 347n, 175 N.R. 322n sub nom. R. v. T.(e.) Ont. C.A.)where the social worker testified that the witness might freeze, this was determined insufficient to meet the evidentiary burden for the applicant.

Early identification and assignment

The potential complexities of s.486.2(1) and (2) applications call for Crown lawyers to address the issues at the early stages of a prosecution.

There are a number of issues to be addressed that may required time to resolve, given the various considerations that may arise for out of court testimony or screen applications. The steps involved include:

1. Identification of witnesses for whom there is a presumption and those for whom there may be a necessity
2. Contacting the witness, parent or caregiver, explaining the options, the potential impact on the witness and the trial, the processes needed for the application and the requirements of the court
3. If the application is required for the witness to give a full and candid account, or the witness is disabled and the Crown must show that the witness can give evidence but may have difficulty doing so because of the disability, the Crown must obtain and assess the available evidence and determine whether the application can be made
4. If the witness is the complainant or other vulnerable witness on a sexual offence, Crown must contact the witness, assess the necessity for the accommodation and whether there is evidence that would support the application, as well as explaining the applications available
5. When Crown has determined that an application will be made, Crown must contact defence counsel, advise counsel of the application and ascertain their position on the application
6. If the order sought is 'presumptive', and defence will be making submissions that it would interfere with the proper administration of justice, request the basis of those submissions; if the burden is on the Crown, Crown must provide disclosure and should seek admissions from the defence, if possible
7. Crown must make the application - file a written notice with the courts, ensure the JCMs/trial coordinators are aware of the application, seek the designation of the trial/PH judge and a date for the application
8. Crown should advise the witness, parent or caregiver of the date and the requirement, if needed, to give evidence
9. If an adult witness is required to testify, ensure that the equipment being applied for is available for the witness during their testimony on the application hearing
10. When the order is granted, ensure the judge and defence counsel are agreed upon, or, if there isn't consent, the judge makes a ruling about, the following:
    - If out of court testimony is ordered, whether the witness will be in a different room but

counsel and the judge will remain in the courtroom, or counsel will be in the witness room with the child or vulnerable witness

- If defence counsel will be in the room with the witness, how the accused will signal the judge that the accused wants to communicate something to counsel (in a way that does not interfere with the testimony)
- If there are exhibits that are to be presented to the witness, how this will be done (copies used or the exhibits taken to the other room by the sheriff or clerk, for example)
- If identification is in issue and Crown has determined that the witness must make an 'in court' identification, how this will be managed (for example, deferring this final question until the end of the testimony and having the camera pan the court room or bringing the witness into the court room for this question – if the camera is used, ensure the quality of picture would permit accurate identification)
- If there is a video recording to be viewed by the witness, how the technology will cope with that and how the playing of the tape – as well as starting and stopping it – will be done (usually by Crown with some instruction from the clerk)
- If there is a support person, where that person is to be seated and any instructions to be given to them
- How the child will be taken to the room in a way that avoids any encounter with the accused and if there are any breaks, how this will be managed
- Which room will be used by the witness and whether any special arrangements are needed, for example, a booster seat or adjustable chair
- When (and if) the equipment can be available for an equipment check and run through, as well as a 'tour' by the witness to see how it works and what will be required of the witness, and any support person, in testifying

11. If the accommodation is a screen:
    - Where the screen will be set up
    - Where counsel will stand to question the witness
    - Where the accused will be seated
    - How the witness will be brought to the stand to avoid encountering the accused or having to pass near the accused in the court room (for example, standing court down and having the witness brought in and seated before the accused comes into the courtroom and court resumes; reversing the procedure when the witness finished testifying)
    - If the witness needs a booster seat or adjustable chair to be seen in the box, that that is provided
    - Where the support person, if permitted, will sit or stand to be near the witness
    - If identification is an issue and Crown requires in court identification, how that will be managed (for example, Crown is permitted to leave that question until the end of the witness' testimony and have the witness step from behind the screen to view the court room)
    - How the witness can leave the stand without encountering the accused

12. If the accommodation is an "other device" (an opaque barrier with a camera trained on the witness

which is connected to a monitor for the accused to watch the witness)

- How the barrier and the camera will be positioned
- Which courtroom can best accommodate this option
- The other issues listed above with respect to the screen

Note: Court Services in some locations has the capacity to provide the camera/monitor set up, that can deliver a better picture to the accused of the witness as well as giving more flexibility of set up and a greater sense of security to the witness. Where available, it may be a better choice for 'in court' testimony than the screen. Although there is no reported case law, this arrangement is in use in other provinces and countries. Alberta and Manitoba have court rooms equipped for this option. Pictures are available, if required.

In developing a process to manage the new accommodations, the following issues are relevant considerations:

- The section allows for an application by either the Crown or the witness.
- More court time will be required, particularly for a disputed application. Therefore the earlier counsel know of the requirements the better in order to accurately estimate application time and the time required for trial using the equipment ordered.
- Informing the witness of the possibilities open to them is best done by a personal interview rather than by form letter.
- The files must reflect whether a witness has been notified of the options as well as whether there will be an application, in order to allow other persons handling the file to be informed and prepare.
- As Crown we cannot always predict which witnesses will benefit from or request these accommodations.
- The notices to witnesses that informs them of the accommodations available to them needs to be sent out well in advance and contain a procedure that the Crown inform the witness of what is available and the witness inform Crown of their needs in time for preparation for the application.

Meet witness(es) in advance

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

Determining the set up - out-of-court, screen or other device:

The *Code* does not specify how one decides the method a witness testifies but the case law in interpreting the pre-Bill C-2 sections suggests that it is <u>not</u> a hierarchal decision whereby the more the fearful the witness the more s/he qualifies for the out-of-court testimony. Nor is there a hierarchy whereby the witness is tested to see if the screen is good enough and if not, move on to the out-of-court testimony option.

The research suggests that testimony outside of the courtroom better separates the witness from the

accused and the courtroom than does the screen or other device. The Crown can seek the closed circuit from the beginning. *R. v. Peterson* (1996), 106 C.C.C. (3d) 63 (Ont. C.A.); In *Levogiannis* (at page 492), L'Heureux-Dubé J. stated for the Supreme Court that the judge need not find "exceptional and inordinate stress on the child" in order to merit the use of the special measures.

Once it is determined that out-of-court testimony will take place, the question arises who will be in the room with the witness. Although technology allows a variety of set ups, the most likely set ups are:

1. The witness will be in the other room with both counsel .The judge remains in the courtroom with the accused.
2. The witness is in the other room with a support person and is asked questions through the television monitor by counsel who remaining the courtroom.
3. Although not contemplated by the legislation, technology would permit other possibilities such as the accused being in the separate room, leaving the witness to testify in the same room as the judge. This model was drafted into the first reading of Bill C-15 in 1987, but was omitted from subsequent versions.

Communication with the defense

Crown needs to tell the defense lawyer of the plans to make the application as soon as possible and to disclose the evidence anticipated in the application, if the onus is on the Crown in the application. If the application is on behalf of a witness under 18, Crown needs to ensure that the defense (and the court) are clear that the onus is on the defense to displace the presumption.

In addition, any set up requires that the accused be permitted to communicate with counsel. The technology permitting this may be a telephone or similar device but a growing practice is to instruct the accused to signal to the court when he seeks to speak with counsel who is in a separate room.

Timing of the application

Section 486.2(2.1) allows for the applications under (1) or (2) to be brought prior to the trial or preliminary hearing, before the presiding judge or justice.

Ideally in applications that require the court registry to provide equipment, especially equipment for out of court testimony, the order can be sought well before the trial or preliminary hearing begins, even where not disputed. Not all locations have the necessary equipment and it must be obtained from other locations or provided by commercial suppliers, who may also have other 'bookings' for the equipment needed.

S. 486 (2.1) gives express jurisdiction to the presiding judge to hear the application in advance of the trial. However, if defence counsel commits to consenting to the order, Crown Counsel could consider delaying making the application until the opening of the trial or preliminary hearing, if court services is willing to provide the necessary equipment on that basis and Crown Counsel is satisfied that any risks to this procedure are acceptable in the context of the case.

Some judges may consider it presumptuous if you have the equipment set up before the order is granted,

and others may consider you ill prepared if you haven't. With the presumption now in favour of out-of-court testimony for witnesses under 18, Crown can feel more confident about arranging the set up in advance.

However, disputed applications may be lengthy and could force a delay and rescheduling of the trial or preliminary hearing. For example, in the recent case *R. v. R.G* (above), in New Westminster Supreme Court, the voir dire was three days long and required the testimony of the child (age 9) during the voir dire, which also involved using the technology.

Arranging the required equipment:

The setup design will determine the equipment required. Court houses are not already equipped for out-of-court testimony in British Columbia but Court Services Branch, whose responsibility it is to provide the equipment, is in the process of equipping courtrooms and creating mobile closed circuit units.

Any arrangements for equipment start with communicating with the manager of the Court registry. Some registries prefer Crown to make the arrangements themselves through a private rental company such as Commercial Electronics and then to inform the registry. Others will make the arrangements themselves, which may include seeking the assistance of court services staff for the set up. Crown will always play an integral role in determining the set up and should be prepared to discuss this with the court and the defense to ensure the set up meets the needs of all (see above).

The use of out of court, screens, or other device equipment calls for a dress rehearsal, if possible. Expect an equipment or operator error in most cases on the first attempt.

The witness on the stand

The child or vulnerable adult witness should be shown the set up in advance. The Crown is the best one to do this in accompaniment with a victim assistance worker and the clerk. Unfortunately, this is often not possible until minutes before the actual testimony unless the equipment is set up in advance.

The witness room is a less formal setting than the courtroom. A witness may tend to want to speak out of turn or speak quietly and personally to questioning counsel who is in the room with them. Preparation in advance will help the witness and support person understand the respective roles of counsel and the importance of speaking to the court rather than lapsing into informal chats in the witness room.

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

Identifying the accused

If identity of the accused is an issue, counsel must to consider whether it is necessary to have the vulnerable witness make an in court identification of the accused.

In many cases the witness knows the accused and identification can be made through the testimony of other witnesses and the witness can give evidence of the name or relationship (Uncle Fred).

If the vulnerable witness must identify the accused personally, and is giving testimony form outside the court room, it may be necessary to ensure that the cameral can pan the court room so the witness can see the occupants and testify whether s/he recognizes the perpetrator as being in the room. You may want to test out whether the camera gives a good enough picture to allow identification in this fashion.

If the witness has to be brought to the court room or must come out from behind the screen, you may be permitted, if arranged in advance, to have this aspect of your examination in chief deferred to the end of the cross examination, in order for the witness to give all his/her evidence before having to face the accused.

However, you should ensure that the witness, support person, parents and caregivers are aware of the proposed process. In one case in Vernon, the screen was lifted at the very end of both examinations in chief and cross examination. The parent of the child was very distressed and yelled at the counsel to stop this. He had not been privy to the discussions of the judge and counsel on the plan and was surprised.

Warning to the jury:

R. v. Letourneau (1994), 87 C.C.C. (3d) 481, 87 W.A.C. 81, 22 W.C.B. (2d) 451, supplementary reasons 90 W.A.C. 130, 26 W.C.B. (2d) 224 (B.C.C.A.) , leave to appeal to S.C.C. refused 102 C.C.C. (3d) vi, 115 W.A.C. 320n, 197 N.R. 320n offers an example of a charge to the jury made to dispel any impression the jury may have that the special procedures reflect one way or another on the credibility of the witnesses or the guilt of the accused. In that case, an adult witness used a screen due to fear of the gallery. The B.C.C.A. said the warning as articulated was enough.

The *Code* will now specify, with respect to applications for support persons (s. 486.1(6)), for out-of-court testimony or a screen (s.486.2(8)) and the appointment of counsel (s.486.3(5)), that no adverse inference may be drawn from the fact that the application was, or was not, ordered.

Where an application has been denied

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

Of course, the witness may have been traumatized by now, and in cases where there is reluctance or profound silence, the Crown may seek the admission of a previously provided statement rather than subject the witness to anything more vive voce.[4]

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

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

One can surmise that such an event may be difficult for many.

Witnesses, victims services workers and other support persons for the witness, should be prepared in advance for the possibility that the accommodation will not be permitted.

Examples of cases:

R. v. R.G. (2002), Unreported New Westminster Registry XO56997R (April 4, 2002) Wilson, J. At trial (judge alone) the Crown applied for the 11 year old child to testify outside of the courtroom. Although the defense indicated they did not oppose the application the law requires an evidentiary foundation be laid and disputed the Crown's claims and the set up proposed. The voir dire lasted close to three days. The child testified during the voir dire while using the set up. The court did not approve of the child being in a room and a set up was established, whereby the accused agreed to leave the courtroom and hear the evidence from the jury room via the link. The child stayed in the court both for the application, which was granted, and for her testimony that followed. On the application, the Crown called a number of witnesses, including the Crown lawyer from the preliminary hearing who described the difficulties the child had during those proceedings. When she testified at the preliminary hearing, the child felt the accused was staring at her and he was asked to move.

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

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

- C be in the jury room which is much smaller than the courtroom
- C be with his therapist to support him
- Others in the room with C are Crown counsel, Defense counsel , the court clerk and the Judge
- the accused will be in the public courtroom
- The Judge will have a view of the public courtroom but C would not.
- The set up will be in advance.

R. v. Poslowsky [1997] B.C.J. No. 2585, October 15, 1997, (B.C.S.C.)
The accused was charged with attempted murder and aggravated sexual assault of the nine year old

complainant. He had lured her into a neighbour's house and choked and raped her, carrying her body to a field where she was left presumably to die. At trial, the victim testified behind a screen with consent of both the accused and the defense. The Court instructed itself on the law as enunciated by R. v. M. (P.) (1990), 42 O.A.C. 153 (Ont. C.A.).

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

R. v. Grey, [1996] O.J. No. 4743 (Ontario Court of Justice- Provincial Division). Appeal to Ont.C.A.. dismissed on other grounds [2000] O.J. No.302, provides an example where the court allows the appointment of counsel for the cross examination of the child even where the offence is not enumerated in the section. The accused was charged with criminal harassment being numerous phone calls to a female child under 12 at the time of the calls.

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

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

R. v. Milot, [1994] B.C.J. No. 111 (B.C.S.C.)
The Crown applied to have the 7 year old testify from an interview room with closed circuit. The defense felt a screen was adequate. The application was allowed and the defense counsel was to be in a separate room for cross examination. The child here was afraid the accused would kill her in the courtroom, had worries about the courtroom and what was expected of her and was embarrassed to testify about sexual matters. Owen-Flood J. was satisfied that these days examination can be done without the need of physical presence.

R. v. T. (E.) , [1993] O.J. No. 3181 (Ont. C.A.), leave to appeal to S.C.C. refused 72 O.A.C. 347*n*
On appeal, the Court of Appeal held that the evidence from a social worker that the child might freeze or might not be able to give her evidence was not sufficient to justify ordering that a screen be used to testify.

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

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

Previously Recorded Videotaped Statements

The pre- Bill C-2 sections 715.1 and 715.2 allowed for the previously recorded videotaped statement of a witness under 18, to be admitted for the truth of the contents where the witness testifies and adopts the contents and where certain other preconditions exist including the type of offence charged. Murder, attempted murder, arson and many other offences did not qualify for this exception.

The new section s. 715.1(1) and 715.2(1) allow for the admission of a previously recorded statement in all criminal cases and not just those involving sexual offences and crimes of violence. The sections now specify that the court will have discretion to exclude the evidence if it would prejudice the accused in having a fair trial.

The revised section 715.1(1) of the *Code* is a statutory hearsay exception allowing a previously video recorded statement to be admitted where the witness testifies. The preconditions to admissibility include:

1. the witness is under the age of 18 at the time of the offence;
2. the video was made within a reasonable time following the alleged offence;
3. the witness describes the acts complained of; and
4. while testifying, the witness adopts the contents of the videotape.

Once those preconditions are met, the tape will be admitted in evidence unless the presiding judge is of the opinion that to admit the video would interfere with the proper administration of justice.

Similarly, s.715.2(1) provides a similar hearsay exception for victims or witnesses who are able to communicate the evidence but may have difficulty doing so by reason of a mental or physical disability.

The amendments in force on January 2, 2006 make subtle changes to the legislation that was first enacted in 1988. *Videotape* now becomes *video recording*, *complainant* becomes *victim* and the section now articulates an overriding discretion on the part of the court to exclude the recording even when all the preconditions are met if it would create an unfair trial for the accused.

An example where the tape was excluded before the Bill C-2 amendments is ***R. v. Kilabuk*** (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.) where the statement consisted of leading questions and the court opined to rely on it at the trial would be unfair and prejudicial to the accused.

The Purpose of Sections 715.1 and 715.2

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

Professor Bala states the primary purpose of s.715.1 to be:

- to hear what is probably the best recollection of events the child can offer
- to reduce the requirement of telling the entire story on the stand.

In his research he interviewed judges who told him other positive results:

- to reduce the trauma of telling by adopting the statement
- to see the child's demeanour in a more friendly environment
- to increase the likelihood that cases come to court where children cannot recall or cannot talk at trial time
- to see the child at the age closer to when the incidents happened
- to provide a record of the interview techniques.[5]

In *R. v. R.E.M* [2002] B.C.J. No. 185 (B.C.S.C.) Mr. Justice Romilly cites at length from the R. v. L. (D.O) case in dealing with issues related to a videotaped statement of a child.

In *R. v. L. (D.O),* supra, at p. 308, Madam Justice L'Heureux-Dubé adopted the words of Kerans J.A. in *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.) leave to appeal dismissed (1992), 69 C.C.C. (3d) vi, where Kerans J.A. stated that s. 715.1 does:

> ...[offer] the witness the choice, even if the witness can recall the events in questions, to refer while testifying to an earlier taped account provided that the witness can recall the taping and can and does affirm that, at the taping, he was honest and truthful. When the witness makes such a reference, the tape becomes evidence in proof of the truth of its contents.

And in *C.C.F.*, (1997, S.C.C.), Mr. Justice Cory said in paragraph 21,

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

5 N. Bala, Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes, [2001] 44 Crim. L.Q. 461 at page 474.

Determining Admissibility

Clearly, this procedure only benefits the witness if the investigative interview is done well. This usually requires a skilled investigative interviewer. The writer is a strong proponent of the "step wise" interview which offers a structure for a non leading interview. This method has been taught widely throughout the world by Dr. John Yuille, of U.B.C. and is based on principles that could be applied by prosecutors to introduce the evidence of vulnerable witnesses in examination in chief.

In *R.E.M.* [2002] B.C.J. No. 185 (B.C.S.C.)
Romily J. acknowledges that it is preferable that police officers conducting the interview ask the child simple, open-ended questions, although it is recognized that in some situations it is necessary to ask leading questions.

Defense will challenge the credibility at the trial where the tape shows an interview that leads a child witness into the description of the complaint with suggestive questioning.
The Crown will be required to become familiar with the file and determine:

- Is there a young witness?
- Is there a videotaped recording?
- Was the witness under 18 at the time of the offence?
- What is the content in the recording?

The next step is to read the transcript and view the video tape to observe:

i) Is the audio acceptable and if not, is the audio tape in the file?
ii) Are there parts of the tape that should be edited before court?[6] (Other negative behaviour, addresses and phone numbers, other personal matters not relevant and prejudicial).
iii) Were there other persons in the interview besides the child and interviewer?
iv) Were other persons seen in range of the camera?
v) Were there noises and or voices not accounted for in the video?
vi) Does the interview cover material not relevant such as assaults by others?
vii) Is the transcript from the video or the audio tape accurate?
viii) What is the quality of the interview?

Test for adoption of contents by the witness

Mr. Justice Romilly gives an extensive review of the law related to the use of videotaped interviews in the case of *R. v. R.E.M*. [2002] B.C.J. No. 185 (B.C.S.C.)
Paragraph 37:

> In *R. v. F.(C.C.)* (1997),120 C.C.C. (3d) 225(S.C.C.) the Supreme Court of Canada resolved the test to be applied to determine if the videotaped statement of a child under s. 715.1 of the Code has been adopted. In doing so, they resolved the conflict that existed between *R. v. Meddoui* (1990), 61 C.C.C.

6 Thereby making a version of the tape with the edited portion out. The transcript would also require an edit. Counsel will have two versions therefore, the original and the edited version.

(3d) 345 (Alta. C.A.) and R. v. *Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.). The Court preferred the reasoning in Meddoui on this issue as they were of the view that s. 715.1 had built-in guarantees of trustworthiness and reliability. Cory J. writing for the Court stated, at pp. 239-240:

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

Proper Administration of Justice

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

- the form of questions used by any other person appearing in the videotaped statement;
- any interest of any person participating in the making of the statement;
- the quality of video and audio reproduction;
- the presence or absence of inadmissible evidence in the statement;
- the ability to eliminate inappropriate material by editing the tape;
- whether other out-of-court statements by the complainant have been entered;
- whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);
- whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;

- whether the trial is by judge alone or by a jury; and
- the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

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

Editing the tape

It is acceptable for Crown to offer an edited tape. An example where this was considered judicially was described by Mr. Justice Romilly in *R. v. R.E.M.* [2002] B.C.J. No. 185 (B.C.S.C.) at paragraph 43.

Setting up the equipment

Most courtrooms and Crown offices have VCR equipment but Crown must ask for the equipment in advance if a recording will be shown in court. Court Services Branch carries the responsibility of providing the equipment to do so.

Usually in provincial court, there is one monitor for all to watch. This setting may place the accused in closer range to the child, which is counter productive. Designing the setup in advance with additional linked monitors would enhance the viewing. If the witness is outside the courtroom this link is essential. At times the audio is very poor and either enhancement or special equipment is needed to listen to the tape. This may require extra equipment and the assistance of persons in the business of providing equipment and aid to the courts such as Commercial Electronics (604-669-5528) in the Lower Mainland.

Pre-Court preparation of the witnesses

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

In a study in 1994, Dr. Yuille looked to whether having children view their previously recorded statement is any different than adults doing the same. The result demonstrated that the child’s memory would be properly refreshed upon seeing the recording.

One important caveat exists however, where there are concerns about the nature of the original interview.

Clearly, it is not helpful to show a child an excessively leading interview as part of the trial preparation.

Before any application, the interviewer officer must review the tape and compare the transcript. They will testify in the voir dire and should be intimately knowledgeable about the interview and its contents.

Caution: The police may make an audio tape while the interview is being video recorded in order to facilitate making a transcript of the interview. The section is specific that the evidence that is admissible is a videotape. The audio tape backup may become important in the trial or preliminary hearing and could become an exhibit. Crown should listen to the video itself to ensure all of the content of the transcript can be heard from the video tape.

Entering the tape

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

The tape is not be given to the jury for viewing as part of their deliberations. *R. v. Kilabuk* (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.).

The pre-video interview

Where there is an interview before the video this will affect the weight given to the contents and not the admissibility. *R. v. R.E.M.* [2002] B.C.J. No. 185 (B.C.S.C.) at para 41, *R. v. Buric* (1996), 106 C.C.C. (3d) 97, 48 C.R. (4th) 149, 28 O.R. (3d) 737, affd [1997] 1 S.C.R. 535 (S.C.C.).

The recording is inconsistent with viva voce testimony

Romily, J. in *R. v. R.E.M.* [2002] B.C.J. No. 185 (B.C.S.C.)
at paragraph 39:

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

Where complainant cannot remember the contents of their video statement

Where the complainant cannot recall parts of the evidence in the tape, the tape may still be admissible because even though they cannot be cross examined on that part, there will be sufficient guarantees of reliability to accept the Meddoui approach to "adoption". Cross examination is not the only guarantee of reliability. Other factors which provide the requisite reliability in s.715.1 include:

- the requirement that the statement be made within a reasonable time;
- the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanour, and assess the personality and intelligence of the child;
- the requirement that the child attest that she was attempting to be truthful at the time the statement was made;
- the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made.

R. v. R.E.M. [2002] B.C.J. No. 185 (B.C.S.C.) at para 38, *R. v. C.F.F*. Cory J., at p. 241 citing *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.).; *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.); and *R. v. B. (K.G.),* [1993] 1 S.C.R. 740 (S.C.C.).

And where the complainant has no independent memory of the events this will constitute necessity for the videotaped evidence. In such a case the tape will be admitted as a *Khan* exception and the trier of fact will be given a special warning similar to the one given in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1 (S.C.C.)of the dangers of convicting based on the videotape alone. *R. v. Meddoui*, (1990), 61 C.C.C. (3d) 345 (Alta. C.A.) and *R. v. F. (C.C.),* [1997] 3 S.C.R. 1183, 120 C.C.C. (3d) 225, 11 C.R. (5th) 209 (S.C.C.),

Disclosure of the tape to the defense

The defense must have access to view the video tape of the interview and show it to his/her client to properly prepare the case. The tape can be released conditionally, however. In *R. v. Wilson* , [2001] O.J. No. 307 (Ont. Sup. Ct. of Justice the court approved of the practice that the tape is returned to the Crown after the appeal period had passed at para.18.

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

See Practice Bulletin #63 (Dated November 18, 2005) for direction related to the release of videotaped statements, page 3 paragraph 1 which suggests that disclosure to defence of videotaped statements in sexual assault cases might be given upon receipt of an Undertaking with conditions. Page 3, paragraph 2, states that in some cases an opportunity to view should be given rather than providing tapes, for example, where the accused is not represented.

Process during the voir dire

During the testimony of the interviewer in the voir dire, enter and identify the videotape, the transcript and if permitted the audio tape as well as any exhibits that were seized during the interview itself. Enter these in the voir dire for identification, and later where appropriate at trial. The tape does not go into the jury room for further observation by the jury. *R. v. Kilabuk* (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.)

Examples of cases

R. v. V.C.A.S. [2002] S.C.J. No. 37 (S.C.C.)
Another example where the child's complaint of sexual and physical assault is video recorded and tendered at trial pursuant to s. 715.1. The accused unsuccessfully appealed to the S.C.C.

R. v. S.G.F. [2002] S.C.J. No. 38 (S.C.C.) dismissing the accused's appeal [2001] B.C.J. No. 947 (B.C.C.A.). The complainant provides a two hour complaint of sexual activity by the accused to the police which is videotaped. The child adopts the contents of the tape but retracts much that was on the tape when she testified. The judge finds there is a mixture of fact and fantasy on the tape but is prepared to convict on the basis that the allegations were of such a graphic nature that fabrication was unlikely. The accused was convicted and his appeal was dismissed.

R. v. R.E.M. [2002] B.C.J. No. 185 (B.C.S.C.)
The accused successfully appeals his conviction for sexual offences. In this case the child complainant is five and a videotaped recording is entered as a part of the evidence. Mr. Justice Romilly offers an extensive review of the law relating to children witnesses, credibility assessment and the intricacies of videotape evidence and orders a new trial due the weaknesses in the reliability of the young complainant.

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

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

R. v. B.(J.M.). [2001] B.C.J. No. 556 (B.C.C.A.)
The 3 year old complainant told her mother of the assaults while drying after a bath. The mother took the child to the police station where a complaint was recorded. The child had been told she was taking a tour of the police station. The interview by the police officer was non leading in nature. The videotape was entered as part of the evidence pursuant to s.715.1. One of the grounds of appeal was that the child did not understand a promise and therefore the tape should not have been entered. On appeal, the accused appeal was dismissed the court finding that the trial judge had conducted a sufficient inquiry into the child's appreciation of the obligation to tell the truth.

R. v. J.M. [1998] O.J. No. 5504 (Ont. Ct. of Justice – Prov. Div.)
The court allowed two tapes to be admitted under s.715.1.

Appointment of Counsel to Conduct the Cross Examination When the Accused is Unrepresented –

S. 486.3.

If the accused does not have a lawyer, the court may appoint another lawyer to cross-examine the witness in a trial or preliminary hearing. Certain witnesses will be presumed to require this order; others must demonstrate a need.

Section 486.3(1) stipulates that in any proceedings where the witness is under 18, the court shall order that the accused not personally conduct the cross examination and shall appoint counsel to do so unless the court is of the opinion that the proper administration of justice requires the accused personally conduct the cross-examination.

Section 486.3(2) allows for applications by all witnesses for an order that the accused not personally cross examine them and the court shall so order if the judge is of the opinion that this practice is necessary in order to receive a full and candid account from the witness. Where the witness is the victim in a criminal harassment prosecution they are entitled to the order unless the judge is of the opinion that the proper administration of justice requires the accused to personally cross examine the witness.(s. 486.3(4)

The factors the court shall consider for a s.486.3(2) application are the same as those for a s.486.1 application by an adult and include:

- the age of the witness,
- whether the witness has a mental or physical disability,
- the nature of the offence,
- the nature of the relationship between the witness and the accused,
- any other circumstances that the judge or justice considers relevant

Implications for Crown Counsel

These applications are more difficult to foresee than others because whether or not the accused is represented by counsel is a matter within the control of the accused. Unwanted and troublesome adjournments are inevitable to identify and eventually appoint counsel while attempting to protect the witness from being cross examined by the accused.

Crown counsel do not have a duty to find a lawyer for the accused who does not have one and are wise to limit their involvement to informing the accused of his obligation to find counsel and providing phone numbers for legal aid.

The CJB pays for the court ordered counsel at the legal aid tariff – see Practice Bulletin #31. Where Crown Counsel makes an application under s. 486.3, Crown Counsel should advise the Director, Legal Services (presently Geoff Gaul) and should direct counsel appointed under this section to contact the Director, Legal Services, at 250-370-2964 or by mail at the Criminal Justice Branch Headquarters in Victoria.

RESOURCES

Bill C-2 an Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act.
http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=38&Ses=1&ls=C2&source=Bills_House_Government%20

Children as Witnesses, Vol 1: Child Witness Court Preparation. Centre for Children and Families in the Justice System, London, Ontario. http://www.lfcc.on.ca

Cory's Courthouse. A Canadian online court preparation guide and resources for young children.
http://www.tcac.on.ca/courthouse/

Courtprep.ca. A Canadian online interactive court preparation guide and resources for youth.
http://www.courtprep.ca/

Guidelines on Justice for Child Victims and Witness of Crime. International Bureau for Children's Rights.
www.ibcr.org

Highlights of Bill C-2 Amendments to Protect Children and Other Vulnerable Persons. Department of Justice Canada. http://canada.justice.gc.ca/en/news/nr/2005/doc_31584.html

What's My Job in Court. An Answer and Activity book for Kids who are Going to Court. Ontario Ministry of the Solicitor General. (Available from Victim Services and Community Programs Division, Ministry of Public Safety and Solicitor General, Vancouver, BC.